

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration      :
of a Dispute Between                  :
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DODGE COUNTY SHERIFF'S DEPARTMENT    :
SWORN DEPUTIES, LOCAL 1322-B         :
AFSCME, AFL-CIO                      : Case 186
                                       : No. 50268
and                                    : MA-8198
                                       :
DODGE COUNTY                          :
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Appearances:

Mr. Sam Froiland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 944, Waukesha, Wisconsin 53187-0944, appearing on behalf of Dodge County Sheriff's Department Sworn Deputies, Local 1322-B, AFSCME, AFL-CIO.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Roger E. Walsh, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of Dodge County.

ARBITRATION AWARD

Dodge County Sheriff's Department Sworn Deputies, Local 1322-B, AFSCME, AFL-CIO (Union) and Dodge County (County or Employer) have been parties to a collective bargaining unit at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an arbitrator appointed by the Wisconsin Employment Relations Commission (Commission) from its staff. On December 23, 1993, the Union filed with the Commission a Request to Initiate Grievance Arbitration. The County concurred in said request. The Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on March 9, 1994, at which time the parties were afforded the opportunity to present evidence and make arguments as they wished. The hearing was transcribed, and a copy was received on March 18, 1994. The parties submitted briefs, the last of which was received May 4, 1994. The County filed a reply brief on June 20, 1994, and the Union waived its right to file a reply brief in a telephone conversation on June 21, 1994. Full consideration has been given the evidence and argument of the parties in reaching this decision.

STATEMENT OF THE FACTS

In or about the summer of 1992, Deputy Sheriff Roy Jaster (hereinafter Grievant) and Deputy Sheriff JoAnne Swyers (hereinafter Deputy) were in the Sheriff's Department Communication Room. The Deputy was in the radio room requesting Dispatcher Howard Rhode (hereinafter Dispatcher) to run something on the state teletype. As the Deputy was looking over the Dispatcher's shoulder,

the Grievant, who was behind the Deputy, grabbed her on the buttocks without her permission, causing her to jump forward. The Deputy did not say anything to the Grievant at that time; once they left the room, the Deputy told the Grievant that the Deputy would report the Grievant if he ever did that again.

On August 17, 1993, the Deputy advised Personnel Director Gary Hamburg (hereinafter Director) that the Deputy had been sexually harassed. On August 30, 1993, the Director investigated this allegation by interviewing the Deputy. At that time, she indicated that the perpetrator was the Grievant. The Deputy also advised the Director that another female employe, Deputy Sheriff Maureen Soblewski (hereinafter Female Deputy), had been harassed by the Grievant. The Deputy told the Director that she did not come forward sooner because she feared the repercussions.

The Director interviewed the Female Deputy on September 9, 1993. At that time the Female Deputy stated that the Grievant had touched her chest and buttocks without her permission on one occasion.

On or about September 15, 1993, the Director interviewed the Grievant. The Director did not ask about the specific incident; instead, the Director asked the Grievant if he was aware of any sexual harassment in the Sheriff's Department. The Grievant said he was not.

The Director then turned the investigation over to Chief Deputy Jerold Witte (hereinafter Chief Deputy). The Chief Deputy assigned the investigation to Lieutenant Blaine Lauersdorf (hereinafter Lieutenant).

The Lieutenant interviewed the Female Deputy and the Deputy. Based upon these interviews, the Lieutenant prepared written reports and submitted them to the Chief Deputy. After reviewing these reports and talking to the Lieutenant, the Chief Deputy interviewed the Grievant. The Grievant denied the allegations. The Grievant did not implicate any one else in regard to this incident of sexual harassment.

On October 1, 1993, the Chief Deputy issued a written letter of reprimand to the Grievant for sexual harassment. The Grievant had been orally reprimanded previously for sexual harassment.

The Union timely filed a grievance on behalf of the Grievant. Said grievance proceeded through the parties' contractual procedure without resolution. Said grievance is properly before this Arbitrator.

