

BEFORE THE ARBITRATOR

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

and

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

Case 628
No. 67166
MA-13784

Appearances:

Eggert & Cermele, S.C., Attorneys at Law, by **Mr. Matthew L. Granitz**, 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Room 303, Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County (Sheriff's Department).

ARBITRATION AWARD

Milwaukee Deputy Sheriffs' 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 October 2, 2007 in Milwaukee, Wisconsin. The hearing was not transcribed and the record was closed on December 7, 2007, following receipt of the Employer's confirmation that it would not be filing a reply brief.

ISSUES

At hearing, the parties stipulated to the following statement of the issues:

Did just cause support the rule violations charged?

If not, what is the appropriate remedy?

APPLICABLE RULE PROVISIONS

MILWAUKEE COUNTY SHERIFF'S OFFICE RULES AND REGULATION

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 criminal law.

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

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

RELEVANT BACKGROUND

On or about October 13, 2005, Jail Records Deputies were notified of the following:

DATE: October 13th, 2005
TO: Jail Records Deputies
FROM: Kerri A. McKenzie, Sergeant
RE: Problem Basket

Effective immediately, when placing **any** ADR packet or form in the “problem basket”, the problem tracking form will be completed and placed in the ADR packet and/or attached to the problem paperwork.

The deputy will document the date, the nature of the problem, the action taken by the deputy, and the deputy’s signature and badge number.

If there is an issue, such as revocation orders, that you are unsure of how to enter/calculate, please inform me that you need to be trained in this area. Additionally, if the area or agency you need to contact to resolve the problem is closed for the day, and a voicemail message **can** be left, leave the message and note it on the tracking form.

If you have any questions or concerns, please contact me.

. . .

On July 20, 2007, Detention Bureau Staff were notified of the following:

TO: All Detention Bureau Staff
FROM: Richard R. Schmidt, Jail Administrator
RE: Jail Records "Problem Basket"

Jail Records Problem Basket –
Roll Call

The "Problem Basket" can now be termed the "Supervisor Contact."

Effective immediately, all paperwork that was formerly placed in the "Jail Records Problem Basket" by Jail Records Deputies/Officers, will be HAND-DELIVERED to the person's immediate supervisor. If the Supervisor cannot solve the problem, then the Shift Commander will be contacted and the problem handled. If the problem carries over into the next shift based on information not being available due to the time (2nd or 3rd shift) then the shift commander will hand deliver the paperwork to the next Shift Commander who will handle the issue. Under NO circumstances should there be any paperwork placed in a pile and left without being addressed by the Shift Commander. ALL unresolved issues must be communicated to the relieving Shift Commander, including the hand delivered paperwork. Any Shift Commander that must pass on paperwork will send E-mail to the relieving commander documenting the hand off and the reason why the issue could not be resolved on their shift.

If there is any other area where concepts such as the "problem basket" exist, the practice should be abolished immediately and steps taken as outlined above. Accountability must be maintained and documented.

Sheriff David A. Clarke, Jr., approved Order No. 1022, dated July 19, 2007 that states as follows:

**RE: SUSPENSION
INTERNAL AFFAIRS CASE NO. 07-156**

Effective August 12, 13, and 14, 2007, Deputy Sheriff Christopher R. Wargolet is suspended from duty, without pay, for three (3) working day(s), for violation of:

**MILWAUKEE COUNTY SHERIFF'S OFFICE RULES AND
REGULATION**

1.05.14-Efficiency and Competence

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

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

Attached to Deputy Wargolet's "Notice of Suspension" was an Internal Affairs document that states, in relevant part, that Deputy Wargolet was assigned as the Jail Records Officer on third shift in the CJF; that MPD arrested an individual on an outstanding warrant; and that this warrant confirmation states: "9 months-body only." The ADR states, "9 months-body only."

This document contains the following:

Deputy Wargolet read the Judgment of Conviction. The top of the Judgment of Conviction states: "Amended, Sentence imposed and Stayed. Probation Ordered." However, in the body of the Judgment of Conviction it reads, "Straight time.STAYED pending a review hearing." Below this it states, "07-12-06 Amended Judgment of Conviction. Court ordered entry dated 2-23-2006 corrected to reflect forty-five days of condition time instead of forty-five hours." It does not mention that this amended time frame it (sic) also to be stayed. He checked CCAP and found the same information written.

Due to his confusion and his inability to contact anyone from the Courts Division to clear up the uncertainty as to the correct sentence, Deputy Wargolet calculated the Good Time release date based upon the corrected 45 days. He then placed the entire packet into the "Problem Basket" within Jail Records. It was his understanding that someone from dayshift would have the first opportunity to contact the Courts Division to ascertain the correct sentence information. Deputy Wargolet stated he based his decision on the side of caution instead of releasing someone to the streets without complete and accurate information from the court.

The title of the Judgment of Conviction states, "Amended, Sentence Imposed and Stayed, Probation Ordered." Based on the information on the Judgment of Conviction, this person should not have had a warrant placed against her in the TIME system, she should not have been arrested, and should not have been held in custody. Deputy Wargolet did not address his questions with the captain (Sitte) prior to placing the packet into the "Problem Basket."

Deputy Christopher Wargolet is in violation of the following rules:

MILWAUKEE COUNTY SHERIFF'S OFFICE POLICY AND PROCEDURES:

1.05.14-Efficiency and Competence

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

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

POSITIONS OF THE PARTIES

County

The underlying facts are not in dispute. The Grievant disputes that there has been a rules violation.

The Grievant discovered the conflict in the inmate's paperwork and made inquiries to ascertain the precise facts; which was good. The Grievant erred when he put the paperwork in the "Problem Basket" for the Monday day shift to sort through, thereby guaranteeing that the inmate would be wrongfully incarcerated in the Jail for at least three days.

The Grievant had other options. These options include contacting the duty judge for guidance and seeking advice from the supervisory staff on duty, *i.e.*, a sergeant and two captains. The Grievant ignored the options which he freely acknowledges were available to him.

The Grievant's poor exercise of discretion had ramifications. The inmate was deemed to have a valid claim of wrongful incarceration; which valid claim was settled by the County's insurer.

As a law enforcement officer, the Grievant has a responsibility for, and the means to effect, responsible conduct on behalf of the citizenry that he is sworn to safeguard. In this case, the Grievant either ignored the means to achieve a proper outcome or blithely ignored the need to protect the liberty interests of those entrusted to his care.

The Grievant was previously disciplined for prior problems relating to prisoners and their release from custody. The Grievant needs to be held accountable. The imposition of discipline by the Sheriff should be sustained.

Association

The inmate should not have been arrested because County clerical employee D.G. erroneously entered a warrant into the TIME system. This error was not known by either the Milwaukee Police Department or the Grievant. This clerical employee was not disciplined for this erroneous entry.

The inmate's packet contained conflicting and confusing information. Her warrant (Jt. Ex. #7) and her positive hit sheet (Jt. Ex. #8) confirm that she was to serve a nine month jail sentence without bail. CCAP contained contradictory information on whether her jail time was stayed and whether the jail sentence was conditional or straight time. (Jt. Ex. #6)

Deputies in Prebook, Search, AFIS and Mugshot had contact with portions of the inmate's packet prior to the Grievant, but did not notice any discrepancies. The Deputies who failed to notice the discrepancies were not disciplined.

Given that he was working third shift, the Grievant could not contact the court for clarification. It is undisputed that Sgt. Kerri McKenzie, supervisor of jail records, had instructed Deputies that, if a problem exists with a packet, a Deputy is to err on the side of caution and complete the problem tracking forms and then place the form and corresponding packet in the "Problem Basket." (Jt. Ex. #9)

Rather, than releasing the inmate on the basis of incomplete information, the Grievant created a problem packet (Jt. Ex. #14). After the Grievant placed the packet in the "Problem Basket", a Deputy assigned to first shift contacted the court and clarified that the inmate's sentence had been stayed by the court.

Following the inmate's release, the inmate filed a suit against the County. The County mistakenly contends that this suit was settled by the insurer on the basis of the Grievant's conduct, rather than D. G.'s clerical error. The Grievant's actions expedited the inmate's release.

In a prior proceeding, the Grievant was found to have been rightfully disciplined for failing to read all the documentation within a jail release packet and an inmate was released by mistake. Learning from his mistakes, the Grievant demonstrated competency by noticing the discrepancies and taking affirmative actions.

The record is devoid of any evidence that there was a requirement or policy that the Grievant seek the advice of supervisory personnel prior to placing the inmate's packet in the "Problem Basket". Indeed, the requirement to notify a supervisor came into effect the day after the Grievant's order of suspension. (Jt. Ex. 12)

The County may not retroactively apply a work requirement. The Grievant's conduct is consistent with the rule requirement that an employee demonstrates reasonable aspects of police work and must adhere to the policies in place.

The Grievant is being disciplined for the mistakes of another employee; who was not disciplined. Assuming *arguendo* that the Grievant engaged in conduct that warrants discipline, a three day suspension is excessive.

The County bears the burden to prove just cause for discipline. The record fails to establish that the Grievant violated any of the charged rules. The Grievance should be sustained.

DISCUSSION

On or about April 21, 2007, an inmate was arrested and incarcerated in the County Jail as a result of a clerk's erroneous entry into the TIME system. Capt. Eileen T. Richards, the Internal Affairs Investigator in this matter, confirms that the Grievant did not enter any erroneous information. As the Association argues, the Deputy Corporation Counsel who reported on the inmate's subsequent civil claim concluded that there was County liability due to the error in the TIME system. (County Ex. #1)

The Grievant states that, as a Deputy in Jail Records, he has a responsibility to review information in the inmate's packet to ensure that, if the information is not accurate, then steps are taken to find accurate information. According to the Grievant, he was trained to not improperly accept or release any inmate.

The Grievant has been a Jail Records Deputy for at least twelve (12) years. According to the Grievant, he reviewed the inmate's packet and discovered discrepancies in the information.

The Grievant states that, based upon his experience, he knew that the discrepancies could not be resolved until Monday, when the Court would be open; and that the discrepancies in this case were clarified with the Court on Monday. The record does not establish otherwise.

The Grievant states that, under Jail Records procedures in effect at the time of the incident that gave rise to the discipline, the appropriate response to discovering the inmate packet discrepancies was for the Grievant to place a tracking form and the inmate packet in the "Problem Basket" and then brief the first shift personnel when they came on shift. The Grievant states that he placed a tracking form and the inmate packet in the "Problem Basket" and then briefed first shift personnel.

Capt. Richards does not deny that the Grievant placed the tracking form in the "Problem Basket," but rather, states that IAD was not able to find such a tracking form. Neither Capt. Richard's testimony, nor any other record evidence, provides a reasonable basis to discredit the Grievant's claim that he placed a tracking form and the inmate packet in the "Problem Basket" and then briefed first shift personnel.

The County does not assert, and the record does not establish, that, at the time that the Grievant placed the packet in the "Problem Basket," the Grievant had sufficient information to reasonably resolve these discrepancies. The "Investigative Summary" of Capt. Richards reasonably indicates that she viewed the Grievant to have erred by not addressing the issue of the discrepancies with Capt. Sitte prior to placing the inmate packet in the "Problem Basket." (Jt. Ex. #4)

On October 13, 2005 Jail Records Sergeant, Sgt. McKenzie issued a memo to Jail Records Deputies that sets forth procedures to be followed when placing inmate packets and forms in the "Problem Basket." (Jt. Ex. #9) This memo neither expresses, nor implies, that there is any duty to contact on-shift supervisors prior to placing documents in the "Problem Basket."

In her January 2, 2007 memo to Jail Records Deputies, Sgt. McKenzie addresses release packets. (Assoc. Ex. #1) In this memo, Sgt. McKenzie states that, when in doubt, "DON'T SEND THE PACKET OUT!" This memo neither expresses, nor implies, that there is any duty to contact supervisory personnel to resolve any doubts.

The Milwaukee County Sheriff's Office memo of July 20, 2007 from Jail Administrator Richard R. Schmidt states that the "Problem Basket" can now be termed the "Supervisor Contact." (Jt. Ex. #12) This memo reasonably indicates that, on that date, a new policy was established in which paperwork formerly placed in the "Problem Basket" was now required to be hand delivered to supervisory personnel. As the Association argues, this memo was issued the day after discipline was imposed upon the Grievant.

The Grievant states that, at the time of the incident that gave rise to this discipline, issues in the "Problem Basket" were never "kicked up" to the third shift Captain or Sgt. and that the Grievant had not been trained to contact the third shift Sgt. or Capt. to resolve records problems. The Grievant's testimony is consistent with the October 13, 2005, January 2, 2007 and July 20, 2007 memos.

At hearing, Capt. Richards states that the Courts are not open on third shift, but that there is a duty officer on call if a matter needs Court attention. The Grievant states that there are duty judges on each shift, but that such judges are used to determine probable cause issues which were not present in this case.

Capt. Richards' "Investigative Summary" is devoid of any reference to a duty judge. Capt. Richards does not state that any third shift Court attention could have resolved the discrepancies at issue.

The Office of the Sheriff Order No. 1022, which imposed the suspension at issue herein, has an "Attachment" that states, *inter alia*, the Grievant "did not address his questions with the captain (Sitte) prior to placing the packet into the "Problem basket." (Jt. Ex. #2) At hearing, Capt. Richards confirmed that the alleged rules violation was based upon the Grievant's failure to contact a third shift supervisor, such as the Sgt. or Capt.

Capt. Richards states that there was no prior directive to contact a third shift supervisor, but, given the conflicting information in the inmate packet, common sense would have told an Officer to contact a supervisor. According to Capt. Richards, the Grievant should have contacted an on-shift Sgt. or Capt. for a determination on whether to release or hold the inmate.

Conclusion

The conduct for which the Grievant received discipline was his failure to contact Capt. Sitte regarding the discrepancies in the inmate's packet prior to placing the packet in the "Problem Basket." At the time of the incident, Jail Records did not have a policy or procedure that required the third shift Jail Records Deputy to contact a third shift supervisor if that Deputy had a question regarding an inmate's packet. Rather, the procedure was to place the packet and tracking sheet in the "Problem Basket" and to report the matter to first shift Jail Records personnel when they came on duty. The Grievant followed this procedure.

If the instant record provided a reasonable basis to conclude that the Grievant knew, or should have known, that any of the third shift supervisors on duty at the time of the incident could have clarified the discrepancies in the inmate's packet, then the undersigned would agree that it would have been a reasonable exercise of professional judgment for the Grievant to contact one of the third shift supervisors. In the present case, the record does not provide a reasonable basis to conclude that the Grievant knew, or should have known, that any of the third shift supervisors on duty at the time of the incident could have clarified the discrepancies. Rather, the record indicates that the Grievant had a reasonable basis to conclude that the discrepancy could not be cleared up until Monday morning when the Courts opened.

Under the circumstances of this case, it was appropriate for the Grievant to follow the Jail Records procedure of placing the tracking form and inmate packet in the "Problem Basket" and then reporting the matter to first shift Jail personnel when they came on duty. The Grievant has adequately performed reasonable aspects of police work; has not refused and/or failed to comply with departmental work rules, policies or procedures; and has not engaged in substandard or careless job performance.

The Grievant has not violated Milwaukee County Sheriff's Office Rules and Regulations 1.05.14- Efficiency and Competence or Milwaukee County Civil Service Rule VII, Section 4 (1) (l) and (u) as alleged in Office of the Sheriff Order No. 1022 dated July 19, 2007. The discipline imposed upon the Grievant by the Office of the Sheriff Order No. 1022 is without just cause.

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

AWARD

1. Just cause does not support the rule violations as charged.
2. The appropriate remedy for the Grievant's unjust discipline is for the County and the Office of the Sheriff to immediately:
 - a) Rescind Order No. 1022 dated July 19, 2007.
 - b) Expunge all reference to the aforesaid Order No. 1022 and the suspension effectuated by this Order from the Grievant's personnel files;
 - c) Make the Grievant whole by restoring to the Grievant all wages and benefits lost as a result of his unjust suspension of three working days without pay on August 12, 13 and 14, 2007.

Dated at Madison, Wisconsin, this 23rd day of April, 2008.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

