BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
DUNN COUNTY JOINT COUNCIL OF UNIONS, AFSCME, AFL-CIO, OF DUNN COUNTY, WISCONSIN	Case 77 No. 45827 MA-6769
and	
COUNTY OF DUNN, WISCONSIN	

Appearances:

Mr. Richard L. Wachowski, Thornton, Black, Wachowski and Grosskopf, S.C., Attorneys at Law, 310 Water Street, Eau Claire, Wisconsin 54702, with Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 1937, Eau Claire, Wisconsin 54702-1937, appearing on behalf of Dunn County Joint Council of Unions, AFSCME, AFL-CIO, of Dunn County, Wisconsin, referred to below as the Union.

Mr. James M. Ward, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of County of Dunn, Wisconsin, referred to below as the Employer or as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union and the County jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Steve Highman, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on September 17 and 18, 1991, in Menomonie, Wisconsin. Each day of the hearing was transcribed. The parties filed briefs and reply briefs by December 18, 1991.

ISSUES

The parties stipulated the following issues for decision:

> Does the County have just cause to discipline the Grievant?
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> If so, what is the maximum level of discipline sustainable in this instance?
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> If no just cause exists, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 7 - MISCELLANEOUS PROVISIONS

> Section 1. Management Rights. It is understood and agreed that management possesses the sole right to operate this agency and that all management rights repose in it but that such rights must be exercised consistently with the other provisions of this contract

> and union rights guaranteed by law . . . These rights include but are not limited to the following:
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> . . .
>
> o) To make and enforce reasonable work rules;
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> . . .
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> Section 2. Disciplinary and Discharge Procedure.
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> . . .
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> b) Just Cause Notification. Employees shall not be disciplined or discharged without just cause.
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> . . .
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> d) Personnel Records. Personnel records including remarks, warnings and disciplinary measures taken shall be dated . . . Notice of disciplinary action shall be removed from the employee's record after a two (2) year period at the request of the employee, except that any notice shall remain on file if there is an active disciplinary measure for a like or similar offense.

BACKGROUND

The grievance turns on the events of January 27, 1991, 1/ and on whether the Grievant used excessive force in subduing Carl Berg. The factual background is for the most part undisputed. It will be summarized below first by reference to the events as they unfolded at the departmental level; then as they unfolded for the two deputies who subdued Berg; and finally as they were evaluated after the fact. The final piece of background will be the procedures by which the Grievant was disciplined.

The Initial Events At The Departmental Level

Sometime between 9:30 and 10:30 p.m. on January 27, the Sheriff's Department received an anonymous call indicating that "there needs to be some attention to King's Court in Elk Mound" because "there's a guy that's going what I'd call crazy . . . the one who's going to take the end result is his wife". The caller identified the guy as Carl Berg. 2/ The Dispatcher identified and phoned Berg's estranged wife, Jackie Berg, who confirmed that Berg was outside her home, behaving irrationally. She assumed he was drunk. Jackie Berg and her daughter waited inside the house, with Jackie Berg watching her husband and reporting on the unfolding events to the Sheriff's Department. She noted that Berg no longer lived with them, and that "he's being real violent . . . he said he's not going to be taken alive". She informed the Department that Berg was not a large man, and was, at that point, unarmed.

1/ References to dates are to 1991, unless otherwise noted.

2/ References to "Berg" are to Carl Berg. His wife is referred to as "Jackie Berg".

Berg approached the house, screaming loud enough that the Dispatcher could hear him, and loud enough that the tape of her conversation with Jackie Berg recorded his voice, and the obscenities he was screaming. Events, however, assumed an increasing level of urgency.

Berg left his wife's house and headed toward the house of Marcie Schindele, a friend of Jackie Berg. Jackie Berg, at this point in the conversation, began to weep, noting Berg was "very upset with her . . . " and pleading with the Dispatcher to "get someone out here". She also noted "he's going to be real violent, I know he is". Events continued to worsen, and Jackie Berg sought that the Sheriff send several officers. Berg returned to his wife's house. Jackie Berg stressed again to the Dispatcher how violent Berg could be, and was likely to become when the officers arrived. Berg then dismantled the porch to his wife's house, taking one of the 2 x 2 squared porch spindles in his hand.

The above noted background serves only as preface to the events of significance here, which involve the Grievant and Rodney Dicus, who were dispatched to the scene. By the time they arrived, they had been informed that Berg was drunk, violent, armed, and threatening his wife.

Events After The Arrival Of Dicus And The Grievant

Dicus was the first officer to arrive at the scene. He drove toward the end of the cul-de-sac on which the Berg home was located, and spotted Berg, rounding a camper trailer in front of him. Dicus stopped his squad car, noting that Berg was wielding the porch spindle. Berg saw Dicus at about the same time, and started toward him. Dicus stopped his squad car, and left it. Berg was screaming, but Dicus could not understand what, if anything comprehensible, Berg was saying. Berg approached to within fifteen to twenty feet of Dicus, stopped and waved the spindle in what Dicus took to be a martial arts manoeuver indicating, to Dicus, "Don't come after me; I'm not going anywhere." 3/ Berg then approached Dicus, moving to within eight to twelve feet of Dicus. Dicus backed up, and Berg continued to approach.

Dicus decided to attempt to calm Berg down by speaking to him. Dicus did so while at the same time drawing his baton, then holding it behind his back. At this point, the Grievant arrived. As the Grievant left his squad car, Berg pointed his stick at the officers and said: "There will be bloodshed tonight before I go anywhere." 4/ Dicus, feeling the situation had improved with the Grievant's arrival, put his baton back onto his belt.

The Grievant had stopped about twenty feet from Berg, and was holding his flashlight. Both the Grievant and Dicus attempted to keep Berg flanked, with sufficient distance between each individual to permit the officers to react effectively to any motion by Berg.

After threatening the two officers, Berg walked toward the Grievant. When Berg had come within roughly ten feet, the Grievant drew his gun, ordering Berg to "stop or I'll fucking shoot you." 5/ Berg responded by

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3/ Transcript, day I, (Tr.I) at 21.

4/ Tr.I at 28.

5/ Tr.II at 109.

taunting the Grievant to shoot him. 6/ Berg again resumed his advance on the Grievant. The Grievant again ordered Berg to stop, or he would be shot. Berg stopped.

Dicus had, during this advance, moved around Berg to attempt to take him to the ground. Berg, noticing the manoeuver, flicked the spindle, saying "Don't even think about it." 7/ Dicus continued to advance on Berg, who responded by curling his body together. Dicus grabbed Berg, who continued to curl up, then turned, escaped Dicus' grasp and ran across the road. He did not attempt to strike Dicus with the spindle.

The Grievant, seeing Dicus move on Berg, reholstered his gun, and then pursued Berg. Dicus ran between Berg and the Grievant and again attempted to flank Berg, to take him down. Dicus again rushed Berg, this time securing Berg's left wrist in his left hand, while swinging his right arm around Berg's right arm, in a bear-hug type of manoeuver. Dicus was unable to secure Berg's right hand, in which Berg still grasped the porch spindle. Dicus was, however, able to force Berg off balance and toward the ground. During this melee, while Dicus and Berg were still standing, the Grievant rushed into the fight, swinging his flashlight, striking Berg repeatedly on the head.

The deputies took Berg to the ground, face down. The Grievant secured the porch railing, pressed it across the back of Berg's neck and restrained him, while Dicus put Berg's hands into cuffs. The officers noted Berg was bleeding, and once he had been cuffed, placed him into the Grievant's squad car. Both officers lifted Berg, who was able to walk on his own to the squad car. The Grievant took Berg to the Myrtle Werth Medical Center for treatment.

