

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute between

MILWAUKEE COUNTY

and

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION

Case 606

No. 66568

MA-13562

(Jones Discipline Grievance)

Appearances:

Matthew L. Granitz and **Rachel L. Pings**, Attorneys at Law, Cermele & Associates, S.C., 6310 W. Bluemound Road, Suite 200, Milwaukee, WI 53213, appeared on behalf of the Association.

Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, 901 North Ninth Street, Room 303, Milwaukee, WI 53233, appeared on behalf of Milwaukee County.

ARBITRATION AWARD

The County and the Association are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association requested and the County agreed that the Wisconsin Employment Relations Commission designate an Arbitrator to resolve a grievance filed on behalf of Marlene Jones (Jones or Grievant, herein). The Commission designated Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing on the matter was held at the Milwaukee County Courthouse on February 8, 2007. Initial briefs were filed by May 2, 2007. By letter of May 15, 2007 the County declined to submit a reply brief. The Association filed a reply brief on May 16, 2007, and the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues. The Association states the issues as:

1. Did "just cause" support the rule violations as charged? If yes,
2. Did "just cause" support a three day unpaid suspension, and if not, what is the appropriate remedy?

The County states the issues as:

Was there just cause to suspend Marlone Jones for three (3) days? If not, what is the appropriate remedy?

The issue statements of the parties are essentially the same. Both reflect a just cause standard. The statement of the County is selected as encompassing all elements of just cause.

BACKGROUND AND FACTS

Grievant is a Deputy for the County and had worked for the Sheriff's Department since January of 2000. He has worked in patrol, jail and Courts. Patrol duties include filling out accident reports, supplemental reports, traffic citations and other written reports, records and documents as circumstances and Department rules require. He was working patrol on July 30, 2005, and on that day responded to and investigated a two vehicle injury accident which occurred at approximately 9:15 p.m.

Grievant was one of three Department Deputies to respond to the accident and he volunteered to be the lead investigator, complete the needed accident reports and, if warranted, issue citations. Grievant interviewed the driver of the van involved, and used a form which tracked information needed to complete a needed MV4000 Wisconsin Motor Vehicle Accident Report. One of the other Deputies interviewed the driver of a motorcycle involved. The third Deputy interviewed a witness to the accident. These two Deputies briefly reported their parts of the investigation to Grievant at the scene and later gave written field interview cards to him by placing them in his work mailbox. Part of the information supplied by one of the other Deputies was the name, address, date of birth and phone number of a witness, Carol Pasquerell, who lives Pittsburg, Pennsylvania, and who told the Deputy she saw the motorcycle traveling south bound in the center of three lanes without its headlight on. This is the only witness, other than the two drivers of the respective vehicles, that was mentioned by any Deputy and there is no indication in the record that there were any other witnesses. Grievant included the identifying information of the witness on the MV4000 and included her observations as part of the narrative description of the accident on the MV4000. The narrative did not attribute the description of the accident to any witness or vehicle driver. It did indicate that for the pictorial representation of narrative there were supplemental reports, witness statements and measurements taken. The form has boxes to mark if there are "Supplemental Reports," "Witness Statements" and "Measurements Taken." The MV4000 does not indicate if witness statements, if any, must be in written form to be marked here, or not marked if not in written form.

After clearing the accident scene Grievant went to the hospital where the injured motorcycle driver had been taken. Grievant spoke with him and reported his statements on a Supplemental Accident Report associated with the case and cross referenced by number to the

MV4000. The Supplemental Accident Report did not name or mention the witness. It contained a summary of what each driver said to Grievant. He did not interview the identified witness. The Supplemental Accident Report also contained a portion which read:

Upon Investigation: Unit #1 was stopped at the red light to go southbound. Unit #2 was traveling southbound in lane #2 without his headlight illuminated. Unit #1 turned to go southbound into lane #1 instead of Lane #3 which was the immediate turn lane. Due to Unit #2 headlight not being illuminated, Unit #1 did not see Unit #2 approaching and struck Unit #2 from the side causing damage to both vehicles.

Grievant took the information he had gathered along with the information supplied by the two other Deputies and completed the MV4000. After Grievant completed the MV4000 he put it in his Supervisor's work mailbox. Supervisors have the authority to return such reports to Deputies for additional information or clarifications. The MV4000 was not returned to him by a supervisor or anyone else for any type of corrections, clarifications or additions. In the past on other accident reports, some had been returned to him for additional information to be added or clarified. He has never been disciplined, counseled or cautioned about that.

Grievant later discarded his field notes and the notes given to him by the other two Deputies.

Grievant also issued three Uniform Traffic Citations to the drivers of both vehicles. On the back of a citation issued to the motorcycle driver at space 56, Incident Report, he described the basic nature of the incident and included the phrase:

Subject didn't have his headlights illuminated based on witness statement.

At some point thereafter Grievant was contacted by an insurance company investigator for one of the parties in the accident. Grievant took that person to the scene of the accident. The insurance investigator had a copy of the accident report. Anyone requesting an accident report from the Sheriff's Department receives the MV4000 and any Supplemental Accident Report associated with it. Copies of traffic citations are also available if requested. Grievant explained to this person the diagram on the accident report. The insurance investigator did not question anything on the report.

In March of 2006 the Sheriff's Department received a written complaint from the business owner, Schneider, of one of the accident vehicles. The written complaint was not offered as an exhibit at the hearing. The complaint, as reflected in the Department's investigative summary, asserted that the identity of a witness was omitted from the accident

report that may have a bearing on the outcome of pending litigation involving his company. Schneider bases his belief on a statement on the buff copy of a State of Wisconsin Traffic Citation to one of the drivers involved in the accident.

The buff copy of the citation referred to by Schneider is the document which contains the space 56 Incident Report noted above. The investigation into the complaint included an interview with Grievant. The investigative summary, submitted March 24, 2006, contained the following:

Jones stated that he normally records witness statements in the narrative report on accidents he completes. Deputy Jones failed to do so for the accident on July 30, 2005. No witness statement was denoted for the witness listed.

Based on the aforementioned, I respectfully recommend a proposed disposition of Sustained for violation of the following Milwaukee County Sheriff's Office Rules and Regulations/Policy and Procedure and/or Milwaukee County Civil Service Rules:

MILWAUKEE COUNTY SHERIFF'S OFFICE RULES

1.05.14 Efficiency and Competence

1.05.46 Written Reports

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

(u) Substandard or careless job performance.

The proposed disposition of the complaint recommended that the complaint be sustained. The final disposition of the complaint and disciplinary decision of the Sheriff was a suspension of Grievant for three working days with remedial training for report writing, and was signed by the Sheriff on November 29, 2006.

Among the Policies and Procedures of the Sheriff's Department is the following, which recites in part:

. . .

All reportable traffic accidents will be written on the standard State of Wisconsin form MV 4000 or revision thereof in accordance with DOT instructional manual.

(B) A supplementary report will be required for all accidents where an ambulance conveyance is made, all squad accidents, and any

other accidents where further investigation is required or unusual circumstances exist. A supplementary accident report form #1150 when filled out, shall contain the following information:

. . .

(7) Witness statements and names, addresses of witnesses;

. . .

Grievant's discipline history contains a one day suspension in November, 2004 for turning in citations and documents in an untimely manner. He received counseling and written expectations as to reports, equipment and miscellaneous expectations. In February, 2005 he had a one day suspension in connection with some damage to a county vehicle and involving reporting of the same.

As a result of the instant matter the Grievant was suspended without pay for three days. The discipline was for violation of:

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

(u) Substandard or careless job performance

MILWAUKEE COUNTY SHERIFF'S OFFICE RULES AND REGULATIONS

1.05.14 – 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.

1.05.46 – Written Reports

Reports must be accurate, complete and must contain all pertinent information.

Grievant then grieved the discipline which was denied by the County, and this arbitration followed.

Other matters appear as in the discussion.

POSITIONS OF THE PARTIES

County

In summary, the County argues that the problem in this case, with ramifications for resolution of downstream civil proceedings is that Grievant neglected to record, or preserve, information relating to witness identification. The accident report indicates that witnesses were interviewed and statements gathered. However, the identity of those witnesses and the content of these statements is nowhere to be found, and Grievant is responsible.

The County argues that in his six years as a deputy Grievant has twice previously been disciplined in the form of suspension. Both prior matters concerned law enforcement reports. The need to impose discipline, and more serious discipline, is apparent. Since the previous two disciplinary incidents did not result in changed behavior it is incumbent upon the Sheriff to ramp up the discipline to reform behavior and prevent future misconduct.

The County also argues that in law enforcement there is an overriding need for accuracy and completeness. Courts and the public rely upon these reports. Grievant failed in his obligation to be thorough and complete. Given Grievant's history, it was necessary for the Sheriff to impose discipline in a fashion designed to rectify behavior.

Association

In summary, the Association argues that the County failed to meet its burden of proof. The Department's case is based on a "belief" from an interested party in a lawsuit. The County never demonstrated that a witness was omitted from the accident report or that another witness even existed. The Association argues that when the accident report and traffic citation are viewed together, the identity of the witness is apparent. The accident report identifies Pasquerell as the only witness. The buff traffic citation wrote "Subject didn't have his headlights illuminated based on witness statement." Since no other witness is identified it is reasonable to conclude Pasquerell gave the statement. Grievant explained that during the investigation.

The Association contends that Grievant's statements have reinforced his position that the accident report contained all pertinent information. Grievant maintained that the accident report contained all pertinent information. He clearly indicated that the information he was given was recorded on the accident report. He testified that the only eye witness he knew about was recorded on the accident report.

The Association argues that the plain language of the alleged rule violations does not support the charges. The alleged rule violations have not occurred. The accident report and corresponding traffic citations were not returned. The department returns reports that lack

pertinent information and that was not done here. The Department never conclusively proved that any pertinent information was left out of the report or that the report was not sufficiently completed. Any reasonable person with the accident report and traffic citation will logically conclude that the witness on the traffic citation is the same person on the accident report.

The Association also argues that just cause does not support a three day suspension. Progressive discipline does not support the suspension. Grievant has never been charged with or alleged to have violated the rule on Written Reports. A three day suspension is not warranted for this rule violation since this is a first time violation. The same goes for the rule on Efficiency and Competence. The conduct is not similar so the prior rule violation is not applicable. And, mitigating factors exist that minimize the discipline imposed. An individual who examines the accident report and traffic citation will reasonably ascertain the witness's identity. A three day suspension is too harsh for this minor violation. This punishment is punitive and not corrective. Additionally, grievant met with the interested party to answer any questions regarding the accident and report, exceeding his responsibilities.

The Association further argues that Grievant was not charged with violating a rule on information preservation. The County argues the neglect to record or preserve information relating to witness identification. But the County never charged Grievant with such a rule violation. The County's arguments must be rejected. The Association argues that the only witness statement was contained in the reports. There is no evidence of a second witness. And, the prior rule violations involve different conduct. There is nothing similar between the prior violations and the conduct here. Grievant has never been charged before with completing a report that lacked information. And driving a squad car involved in a collision has no correlation with writing a report.

DISCUSSION

The case involves the issue of whether there was just cause for the three day unpaid suspension. The agreement does not define just cause and the parties did not stipulate to a definition of just cause. Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See, *Elkouri & Elkouri*, Sixth Edition, p. 948. In essence, two elements define just cause. The first is that the employer must establish conduct by the Grievant in which it had a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest. SEE, *AMERIGAS PROPANE*, A-6129 (Gordon, April, 2006). Although the agreement here does not specifically provide for modification of penalties, the finding of a just cause standard includes the ability to consider the level of discipline, if any, for which there is just cause to impose. See also, *BIG BUCK BUILDING CENTERS, INCORPORATED*, A-6354 (Gordon, July, 2007).

The first inquiry must be into the conduct that was established. The parties do have a dispute as to the facts here. The County argues that:

“ . . . Jones neglected to record, or preserve, information relating to witness identification. The accident report indicates that witnesses were interviewed and statements gathered. However, the identity of those witnesses and the content of these statements is nowhere to be found. For this, Jones is responsible.”

The Association argues there was only one witness besides the two drivers, that witness was clearly identified in the accident report and her statement is the only one referred to in the citation description. The Association is correct on this factual issue. The record demonstrates that besides the two drivers, there was only one witness. That was Pasquerell. There is no evidence that there were any other witnesses to the actual accident. Pasquerell is clearly and completely identified in the accident report. There is no evidence that either of the other two Deputies took a written statement from this witness. They did report their findings to Grievant. He was under no obligation to keep or retain the field information cards that the other Deputies used to report their information to him. Grievant has not been charged with discarding those reports. And, as the Association argues, the narrative at item 56 of the citation issued to the cycle driver refers to a witness statement. This is in the singular. Reading the accident report separately and reading the citation separately both indicate a single witness. Reading them together indicates a single witness and identifies or attributes the statement to Pasquerell. Grievant testified, credibly, that he was aware of only one witness, other than the two drivers. The drivers were identified separately as operators. There is no credible evidence that there were any other witnesses to the accident. There is no evidence that the information Grievant received from the other two officers, both verbally and in writing, was not accurately and completely reflected in the combined MV4000, the Supplemental Accident Report, and the Buff of the citation to the motorcycle driver. The identity of the only witness and the content of that witness's statement was recorded and preserved by Grievant.

To the extent that the County's case relies on a failure to preserve the identity of witnesses and content of statements other than Pasquerell, the County has failed to prove or demonstrate such conduct. There is no just cause to discipline Grievant for any thing that would relate to anyone other than how the Pasquerell information and statement was handled.

This turns the inquiry into how Grievant dealt with the information concerning Pasquerell. There is no evidence that suggest the other Deputy took a written statement from this witness or that one ever existed. Again, reading the accident report and the buff of the citation together, all of the information and statement of Pasquerell was recorded and maintained by Grievant. This is that Pasquerell:

saw the motorcycle traveling south bound in the center of three lanes at approximately 35 miles per hour without its headlight on.

The narrative portion of the MV4000 says, among other things:

Unit 2 was traveling s/b in Lane 2 at approx. 35 mph without his headlight on.

Thus, contrary to what the Department investigator concluded in his investigative report, the accident report actually did contain the statement of the witness, albeit a verbal one. To the extent that the Department relied upon a failure to put a witness statement in the MV4000, that allegation is not factually sustainable and cannot support just cause for discipline. And, the record demonstrates that accident reports are reviewed by a Deputy's supervisor, and they are sometimes returned for additions, clarifications or corrections. The report was turned in by Grievant and never returned to him. This is an indication that the Department did feel, at least initially, that the report was complete and accurate. Grievant was not given an opportunity to correct, clarify or add to it, which has happened in the past without disciplinary ramifications.

The Sheriff's Department Investigative Summary makes a number of findings and then a conclusion that:

Jones stated that he normally records witness statements in the narrative report on accidents he completes, Deputy Jones failed to do so for the accident on July 30, 2005. No witness statement was denoted for the witness listed.

The Investigative Summary then recommended a deposition of Sustained to the noted rules, regulations and policies for which Grievant was then disciplined. The problem for the County here is that, as Grievant testified, and reading all the documentation together shows, the witness's observation is actually contained in the narrative report of the MV4000. It is true that the narrative does not indicate anything such as "a witness saw," "a witness said," "according to witness Pasquerell," or anything like that. But the narrative does not call for that. Nowhere in the MV4000 is there an indication of where, if at all, a witness statement is to be recorded and identified as a witness statement. The MV4000 does not read to indicate or require that a witness statement be provided therein. Immediately below the "Pictorial Representation of Narrative" heading are spaces to mark Supplemental Reports, Witness Statements and Measurements Taken. All three of these are marked either "yes" or "no" in the MV4000 for this accident. Although very faint in the exhibit, the form indicates "no" for witness statements. The MV4000 does not say whether a witness statement must be in writing in order for the form to be marked "yes". A "no" mark indicates that any witness did not make a written statement where here a witness is identified on the same page of the form. There was no testimony at the hearing on this point. There is no evidence that Pasquerell ever made a written statement. Thus, insofar as the discipline here was given for failure to denote

a witness statement for Pasquerell on the MV4000, such denotation is not required. The County produced no rule, policy or procedure which requires a witness statement be denoted as such on an MV4000, even though here the substance of such statement is in the narrative. There is nothing in the record to demonstrate the Grievant was ever told or instructed to make such denotation. The Sheriff's Department Rule 1.05.46 requires written reports to be accurate, complete and must contain all pertinent information. Grievant's MV4000 does this and he did not violate that rule. He cannot be disciplined for that.

Rule 1.05.14 requires that members shall adequately perform reasonable aspects of police work, which includes report writing. The undersigned is not persuaded that Grievant did not adequately complete the MV4000, and thus he did not violate that rule. He cannot be disciplined for that.

The final rule he was charged with was County Civil Service rule VII, Section 4.1, which prohibits substandard or careless job performance. As to the MV4000, that was turned in to Grievant's supervisor and never returned to him for correction, addition or clarification. This indicates acceptable job performance. As noted, the form also contains all pertinent information. This has not been shown to be substandard or careless job performance. Grievant did not violate this rule and he cannot be disciplined for it.

