

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY

Case 533
No. 62634
MA-12376

(Anthony J. D'Acquisto Grievance)

Appearances:

Jonathan Cermele, Eggert & Cermele, S.C., 1840 North Farwell Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Timothy R. Schoewe, Deputy Corporation Counsel, Room 303, 901 North 9th Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and County, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the above-captioned grievance. A hearing was held on January 27, 2004, in Milwaukee, Wisconsin at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was not transcribed. The parties made closing oral arguments and the record was closed at the end of the hearing. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the County have just cause to suspend Anthony J. D'Acquisto for five (5) days without pay? If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

1.02 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is:

...

The right, subject to civil services procedures and ss. 63.01 to 63.17, Stats., and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action.

...

5.02 SELECTION OF ARBITRATOR

(2) HEARINGS

c. Any time prior to the filing of the Arbitrator's award with the Department of Labor Relations and the Association, either party may petition the Arbitrator to reopen the record for the purpose of presenting additional evidence.

(4) ARBITRATOR'S AUTHORITY

The Arbitrator in all proceedings outlined above shall neither add to, detract from nor modify the language of any civil service rule or resolution or ordinance of the Milwaukee County Board of Supervisors, nor revise any language of this Agreement. The Arbitrator shall confine himself to the precise issue submitted.

5.05 DISCIPLINARY SUSPENSIONS NOT APPEALABLE UNDER S. 63.10, STATS.

In cases where an employe is suspended for a period of 10 days or less by his department head, pursuant to the provisions of s. 63.10, Stats., the Association shall have the right to refer such disciplinary suspension to arbitration. Such reference shall in all cases be made within 10 working days from the effective date of such suspension. The decision of the Arbitrator shall be served upon the Department of Labor Relations and the Association. In such proceedings, the provisions of s. 5.02(2)(c) shall apply.

FACTS

The parties stipulated to the essential facts of the case. Other facts summarized herein were presented by the Association, and are not contested by the County.

Grievant, Deputy Sheriff Anthony J. D'Acquisto, has been employed as a Deputy Sheriff for Milwaukee County for eleven years, including five (5) years serving in the Milwaukee County courts. In late April/early May 2003, Grievant's regular partner in the

courts was on vacation. Several different deputies worked with Grievant during the course of the eight (8) day vacation. In particular, on May 1, 2003, Deputy Sheriff Risa Hoffman was assigned to work with Grievant.

Deputy Hoffman is a relatively new deputy and had previously been assigned to the jail. For about two weeks prior to May 1, she had been assigned bullpen duty. This was the second day she had been assigned to the courts. The deputies were assigned to Judge Siefert's court, Branch 47, Room 615 of the Courthouse, a misdemeanor courtroom on the day in question. That day, the courtroom did not have bullpen staff and, in fact, there was no available bullpen for female prisoners at all. Grievant and Deputy Hoffman had brought five (5) prisoners, four (4) male and a female, from the Criminal Justice Facility (CJF). The males were placed in Judge Manian's bullpen and the female prisoner was handcuffed to a chair in Judge Siefert's courtroom to await her hearing.

A jury was due in the courtroom around 10:15 that morning. Shortly before 10:00 a.m., a hearing was held regarding the in-custody woman. Her attorney was also the attorney for an out-of-custody female, Nakita Jordan. The attorney requested that Judge Siefert hear Ms. Jordan's case next, and he agreed to do so.

During the course of the Jordan hearing, Grievant instructed Deputy Hoffman to take the in-custody woman and two men that had been returned to the bullpen back to the CJF. Grievant provided Hoffman with a three-man chain to utilize in this process.

As he was assisting Deputy Hoffman, he heard Judge Siefert say that he was taking Jordan "into custody forthwith." Upon hearing this, Grievant directed Deputy Hoffman to cuff Jordan to a chair so that he could complete the paperwork required to bring Jordan to the CJF. Hoffman thereupon cuffed Jordan to a chair in front of the jury box. Hoffman then observed Jordan slip her handcuffs. Hoffman reapplied the handcuffs and proceeded to take the other in-custody prisoners to the CJF, leaving Grievant in the courtroom with Jordan. At no time did Deputy Hoffman tell Grievant that Jordan had slipped her cuffs.