The physician's report regarding Berg's wounds reads thus:

> The patient smells strongly of alcohol and seems to be obviously intoxicated. He is alert and oriented as to time, place, and person. He was not combative here in the Emergency Room . . . He is noted to have four large irregular lacerations on his scalp as well as one T-shaped laceration on the posterior part of the right ear. There is no obvious evidence of a depressed skull fracture or anything of this nature. His ears are clear bilaterally with no battle sign. Pupils are equal, round, and reactive to light . . . His neck is nontender with no evidence of trauma there. Chest exam does not reveal any evidence of injury. The abdomen is soft and nontender . . . A total of 43 sutures were applied.

The porch spindle wielded by Berg was between three and four feet long, and had a nail protruding from the end opposite the end grasped in Berg's right hand. The spindle was machined in part, but had four square edges running much of its length.

This completes an overview of what constitutes the undisputed core of

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6/ According to Dicus, Berg shouted "Shoot me; fucking shoot me" (Tr.I at 29). According to the Grievant, Berg shouted, "Shoot me, shoot me, you don't have a hair on your ass if you don't shoot me" (Tr.II at 109).

7/ Tr.I at 30.

facts surrounding Berg's injuries. The balance of the background regarding the physical confrontation will be set forth as a summary of the testimony of individual witnesses.

The Testimony of Rod Dicus

Dicus is roughly six feet tall, and weighs roughly 210 pounds. Dicus described Berg as being roughly five feet, five inches tall, weighing roughly 160 pounds. Dicus acknowledged he felt threatened by Berg, but did not feel that once he had a solid hold on Berg, that Berg could inflict any appreciable damage. He testified that from the time he secured Berg's wrist on the second attempt, he did not lose any control over Berg. He was convinced that once he had a bear-hug on Berg, that Berg would not be able to wield the stick to any life-threatening degree.

Dicus described his perception of the blows landed by the Grievant on Berg's head thus:

> Q. Could you describe as precisely as possible the swinging motion?
>
> A. I would state it's a good, solid, swinging motion. It wasn't a tap and it wasn't a wind-up-and-hit type motion but a good, solid swinging maybe. I guess if you could compare it to anything, maybe hammering a nail in a board, a good, solid motion.
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> Q. Could you estimate the approximate number of swings that you saw (the Grievant) take?
>
> A. I could say it's more than, you know, one or two, but other than that, he wouldn't -- at the time out there, I would have never been able to say yes, that's how many he swung.
>
> Q. Okay. Did you ever see (the Grievant) swing at Mr. Berg when he was on the ground?
>
> A. Like I stated before, when we were going down, at some point we were both in contact with the ground going down. And to my best recollection, that's when I saw the last swing. And in my view or recollection, that's the only -- I recollect -- Like I said, I am grabbing the man's hands, and that's the only time that I recall that he swung.
>
> Q. Do you recall seeing only one such blow?
>
> A. Right. 8/

The Testimony of Marcie Schindele

Schindele noted that Berg blamed her for much of his marital troubles

8/ Tr.I at 37-38.

with his wife, and that she had, at best, contempt for him. She called Jackie Berg on the evening of January 27, to warn of Berg's approach. She did not call the police, fearing repercussions from Berg if she did. She watched Berg from her darkened bedroom, as he approached his wife's home on the other side of the street, and as he came screaming toward her own home. She watched, in fear for her own safety as well as for the safety of her own children, Jackie Berg and her children.

She saw both Dicus and the Grievant arrive, and watched as the officers and Berg approached each other. She did not recognize either officer, but could tell them apart by their build. She did not see the Grievant pull his gun on Berg. She did see the Grievant strike Berg on the head, with what she took to be a nightstick. She estimated that her vantage point was from fifteen to twenty steps from the fight.

She testified that the Grievant struck four blows to Berg: "one to two going down and one to two on the ground." 9/ She analogized the motion by which the blows were struck as a hammering motion, more like hammering on a shed than hammering on a wall. The Grievant's arm, as he swung it, was bent, she noted. After Berg had been subdued she heard one of the officers say: "Get up; stand up . . . Stand up you pussy." 10/ She did not know which officer made the statement.

She elaborated on the blow she perceived to have been administered while Berg was down thus:

> A. When (the Grievant) started to strike the last blow, Berg was on the ground? I would say yes.
>
> . . .
>
> Q. Okay. That means, as I understand it, what you are saying is that Mr. Berg was flat on the ground. And after he was flat on the ground, (the Grievant) then went back and struck him. Is that what your testimony is?
>
> A. Yes. Would you like me to clarify why I remember that?
>
> Q. Sure, sure, do that.
>
> A. Because I work in a medical field. I have worked as an EMT, and I work in the hospital. I know what blunt trauma is. And what went through my head was this is even blunter trauma because the head is on the ground and there is a blow, and then there is no give. And that's why I remember that. 11/

9/ Tr.I at 107.

10/ Tr.I at 112.

11/ Tr.I at 130-131.

Schindele acknowledged that she reported to Undersheriff Bruce Palmer on the evening of January 27, that she did not perceive anything unusual in the way the officers had handled Berg. She noted she based this view in part on a reassurance she had received from a friend that evening to the effect that the officers would have to strike Berg to subdue him. She also attributed the remark to her intense relief at seeing Berg subdued.

The Testimony Of The Grievant

The Grievant wrote a report of the January 27 incident in the early morning hours of January 28. The section of that report dealing with Dicus' second attempt to tackle Berg reads thus:

> Once again Deputy Dicus lunged for Berg in a second attempt to subdue him. Berg then attempted to strike Deputy Dicus with the section of railing, swinging it violently. It was at this point that I then rushed Berg and by the use of my squad flashlight did strike him a total of three (3) times in the head area. Berg then began to stagger but then once again brought the portion of rail up in a striking threat. One more blow to the head of Berg was made. At this Berg fell to the ground and I was able to secure the piece of railing from him. At this point he was lying on his stomach and Deputy Dicus was on top of him. I then placed the portion of rail on the back of Berg's neck and applied pressure downward to subdue him long enough for Deputy Dicus to place him in cuffs.

The Grievant testified that he was "startled" by Dicus' first attempt to tackle Berg, since: "I knew it was improper, an absolute improper move to make." 12/ The Grievant stated that as he watched Dicus grab Berg on the second attempt, he felt Dicus had secured only about 50% control over the Grievant's right arm. He stated he also noted that Dicus' gun was undefended, and exposed to Berg's right side. Feeling the situation was urgent, the Grievant rushed into the fight, and "employed my flashlight as a weapon." 13/

The Grievant noted he struck Berg four times, and described the four blows thus:

> A. As I recall, the first three blows were administered in very rapid succession . . . The fourth blow followed after just a momentary evaluation by me . . . This evaluation showed me that the three blows that I used to subdue Berg were not sufficient, he didn't show any relaxing; however, he was now going down to the ground.
>
> Q. What do you mean by that?
>
> A. He was going down to the ground; however, he was still violently resisting any subduction by Dicus.

12/ Tr.II at 114.

13/ Tr.II at 123.

Q. What was the purpose of the fourth blow?

A. Again, to stop Berg's resistance. 14/

The Grievant specifically denied striking Berg while Berg was on the ground. The final blow, the Grievant stated, would have occurred "near the ground". 15/ At no time during this sequence did the Grievant perceive Dicus to have brought Berg under control.

Weather conditions did not play a role in the ability of any of the testifying witnesses to observe the events sketched above. The end of the cul-de-sac at which the struggle occurred is lit by a streetlight.

