BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION	Case 317 No. 46642 MA-7029
and	
MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)	

Appearances:
Gimbel, Reilly, Guerin & Brown, by Mr. Franklyn M. Gimbel, on behalf of the As
Mr. Timothy R. Schoewe, Deputy Corporation Counsel, on behalf of the County

ARBITRATION AWARD

The above-entitled parties, herein "Association" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Milwaukee, Wisconsin, on May 18, 1994, and June 10, 1994. The hearing was not transcribed and the parties subsequently filed briefs and reply briefs which were received by August 2, 1994.

Based upon the entire record, I issue the following Award.

ISSUES

Since the parties were unable to jointly agree on the issues, I have framed them as follows:

1. Is the grievance arbitrable?

2. If so, did the County violate the contract when it failed to provide grievant George E. White with all of the written documentation in the Sheriffs Department's files before the County suspended him in 1990 and, if so, what is the appropriate remedy?

DISCUSSION

Detective White on February 7, 1990, was involved in a personal dispute while on duty with MoFoCo Auto Parts, an automotive garage located on Capitol Drive, Milwaukee, Wisconsin, over the latter's refusal to release White's private vehicle which he had taken there the day before. The garage manager then called the Greendale Police Department and White called the Milwaukee Police Department. After police from both departments arrived, White arrested the garage owner and a garage mechanic and took them into police custody. 1/ The Milwaukee County District Attorney's office subsequently decided not to press charges against the two.

Following a police department internal investigation of the incident, Sheriff Richard E. Artison suspended White for one day via a November 12, 1990, Departmental order which provided:

1/ The record shows that other customer complaints have been filed against MoFoCo.

> This suspension is made because on Wednesday, 02/07/90 Detective White, while on duty, became involved in a dispute while conducting personal business at a local place of business known as MoFoCo Auto Parts, Inc., located at 102 West Capitol Drive. During this dispute Detective White arrested two employees of MoFoCo, Inc., and caused them to be conveyed to the Milwaukee County Jail. Both employees were subsequently unarrested. A review of this matter by the District Attorney's Office resulted in no charges issued against the MoFoCo employees.
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> Based on the above incident it has been determined Detective White violated the following:
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> 1.05.02 RULE 2 - CONDUCT OF MEMBERS
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> Members of the department shall not commit (sic) any action or conduct which impedes the department's efforts or efficiency to achieve it's (sic) policies and procedures or brings discredit upon the department.
>
> 1.05.04 RULE 4 - ATTENTION TO DUTY
>
> Members of the department shall devote their whole time and attention to the service of the department, and they are expressly prohibited from engaging in any other business or occupation while on duty.
>
> 1.05.06 RULE 6 - MISUSE OF OFFICIAL POSITION
>
> Any member whose conduct or action is taken to use their official position for personal gain or influence is prohibited. (sic)

White grieved and appealed his suspension to arbitration where it was heard by Arbitrator Daniel Nielsen who found that the County had just cause to discipline White and sustained his one-day suspension. 2/ Arbitrator Nielsen also ruled: "The record is not sufficient to determine whether Deputy White was denied due process in that he was not allowed to see investigative materials prior to meeting with the Sheriff."

The Association proposed in that proceeding that one of the issues before Arbitrator Nielsen centered on:

> "Was Deputy White denied due process in that he was not allowed to see investigative materials prior to meeting with the Sheriff and was not informed of the "Conduct of Members" change until he received the discipline?"

Arbitrator Nielsen stated that "The right of employees to access investigative files is the subject of another [i.e. this] pending grievance" and that, as a result:

> "Given the state of the record on this point and the fact that the substance of the Association's complaint is the subject of another pending grievance, the undersigned declines to speculate on the possible impact of the County's denial of access."

2/ Milwaukee County (Sheriff's Department), Case 298, No. 44877, MA-6444.

Prior to being suspended and meeting with Sheriff Artison, White on October 18, 1990, filed a written request for all documents bearing on the MoFoCo incident and repeated that request on December 17, 1990. But for the reports which he himself had prepared, the County denied White's request. 3/

Earlier, the Association on a number of occasions since 1983 has asked for all documents regarding pending disciplinary investigations against various police officers before discipline was imposed. The Union throughout that time believed that all such documents were being provided. In fact, the County sometimes deleted or withheld certain documents without telling the Union.