Following his sentencing of Jordan, Judge Siefert recessed proceedings in his courtroom until such time as the jury returned. Grievant, Jordan, the Clerk and 10 to 12 persons who had to re-schedule hearings remained in the courtroom, as well as the District Attorney and some other attorneys who had been present for hearings that were to be re-scheduled.

Grievant obtained the court file in order to complete the Arrest and Detention Report (ADR), which was needed to accompany Jordan to the CJF. Grievant was located 10 to 15 feet away from Jordan. As he was about to begin the report, he heard Jordan say "Deputy, deputy. Come over here." He responded to Jordan who showed him that her handcuffed hand was swollen. In accordance with his responsibility to protect prisoners and the public, he

lessened the pressure by unlocking and loosening the cuff. He replaced the cuff, double locking it to ensure that it could not get tighter or looser, in accordance with his training. He used his little finger to test that the cuff was “just snug” so that it would not harm Jordan, but that she should not have been able to get loose.

Grievant then returned to his desk to complete the ADR. He asked Jordan for information to complete the form: her address, her birth date. She responded to these questions, as well as to an inquiry as to whether her birthday was the following day. After writing these responses, he looked up to ask another question and saw that she was no longer sitting in the chair. She had apparently slipped out of the handcuff.

Grievant first thought that Deputy Hoffman had returned and taken the prisoner. He looked around and did not see Jordan; he asked the people in the courtroom if they had noticed her leave; he looked in the hallway and did not see her. He immediately used his radio to alert his supervisor that there was an escape. Within minutes, other officers responded to the scene. Grievant filed an incident report detailing the events and his actions.

Captain Mark Strachota and Captain Brian Mascari investigated the incident for the Internal Affairs Division. Although they made no recommendation as to discipline to be imposed, they issued an Investigative Summary to Captain Randy Tylke. The report signed by Captain Strachota on May 8, 2003 states:

It appears Deputy Sheriff Anthony J. D'Acquisto is in violation of:

MILWAUKEE COUNTY SHERIFFS OFFICE
POLICY/PROCEDURE AND/OR RULES/REGULATIONS:

1.05.02 – Conduct of Members

Members of the department shall not commit any action or conduct which impedes the department's efforts or efficiency to achieve its policies and procedures or brings discredit upon the department. COMMENT: This rule applies to both the professional and private conduct of all members. It prohibits any and all conduct which is contrary to departmental policies and procedures which would reflect adversely upon the department or its members. .

1.05.03 – Violation of Policy

Members shall not commit any acts or omit any acts which constitute a violation of any of the policies, rules, procedures or orders of the

department whether stated in this section or elsewhere. COMMENT: This rule includes not only all unlawful acts by members, but also all acts, which although not unlawful in themselves, would degrade or bring discredit upon the member of the department.

1.05.01 – Efficiency and Competence

Members shall adequately perform reasonable aspects of police work. Such expected aspects include, but are not limited to: report writing, physical intervention, testimony, firearms qualification and knowledge of the criminal law. “Adequately Perform” shall mean performance consistent with the ability of equivalent trained members of the department.

MILWAUKEE COUNTY CIVIL SERVICE RULE VII (4) (1):

- (l) Refusing or failing to comply with department rules, policies or procedures.
- (u) Substandard or careless job performance.

The report regarding Deputy Sheriff Risa J. Hoffman contains identical language as to apparent violations of policy/procedure, rules/regulations and civil service rules.

On May 25, 2003, Captain Randy J. Tylke prepared a memorandum to Sheriff David A. Clarke Jr. entitled “Internal Affairs Case #03-155 Recommendation for Discipline Deputy Anthony J. D’Acquisto. In pertinent part, the memorandum states as follows:

After review of the facts of this complaint and after holding a meeting related to this matter I have come to the following conclusion.