The Departmental Evaluation Of The Grievant's Conduct

County Sheriff Robert Zebro learned of the incident from the Grievant, and after reading Dicus' statement concluded that an internal investigation regarding the use of deadly force was necessary. He delegated this responsibility to Undersheriff Bruce Palmer. Within a few days, Palmer reported on the results of his investigation. Palmer recommended that the Grievant be given the opportunity to resign, and if he declined, be discharged.

Both Zebro and Palmer based the decision to discharge the Grievant on an excessive use of force on January 27, and on prior problems with the Grievant regarding the use of excessive force. Zebro testified that in August of 1988, the Grievant was given a letter of reprimand from then incumbent Sheriff Risler regarding using his nightstick on the head of a person being arrested. The letter suggested counseling if the use of force on that occasion was "because of psychological pressures of your job or from off-duty problems". 16/

Zebro also noted that he had removed the Grievant from duty with the West Central Drug Unit. Zebro stated he took this action after representatives of that unit advised him that the Grievant had used excessive force in handling a suspect who was lying on the ground. Zebro, learning that certain of the municipalities within the Unit would not allow the Grievant to work within their jurisdiction, advised the Grievant that it would be best if Zebro removed him from the Unit. Zebro and the Grievant considered appearing at a hearing conducted by the Unit, but Zebro feared the hearing would be biased, and neither he nor the Grievant appeared. Zebro stated he was not convinced the Grievant had used excessive force in that instance, and did not take any disciplinary action against him, beyond counseling him regarding avoiding any excessive use of force in the future.

Non-Departmental Sources of Evaluating The Grievant's Conduct

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14/ Tr.II at 125.

15/ Tr.II at 128.

16/ Tr.II at 67. The County stipulated that evidence on this instance of discipline was introduced for purposes of showing notice under the Daugherty standards, and was not to be "used as cumulative evidence or in a progressive disciplinary sense for purposes of this disciplinary proceeding." Tr.II at 25.

The Testimony of John W. Traynor

Traynor serves as a Sergeant for the City of Eau Claire Police Department, and as an instructor of self-defense for Chippewa Valley Technical College. In the Spring of 1990, he taught an in-service, attended by the Grievant, regarding the use of force, edged weapon defense and weapon retention. During that in-service, Traynor taught the "confrontational continuum", which is a graphic means to determine the level of force -- from "presence" and "dialogue" through "deadly force" -- which must be used in an officer's decision making process to "reach and maintain control with the least amount of force possible". 17/ Traynor also touched upon the use of deadly force at this in-service. He noted that he taught attending officers that the use of deadly force required, at a minimum, that an officer perceive an imminent threat of death or great bodily harm to the officer or another; that the subject posing the threat intend to do such harm; that the subject have a delivery system capable of administering such harm; and that there is no other way to prevent the subject from attempting to inflict such harm.

The Testimony of Gary Klugiewicz

Klugiewicz serves as a Lieutenant for the Milwaukee County Sheriff's Department, and serves as the Director of its Training Academy. He also operates as an independent consultant who creates and runs training programs at the State and Federal levels. He also serves as an expert witness regarding defensive tactics, including the decision to use deadly force.

Klugiewicz testified at length regarding the "force option continuum", which is a state-wide standard which consists of five major components: Presence; Dialogue; Empty Hand Control; Impact Weapon; and Firearm. The components represent the escalating physical responses available to an officer who is confronting a situation in which coercion must be employed. Each option is to be considered and rejected before resorting to a higher level response.

Klugiewicz testified that judged from his point of view, with the continuum as background, Dicus' attempts to tackle Berg were not the best available response. Klugiewicz based this conclusion on the judgement that an officer should not allow himself to be engaged in a "fair fight". Rather, the officer should constantly seek to maintain the advantage. Thus, a "perpetrator's" action should be met not with an equal response on the continuum, but with a higher level response. Thus, for example, an unarmed perpetrator rushing an officer should not necessarily generate an "empty hand control" response, but an "impact weapon response." Dicus' tackles of Berg generated, to Klugiewicz, a fair fight putting the officer at risk. This risk, in Klugiewicz' view, generated further risk, since Dicus was, for part of the fight at least, all that stood between Berg and innocent victims, such as Jackie Berg or Schindele.

Klugiewicz did not fault the Grievant's drawing of his gun, since Berg himself approached the Grievant with an impact weapon, capable of inflicting great bodily harm. The Grievant's drawing of his gun put the Grievant in a position of advantage. Klugiewicz did not fault the Grievant's use of the flashlight as a weapon, in itself. Nor did he fault the Grievant's use of that weapon on the Grievant's head. Any lesser response, Klugiewicz felt, denied the Grievant a position of advantage. Klugiewicz was, however, concerned that

17/ Tr.I at 147.

the Grievant's use of the flashlight as a weapon should reflect his prior training. If the use of deadly force reflects an officer's training regarding the use of deadly force, the judgement represents a reasoned act of discretion. If not, the force may reflect an untrained personal response, which can reflect or result in an abusive use of force. To Klugiewicz, the initial determination necessary was whether deadly force was warranted, the next necessary determination was whether the use of force reflected the officer's training in light of the facts posed. Klugiewicz felt the January 27 incident warranted the use of deadly force on Berg. He specifically noted, however, that no use of force while the Grievant was subdued and on the ground could be considered justifiable.

The Procedures Following The Departmental Evaluation

Zebro suspended the Grievant, with pay, in a memo to the Grievant dated January 30. The memo noted the paid suspension was "to provide time for an orderly and complete investigation." The memo also noted that a meeting was to be conducted on February 6, to permit the Grievant to give his account of the incident. A meeting was conducted on that date. On the advice of his Union representative, the Grievant did not respond to questions at that meeting.

In a letter dated March 12, to Pat Thompson, the County's Administrative Coordinator, Steve Day inquired regarding the status of the matter, specifically noting that the Grievant "was to be off work and on paid status until such time as the County completed its investigation of the alleged incident", and specifically asking that "the County . . . notify this office of any change which does develop, including any discipline which may occur".

In a letter to the Grievant dated April 26, Zebro stated:

> As of Friday, April 26, 1991, you are hereby suspended without pay from your duties as a Deputy Sheriff with the Dunn County Sheriff's Department.
>
> A complaint (see enclosure) has been filed with the Dunn County Board of Supervisors Grievance Committee seeking your dismissal from the Sheriff's Department . . .

The enclosure was a letter to the "Supervisory and Personnel Committee" of the County Board, which reads thus:

> I am filing this report and complaint with your group in its capacity as grievance committee under the Dunn County Civil Service Ordinance.
>
> It is my belief that (the Grievant) has acted in a manner as to merit his dismissal from the Dunn County Sheriff's Department. I have listed below the specific charge against (the Grievant) which I believe forms a basis for his dismissal, and request that your committee seek action to confirm such dismissal.
>
> The specific charge against (the Grievant) is as follows:
>
> > On Sunday, January 27, 1991, at approximately 10:36 p.m. . . . (the Grievant) did use excessive and deadly force in subduing one Carl

> Berg, a suspect in a domestic dispute. The excessive and deadly force complained of consisted of the delivery of at least five (5) blows to Mr. Berg's head with a flashlight, resulting in multiple lacerations requiring a total of forty-three (43) stitches to close. In so using excessive and deadly force, (the Grievant) did act in violation of Sheriff's Department Policy Nos. F003 (Policy on the Excessive Use of Force) and F007 (Use of Deadly Force), and did further act contrary to his professional training in regard to the use of force as well as certain corrective actions by his superiors in response to prior incidents regarding his use of force.
>
> . . .

