

BEFORE THE ARBITRATOR

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

and

**MILWAUKEE COUNTY
(SHERIFF'S DEPARTMENT)**

Case 579
No. 65106
MA-13124

Appearances:

Eggert & Cermele, S.C., Attorneys at Law, by **Mr. Timothy J. Walther**, 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Deputy Sheriff's Association.

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

ARBITRATION AWARD

Milwaukee Deputy Sheriff's Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a member of its staff as Arbitrator to hear and decide a dispute between the Association and Milwaukee County, hereinafter the County or Employer. The Commission subsequently designated Coleen A. Burns as Arbitrator. Pursuant to the agreement of the parties, an arbitration hearing was held on November 30, 2005 in Milwaukee, Wisconsin. The hearing was not transcribed and the record was closed on January 19, 2006, following the receipt of the parties' post-hearing written argument.

STIPULATED ISSUES

Was there just cause for the Sheriff to suspend Deputy Sino for five days?

If not, what is the appropriate remedy?

DEPARTMENTAL POLICY AND PROCEDURES

DISCIPLINARY ACTION

...

1.03.42 GOALS OF PUNITIVE MEASURES

Generally, punitive action should be directed toward retraining whenever an act is not willful or overt. An intentional, willful or overt act requires a more severe punishment. A serious violation or action by a subordinate may necessitate immediate suspension from duty.

1.03.43 DISCIPLINARY CONSIDERATIONS

Disciplinary action shall be determined by the Sheriff who may consider the following guidelines in determining punitive measures:

- (1) All pertinent information regarding the case;
- (2) The seriousness of the member's conduct;
- (3) The member's record with the Department;
- (4) Action the Department may have taken to prevent the conduct;
- (5) Corrective action as a remedial solution rather than strictly punitive;
- (6) Past policy or the position the Department has taken in similar instances;
- (7) The reason for the member's behavior;
- (8) The effects on morale the decision will have;
- (9) Has the member committed the act in the past; (Repeated violations will be dealt with more severely.)
- (10) Recommendations by the Complaint Review Board.

RELEVANT BACKGROUND

Iilir Sino, hereafter Grievant, has been employed by the County as a Deputy Sheriff for approximately eleven years; of which at least seven years have been worked at the County jail. On June 9, 2005, the Grievant was assigned to work third shift at the County's jail.

During this shift, Deputy Haldemann entered Pod 4D for the purpose of relieving the Grievant. Pod 4D is the disciplinary unit; which also houses special needs overflow and protective custody.

Prior to Deputy Haldemann's entrance, Inmate M had repeatedly kicked his cell door; which behavior was disruptive, but apparently not harmful to the inmate or any other individual. Having concluded that Inmate M would be less likely to kick his cell door if he were not wearing his flip-flops, the Grievant decided to retrieve these flip-flops. The Grievant then asked Deputy Haldemann, who was stationed at the control console, to open Inmate M's cell door. At this time, the Grievant knew that he had the option of retrieving Inmate M's footwear by requesting that Inmate M place this footwear in the food chute of his cell door.

After Deputy Haldemann opened Inmate M's cell door, Inmate M attacked the Grievant. The Grievant and Inmate M each received minor injuries. Inmate M was charged with Battery by Prisoner. At the time of this attack, the Grievant and Deputy Haldemann were the only two Deputies in Pod 4D.

The Grievant and Deputy Haldemann promptly notified supervisory personnel of the incident. Captain Strachota, of Internal Affairs, conducted an investigation of the incident. Captain Strachota's Investigative Summary includes the following:

. . . By Deputy Haldemann opening the door according to Deputy Sino's request they violated Milwaukee County Sheriff's Office Policy IM4.3 – At no time are deputies to be face to face with an unrestrained inmate in Pod 4D. Inmates are placed in restraints utilizing 3 deputies; 2 deputies place the restraints on the inmate and 1 deputy runs the pod and cell doors.”

On June 15, 2005, I interviewed Deputies Sino and Haldemann. Both deputies admitted to the entire incident and admitted that they were aware of the policy. They were both contrite and realized that the incident would not have happened if they would have followed policy. When asked why he didn't use the food chute to retrieve the flip-flops, Deputy Sino stated that he had left his keys at the control desk.

In his Investigative Summary, Captain Strachota concluded:

Based upon the aforementioned facts, Deputies Sino and Haldemann are in violation of the following rule:

**MILWAUKEE COUNTY SHERIFF'S OFFICE POLICY AND
PROCEDURE AND/OR RULES AND REGULATIONS**

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.

1.05.08 - Knowledge of Rules and Regulations

All members of the department shall be accountable for knowledge of, performance of, and familiarization with, all policies, procedures, rules and regulations of the department.

1.05.69 - Personal Safety Conduct

Members shall not, by action or omission, create a situation of risk of injury to themselves or others. Included without limitation as examples of such conduct are the following:

- 1) Failure to exercise proper precautions in guarding prisoners;
- 2) Failure to make a proper and thorough search of prisoners for weapons or instruments.
- 3) Negligently or carelessly leaving personal or confiscated weapons or instruments, in a location which allows accessibility.

**MILWAUKEE COUNTY CIVIL SERVICE RULE VII,
SECTION 4 (1):**

- (i) Violation of rules or practices relating to safety.
- (j) Refusing or failing to comply with departmental work rules, policies or procedures.

Following a review, Milwaukee County Sheriff David A. Clarke Jr. signed Order No. 812, dated July 19, 2005, which includes the following:

TO BE READ AT ROLL CALLS

**RE: SUSPENSION
INTERNAL AFFAIRS CASE NO. 05-146**

Effective August 22, 23, 24, 25 and 26, 2005, Deputy Sheriff Ilir Sino is suspended from duty, without pay, for five (5) working day(s), for violation of:

MILWAUKEE COUNTY SHERIFF'S OFFICE RULES AND REGULATIONS

1.05.03 - Violation of Policy

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- 3) Negligently or carelessly leaving personal or confiscated weapons or instruments, in a location which allows accessibility.

**MILWAUKEE COUNTY CIVIL SERVICE RULE VII,
SECTION 4 (1)**

- (i) Violation of rules or practices relating to safety.
- (1) Refusing or failing to comply with departmental work rules, policies or procedures.

The final disposition of the internal affairs case against Deputy Haldemann, dated July 20, 2005, includes:

Sheriff David A. Clarke Jr., has reviewed and closed the above-captioned Internal Affairs case, **which is now to be handled at the bureau level, with an 'EMPLOYEE ACTIVITY DOCUMENTATION' form.**

The attached "Employee Activity Documentation" (EAD) form has a check in the "Counseling Session" box and includes:

Description of Activity: Violation of Policy

...

Opening the door violated Milwaukee County Sheriff's Office, Detention Bureau Policy IM4.3 which states, "At no time are deputies to be face to face with an unrestrained inmate in Pod 4D. Inmates are placed in restraints using 3 deputies; 2 deputies place the restraints on the inmate and 1 deputy runs the pod and cell doors."

Deputy Haldemann is reminded that he must follow the policies and procedures that are in place to maintain security and protect staff and inmates.

POSITIONS OF THE PARTIES

County

The parties have stipulated that the Grievant has violated rules governing the conduct of members of the Milwaukee County Sheriff's Department. The Grievant has acknowledged that what he did was wrong.

The Grievant has almost eleven years experience with the Department; primarily dealing with persons in custody. Pod 4D is a special unit; housing the worst inmates in the County's jail. On the night in question, the inmate had been disruptive for the entire time that the Grievant was exposed to the inmate. The Grievant had determined that it was necessary to remove the inmate's footwear in order to make the inmate compliant and quiet.

The Grievant could have and should have followed Department rules by either obtaining the assistance of other officers or using the access panel (chute) on the cell door. The Grievant was too lazy to return to the desk to retrieve the chute key or obtain the assistance of other officers. The Grievant placed himself, an inmate and other Deputies at risk.

Deputy Haldemann electronically opened the door to allow the Grievant access to the cell. It was the Grievant, the senior Deputy, who instigated the affair and eschewed the opportunity to follow the correct procedure.

The Grievant indicated that he was taking responsibility for the incident and he should. The Grievant's conduct was egregious. The Grievant had been suspended for sixty days for a prior infraction.

The Grievant's claim that he should have received the same discipline as Deputy Haldemann ignores the facts, as well as the Grievant's own spotty disciplinary record. Not only should the discipline imposed by the Sheriff be sustained; but a strong argument may be made that the discipline should be increased.

Association

During the internal investigation, the Grievant and Deputy Haldemann readily admitted to the alleged rule violations and appeared very apologetic. The Grievant received a five (5) day suspension for his role in the incident and Deputy Haldemann received an Employee Activity Documentation (EAD).

The concept of just cause implies that an employer have a legitimate “cause” of action for asserting discipline, as well as that the discipline be “just” in relation to the asserted cause. In the present case, the level of punishment imposed bears no just relationship to the underlying cause.

Consistent with the Department’s rules, the Grievant’s knowing violation of the rule must be analyzed in conjunction with surrounding circumstances. These surrounding circumstances include the length and quality of the Grievant’s work record; the past practice of the Department in similar cases; and the fact that this is the first time the Grievant has been charged with violating this safety rule.

Department Captain Keith Zauner testified that, approximately two years prior to the Grievant’s incident, three Deputies had been charged with the same “personal safety rule” violation. The charge stemmed from virtually identical conduct, *i.e.*, a single deputy placing himself in a face to face situation with an unrestrained inmate along with a supporting cast of deputies responsible for opening the cell door, with an ensuing fight.

Commonly accepted arbitral principles recognize that there must be reasonable rules and standards of conduct that are consistently applied and enforced in a non-discriminatory fashion. Given the striking similarities between the present incident and the incident of two years ago, the punishments should follow a similar course.

In the prior case, there were EAD’s and retraining. The disposition of Deputy Haldemann’s rule violation was consistent with the prior case, but the Grievant’s disposition was not.

Captain Zauner testified that the Grievant’s prior disciplinary history was the deciding factor. Within his approximately eleven year career, the Grievant was disciplined once. Under Department Rule 1.03.43, a consideration is whether or not the member committed the act in the past. On cross-examination, Captain Zauner acknowledged the lack of similarity between this prior discipline and the present incident. The prior discipline should no longer bear any significance.

In imposing a five (5) day unpaid suspension upon the Grievant, the Sheriff did not provide the Grievant with proper consideration under Department Rule 1.03.43. The Sheriff has engaged in arbitrary and discriminatory disciplinary practices. The discipline should be reduced to more appropriately fit the type of behavior displayed by the Grievant, as well as to demonstrate consistency with the past disciplinary practice of the Department.

DISCUSSION

The Association acknowledges that the Grievant's conduct provides just cause for discipline. At issue is whether the level of discipline is appropriate under the just cause standard.

The Association argues that the Grievant has been disciplined more severely than employees in similar cases. In making this argument, the Association compares the Grievant's treatment to that of Deputy Haldemann and of other Deputies in 2003.

Departmental Policy 1.03.43 lists factors that may be considered when disciplining employees. Under this policy, it is appropriate to consider "past policy or the position the Department has taken in similar instances." Such consideration is consistent with the just cause standard.

As set forth in the Investigative Summary, the Grievant and Deputy Haldemann were each charged with the same violations of Departmental and Civil Service rules. All of these charges stemmed from the conclusion that the Grievant and Deputy Haldemann had knowingly failed to follow Milwaukee County Sheriff's Office Policy IM4.3 which states:

At no time are deputies to be face to face with an unrestrained inmate in Pod 4D. Inmates are placed in restraints using 3 deputies; 2 deputies place the restraints on the inmate and 1 deputy runs the pod and cell doors.

This conclusion is not in dispute.

The Internal Affairs Investigator proposed that the charges against the Grievant and Deputy Haldemann be sustained. After review, Sheriff Clarke determined that the Grievant would receive a five working days suspension without pay and that Deputy Haldemann's charges would be handled at the bureau level, with an "Employee Activity Documentation" form. The County, contrary to the Association, asserts that the "Employee Activity Documentation" form is not discipline.

Under Departmental Policy 1.03.43, it is appropriate to consider "the seriousness of the member's conduct." Such consideration is consistent with the just cause standard and appropriately reflects that violations of the same rule may involve different types of conduct; not all of which are equally serious.

As the County argues, the Grievant instigated the incident when he decided to obtain the inmate's footwear by entering the inmate's cell without requesting the assistance mandated by Policy IM4.3. By requesting Deputy Haldemann to open the cell door, the Grievant asked a fellow Officer to act in a manner that the Grievant knew was contrary to Departmental policy.

The Grievant and Deputy Haldemann did not engage in the same conduct. One may reasonably conclude that the Grievant's conduct is more serious than that of Deputy Haldemann.

In 2003, during the tenure of Sheriff Clarke, three deputies were investigated by Internal Affairs regarding an incident that occurred in Pod 4D. The Investigative Summary indicates that Deputy S. was collecting lunch garbage and trays when an inmate refused to place his tray and garbage in the chute; that the inmate stuck his arm out of the chute and tried to stab Deputy S. with a pencil; that Deputy S. motioned for Deputy P. to open the cell door and then grabbed the inmate; that Deputy L. then observed Deputy S. struggling with the inmate and came into the cell to assist Deputy S.; that a struggle ensued in which the inmate threw materials at the Deputies and threatened to stab the Deputies with the pencil; and that the Deputies used force to subdue and restrain the inmate. According to Captain Zauner, these three Deputies, unlike the Grievant and Deputy Haldemann, were not senior Deputies.