The Association in past collective bargaining negotiations has tried, but failed, to obtain contractual language calling for the release of all pertinent documents bearing on an ongoing disciplinary investigation. Its October 13, 1992, proposal for instance stated:

> **L. DISCIPLINE**
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> 1. Employees facing disciplinary proceedings shall have full access to the investigative file prior to any meeting with or hearing before any person or entity who will recommend or decide the discipline, if any, to be imposed.
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> 2. At the meeting with the Sheriff or his designee for purposes of considering the imposition of discipline, the employee shall have the right to be represented by counsel and one Association official,, and shall have the right to present evidence and challenge evidence presented against the employee.
>
> 3. All written reprimands shall be purged from the employee's personnel file and expunged six months following the date of issuance.
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> 4. If a suspension or discharge is reduced to a reprimand as a result of a decision by an arbitrator or the Personnel Review Board, the reprimand shall be effective as of the date the original discipline was imposed.

In 1993, the Union proposed contract language which stated:

> "Employees facing disciplinary proceedings shall have full access to the investigative file 48 hours prior to any meeting with investigator or hearing before any person or entity who will recommend or consider the discipline, if any, to be imposed."

The County rejected those proposals, just as it rejected all similar bargaining proposals requesting such information.

White on November 20, 1990, filed the instant grievance wherein he asserted, inter alia:

. . .

3/ I credit White's testimony that he only was provided with copies of the reports which he himself prepared and that he was not provided with any documents under the County's "STAR" program.

> "The denial of the grievants' right to see the contents of the file by the Sheriff also denies the Grievant's right to due process and [sic] a violation of Department policy and procedure."
>
> . . .

His grievance was subsequently amended on December 17, 1990, to also change that the refusal to turn over the investigatory files violated past practice.

In support thereof, the Union primarily argues that denying White access to the Office of Professional Standards file violated "Wisconsin law and Departmental Policy and Procedure Rules" and that it also violated past practice. As a remedy, the Union seeks an order requiring the County to provide White and "any other accused member the right to access and copy his or her OPS file."

The County, in turn, contends that the grievance is not arbitrable because this issue was disposed of by Arbitrator Nielsen and is thus "moot" and covered by the doctrine of res judicata; because it has never agreed to arbitrate any "matters not specifically delineated in the four corners of the grievance"; and because the Union's reliance on Wisconsin's open records law and other statutory provisions "are of no moment. . .". As for the merits, the County asserts that the grievance should be denied because there is no past practice on this issue; because White had sufficient evidence to present his case without the requested materials; because the Sheriff never relied on any of the other documents in the investigative file when he decided to suspend White; and because there is no contractual right to the documents sought.

Turning first to the question of arbitrability, I find that the grievance is arbitrable since the record shows that Arbitrator Nielsen reserved ruling on this issue and never addressed it on its merits. That is why he referred to the instant grievance and stated that he "declines to speculate on the possible impact on the County's denial of access." Having reserved ruling in that fashion, it follows that the principle of res judicata is inapplicable, as it arises only when the very same issue has been actually decided on its merits - which is not the case here.

Furthermore, there is no merit to the County's mootless claim since the Union is seeking an order which allows other police officers besides White to have access to their investigatory files in the future. Accordingly, this is a continuing case and controversy because the claimed wrong is capable of repetition, yet evading review. See, Honig v. Doe, 484 U.S. 305 (1988).

Also without merit is the County's assertion that White cannot rely on Wisconsin's open records law and the Sheriff Department's own internal policies and procedures in support of his grievance, as Section 5.01.6(c)1 of the contract states that grievances must "cite the rule, regulation or contract provision. . ." involved, thereby showing that Departmental rules and regulations are grievable. Here, White's November 20, 1990, grievance alleged "a violation of Departmental policy and procedure."

Turning now to the merits and the Union's claim that a past practice exists to the effect that investigatory files have always been turned over during disciplinary investigations, the record shows that the Union for a number of years reasonably thought that it was being supplied with all such files when it requested them. The County, though, sometimes failed to turn over all requested documents in particular files - a fact it inexplicably never communicated to the Union. As a result, it is impossible to now determine what materials were and were not provided in given situations. The precise scope of this past practice therefore cannot be ascertained.

Nevertheless, the fact remains that parts of files were routinely turned over so that accused officers and/or Association representatives could properly defend themselves against possible charges.