Policy F003 is entitled "POLICY ON THE EXCESSIVE USE OF FORCE", and reads thus:

> . . .
>
> POLICY
>
> It is the policy of this department that deputies shall use an absolute minimum of force in effecting an arrest, transporting prisoners, and in the prevention of escape. Excessive force shall never be used.
>
> DEFINITION
>
> As used in this policy, excessive force is that force used by a deputy beyond which a reasonable and prudent deputy i(n) similar circumstances would use force to gain and/or retain custody of a suspect during a legal arrest/detention. Or, that force used by a deputy in violation of this department's policies on deadly and non-deadly force.
>
> . . .

Policy F007 is entitled "USE OF DEADLY FORCE", and reads thus:

> . . .
>
> POLICY
>
> Deadly force, as used herein, is the use of firearms or any other means a deputy may use to inflict death or serious bodily injury.
>
> . . .
>
> GUIDELINES FOR USE OF DEADLY FORCE
>
> A. Deadly force shall not be used by deputies of this department in the performance of their official duties except under the following circumstances:

> 1. Only as last resort in the defense of one's self, when there is reasonable cause to believe that one's life is in immediate jeopardy, or one is subject to great bodily harm.
>
> . . .

The Union and the County ultimately agreed to put the matter into grievance arbitration. The parties' understanding of the implications of that agreement does, however, vary. In a letter to Day dated June 20, 1991, James W. Ward stated the County's position thus:

> With respect to matters of procedure, I will simply reiterate my understanding that the parties mutually wish to utilize a format involving only one evidentiary hearing as a means of resolving the misconduct charge against (the Grievant) . . .
>
> In effect then, Arbitrator McLaughlin would assume the statutory role of the County's Supervisory and Personnel Committee under Section 59.21(8)(b), Wis. Stats. Nevertheless, the Supervisory and Personnel Committee would not be entirely removed from the process. Thus, in the event of an arbitration award by Arbitrator McLaughlin finding just cause for a given level of discipline against (the Grievant) the Supervisory and Personnel Committee would still be called upon to actually impose discipline consistent with the terms of any such award. There would be no further evidentiary hearing before the Supervisory and Personnel Committee, however. In lieu of any sort of evidentiary hearing within the meaning of Section 19.85(1)(b), Wis. Stats., the Supervisory and Personnel Committee would simply engage in deliberations as provided in Section 19.85(1)(a), Wis. Stats., and take final action accordingly . . .

Day responded in a letter dated June 28, which reads thus:

> . . .
>
> There seems to be some confusion as to which legal jurisdiction this matter is proceeding under and I wish to clearly express the Unions' position . . .
>
> As far as the Union is concerned, Arbitrator McLaughlin will journey here solely to decide whether the provisions of the contract have been violated. It is Dunn County who has contractually retained the authority to discipline a represented employee. The Union will not absolve the County from making such decisions (and the responsibility for those decisions) by granting an arbitrator such disciplinary powers . . .

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The County's Initial Brief

After a review of the evidence, the County notes that "both parties have acknowledged the utility of the seven standards enunciated by Arbitrator Carroll R. Daugherty in Enterprise Wire Co., 46 LA 359, 362-365 (1966) for determining whether just cause for discipline exists in a given situation." The County contends that only five of the seven Daugherty standards can be considered in dispute.

The County argues that it gave the Grievant forewarning and foreknowledge of the possible or probable disciplinary consequences of his conduct. More specifically, the County contends that Policies F003, F004 and F007 clearly put the Grievant on notice that "the blows from his flashlight . . . constituted the use of deadly force", and that he "was not entitled to inflict such blows . . . until every other reasonable means of apprehension or defense (had) been exhausted". Beyond this, the County urges that the Grievant had, through in-service training, been fully apprised "in the use of excessive and/or deadly force." The County then asserts that apart from his training and departmental policies, the Grievant had received prior warnings regarding the use of excessive force. Specifically, the County points to discipline for "an August, 1988 incident involving blows to the head in the course of subduing a suspect", and to a non-disciplinary incident in the Fall of 1990, in which Zebro "made the pointed observation to the Grievant that complaints of police brutality seemed to accompany his activities, and that because of his reputation, the Grievant should be especially cautious in employing any degree of force".

The County's next major line of argument is that its departmental rules are reasonably related to the orderly, efficient and safe operation of the Sheriff's Department. Application of this standard to the record is, according to the County, "virtually self evident". More specifically, the County asserts that liability considerations must be weighed, but that "it also goes without saying that public trust and confidence, so integral to effective law enforcement, is seriously undermined by incidents of police brutality."

The County then contends that it obtained substantial evidence or proof that the Grievant was guilty as charged during its investigation of the incident. As background to this point, the County emphasizes that "(s)urprisingly little eyewitness testimony surrounding the Berg incident is seriously in dispute." A review of that testimony, the County argues, establishes that the Grievant struck Berg's head four to five times "even though, in the Grievant's own mind, Berg was not then in a position to hit Deputy Dicus anywhere but in the lower leg region." It follows, according to the County, that "(a)t least in the Grievant's mind . . . there should have been no reasonable apprehension of great bodily harm toward Deputy Dicus." Nor does Klugiewicz's testimony alter this conclusion, in the County's view. The County asserts that County Departmental Rules, not outside testimony, set the applicable standard for the use of deadly force in Dunn County. Even if this were not the case, the County argues that "it was clearly improper for the Grievant to have delivered the fourth blow to Berg's head."

That the Grievant delivered at least one blow to Berg's head while Berg was prone is, according to the County, clearly established by Schindele's testimony. Contending that she, unlike the Grievant, has no self-serving motive to color her recollection, the County argues that "her testimony on the

pivotal question of the timing of the delivery of the last blow (or perhaps the last two blows) must be favored over that of the Grievant." It necessarily follows, the County asserts, that the Grievant employed excessive force.

The County's next major line of argument is that it applied its rules without discrimination and even-handedly when it discharged the Grievant. This standard has been met, the County contends, on two levels. First, the County notes that the Grievant is the sole County officer discharged for the use of excessive force. It follows inevitably, the County argues, that "the Grievant cannot claim to have been unfairly singled out for discipline." On a separate level, the County argues that there is no persuasive basis to exonerate the Grievant by discrediting Dicus' response to the incident.

The County then contends that the final Daugherty standard has been met since the Grievant's discharge is reasonably related to the seriousness of the charge against him, taking into account his record of service with the County. The seriousness of the charge is amply established by the extent of Berg's injuries, according to the County. Beyond this, the County argues that even if it is accepted that the Grievant was justified in striking Berg, this "does not, in any event, change the fact that . . . the blows continued to land after Berg was flat on the ground." Beyond this, the County urges that the "Grievant's state of mind may also be an important factor in determining the appropriate level of discipline to be imposed." The County contends that "exigent circumstances did not compel the Grievant to strike Berg in the head numerous times . . . (rather) the Grievant welcomed the opportunity to exact retribution for Berg's earlier insults."

Contending that the record establishes that it "has met its burden of proof with respect to all five just cause standards at issue in this proceeding", the County concludes that the grievance must be denied.

The Union's Initial Brief

After a review of the evidence, the Union asserts that the Grievant acted in a professional manner during the Incident. More specifically, the Union contends that the Grievant acted appropriately in confronting Berg, but was frustrated by the acts of Dicus, who "violated accepted rules of training, in the use of force, by barehandedly trying to disarm a violent perpetrator armed with a club". Arguing that the Grievant "could not grab or strike Berg's club hand because of the violence of the struggle and constant movement", the Union argues that the Grievant struck all four blows to Berg in a justifiable effort to disable a violent, armed man.

