

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between  
**MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION**

and

**MILWAUKEE COUNTY**

Case 462  
No. 56729  
MA-10399

---

Appearances:

Gimbel, Reilly, Guerin & Brown, by **Attorney Franklyn M. Gimbel**, appearing on behalf of the Association.

**Mr. Timothy R. Schoewe**, Deputy Corporation Counsel, appearing on behalf of the County.

**ARBITRATION AWARD**

Milwaukee Deputy Sheriffs' Association, hereinafter referred to as the Association, and Milwaukee County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a three-day suspension. Karen J. Mawhinney was so designated. Due to the unavailability of Arbitrator Mawhinney, the undersigned was substituted as arbitrator in this matter. Hearing was held in Milwaukee, Wisconsin, on March 10, 1999. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged April 26, 1999. The parties reserved the right to file reply briefs and notified the undersigned that they would not be filing any replies and the record was closed on May 5, 1999.

**BACKGROUND**

The grievant is employed by the County as a Deputy at the Milwaukee County Jail working the third shift from 10:00 p.m. to 6:00 a.m. The grievant worked on April 10, 1998,

and was assigned to Pod 3D. At approximately 10:30 p.m. on April 10, 1998, the grievant had a physical altercation with an inmate. The altercation started when the inmate refused the grievant's instructions to go to his cell and the grievant then began to move the inmate to the attorney cubicle outside Pod 3D during which the inmate attempted to elbow the grievant in the chest. The floor was wet due to stripping and the grievant and inmate went to the floor and in attempting to get the inmate's arms out from under the inmate who was on his stomach on the floor, the grievant struck the inmate in the arm and shoulder to create a dysfunction to get the inmate's arms out from under him. Another Deputy came to the grievant's assistance and the inmate was placed in the attorney cubicle. Other deputies witnessed the altercation and a nurse conducting medical rounds observed part of it. The altercation lasted no more than ten seconds. At approximately 2:15 a.m. on April 11, 1998, the nurse who was troubled by what she observed reported the altercation to Captain Iushewitz who contacted Sergeant Zwicke, the supervisor in the jail, to investigate the matter. At about 2:30 a.m. Sergeant Zwicke went to Pod 3D. The grievant was off to lunch and the Sergeant checked the log and noted that the inmate was moved to the attorney cubicle for causing a disturbance but there was no mention of any use of force. At around 2:45 a.m. Sergeant Zwicke contacted the grievant and ordered him to write a report about what occurred when the inmate was moved to the attorney cubicle. The Sergeant then contacted the other deputies on duty and ordered them to complete reports on what they observed when the inmate was moved.

On May 21, 1998, Captain Brian Mascari interviewed the grievant in the presence of his Association representative concerning the incident with the inmate on April 10, 1998. Subsequently, the grievant was suspended for three days for failing to report the use of force in a timely fashion. Two deputies who observed the altercation were given letters of reprimand for failure to submit a supplemental report.

### ISSUE

The parties stipulated to the following:

Should Deputy Scott Radack have been disciplined?

If so, was the quantity of discipline imposed reasonable under the circumstances?

## **POLICY AND PROCEDURES**

### **DIRECTIVE NO. 3-97**

January 15, 1997

#### **RE: 11.23, REPORTING THE USE OF FORCE**

#### **11.23 REPORTING THE USE OF FORCE**

##### **11.23.1 POLICY**

A report (force.sum, in addition to the citation, incident, or offense reports) will be filed in all instances where force is used.

. . .

##### **11.23.3 PROCEDURE**

In all instances where deputies use force, the following procedure shall be strictly adhered to:

- (1) Any deputy who uses force shall, as soon as possible, make an oral report to their immediate Supervisor and/or the Shift Commander. Reference to the oral report shall be made in all initial reports.
- (2) Any deputy who uses force will submit an initial report (Citation, Incident, or Offense) which will include, but is not limited to, all details leading up to the use of force, the actual force used, and the monitoring of the person on whom force was used.

All department members present at an incident, at which force has been used, will submit a supplemental report to the initial report.

## **COUNTY'S POSITION**

The County points out that the grievant was not disciplined for having employed the use of force but for violation of the procedure which requires to "as soon as possible make an oral report" and then to submit an initial written report. It observes that the altercation occurred at 10:30 p.m. and after the incident, the grievant made no oral or written report. It notes that several hours later Sergeant Zwicke went to the Pod but the grievant was at lunch and Zwicke read and signed the log which noted the inmate had been moved to the attorney cubicle but

there was no mention of the use of force. The County contends that some four hours after the incident, Zwicke contacted the grievant and specifically directed the grievant to report what happened which the grievant did and later filed the required written report. It asserts that the grievant was trained in the policy and the manner in which to report use of force incidents. It states that the grievant attempts to excuse dilatory conduct by saying he intended to tell Zwicke but when he would do so is not offered. The City submits that the grievant admitted that but for Zwicke's intervention, no report would ever have been made.

It insists the grievant's excuse does not hold up. It contends that the policy is clear and unambiguous and the grievant never obeyed the rule to report as soon as possible as nothing prevented him from doing so during the four hours after the incident. It claims that the grievant's misconduct is twofold: He failed to act pursuant to the rule and he did not submit the written report until directly ordered to do so. It maintains that words have meaning and the use of force is a serious matter and the term "shall report" does not make reporting optional and "as soon as possible" means as soon as you can and not when you get around to it. It states that the failure to follow the rule can imply a cover up. It concludes that the grievant did not follow the rule and would not have but for the report of a nurse. It takes the position that this is a serious matter and arguably the Sheriff was lenient as the suspension imposed was reasonable under the circumstances.

### **ASSOCIATION'S POSITION**

The Association states that the basis for the grievant's suspension was that there was no indication that the grievant was to make a report until ordered to do so by Sergeant Zwicke. The Association contends that clear language must be applied and ambiguous language must be interpreted and ambiguous language must be construed against the drafter because the risk of ambiguity should be assessed against the drafter.

It submits that the grievant submitted an initial report and complied with the clear language of Sec. 11.23.3 (2) of the Use of Force directive and his suspension is improper. It argues that the Sheriff's suspicion that the grievant only complied because he was ordered to do so is irrelevant. It states that even if it is relevant, it is not out of the ordinary for deputies to submit written reports after their supervisor told them to do so because they are required to make an oral report before submitting a written report. It points out that Sec. 11.23.3 (2) does not suggest a time frame, so the fact that the grievant did not submit an initial report until four hours after the incident cannot be the basis of a violation. It claims the County cannot assert such an inference because inferences must be drawn in favor of the grievant, not the drafter. It concludes the suspension is improper.

Alternatively, the Association argues that if it is concluded that the grievant violated Sec. 11.23.3, the suspension is unreasonable and it should be reduced to a written reprimand.

### DISCUSSION

The facts are undisputed that the grievant used force on an inmate. The grievant's use of force was investigated and he was exonerated regarding treatment of prisoners. The grievant was not disciplined for his use of force; rather, he received discipline for his failure to report it orally and not filing an initial report until ordered to do so. The Association focuses on Sec. 11.23.3 (2) of the procedure; however, Sec. 11.23.3 (1) clearly states that a deputy who uses force shall as soon as possible make an oral report to their immediate supervisor. The grievant did not do so. There was no evidence that he was engaged in some activity that prevented him from reporting it shortly after it occurred. The grievant admitted he was familiar with the procedure having been instructed at the jail within the last two years. The log indicates that at 2230 the inmate was moved out to the attorney cubicle for disrespect to Deputy, causing a disturbance, threats to staff and using obscene language. (Exhibit 5) It is silent on the use of force. The grievant claimed he was waiting for Sergeant Zwicke to come on his rounds and was going to tell him then. Sergeant Zwicke did go to Pod 3D but the grievant had gone to lunch, so he missed the chance to verbally tell him what happened. The grievant never called the Sergeant nor did he write an initial report then. Instead Zwicke contacted the grievant and had him come to Zwicke's office at which time he was ordered to write the report. (Exhibit 6) In his interview with Captain Mascari on May 21, 1998, the grievant was asked if he wrote a report on the incident. The following is the exchange between the Captain and the grievant:

MASCARI	Did you write a report on this at all?
RADACK	After I was instructed to do so, yes.
MASCARI	Were you 'gonna write a report unless you were instructed to?
RADACK	If I would have sent the inmate to 4D, yes I would have wrote a report.
MASCARI	Uh huh.
RADACK	Otherwise, no Sir, I would not have.
MASCARI	Why?
RADACK	Well, just about 99.9% of the reports I've written I've been ordered to.

(Exhibit 4, page 8)

The grievant admits that he would not have written a report unless ordered to do so, yet how would the Sergeant know to order a written report unless he knew of the incident and how would he know if the grievant made no oral report?

This point was made by Captain Mascari in the following exchange:

RADACK                If Sergeant Zwicke would have came through on his rounds, and I would explain to him what had occurred, I would not have wrote a report, yes.

MASCARI              Well.

RADACK                I made the mistake of not notifying him immediately, therefore, he found out before I had a chance to talk to him, and was automatically ordered to write the report.

MASCARI              What do you mean before you had a chance to talk to him? Did you have two to three hours to talk to him?

RADACK                Yes, Sir, I did.

MASCARI              Now if he would come through on a round on 3D, and you happened to be a lunch, was there anything that would indicate to him that there was an incident regard, regarding the use of force in pod 3D or, ah, in the third floor hallway?

RADACK                No. Sir.

MASCARI              So if he would not have ordered you to write a report, would any reports have been forthcoming from you?

RADACK                Again, Sir, if I would have told him what had transpired, I.

MASCARI              That's not when I'm asking you.

RADACK                Would have wrote the report.

MASCARI              Please listen to the question. If he had not ordered you to write a report, would you have written a report on this matter?

RADACK (No answer heard.)

MASCARI Its (sic) pretty much a yes or no question. I mean, I'm not 'gonna limit you to that, but I'm 'gonna ask you to stay focused on it.

RADACK All, all I can, all I can say is that if I would have told him, ah.

(Exhibit 4, page 13)

Whether the grievant made a mistake or intentionally decided not to make the report, the fact is that he did not follow reporting the use of force procedures and therefore should have been disciplined.

As to the quantity of discipline, those deputies who observed the incident and failed to report it were given a written reprimand. It was the grievant who used the force and was obligated to report it as soon as possible and to write an initial report. He had a greater burden and he failed in it so he deserves greater punishment. The undersigned cannot conclude that a three-day suspension is excessive and unwarranted.

Recent news reports indicate that many counties and cities are being criticized for policy brutality and inmates of prisons file an enormous number of lawsuits, albeit the vast majority of which are frivolous; however, there are costs associated in responding to them. Thus, it is important that use of force be reported promptly so that inferences that such incidents were not timely reported because deputies had something to hide or cover up cannot be entertained. In light of all the circumstances, the undersigned concludes that the three-day suspension was reasonable.

Based on the above and foregoing, the record as a whole, the arguments of counsel, the undersigned issues the following

**AWARD**

The grievance is denied.

Dated at Madison, Wisconsin, this 11<sup>th</sup> day of June, 1999.

Lionel L. Crowley /s/  
\_\_\_\_\_  
Lionel L. Crowley, Arbitrator