At hearing, the Grievant testified that the Deputy was sexually harassed in the Communications Room in 1992, but that it was Deputy Ronald Faust (hereinafter Male Deputy) who had sexually harassed the Grievant. The Grievant also testified that he had advised the Chief Deputy of this at the interview previously mentioned.

PERTINENT CONTRACT LANGUAGE

**ARTICLE III
MANAGEMENT RIGHTS**

- 3.1 Except as hereinafter provided, the Employer shall have the sole and exclusive right to determine the numbers of Employees to be employed, the duties of each of these Employees, the nature and place of their work and all other matters pertaining to the management and operation of the County, including the hiring, promoting, transferring, demoting, suspending or discharging for cause of any Employee. This shall include the right to assign and direct Employees and the Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or Employees, such rights are retained by the Employer. However, the provisions of this Section shall not be used for the purpose of undermining the Union or discriminating against any of its members.

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**ARTICLE XV
GRIEVANCE PROCEDURE**

- 15.1 **Grievance.** A grievance is defined as any matter involving the interpretation, application or enforcement of this Agreement.

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- 15.3 **Arbitration.** . . . In rendering his decision, the arbitrator shall neither add to, detract from nor modify any of the provisions of the Agreement.

ISSUE

The parties stipulated to framing the issue as follows:

Did the County violate the collective bargaining agreement by issuing the October 1, 1993, written letter of reprimand to the Grievant?

If yes, what is the appropriate remedy?

POSITION OF THE PARTIES

On brief, the Employer argues that there is no specific contractual standard for discipline involving a written reprimand; that although a "cause" standard is specifically provided for discipline involving demotion, suspension or discharge, there is no such standard established for discipline involving written reprimands; and that, at best, the only restriction on the Employer's right to give written reprimands might be that such reprimands would not be sustained if they were arbitrary, capricious or discriminatory.

The Employer also argues that the arbitrator should resolve the credibility issue in favor of the victim of the sexual harassment; that based on the victim's testimony alone, the written warning given to the Grievant by the Employer can be justified; that therefore the Employer's issuance of a written reprimand to the Grievant did not violate the collective bargaining agreement; that it was neither arbitrary, capricious or discriminatory, and even if a "cause" standard was contained in the contract, the Employer has met that standard.

Therefore the Employer requests that the grievance be denied and dismissed.

On brief the Union argues the Deputy's memory of the event is quite clouded; that when pressed as to when the event took place, she could only remember that she thought it took place in 1992; that the Grievant has denied the allegations made against him by the Deputy; that the Grievant is not guilty of those allegations; that the Grievant's recollection of the situation is that another deputy committed the actions; and that the Grievant informed the Chief Deputy of this recollection.

The Union also argues that the Employer did not introduce any documentary evidence of any oral reprimand previously issued to the Grievant; that given the Employer's failure to document an alleged verbal warning about a previous allegation of sexual harassment and the Grievant's recollection that he was not informed of who his accusers were in that incident, the Employer did not follow proper procedure or allow any opportunity for a fair hearing in the previous matter; that the Grievant has been evaluated only once and the Employer failed to make an issue of any problem in the area of his dealings with other employees; that where an employe has been disciplined in general and for a charge like sexual harassment in particular, the Employer has a responsibility to apply corrective discipline and to instruct the Employe as to how he/she can change his/her behavior; that in this case there is conflicting testimony about who gave the warning if any was given and what the substance of the warning was; and that any effort to create a record here of past offenses of this nature is pure deception, because no record exists.

In regard to the alleged harassment of the Female Deputy, she denied at hearing specific knowledge of a date, time, place, and even the substance of what was alleged to have occurred; that the Grievant can not possibly respond to such a flimsy allegation; and that a reasonable interpretation could not possibly attribute any offense to the Grievant in regard to this allegation.

In addition, the Union argues that the Employer offered no evidence that it has articulated a policy of preventing or eliminating sexual harassment in the Sheriff's Department or the County in general; that here the Employer seeks to lay this issue at the feet of an individual employe and to depict itself as the aggressive prosecutor of alleged harassers, when it has no such policy on such an emotional work place issue.