The Union then contends that the record establishes that the Grievant used only reasonable force during the incident. Klugiewicz' testimony, according to the Union, establishes the "force option continuum" against which the acts of Dicus and the Grievant must be assessed. The Union argues that this continuum establishes that Dicus engaged Berg in a "fair fight", which a police officer must strive to avoid. Rather, according to the Union, an officer must constantly maintain the advantage so that a dangerous situation does not operate in the favor of the law-breaker. The Grievant, and not Dicus, behaved appropriately under this standard, the Union concludes.

The Union's next major line of argument is that "(t)he County violated the contract when it indefinitely suspended the grievant without pay." More specifically, the Union argues that the County delayed imposing discipline on the Grievant for an inordinate amount of time, and "excessive delay is almost

the same as double jeopardy". This delay must be considered in the application of the Daugherty standards. The Union concludes that the County's conduct in delaying discipline violated both the just cause provision, and Article 7, Section 2, c.

The Union argues that the County has the burden of proof in this case, and that it bears "a higher standard of proof than in a normal discharge." That the offense charged is a crime, and that the offense charged has generated media attention make the discipline particularly onerous, the Union contends. The Union asserts that whatever the outcome of this proceeding, the Grievant's ability to earn a living as a law enforcement officer outside of Dunn County "has been severely damaged." It necessarily follows, the Union concludes, that the County must prove its case beyond a reasonable doubt.

Even if its contentions regarding the burden of proof are rejected, the Union asserts that the County has offered "no credible evidence" that "the grievant struck Carl Berg after he was under control." The Union argues that neither officer's testimony would justify such a conclusion. Schindele's testimony, according to the Union, would justify the conclusion. That testimony is, however, flawed in the Union's estimation. The Union contends her testimony can not be reconciled to that of the two officers. The Union concludes that her testimony regarding the final blows is particularly suspect: "The Union believes that what (she) thought was (the Grievant's) last strike at Carl Berg was actually his use of the long club to secure Berg's neck to the ground so that Dicus could apply the handcuffs." Beyond this, the Union questions why "the County did not even examine . . . three other eye-witnesses at the hearing".

Against this background, the Union contends that the County has failed to meet three of the Daugherty standards. More specifically, the Union asserts that the County has not adduced "credible proof that (the Grievant) struck Carl Berg after he was under control." Beyond this, the Union asserts that the Grievant was treated discriminatorily, since Dicus received no discipline for the incident. Beyond this, the Union contends that the "indeterminate suspension without pay was not a proper form of discipline."

The Union concludes by requesting "that the Arbitrator sustain the grievance and order the County to reinstate the grievant to his position of Deputy . . . (and) order the County to make the employee whole for all lost wages and benefits." In the alternative, the Union requests that, if some degree of just cause exists, "the Arbitrator determine the maximum sustainable penalty which the County can impose, reinstate the grievant . . . and make him whole for all appropriate wages and benefits which have been lost."

The County's Reply Brief

The County argues initially that each of the bases upon which the Union seeks to discredit Schindele's testimony is not well founded in the record. The County then specifically attacks the Union's "somewhat ingenious" assertion that Schindele saw not the flashlight, but the porch spindle, as the instrument of the final blows from the Grievant to Berg. Noting that Schindele described "a swinging motion", the County concludes "(i)t would be difficult to mistake such a swinging motion for the use of the club to pin Berg to the ground."

Beyond this, the County contends that the Union's assertion that it failed to call material witnesses is misplaced. The County contends that two of the non-witnesses were Berg and his "then-estranged wife with whom he has now reconciled." Since Berg has a pending claim with the County over the

incident, the County urges that "the Bergs are certainly not the type of potential witnesses whose absence can give rise to any sort of adverse inference." The sole remaining "eyewitness" stated "he did not personally see anything of the final encounter", thus rendering his testimony needless, according to the County.

The County next contends that the delay in its final action toward the Grievant reflects not indecisiveness over the appropriate response, but a realistic response to the Grievant's rights under the contract and Sec. 59.21(8)(b), Stats. According to the County, Zebro promptly preferred charges against the Grievant, and "promptly advised the Grievant that such charges had been filed." The County contends that the next choice was the Grievant's, and concerned whether he wanted a hearing before the County Supervisory and Personnel Committee or a grievance arbitrator. The County contends that because the Grievant chose to grieve the matter, and because the County wished to limit the matter to one evidentiary hearing, the County and the Union agreed to take the matter to grievance arbitration. The County contends that because Sec. 59.21(8)(b)5, Stats., vests the authority to discharge in the Supervisory and Personnel Committee and not in the Sheriff, it has delayed final disposition of the Grievant's discipline until "after the Arbitrator renders his decision." It follows, the County contends, that there is no procedural impropriety which flaws the disciplinary action taken against the Grievant.

Beyond this, the County argues that there is no procedural defect in the Sheriff's decision to convert the Grievant's suspension from a paid suspension to an unpaid suspension. Acknowledging that Sec. 59.21(9)(a), Stats., was amended "to prohibit an unpaid suspension until all statutory hearing and appeal rights had been exhausted", the County argues that since "that new . . . enactment was not yet in effect when the Grievant was suspended without pay, the obvious implication is that . . . Zebro's actions were entirely proper at the time."

Concluding that the Union's procedural and substantive arguments must be rejected, the County concludes that "there is just cause for the Grievant's discharge."

The Union's Reply Brief

The Union argues initially that "it is evident that the Union rejected any attempt to combine any type of civil service proceeding with the Arbitrator's determination of the grievant's rights under the contract."

The Union then asserts that Policy F004 can play no role in this matter since it "was never mentioned in the Sheriff's letter of discipline and recommendation for dismissal".

Beyond this, the Union contends that any assertion that Berg could only have struck Dicus or the Grievant in the leg once Dicus had tackled Berg "fails to take into account either (the Grievant's) fear of Berg grabbing Dicus's gun . . . or the dynamics of the situation." The Union concludes that "(h)indsight is easy, but the grievant's need to think and act instantaneously in this struggle was difficult at best."

The Union also disputes the County's claim that the Grievant could have struck Berg on the arm. This assertion, according to the Union, ignores Klugiewicz's testimony that such an attempt would be dangerous. Beyond this, the Union acknowledges that the Grievant struck Berg while he was falling to

the ground, but asserts that both Berg and Dicus were falling while "Berg continued to struggle violently".

DISCUSSION

While the extent of my authority in this case is disputed, the parties agree that the stipulated issues require the application of the just cause provision of Article 7, Section 2, b), to the record developed at hearing. The parties agree that the seven standards posited by Arbitrator Carroll Daugherty in Enterprise Wire Co., 18/ define the just cause analysis. The discussion below is structured on those seven standards.

I.

Did the (County) give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?

There can be no dispute that this standard has been met by the County. Even assuming a police officer requires specific notice that the use of excessive force can have disciplinary consequences, ample notice has been afforded the Grievant.

The Grievant received a copy of the Department's Rules, including Policies F003 and F007. During an in-service attended by the Grievant, Traynor dealt with the thought process which should proceed the use of deadly force. It is undisputed that then-incumbent Sheriff Risler issued, in August of 1988, a written warning to the Grievant regarding his striking a suspect's head. Zebro, then the Undersheriff, specifically informed the Grievant to be careful in the use of force in the future. In the Fall of 1990, the Grievant was pulled off a multi-county drug unit due to a perceived use of excessive force. He was not disciplined by the County, but Zebro again counseled him on the implications of the use of excessive force. In sum, the record establishes that the Grievant was advised of the probably disciplinary consequences which would follow his use of excessive force.

II.

Was the (County's) rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the (County's) business and (b) the performance that the (County) might properly expect of the employee?