This is further evidenced by the March 21, 1991, report of Hearing Officer Thomas M. Taylor from the County's Department of Labor Relations who heard White's grievance at the second step of the grievance procedure. Taylor found:

> DISPOSITION: The grievance as initiated and filed is singular in nature and will be treated as such by the hearing officer.
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> It is the recommendation of the Department of Labor Relations that Officer George White and his Association representative, if it is so requested by the grievant, be allowed to review his O.P.S. file. However, the extent to which Officer White will be allowed to review the file shall be limited, pursuant to the past practice established between the parties.
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> At the request of the Association, Director Tobiasz and Officer Reider testified that individual members and their Association representatives (if requested) were permitted to review the individual's record including the O.P.S. file. This testimony was uncontroverted at the Hearing. However, again, at the request of the Association, Director Tobiasz testified that sometimes individuals were allowed to review their whole file and sometimes they were limited, when serious, criminal or sensitive matters were involved.
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> Therefore, based on the above and based on the testimony of the parties and the evidence presented at the 2nd Step Hearing, Officer White along with his Association representative (if requested) should be allowed to review his personnel file and his O.P.S. file to the extent that said review be limited to those areas of his O.P.S. file that are not criminal or sensitive in nature.
>
> . . .

The key phrase here is withholding any materials which are "criminal or sensitive in nature." 4/

This is a reasonable accommodation of the conflicting interests involved here: officers and/or Association representatives are entitled to all documents in an investigatory file even if all of them are not relied upon by the Sheriff when discipline is finally imposed, with the only exclusions being those documents relating to criminal or sensitive matters. However, if such documents are to be withheld, they must be specifically identified so that officers (and the Association) know exactly what is being provided and what is being withheld. This is the only way of ensuring that the County drops its

4/ The County argues that Taylor's report should not be considered because it "was an attempt to resolve the matter absent the intervention of a third party." The report is not being considered as an admission against interest however; it is only being considered to further show the existence of the past practice related at the instant hearing.

secrete policy of not disclosing whether documents are being withheld in a particular case.

White therefore is not entitled to examine all documents since that represents an expansion of the parties' past practice and since the Association in past contract negotiations failed to secure agreement on its contract proposals to the effect that all materials must be supplied. Hence, neither White nor the Association is entitled to obtain in arbitration what was not achieved in negotiations. Instead, they are only entitled to examine what has been provided under the parties' past practice.

As for copying any such documents, the County's Policy and Procedure for the OPS provides at ss. 54.55(G):

> "Accused members will be allowed reasonable access to the Office of Professional Standards Members requesting access to their file will submit "Matter Of" request to the Office of Professional Standards at least forty-eight (48) hours prior to inspecting the file. An accused member may not remove or make copies of any document in their file." 5/ (Note: Wisconsin Open Records Law Applicable (ss. 19.35). (sic)

This proviso is internally inconsistent because the open records law at Section 19.35(1), (2), (3) and (4) expressly allows for the copying of documents - something which the Policy and Procedure expressly forbids. Since state law supersedes the Policy and Procedure, and since there is no evidence that the Association has ever waived its members' statutory right to receive copies, it must be concluded that officers and/or Association representatives are entitled to copy all documents provided, subject to reasonable copying changes.

I therefore conclude that but for any documents pertaining to criminal or other sensitive matters, White was entitled to examine and copy all documents in the investigatory file relating to the MoFoCo incident before discipline was imposed and that the County improperly denied his request for such documents.

As a remedy, White and/or Association representatives are therefore entitled to examine and copy such documents if they so desire, and the County shall make them immediately available.

Lastly, and least there be any possible misunderstanding over application of this Award, I shall retain my jurisdiction for at least sixty (60) days.

In light of the above, it is my

AWARD

1. That the grievance is arbitrable;

2. That the County violated the contract when it failed to provide grievant George E. White with the written documentation in the Sheriff's Department files which did not relate to either criminal or sensitive matters and that, as a result, it shall immediately make those records available to White and/or Association representatives.

3. That I shall retain jurisdiction for at least sixty (60) days.

5/ The County claims that the term "reasonable access to the Office of Professional Standards" means only that officers can visit the office and not examine the documents in their investigatory files. I disagree. The only fair reading of this proviso is that officers are to have access to what is in that office; i.e., files. Why else is there reference to the open records law?

Dated at Madison, Wisconsin this 9th day of September, 1994.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator