

BEFORE THE ARBITRATOR

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

and

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

Case 617
No. 66965
MA-13699

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 Commissioner or 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 January 7, 2008 in Milwaukee, Wisconsin. The hearing was not transcribed and the record was closed on April 1, 2008, following receipt of the Employer's confirmation that it would not be filing a reply brief.

ISSUES

At hearing, the parties were unable to stipulate to a statement of the issues. The Association frames the issue as follows:

Did just cause support the rule violations as charged?

If yes, did just cause support a ten day suspension?

If not, what is the appropriate remedy?

The County frames the issues as follows:

Was there just cause to suspend Deputy Gaidosh for ten (10) days?

If not, what is the appropriate remedy?

APPLICABLE RULE PROVISIONS

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

...

- (l) Refusing or failing to comply with departmental work rules, policies, or procedures.

...

MILWAUKEE COUNTY SHERIFF'S DEPARTMENT
RULE 11.23, REPORTING USE OF FORCE

11.23 **REPORTING THE USE OF FORCE**

11.23.1 **POLICY**

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

...

11.23.3 **PROCEDURE**

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

- (1) Any deputy who uses force shall, as soon as possible, make an oral report to their immediate Supervisor and/or the Shift Commander. Reference to the oral report shall be made in all initial reports.

- (2) Any deputy who uses force will submit an initial report (Citation, Incident, or Offense) which will include, but is not limited to, all details leading up to the use of force, the actual force used, and the monitoring of the person on whom force was used. All department members present at an incident, at which force has been used, will submit a supplemental report to the initial report.
- (3) In addition to the report in (2) above, a "Use of Force Summary" (force.sum) will be completed by all deputies using force. A separate "Use of Force Summary" is to be filed for each person on whom force is used.

This summary shall be forwarded to Sheriff's Administration after review by the deputies' immediate supervisor and Lieutenant and Bureau Director and Facility Administrator (if applicable).

- (4) The deputies' immediate supervisor and Lieutenant and Bureau Director and Facility Administrator (if applicable) shall determine if the force used was "objectively reasonable" and; in compliance with department policy, procedure and training and if further investigation is required.
- (5) If further investigation is warranted, the Bureau Commander (Bureau Director or Facility Administrator [if applicable]) shall forward all pertinent reports and documents to the Office of Professional Standards.
- (6) In those instances in which further investigation is deemed unnecessary by the Bureau Commander, the file shall be marked "Inactive" and forwarded to the Office of Professional Standards.

RELEVANT BACKGROUND

On December 29, 2006 at approximately 8:00 a.m., Sgt. Kriefall, in the company of three Deputies, including the Grievant Jeffrey Gaidosh, entered the staging area of the Milwaukee County Jail. Thereafter, the Grievant applied a pressure point to an inmate. Prior to this application of a pressure point, the inmate had engaged in certain disruptive behaviors, including refusing to comply with orders. By applying this pressure point, the Grievant engaged in "use of force" as defined by the Milwaukee County Sheriff's Department.

Following a Department investigation, the Milwaukee County Sheriff issued the following:

ORDER NO. 961

March 15, 2007

TO BE READ AT ROLL CALLS

**RE: SUSPENSION
INTERNAL AFFAIRS CASE NO. 07-006**

Pending Review by the Personnel Review Board, Deputy Sheriff Jeffrey A. Gaidosh is suspended from duty, without pay, for ten (10) working day(s), for violation of:

MILWAUKEE COUNTY SHERIFF'S OFFICE RULES AND REGULATIONS

1.05.08 - Knowledge of Rules/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. To wit: 11.23.3 Reporting the Use of Force

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

(1) Refusing or failing to comply with departmental work rules, policies or procedures.

The ten-day suspension imposed by the Sheriff was grieved; denied; and, thereafter, submitted to grievance arbitration.