The parties do not dispute that Policies F003 and F007 are reasonably related to the orderly, efficient and safe operation of the Sheriff's Department. The Department is, by law, privileged to use force in limited circumstances to enforce the law. It is essential to the public trust thus conveyed that force be applied judiciously. The use of excessive force erodes and threatens the public trust upon which any law enforcement agency depends.

Nor can there be any dispute that the County could properly expect the Grievant to honor its policies on the use of excessive force. None of the testifying witnesses questioned this point. The dispute here is more factual, focusing on whether the Grievant violated those policies.

III.

18/ 46 LA 359, 363-365 (1966).

Did the (County), before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

The Union has stipulated that the County has met this standard. 19/

IV.

Was the (County's) investigation conducted fairly and objectively?

The Union has stipulated that the County has met this standard. 20/

V.

At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

The Union has stipulated that the County has met this standard. 21/

VI.

Has the (County) applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Zebro's April 26 report is the first time the County has sought to discharge an officer for the excessive use of deadly force. There can be, then, no issue regarding whether the County has, in the past, consistently applied its rules on excessive force.

The dispute on this standard focuses on whether the County treated the Grievant discriminatorily by disciplining him, without disciplining Dicus.

Before addressing this point, it is necessary to touch on several prefatory points regarding the standard for assessing an officer's conduct. First, there can be no discriminatory application of discipline if the County has no disciplinary interest in Dicus' conduct. Thus, the analysis must first address whether any such disciplinary interest exists. Second, the determination of a disciplinary interest in either officer's conduct must focus on the officer's conduct as the January 27 incident unfolded. Finally, a determination of the County's disciplinary interest must focus on the reasonableness of the officer's response to the then-present circumstances.

The latter two prefatory points require some elaboration. The necessity to focus on the events as they unfolded is dictated by the need to enforce a realizable standard of conduct. To illustrate the point: When Dicus first emerged from his squad, he could not have known that Berg would not attempt to strike him with the porch spindle. Later events proved this to be the case, but at the time Dicus chose to rush Berg, he could not have known if Berg would strike or not. A disciplinary review of his conduct must focus on the facts then available to him. To assess his conduct based on Berg's not striking him uses facts not then available to him, and thus creates an unrealizable standard

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19/ Tr.II at 82.

20/ Ibid.

21/ Ibid.

of conduct. Any review of an act of discretion must allow for the background of uncertainty which forms the need to act. Not to do so undercuts the purpose of discipline. Discipline is designed to highlight improper conduct and to afford an incentive for proper conduct. To assess the exercise of discretion against any factual background other than the one which confronted the officer at the time of the need to act turns discipline into punishment.

The final prefatory point highlights that the County's disciplinary interest in either officer's conduct turns less on whether the officer's response was the best available, than on the reasonableness of the response. Whether the best response to Berg's approach was for Dicus to draw his baton or his gun is a fundamental question of public and law enforcement policy. An assessment of this policy issue can take into account facts not available to the officer, for the policy decision forms the basis for the instruction of an officer's future conduct. This level of review is reserved by Section 7 of the contract primarily for management, and only derivatively for an arbitrator. The issue here is not, then, whether the officer acted in the best fashion possible. Rather, the issue is whether the officer's act of discretion is so unreasonable that it should be sanctioned with discipline. This is a more factual than policy-based standard of review. Applying a reasonableness standard is the means by which this less policy-based analysis can be effected. The reasonableness standard is, it should be noted, expressly incorporated into Policies F003 and F007.

With this as background, the record establishes that Dicus' conduct on January 27 was reasonable. No testifying witness, except the Grievant, seriously questioned this point. Zebro specifically affirmed the reasonableness of Dicus' conduct. Klugiewicz did not specifically deny it, being unwilling to make an after the fact judgement that the Grievant had behaved unreasonably. Rather, Klugiewicz doubted whether, as viewed from the force option continuum, Dicus' response was the best available. Klugiewicz concluded it was not, because Dicus use of empty hand controls at best put Dicus in a "fair fight", and at worst put him at a disadvantage to Berg. This is a valid policy-based conclusion that a higher level of force would have subjected Dicus, and presumably the people Dicus was protecting, to less risk than an unarmed rush on Berg. The review here is not, however, primarily concerned with the policy issue of defining the best available response. The review here is whether Dicus acted reasonably.

The record establishes the reasonableness of Dicus' conduct. He did not thoughtlessly rush Berg. He engaged Berg in dialogue, and considered rushing him only after the Grievant had arrived, and only after he concluded the situation was escalating to the point that Berg faced a significant chance of being shot. This conclusion was reasonable in light of the circumstances then posed. Whether the Grievant's arrival or his conduct caused the escalation of Berg's threatening behavior can not, and need not, be determined. It is apparent that Berg chose to advance on the Grievant, and thus took a significant chance of being shot. Dicus did not consider Berg to be a significant enough threat to warrant that level of violence, and chose to act to prevent it. Later events confirmed the accuracy of his assessment of Berg's strength and determination.

Even acknowledging that Dicus' assessment of Berg was in doubt at the time he attempted the tackle, his conduct cannot be dismissed as unreasonable. His rushes of Berg, although employing a lesser level of force than was probably advisable, were taken with the Grievant available as backup. The fight was not a truly "fair fight" since Berg was outnumbered. Beyond this, and as emphasized by Klugiewicz, an officer's exercise of discretion should

reflect his training and experience. There has been no showing that Dicus was ever schooled to maintain the advantage in the manner testified to, after the fact, by Klugiewicz. This was Dicus' first encounter with the level of violence displayed by Berg. There is no persuasive evidence that Dicus in any way deviated from his training or experience.

Because Dicus' conduct was reasonable, the County has no disciplinary interest in it. That the County did not discipline him thus affords no basis to conclude that the Grievant should not have been disciplined. The County has thus met the sixth Daugherty standard. The issue is now whether, and to what extent, the County had a disciplinary interest in the Grievant's conduct.

VII.

Was the degree of discipline administered by the (County) in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the (County)?

The two elements to the application of this standard will be addressed in reverse order. That the Grievant has, in the past, served the County well is not in doubt. He was recognized as officer of the year in 1988. The more troublesome point turns on past instances in which the Grievant may have used excessive force. The April 26 report, Zebro's testimony and Palmer's testimony all verify that the dismissal was based, in part, on these instances.

The August, 1988, warning and the Grievant's removal from the multi-county drug unit are the instances at issue. Neither instance supports a conclusion that the dismissal can be justified as the end response to a pattern of conduct.

The parties have stipulated that the August, 1988, letter can be used only for establishing that the Grievant was aware that discipline would follow the excessive use of force. Even in the absence of this stipulation, and ignoring the parties' potential dispute regarding Article 7, Section 2, d), the facts underlying this incident are unclear and of dubious benefit here. Beyond this, the Grievant's removal from the drug unit did not result in any departmental discipline. Since the County exercised no substantive disciplinary interest in that matter then, it cannot create one now.

These incidents create a troublesome undercurrent to this matter, but just cause requires that the Grievant be judged on proven conduct. Thus, his discharge must be based solely on his January 27 conduct.

It is necessary now to determine if the discharge or any other level of discipline is reasonably related to the Grievant's proven offense.

The Grievant is accused of improperly using deadly force, and of using excessive force in striking Berg repeatedly with his flashlight. The charges are related, but must be examined separately. To resolve the final just cause standard it is necessary to first determine if the Grievant was, under Policy F007, privileged to use deadly force. If he was not, the reasonableness of the discharge has been proven. If he was, it is then necessary to determine what level of force was applied by the Grievant, and whether that level of force was excessive under Policy F003. After these determinations have been made, the appropriate level of discipline, if any, can be addressed.

Policy F007 authorizes the use of deadly force if used "as a last resort" where "reasonable cause" exists to believe "one's life is in immediate

jeopardy, or one is subject to great bodily harm." 22/ To draw on Traynor's analysis, the use of such force would require that no less deadly means exist to thwart an imminent threat of great bodily harm, made by a person who intends to do such harm and is equipped to do so.

The record establishes that Berg's conduct could reasonably be considered to warrant the use of deadly force to subdue him. The threat of great bodily harm to Dicus and the Grievant was imminent, even after Dicus had secured Berg's left wrist. Dicus was aware that he had a secure grip on Berg. The Grievant could not have been. Berg had successfully eluded Dicus' grasp once, and there was, at that point in time, no reasonable assurance that Berg could not do it again. Beyond this, Dicus had not fully secured the arm by which Berg held the club. Whatever the full range of mobility Berg had with the club, it is apparent that the Grievant could reasonably conclude that the club could still be used as a weapon. In any event, the tackle had exposed Dicus' gun to Berg at a time when Dicus literally had both hands full. Future events would prove the validity of Dicus' belief that he had Berg under control. In the split seconds of time during which the Grievant viewed the struggle, however, he could reasonably have concluded that Berg continued to pose a threat of great bodily harm to each officer.

That the Grievant could reasonably conclude Berg intended to inflict great bodily harm on anyone in his path is amply demonstrated in the record. Berg directly threatened Dicus and the Grievant that blood would be shed that evening. Whether, as Jackie Berg feared and Klugiewicz wondered, this reflected a suicidal wish on Berg's part poses a fine psychological point. Such a fine point is irrelevant here, however. At the time the Grievant was called upon to act, he reasonably concluded that Berg intended to hurt, perhaps kill, someone.

Nor is there any doubt that the porch railing, with or without the protruding nail, could reasonably be perceived as a "delivery system" for inflicting great bodily harm. It was solid, edged wood, wielded by a man who either knew martial arts or was sufficiently skilled to wield the spindle as if he did.

Nor can the Grievant be faulted for using the flashlight as a weapon. The time for action was limited, if he was to charge Berg. The baton was too long to wield in close quarters, and his gun was useless because the target could not be isolated. This left his bare hands or the flashlight. That he chose the flashlight preserved the advantage, as Klugiewicz put it. A lesser level of response would have had both officers engaging Berg at a lower level of force than Berg himself was using. This would have operated to give up at least some of the advantage possessed by the officers.

It follows, then, that the Grievant was privileged, under Policy F007, to use deadly force in subduing Berg. Zebro acknowledged this point in his testimony, by noting that he sought to sanction not the initial use of the flashlight, but its repeated use.

It is now necessary to determine the degree of force employed by the Grievant, and whether that level of force was excessive, in violation of Policy F003.

22/ Policy F007 also requires that "every reasonable means of apprehension or defense (be) exhausted." A similar requirement is found in Policy F003. This point is discussed in the application of Policy F003.

The first determination required here is whether the record establishes that the Grievant struck Berg while Berg was lying on the ground.

The record will not support this conclusion. The sole basis supporting it is Schindele's testimony. She testified convincingly that she saw Berg struck once or twice while he was on the ground. The testimony is fully credible. She had every reason to ignore, if not cheer, any degree of force used on Berg. That the brutality of the confrontation affected her as it did is the most damaging evidence of excessive force posed in the record.

Her testimony is not, however, sufficient in itself to establish that the Grievant struck Berg while Berg was on the ground. Initially, it must be stressed that the difference between her testimony and the Grievant's is a fine point. The Grievant has acknowledged he struck Berg as Berg and Dicus fell to the ground. The final blow, under the Grievant's view, was started as Berg and Dicus fell, and administered near the ground.

That Schindele's observations cannot be corroborated makes it impossible to conclude that the Grievant struck Berg while Berg was on the ground. Most significantly here, Dicus' testimony corroborates the Grievant's, placing the final blow near, but not on, the ground. There is no reason to believe Dicus is covering for the Grievant. By the time of their testimony, litigation prompted by the incident had placed them at adverse points, with the Grievant questioning the propriety of Dicus' conduct. Beyond this, Zebro's and Dicus' testimony establishes that Dicus viewed the Grievant's response to be excessive. Dicus had, at most, reason to defend his own response. He had no reason to cover for the Grievant's.

The lack of corroboration for Schindele's testimony is significant not because her testimony might be fabricated, but because her honest account of the facts she perceived addressed a fast-flowing, traumatic incident which was played out fifteen to twenty steps from her in partially illuminated evening darkness. She could not make out what the flashlight was, taking it for a nightstick. She did not see the Grievant pull his gun or secure the spindle from the Grievant. Somehow as Dicus, Berg and the Grievant struggled toward the ground, the Grievant delivered four blows to Berg and wrested the spindle from Berg, using it across the back of Berg's neck as Dicus put Berg into handcuffs. This mass of motion took place for, according to Schindele, "between five and ten seconds". 23/ Against this background, it is impossible, in the absence of corroboration, to affirm that the blow noted by Schindele while Berg was on the ground was actually administered with Berg on the ground, or to deny that the perceived blow was some motion related to wresting the spindle from Berg, and placing it over the back of his neck.

The physician's report can not corroborate Schindele's account. There was no "obvious evidence of a depressed skull fracture or anything of this nature". Two of the lacerations were on the back of Berg's head. This could indicate he was struck while down, but can with equal justification be taken to indicate he was struck as he fell. He was able to walk after the confrontation, and received no apparent injury beyond the lacerations. Whether the absence of the serious "blunt trauma" that Schindele feared represents anything more than Berg's good fortune after being struck on the head while on a hard surface can not be determined. There is, however, no persuasive basis in the record for concluding Berg's injuries are inconsistent with the

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23/ Tr.I at 125.

Grievant's testimony.

Beyond this, the conduct of the testifying witnesses after the incident affords no corroboration for Schindele's account. Dicus did not question the wisdom of allowing the Grievant to transport Berg to the hospital. If he had concluded the Grievant had deliberately brutalized Berg, it is unlikely he would have permitted this to occur. Schindele herself informed Palmer shortly after the incident that she had not observed anything unusual in the way Berg had been handled.

Nor did the Grievant act like an officer out of control prior to Dicus' final rush on Berg. The reasonableness of his decision to pull his gun to stop Berg's advance was specifically noted by Klugiewicz, and not disputed by Zebro. That the Grievant did not pull his gun until Berg was within striking distance affirms that he was not trigger-happy. Beyond this, when Berg eluded Dicus' first attempt to tackle him, the Grievant did not act rashly, but reholstered his gun before joining the pursuit. Nor did the Grievant provoke the final confrontation. Rather, he responded to it. The physician's report details no injury to Berg's neck. Thus, it appears that within seconds of his striking Berg's head with his flashlight, the Grievant used controlled force on the back of Berg's neck. Thus, the final struggle can not be viewed as the culmination of a series of uncontrolled actions by the Grievant. This can not establish that the Grievant did not strike Berg while Berg was on the ground. It does, however, indicate such a blow was not the inevitable conclusion of a sustained, uncontrolled attack.

Viewed as a whole, the record will reliably support a conclusion that the Grievant struck Berg near the ground, but will not reliably support a conclusion that the Grievant struck Berg while Berg was on the ground. Thus, the level of force employed by the Grievant was, at most, four blows to Berg's head with a flashlight, including one blow administered close to the ground.

It is necessary now to determine if this level of force violated Policy F003. This point is particularly difficult, because the County asserts the excessive use of force involves something more than just the Grievant's use of the flashlight. That something more turns on the decision-making process by which the Grievant decided to use, and to sustain the use, of deadly force until Berg and Dicus had nearly fallen to the ground.

Policy F003 states a departmental policy that "deputies shall use an absolute minimum of force in effecting an arrest". Thus, the decisional process preceding and attending the use of force must be considered with the actual use of force. In this case, there is some indication the Grievant did not fully assess his options before acting. The Grievant noted that he observed Dicus' unguarded garrison belt, and determined the situation required immediate action. This conclusion is not unjustifiable, but does not appear to have involved a full review of the then unfolding events. Berg had not attacked Dicus during the first encounter, and had put more effort into escape than into counter-attack. This affords some basis to question the Grievant's initial decision to strike Berg. Because Berg's conduct justified the Grievant's use of deadly force, however, this conclusion states no more than that not rushing into the fray may have been a better response.

More significant here is the Grievant's sustaining of the attack, in light of the then unfolding events. During the second encounter, Dicus' gun was at risk of being taken only if Berg abandoned the club. Berg could not pose a threat on Dicus' gun and with the club at the same time. The Grievant's testimony indicates he treated both the club and the exposed gun as causes for

an immediate and sustained attack. The Grievant did not apparently alter this view during the attack, in spite of the fact that Berg never succeeded in weakening Dicus' grip over him. This may indicate an inflexible thought process which ignored less coercive alternatives than an immediate and sustained attack on Berg's head with a flashlight.

As noted by Klugiewicz, an officer's actions should reflect his training. In those cases where a deviation from an officer's training is detected, the officer's exercise of discretion may not be reasonable. In this case, the Grievant had been specifically counseled on at least two occasions to avoid the use of excessive force. One of those instances concerned a blow to a suspect's head. In this case, the Grievant went straight for Berg's head, and continued to apply blows to Berg's head until Berg was near the ground. How this reflects the Grievant's training and experience is a most troublesome point.

Ultimately, the essence of the County's criticism of the Grievant's attack is that Dicus had the situation under control, and could have handled Berg without the Grievant. This view has considerable support in the record, and forms the sole basis to conclude that the Grievant used excessive force, in violation of Policy F003.

The scope of the County's disciplinary interest in this violation is, however, narrow. That Berg could not wield both the club and Dicus' gun at the same time can not obscure that his use of either weapon would constitute a threat of deadly force. Beyond this, the less coercive alternatives available to the Grievant were, at best, few in number. As pointed out by Klugiewicz, an attack by the Grievant on Berg's arm or the spindle risked hurting Dicus, and exposed the Grievant to more risk than necessary. Since Dicus and the Grievant were all that stood between Berg, his wife, Schindele or their children, this risk was a dubious one to assume. Berg's head was exposed and undefended. The Grievant's attack on it gave the advantage to the Grievant.

The questions surrounding the Grievant's decision-making process thus form the sole violation of Policy F003 proven on this record. This makes the proven offense the inflexibility of the Grievant's decision to use his flashlight as a weapon, ranging from the swiftness of the decision to attack to his refusal to break it off until Berg and Dicus were near the ground. This offense reflects, however, a narrow disciplinary interest rooted in the County's desire to strictly enforce the minimum force requirements of Policy F003.

This disciplinary interest cannot warrant the Grievant's discharge. As noted above, Berg's conduct privileged the Grievant to strike Berg with his flashlight. With this as background, it is unpersuasive to assert the privilege vanished somewhere between the first and fourth blow in the absence of clear evidence, available to the Grievant as the incident unfolded, that Berg had been subdued. Some evidence that this was the case was available to the Grievant, since the Grievant could see Dicus' hold on Berg's left wrist, and should have, at some point, perceived Berg and Dicus to be falling to the ground. However, no fully reliable level of certainty can be read into this rapidly changing situation. The Grievant could see that Dicus had not fully controlled Berg's right arm, and was aware that Berg had once eluded Dicus' grasp. Thus, any fully reliable conclusion that Berg had been subdued turns inevitably on Dicus' perception of his own hold on Berg. This perception was unavailable to the Grievant. At the time, the Grievant concluded Berg was not subdued until Dicus and Berg had fallen to the ground, with the Grievant seizing the spindle. While this conclusion was not proven to be fully accurate, it was not, at the time it was made, unreasonable. Because the use

of force was not unreasonable, the sanction of discharge can not reasonably be applied here.

It does not, however, follow that the County lacked any disciplinary interest in the Grievant's conduct. It is easier to characterize the Grievant's conduct as not unreasonable than as reasonable. This is because it was the irrationality of Berg's conduct which justified the Grievant's response. The Grievant's use of discretion must, however, reflect his training to be reasonable in itself. In this case, that reflection is troublesome in light of his prior warnings regarding the use of force. In certain respects, his decision to attack Berg and to continue the attack while Berg and Dicus fell to the ground appears not to have fully assessed the degree of control over Berg exercised by Dicus or the possibility of a less violent response. These concerns are, however, more easily minimized than exaggerated. Ultimately, those concerns are less rooted in the events of January 27 as those events unfolded than in an after the fact review of those events armed with the certainty of hindsight. Those concerns thus form more of a policy guide for the Grievant's future conduct than a fully persuasive condemnation of his January 27 conduct. The record establishes that Berg brought the January 27 attack on himself.

Thus, the County's disciplinary interest in the Grievant's conduct is narrow and must be narrowly applied. The AWARD entered below recognizes this by permitting no level of discipline greater than a one day suspension. The purpose of this lesser level of discipline is to formally counsel the Grievant on the strictness with which the County intends to enforce the minimum force policy of Policies F003 and F007, and to recognize the validity of County concerns surrounding the Grievant's decision to initiate and sustain an attack on Berg's head until Berg and Dicus were nearly on the ground.

Neither party has asserted the record poses any remedial issues requiring discussion. Thus, the AWARD states a general order requiring the County to reinstate the Grievant and make him whole for the wages and benefits he would have earned but for his unpaid suspension.

Before closing, it is necessary to touch on the procedural arguments raised by the Union. Both parties have sought a ruling on the merits of the grievance. Both parties have not, however, sought a ruling on the procedural points raised by the Union. While each party has addressed those issues, any resolution of the matter requires addressing the statutory issues posed by the County in defense of the procedures employed here. The Union has opposed my exercise of extra-contractual authority. Thus, any ruling on the procedural points raised by the parties would raise, not resolve, issues. Since no ruling on those procedural points would affect the remedy afforded below, it serves no purpose to address them.

AWARD

The County does have just cause to discipline the Grievant.

The maximum level of discipline sustainable in this instance is an unpaid suspension from work for one work day. The County may choose to issue an oral or written warning in place of or in addition to such a suspension, advising the Grievant that the County will strictly scrutinize the decision-making process by which a deputy determines to initiate or sustain the use of force, and will discipline the Grievant in the future if his decision to use force is not preceded and accompanied by an assessment of every other reasonable means of apprehension or defense.

As the remedy appropriate to the County's violation of Article 7, Section b), the County shall make the Grievant whole by reinstating him to the position he would have held but for his indefinite unpaid suspension on April 26, 1991, and by compensating the Grievant for the wages and benefits he would have earned but for the indefinite suspension. The County shall expunge any reference to the unpaid suspension or recommendation of discharge from the Grievant's personnel file(s), and shall amend the Grievant's personnel file(s) to reflect only that discipline which is imposed consistent with the terms of this decision.

Dated at Madison, Wisconsin, this 21st day of February, 1992.

By _____
Richard B. McLaughlin, Arbitrator