The more narrow question appears in relation to the Supplemental Accident Report. This report does not mention Pasquerell by name or refer specifically to Pasquerell as having made a statement. The Policy and Procedure referenced by the County's evidence requires that in an injury accident such as the one in this case, the Deputy is to complete a supplemental report. The policy requires that the supplemental report contain, among other things:

(7) Witness statements and names, addresses of witnesses.

It is undisputed that Pasquerell's name and address is not in the Supplemental Accident Report. It is not clear that Pasquerell's statement is in the report, either. The essence of the statement is contained in the Supplemental Accident report in the portion identified as "Upon Investigation" where there is reference to "headlight not being illuminated". This is substantially the same as the statement on the buff of the citation which stated ". . . subject didn't have his headlights illuminated based on witness statement." Again, Pasquerell is the only person identified as a witness in the MV4000. The essence of Pasquerell's statement is contained in the Supplemental Accident Report but is only attributable to Pasquerell by referring to the MV4000 and citation buff.

The County's investigator acknowledged that the Supplemental Accident Report becomes part of the MV4000 report. Thus, there is an overall report with the required information but a subpart of that report, the Supplemental, which by policy and procedure is

supposed to contain that information but only does so by implication. This is the conduct. The County does have an interest in this conduct. The County is correct that in law enforcement there is an overriding need for accuracy and completeness. It has a policy and procedure which reflects that need and interest. This issue is whether in this case the County's interest is a disciplinary interest in this conduct. The fact that the MV4000 was not returned to Grievant by his supervisor weighs into this. These documents become one, as noted above. Apparently the report passed Department muster when it was originally submitted. Then there is the matter of the complaint by the business owner of one of the vehicles in the accident. The allegation by Schneider was that the identity of a witness was omitted from the accident report. But, that is not true. As detailed in the above discussion, there were no witnesses not identified in the accident report. There was one witness, Pasquerell, and Pasquerell was identified in the report. There were no additional witnesses located, interviewed or identified during the supplemental investigation Grievant made after concluding matters at the accident scene. Beyond that there is the fact that Grievant went to the scene of the accident with an insurance company investigator who had the accident report and explained the diagram on the report to the investigator. It is not clear on whose behalf the insurance investigator was acting. But it is clear that information from the accident report was available and Grievant was willing to discuss and review it, and that no questions were raised at that time about it during the downstream civil proceeding. The conduct as to the Supplemental Report in this case is de minimis.

At the end of the day, this case has to consider what Grievant was actually disciplined for. The basis for the discipline is contained in the Investigative Summary alleging violation of the three noted rules. The County produced the policy for the specific procedure as to supplemental reports at the hearing. However, that is not what the rule violations were based on. The Investigative Summary does mention the Supplemental Accident Report but not procedure (B)(7) from the chapter 31 rule. Although the Investigative Summary mentions the Supplemental, it does not state what it included or did not include, just that one was completed. The Department knew from its interview with Grievant that he did not put Pasquerell's name, address and statement on the Supplemental Accident Report. The failure of Grievant noted in the Investigative Summary did not refer to the Supplemental. The failure was in regard to not recording a witness statement in the narrative report. The Investigative Summary then stated that "No witness statement was denoted for the witness listed". This has to be in reference to the MV4000 only because the only place a witness is listed is in the MV4000. The failure to denote a witness statement is in relation to the MV4000, not the Supplemental. The failure, as set out in the Investigative Summary, is with the MV4000, not the Supplemental. If the Department felt it had a disciplinary interest in the way the Supplemental Accident report was prepared it did not indicate that in the Investigative Summary by specifically saying that, explaining those facts, or even referencing the specific rule on filling out Supplemental Accident Reports. The undersigned is not persuaded that the Department even disciplined Grievant for the content, or lack of content, in the Supplemental Accident Report. There would have been more of a notice to Grievant that that was why he was being disciplined.

This is not to say that Supplemental Accident Reports should not conform to policy and procedure (B) (7) as to name, address and statements of witnesses. But in this case and on this record the undersigned is not persuaded that the County has demonstrated that such a deficiency gives it a disciplinary interest in the conduct.

Given the above, it has not been demonstrated that the County has a disciplinary interest in the conduct of Grievant as to the accident of July 30, 2005. The County did not have just cause to discipline the Grievant or to suspend the Grievant for three days. Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The grievance is sustained. The County will make Grievant whole by paying him any wages and associated fringe benefits withheld, and his personnel record will eliminate the imposition of discipline in this case.

Dated at Madison, Wisconsin, this 9th day of August, 2007.

Paul Gordon /s/

Paul Gordon, Arbitrator