POSITIONS OF THE PARTIES

County

The County received an inmate complaint alleging that the inmate was injured during interaction with Deputies in what is known as the "Court Staging Area." The subsequent investigation revealed that the Grievant was one of the Deputies who responded to an uncooperative inmate and that, to gain compliance, employed a use of force technique

There is little dispute, if any, regarding the relevant facts. The Grievant admits to utilizing a pressure point use of force technique and acknowledges not following the clear and unambiguous rules, policies and procedures relating to the use of force.

The Grievant claims that he verbally reported the use of force; but more than an hour later. Until ordered by Internal Affairs, the Grievant did not reduce his report to writing.

The record amply supports sustaining the charge. The Grievant had previously received a thirty (30) days suspension for his role in a use of force incident. The Grievant should have known of the use of force rule, its application and its import.

The use of force rules, policies and procedures are intended to document the actions taken in the Sheriff's name by his Deputies. These rules, policies and procedures are necessary to protect the public interest, the safety interests of the public interacting with law enforcement, and the reputation and liability exposure of Deputies.

The Grievant inexplicably failed to comply with known rules. The Sheriff's action is a measured response. Under the totality of the circumstances, including the Grievant's disciplinary history, the action of the Sheriff should be sustained.

Association

During the debriefing that occurred approximately one hour after the incident involving use of force, the Grievant advised Sgt. Kriefall that he used force; which was the first moment that he was able to provide use of force notification. Internal affairs conducted an investigation in response to the inmate's complaint. Sgt. Kriefall violated four departmental rules but was not disciplined. The Grievant was found to have violated one departmental rule and given a ten day suspension.

In addition to the departmental rule violation, the Grievant was charged with one Civil Service rule violation. The record does not sufficiently link the Grievant to either of the charged rules. Contrary to the argument of the County, the Grievant did not admit violating a rule.

An accused employee does not have the responsibility to disprove the case against him/her, but rather the employer bears the burden of proof. Thus, it is the Department which must establish that the Grievant did not notify Sgt. Kriefall, rather than the Grievant establishing that he did notify Sgt. Kriefall.

At hearing, Capt. Rewolinski, who conducted the Department's investigation, stated that he could not prove that the Grievant did not notify Sgt. Kriefall and that the Grievant may have spoken with Sgt. Kriefall. Sgt. Kriefall's internal affairs statement contains several instances in which Sgt. Kriefall indicates that the Grievant likely notified him of the use of force.

In its post-hearing written argument, the County suggests that the Grievant violated the rules because he notified Sgt. Kriefall one hour after the incident. Thus, the County has conceded that the Grievant notified Sgt. Kriefall.

For just cause to exist, the Department must prove that the Grievant did not notify Sgt. Kriefall. The Department cannot do so.

The rule, in pertinent part, states that any Deputy using force “shall, as soon as possible, make an oral report to their immediate Supervisor and/or Shift Commander.” Sgt. Kriefall did not conduct a debriefing until one hour after the incident; both Sgt. Kriefall and the Grievant had other responsibilities to attend to. Given the totality of the circumstances, the Grievant made his oral report as soon as possible.

Contrary to the argument of the County, a written report is not necessary. When the Grievant made his oral report, he specifically asked Sgt. Kriefall if a written report was necessary and Kriefall indicated that it was not.

One may reasonably conclude that the Grievant did know that a written report was needed. Accordingly, the County’s assertion that the Grievant did not know he had to submit a written report is not factually accurate.

If the Arbitrator determines that just cause supports one or more rule violations, then the Association and the Grievant contend that just cause does not support the level of discipline imposed.

Under the just cause standard, the assessment of discipline must be consistent with all employees involved in a common event. This has not occurred because Sgt. Kriefall, who was found to have violated three more rules than the Grievant, received an “EAD” that is remedial training and not discipline. The treatment of Sgt. Kriefall is inconsistent with Capt. Rewolinski’s testimony that supervisors are held to a higher standard and subject to more severe discipline.

The Arbitrator should rescind the discipline. If the Arbitrator concludes that there is just cause for discipline, then the Arbitrator should reduce the discipline to a level that more appropriately fits the Grievant’s conduct, as well as comparable disciplines.

DISCUSSION

The parties were unable to stipulate to a statement of the issues. The grievance challenges the Sheriff’s decision to discipline the Grievant by suspending the Grievant from duty, without pay, for ten (10) working days. The parties agree that the Sheriff must have just cause for this suspension. The undersigned concludes that the issues are most appropriately stated as follows:

1. Does the Sheriff have just cause to suspend the Grievant from duty, without pay, for ten working days?
2. If not, what is the appropriate remedy?

As the Association argues, the “Use of Force Summary” signed by Department supervisors on January 4, 2007, concludes that the Grievant’s use of force was reasonable and in compliance with Department policy, procedure and training. (Jt. Ex. #9) Captain Rewolinski, the IAD Investigator in this matter, agrees that the Grievant’s use of force is not at issue in this proceeding.

As established in “The County of Milwaukee Notice of Suspension,” “Attachment to County of Milwaukee Notice of Suspension” and Sheriff’s Order No. 961, there were two rules violations charged. (Jt. Ex. #2) The first charge is that the Grievant violated Departmental Rule 1.05.08 with respect to Rule 11.23.3. The second charge is that the Grievant violated Milwaukee County Civil Service Rule VII, Section 4(1).

The “Attachment to County of Milwaukee Notice of Suspension” identifies the basis for the Sheriff’s charges as follows:

There is no doubt that a use of force occurred in Court Staging on 12/29/06, and that deputies did not document the force used in the incident until a later date – and did so only at the direction of a ranking officer’s order.

At hearing, Captain Rewolinski gave testimony on the issue of whether or not the Grievant made an oral report to his supervisor as required by Rule 11.23.3(1). In this testimony, Captain Rewolinski stated that he could not prove, nor disprove, that the Grievant made an oral report to his supervisor.

The “Attachment to County of Milwaukee Notice of Suspension” use of the word “document,” together with the failure of this attachment to state a conclusion that the Grievant did not make an oral report to his supervisor as required by Rule 11.23.3(1), reasonably establish that the charged violations relate to written reports required by Rule 11.23.3(2) and (3).

The Grievant prepared a written statement as part of the internal affairs investigation (Jt. Ex. #4) that includes the following:

. . . I did inform my immediate supervisor that a use of force did take place. Albeit one hour after the force was used. Although the supervisor stated he did not require a report, I should have written a report to be in compliance with 11.23.3(2).

. . .

Having been refreshed to both the Defensive and Arrest Tactic manual and 11.23, Reporting Use of Force policy I will, in the future, submit the proper reports in accordance to both. Additionally, I will submit a report for any incident that arises to an action defined as a use of force, regardless as to what the immediate supervisor requires. End of report.

If, on the date of the use of force, the Grievant had the knowledge of and/or familiarization with Departmental Rule 11.23.3 required by Department Rule 1.05.08., the Grievant would not have accepted a supervisor's statement that no use of force report was required. Just cause supports the charge that the Grievant violated Departmental Rule 1.05.08.

The above statements of the Grievant contain an acknowledgment that, to be in compliance with Rule 11.23.3(2), the Grievant should have filed a written report. Contrary to the argument of the Association, this failure to file a written report cannot be excused on the basis that the Grievant understood a supervisor to say that the Grievant did not need to file a report. Just cause supports the charge that the Grievant violated Civil Service Rule VII, Section 4(1) by failing to comply with Departmental Rule 11.23.3. Having concluded that just cause supports the two charges, the issue becomes does just cause support the Sheriff's disciplinary decision to suspend the Grievant, without pay, for ten (10) working days?

As the County argues, the Rule 11.23.3 reporting requirements protect the public interest. Not only does such reporting assist the Department in determining whether or not the use of force is reasonable, thereby protecting the reputation and liability exposure of the involved Deputies, as well as the Department, but also, it protects the safety interests of inmates who have contact with Deputies by ensuring that such contacts are reviewed. Such reports also increase the likelihood that inmate injuries, if any, will be discovered and that the inmate will receive appropriate medical attention. Thus, by failing to follow the Rule 11.23.3 reporting requirements, the Grievant has engaged in serious misconduct.

The Grievant confirms that, prior to the incident that gave rise to this grievance, he had received a thirty day disciplinary suspension. The Grievant recalls that this prior thirty day suspension was related to an incident in which another employee used force. Neither the Grievant's testimony, nor any other record evidence, identifies the specific Grievant misconduct that gave rise to the Grievant's prior discipline. The "Notice of Suspension" in this case states that the Grievant's most recent suspension was September 24, 2006.

In arguing that the level of discipline is without just cause, the Association asserts that the Grievant is the recipient of disparate treatment. Specifically, the Association asserts that Sgt. Kriefall was charged with more rules violations than the Grievant and received an "EAD" involving remedial training that was not discipline.

Capt. Rewolinski states that Sgt. Kriefall received a written reprimand for violating more rules than the Grievant. This testimony is confirmed by the "Milwaukee County Sheriff's Office Investigative Summary" (Jt. Ex. #8), which includes the following:

Upon Sergeant Kriefall being advised of the use of force by Gaidosh, Kriefall should have advised his supervisor of the use of force, had (the inmate) medically evaluated and instruct the deputies to complete written reports. Kriefall's actions violated MCSO Rules Regulations pertaining to the Reporting of the Use of Force by staff.

Based upon 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

1.05.03 Violation of Policy

To wit: 11.23.3 Reporting the Use of Force

1.05.02 Conduct of Members

1.05.08 Knowledge of Rules and Regulations

1.04.14 Efficiency and Competency

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

- (1) Refusing or failing to comply with departmental work rules, policies, or procedures.

The record demonstrates that the Grievant, but not Sgt. Kriefall, used force during the incident that gave rise to the Grievant's suspension. As the user of force, the Grievant's Rule 11.23.3 reporting duty is significantly different from that of Sgt. Kriefall; who would be reporting as an officer who was present at the incident. The Grievant's report is the initial report, from which all other reports follow. During a fracas, such as the one that gave rise to the Grievant's use of force, the only Officer who may be in a position to know that force has been used is the Officer who actually used this force.

According to Capt. Rewolinski, the Sheriff's discipline of Sgt. Kriefall was affected by the Sheriff's view that Sgt. Kriefall accepted full responsibility. Capt. Rewolinski also states that Sgt. Kriefall, unlike the Grievant, did not have a prior thirty day disciplinary suspension. The parties' collective bargaining agreement establishes that Sergeants are bargaining unit members.

Unjust disparate treatment occurs when similarly situated employees have engaged in the same type of misconduct but have received different levels of discipline. Assuming, for the sake of argument, that the misconduct for which Sgt. Kriefall was disciplined is similar to, or even more egregious than, that of the Grievant, the Grievant's prior disciplinary record establishes that they are not similarly situated employees. The Association's claim that the Grievant has been the recipient of unjust disparate treatment is without merit.

Given the severity of the Grievant's misconduct; the fact that the Grievant had received prior significant discipline; and the fact that the Grievant had been suspended less than four months prior to the date of the incident that gave rise to the instant discipline, the undersigned concludes that the Sheriff has just cause to suspend the Grievant from duty, without pay. While reasonable minds may disagree as to the appropriate length of suspension, the Sheriff's

decision to suspend the Grievant, without pay, for ten (10) working days is not an abuse of the Sheriff's discretion to decide appropriate levels of discipline.

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

AWARD

1. The Sheriff has just cause to suspend the Grievant from duty, without pay, for ten (10) working days.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 21st day of August 2008.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