Finally, the Union argues that the Grievant did not do what has been

alleged that he has done; that the Employer has failed to establish that the Grievant is guilty of sexual harassment; that a significant period of time elapsed between the approximate date of the alleged harassment and any report to the Employer in this regard; that as a matter of due process, the Grievant certainly should expect that he would be allowed to respond to a clear charge against him; that the Grievant has been required to defend himself against a charge which is not even defined in time; and that to be put in the position of having to defend himself against such an ambiguous charge is absurd and violates his sixth amendment rights to a prompt trial as well as "to be informed of the nature and cause of the accusation."

Therefore, the Unions asserts that the arbitrator must find that the Employer did not establish that the Grievant is guilty of sexual harassment, that the grievance be sustained, and that County shall expunge any and all references to this matter from the Grievant's personnel record.

On reply brief the County argues that the victim was positive that it was the Grievant who grabbed her; that the Grievant's testimony lacks any element of credibility based on the denials of the deputy he alleges was involved and the Chief Deputy; that the Union's comments about the insignificance of the prior oral reprimand must be ignored as the Grievant admitted that he was given an oral reprimand for sexual harassment; that the County does have a policy relating to sexual harassment; that the Union admits that if the Grievant grabbed the victim, such conduct would constitute sexual harassment for which discipline would be appropriate; that the Union's only contention is that the Grievant did not grab the Victim; and that the evidence and testimony at the hearing clearly indicate that the Grievant engaged in totally inappropriate conduct by grabbing the Victim.

Accordingly, the Employer asserts, the written reprimand was appropriate and the grievance must be denied and dismissed.

DISCUSSION

This is a difficult case in several ways. The allegation is relatively old, and one employe's word is in opposition to another employe's word.

But it is clear from the record that the Grievant was previously orally reprimanded for sexual harassment. Even absent the Employer's written documentation, the Grievant admitted such at hearing. And certainly the standards applied to administering an oral reprimand are less stringent than those for more severe penalties; indeed, as the punishment becomes more severe,

the procedural and substantive requirements become more stringent. Also, in this case, there is no clear "just cause" language covering oral or written reprimands.

And while the complaint is old, the Grievant remembers it clearly. He showed no prejudice in the delay that the Deputy took in bringing this allegation to the Employer's attention.

But until the Grievant testified, it was still the Deputy's word against the Grievant's.

But the Grievant's testimony did several things. First, it established the basic credibility of the Deputy; what she said happened did, indeed, happen for the Grievant collaborates it.

However, the Grievant alleges that the perpetrator was not himself but the Male Deputy. Since the Male Deputy denied the allegation, this is, again, one employe's word against another's.

But, more importantly, based upon the Grievant's testimony, the Deputy would either have to be lying or grossly mistaken about the perpetrator's identity. No reason is offered by the Grievant as to why the Deputy would lie about who the perpetrator was.

Nor does it seem reasonable that the Deputy whose credibility has already been bolstered by the Grievant's testimony, could have incorrectly identified the wrong perpetrator to the Employer. How could she make such a mistake when she clearly testified to what happened, and the Grievant agreed? She testified that she confronted the perpetrator in the hall, telling him that if he did it again, she would report it. She testified that she told the Grievant this. How could she be mistaken about this?

In addition, the Grievant's testimony requires the belief that the Chief Deputy was told by the Grievant someone else had committed the sexual harassment, that the Chief Deputy ignored this information and reprimanded the Grievant without acknowledging that someone else had been implicated, and that the Chief Deputy had lied on the stand.

This flies in the face of the process in that this allegation against the Male Deputy was never brought forward during the grievance procedure and that the Chief Deputy testified that this was the first he had heard of it. The Grievant produced no proof to the contrary.

Therefore, for the reasons stated above, the Arbitrator issues the following

AWARD

1. That the County did not violate the collective bargaining agreement by issuing the October 1, 1993, written letter of reprimand to the Grievant.
2. That the Grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 14th day of November, 1994.

By James W. Engmann /s/
James W. Engmann, Arbitrator