. . .Deputy D’Acquisto admits that he was assigned to watch her [Jordan] and that he did take his eyes off her while he was filling out the paper paperwork [sic] so she could be taken to the CJF for booking. Deputy D’Acquisto stated and it is confirmed that he did in fact handcuff people to chairs in the courtroom all the time especially when there is not a holding area in the back of the courtroom and that practice although not taught was done for efficiency and expediency. Deputy D’Acquisto was responsible for the custody of Ms. Jordan at the time of the escape. It should also be noted that he was not told by his partner that Ms. Jordan was an escape risk since she had slipped out her handcuffs before. Deputy D’Acquisto was never trained to handcuff anyone in a

jury box or to a chair. Deputy D'Acquisto also stated had he known she was a risk he would have taken Ms. Jordan immediately back to the CJF. What is clear and evident in this case is that there was a lack of communication between Deputy D'Acquisto and his partner, Deputy Hoffman. That there have been security breakdowns that can be attributed to both the physical operation of courtrooms without holding areas and pressure to keep courtrooms operating as efficiently as possible. What is also clear is that officers should be more aware of their surroundings and never take their attention or eyes off anyone in their custody. Deputy D'Acquisto does not have a history of being an employee that makes mistakes. Although he made an error that caused unacceptable harm to the community in general, it brings more harm to him and this agency. I believe that after reading this file and holding this meeting that the practice of holding prisoners in open court was a practice handed down over time. Deputy D'Acquisto although never officially trained or taught to do so fell into that past practice. What is also clear is that he was trying to do too much and was training several new deputies all in one week, never knowing what to expect. The community and agency were both harmed by the negative nature of this incident it cannot and should not happen. I believe also after discussions that courtroom procedures have changed so this does not happen again. However being diligent is something that all officers must do. It is engrained into the newest recruit from day one and is continually reinforced to be aware of your surroundings. Deputy D'Acquisto failed in that regard.

I recommend that Deputy D'Acquisto be suspended for TWO days for this incident.

On August 8, 2003 Sheriff Clarke imposed discipline of a written reprimand on Deputy Risa Hoffman for her involvement in the events of May 1.

On August 15, 2003, Sheriff Clarke imposed discipline of a five (5) day suspension without pay on Grievant, Deputy Anthony J. D'Acquisto for his involvement in the events of May 1.

Additional facts are included in following sections of this decision.

POSITIONS OF THE PARTIES

County

The County contends that Grievant has culpability for both his own actions and those of Deputy Hoffman. They were treated differently because she was a rookie in the Courts

whereas he had five (5) years of court experience and 11 years as a Deputy Sheriff. Grievant acted as the “in charge” person who gave directives to Hoffman. The County acknowledges that she should have done something different under the circumstances—specifically, she should have apprised Grievant of the fact that Ms. Nakita Jordan had slipped her cuffs.

When Hoffman left the courtroom to return prisoners to the jail, Grievant was left alone with the prisoner. He was responsible for the court and the prisoner, and he should know that every prisoner is a security risk.

Grievant assumed responsibility; he exercised responsibility. He could have called for assistance; he should have been more vigilant of a prisoner on whom he had loosened the handcuffs. Grievant demonstrated negligence when Jordan slipped the cuffs and disappeared. He has to bear and take responsibility for the escape.

Good cause exists for the discipline. Violations occurred and the discipline was justified. A recommendation of a two day suspension was made to the Sheriff who felt that more serious discipline was warranted. There is no magic to the calculus, but it is very important that prisoners not escape into the community. The Sheriff acted appropriately, both in his capacity as department head and as a constitutional officer.

Association

Grievant was disciplined not because he was negligent or because he improperly applied or loosen the handcuffs, or because he took his eyes off the prisoner. The Grievant was disciplined because the Department was embarrassed by the incident.

Had Grievant been told that Jordan had slipped her cuffs, things would be different. Deputy Hoffman should have told Grievant that Jordan had slipped the cuffs, regardless of how long she (Hoffman) had been in the courts.

The claim of negligence does not stand up to scrutiny. There is nothing in the record to show that Grievant did anything wrong. He did not breach the standard of care. The procedures he followed, cuffing a female prisoner to a chair when there was no staffing for a female bullpen, was standard past practice.

There is no just cause for disciplining Grievant at all. Alternately, he should receive no more than the written reprimand that was given to Hoffman, the truly negligent person in this situation.

DISCUSSION

The issue to be decided is whether there was just cause to suspend Deputy D'Acquisto for five (5) days without pay. Where the parties have not stipulated to the standards defining just cause, the analysis must address two elements. First, the County must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the County must establish that the discipline imposed reasonably reflects that interest.

The evidence regarding the first element focuses on the events of May 1, 2003 leading to Nikita Jordan's escape. There is no question that Nikita Jordan escaped from the courtroom when she was in custody and that the Grievant was responsible for her. The question is whether the conduct of the Grievant resulted in that escape.

Ms. Jordan was not in custody prior to her hearing before Judge Seifert. She arrived in the courtroom of her own volition. She had not been considered a flight risk when originally charged or she would have been in custody and brought to the hearing from the CJF. She was convicted of misdemeanors: three counts of retail theft. She was sentenced and ordered into custody. Upon hearing the Judge order that Ms. Jordan be taken into custody forthwith, Grievant directed Deputy Sheriff Risa Hoffman to handcuff Ms. Jordan to a chair near the jury box. This was done in accordance with a long established practice that Grievant had been taught by others and which he had utilized during the course of his five (5) year tenure working in the Courts. This was the same practice as he and Deputy Hoffman had utilized earlier in the day, and continuing to the time that Ms. Jordan was ordered into custody, with another female prisoner who had been brought to the courtroom from the CJF for her hearing. This in-custody female prisoner was handcuffed to a chair in the courtroom because there was no staffed bullpen for female prisoners available on the day in question. The same process was utilized for the in-custody female as for Ms. Jordan.

After cuffing Ms. Jordan to the chair, Deputy Hoffman noted that Ms. Jordan had slipped her handcuffs. Rather than advising Grievant of this circumstance, Deputy Hoffman simply re-cuffed Ms. Jordan in a tighter fashion and continued with her assignment of taking the other female and two male prisoners back to the CJF.

Having had no warning that Ms. Jordan had slipped her cuffs and was thus a greater than normal flight risk, Grievant continued to perform his duties in the courtroom in the usual fashion. He responded to Ms. Jordan's complaint that her cuffs were too tight by loosening them so that they were "just snug." This was done in accordance with his obligation to ensure that his prisoner was not physically harmed while in custody. Had he known that she was a flight risk whose hand was swelling as a result of the pressure of the tightened handcuffs, he

would have taken alternative action to ensure that she remained in custody without being hurt by the cuffs. This might have included contacting the “700” squad for assistance in either escorting Ms. Jordan to the CJF or in observing her while the needed paperwork was completed.

Grievant’s behaviors and actions throughout the morning of May 1 were consistent with his training and his prior performance while working in the courts. The irreconcilable fact is, however, that Ms. Jordan escaped. The Sheriff found that Grievant’s actions constituted “Refusing or failing to comply with department work rules, policies or procedures” and “Substandard or careless job performance.” Captain Tylke’s report implies that the Grievant’s violations were the lack of communication between Deputy Hoffman and Grievant and that “officers should be more aware of their surroundings and never take their attention or eyes off anyone in their custody.”

Clearly, the lack of communication between the deputies resulted in the escape. Just as clearly, it was Deputy Hoffman’s failure to communicate with the Grievant that was problematic. Deputy Hoffman received a letter of reprimand for her failure to report that Ms. Jordan slipped her cuffs.