Deputy P., whose only involvement was to open the cell door, was exonerated of all charges; apparently on the basis that she thought the door had to be opened for medical reasons. The charges that were sustained against Deputy S. and Deputy L. were not identical to those sustained against the Grievant, but did include some of the same charges, *i.e.*, 1.05.69, Subparagraph 1, and Milwaukee County Civil Service Rule VII (4)(1). Deputy S.'s sustained charges also included 1.05.03 – Violation of Policy. The charges against Deputy S. and L. were resolved by issuing remedial training and/or EAD's.

Deputy S. and Deputy L., unlike the Grievant, were not charged with a violation of 1.05.08 - Knowledge of Rules and Regulations. Nor does the record establish that the Department had concluded that Deputy's P., S. or L. "knowingly" violated Policy IM4.3.

Deputy L. entered the cell after observing Deputy S. struggling with the inmate. Deputy S's conduct in entering the cell was preceded by the observation that the inmate was in possession of a potentially dangerous object.

The circumstances of the cases involving Deputy P., S. L. are not the same as those involving the Grievant. Not only is the Grievant's conduct distinguishable on the facts, but also, one may reasonably conclude that the Grievant's conduct is more serious than that of Deputy P., S. or L.

Under Departmental Policy 1.03.43, it is appropriate to consider "the member's record with the Department." Such consideration is consistent with the just cause standard.

It is not evident that Deputy Haldemann, or the Deputies that were involved in the 2003 incident, had received any prior discipline. In 1998, the Grievant received a sixty day suspension without pay for charges resulting from a September 4, 1998 incident. In the 1998 incident, the sustained charges were "Obedience to Laws/Rules; Violations of Policy involving Treatment of Prisoners; False Information involving Truthfulness; Use of Force; and Civil Service Rule VII(4)(1), Subparagraphs (1)(n) and (ee)."

Under Departmental Policy 1.03.43, it is appropriate to consider whether or not “the member committed the act in the past; (Repeated violations will be dealt with more severely.).” Such consideration is consistent with the just cause standard.

Captain Zauner reviewed the record evidence on the 1998 discipline and concluded that the 1998 incident did not appear to involve the same rules violations as the June 9, 2005 incident. According to Captain Zauner, the 1998 incident and the 2005 incident were similar in that each involved the handling of an inmate.

Captain Zauner confirms that the Sheriff gave consideration to this 1998 discipline when he made his decision to suspend the Grievant for five days. Neither the testimony of Captain Zauner, nor any other record evidence, establishes that this was the only factor that was considered by the Sheriff when he made his disciplinary decision. Nor does the record establish that the Sheriff considered the 2005 violations to involve a repeat offense of the 1998 violations.

A sixty day suspension is an extremely severe discipline. The fact that the Grievant worked for approximately six and one-half years without committing another infraction; that the Grievant subsequently received a performance commendation for his response to a situation in which an inmate appeared to be attempting suicide; and that the Grievant has not repeated the misconduct for which he had been previously disciplined lessens the import of this prior discipline. Nonetheless, the prior discipline remains a part of the Grievant’s work record and may be considered when determining the appropriate discipline in the instant case.

Conclusion

The record does not establish that the Grievant, Deputy Haldemann and the Deputies involved in the 2003 incident are similarly situated employees. Thus, the fact that the charges against these other Deputies were resolved by the issuance of retraining and/or EAD’s does not warrant the conclusion that the Grievant has been the recipient of disparate treatment.

The Grievant is a senior Deputy who knowingly and without extenuating circumstance disregarded Policy IM4.3; the purpose of which is to maintain security and to protect employees and inmates. Given the nature of the inmates housed in Pod 4D, the Grievant knew, or should have known, that to disregard the work rule would have a likelihood of breaching security and resulting in harm to employees, including the Grievant, and/or the inmate.

As the Association argues, this is the first time that the Grievant has been charged with violating Policy IM4.3. However, given the surrounding circumstances, including the serious nature of the Grievant’s misconduct and his prior disciplinary record, the imposition of a five working days suspension without pay is not excessive.

Based upon the foregoing, and the record as a whole, the undersigned makes and issues the following

AWARD

1. There was just cause for the Sheriff to suspend Deputy Sino for five days.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 23rd day of February, 2006.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