Grievant acknowledges that he took his eyes off Ms. Jordan while he was obtaining her file and completing the ADR. A rule that requires a deputy to never take his/her eyes off an individual in custody appears to be extreme, in that it would prevent a deputy from attending to any of the other tasks that he/she is assigned in the courtroom. Nevertheless, Grievant did violate this rule, and Ms. Jordan did escape.

Thus, the County has established the existence of conduct by the Grievant in which it has a disciplinary interest. We turn then to the question of whether the discipline imposed reasonably reflects that interest.

Initially, we note that the record is clear that, in Captain Tylke’s words, Grievant “does not have a history of being an employee that makes mistakes.” In fact, Grievant has not been disciplined in the past. In contrast to the discipline imposed upon Deputy Hoffman, the Sheriff imposed a five (5) day suspension without pay on Grievant. The County contends that Grievant’s discipline should be greater than that of Deputy Hoffman as she was a rookie and he took charge. The failure of Deputy Hoffman to report that Jordan slipped her cuffs cannot be attributed to rookie error, or to Grievant. All deputies are trained to be diligent. This encompasses sharing that a prisoner has demonstrated that she is a flight risk by slipping her cuffs.

It is embarrassing to the Sheriff when a prisoner escapes. It causes harm to the agency and the community. Resources are expended in re-locating the escapee. Here, two deputies were involved in the events leading to the escape. One received a letter of reprimand; one was

suspended for five (5) days. Based on the actions of each, and their contribution to the escape, the undersigned finds that a five (5) day suspension of the Grievant is unwarranted.

In a prior arbitration between these parties involving prisoners escaping, MILWAUKEE COUNTY DEPUTY SHERIFF'S ASSOCIATION AND MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT), MA-9603 (KRAUS SUSPENSION) AND MA-9694 (KARABON SUSPENSION), the deputies involved were assigned to transport inmates between the Milwaukee County Jail and multiple state correctional institutions. While stopped for refueling, one of the deputies exited the van, leaving the engine running. The other deputy was standing by an access door, handing out sandwiches, when two inmates forced their way out, overcame the deputy, took control of the van and drove it away. The deputy fired six shots at the moving van in an attempt to disable it. The Sheriff imposed a five (5) day suspension on each of the deputies involved. Arbitrator Nielsen found that a five (5) day suspension was appropriate as to Deputy Karabon who he found guilty of violating the procedure for periodically checking restraints on longer trips, violating the rule requiring members of the Department to wear their uniforms, and violating Departmental rules on the use of deadly force. The arbitrator found the five (5) day suspension inappropriate as to Deputy Kraus who he found guilty of violating the procedure for checking restraints on longer trips.

At the hearing in this matter, neither party presented evidence as to discipline in other escape cases, other than that given to Deputy Hoffman. The Karabon/Kraus cases provide some guidance as to the level of discipline that may be appropriate in the instant matter. In that case, the escapees were felons and the deputy discharged his weapon at a fleeing vehicle under conditions that did not warrant such action. A five day suspension was imposed under those facts.

That is the same discipline imposed on the Grievant for failing to keep his eyes on a handcuffed individual convicted of misdemeanor retail theft. The undersigned finds the rule violations involved to be so dissimilar as to be fundamentally unfair to Grievant. Accordingly, I find that a five (5) day suspension was unwarranted.

I do, however, find that the actions of Grievant did contribute to the escape of Ms. Jordan and conclude Grievant should receive a written reprimand, as did Deputy Hoffman.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

1. The County did not have just cause to suspend Deputy Anthony D'Acquisto for five (5) days without pay.

2. The County shall make Deputy D'Acquisto whole for pay and benefits lost.
3. A written reprimand is appropriate discipline for Deputy D'Acquisto's actions on May 1, 2003.

Dated at Madison, Wisconsin, this 5th day of February, 2004.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

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