

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY

Case 737
No. 69871
MA-14780

(Kruszka Suspension)

Appearances:

Christopher J. MacGillis, MacGillis Wiemer, LLC, Attorneys at Law, 2360 North 124th Street, Suite 200, Wauwatosa, Wisconsin 53226, for the labor organization.

Roy L. Williams, Principal Assistant Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, for the municipal employer.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association (MDSA) and Milwaukee County are parties to a Memorandum of Agreement which provides for final and binding arbitration of grievances arising thereunder. The MDSA made a request, in which the county concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to discipline. The Commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Milwaukee, Wisconsin on October 12, 2010. The parties submitted written arguments by November 29, 2010, and waived their right to reply.

ISSUE

The parties stipulated the issue as, "Did the County have just cause to suspend Deputy Richard Kruszka for seven days? If not, what is the appropriate remedy?"

BACKGROUND

Milwaukee County Sheriff's Department Deputy Sheriff Richard Kruszka works the third shift as a Jail Records Deputy. This grievance concerns the seven-day suspension he was issued after he unilaterally changed the bail terms for a juvenile inmate, resulting in her remaining in custody for a week past her proper release date.

On September 11, 2009, MCSO Administrative Assistant Kathryn Fitzgerald-Sokol wrote Milwaukee County Sheriff's Office (MCSO) Inspector Kevin Carr as follows:

Pertaining to S. D. booking #980175920 ¹

Above subject is an inmate from CCFC. On 08/10/09 Mark Tillman received a OTP&R from juvenile clerk of courts to produce her to court on 9/11/09. On 9/3/09 Mark entered the bail type, as bail not required "BNQ" which is what the 1047 stated. Sometime after Mark had entered this bail type someone changed it on the CC25 screen to remand "REM".

On 09/11/09 Mark Tillman of transportation received a phone call from Prohaska about noon stating the family was upset because the subject had been held in custody past her release date of 9/5/09. When Mark looked at the booking it showed "REM" which is not what he had entered.

On 09/11/09 Mark brought this to my attention (Kathryn Fitzgerald-Sokol) and I contacted Pete Gehloff via e-mail and asked him to provide us with a computer history from that booking number.

The 1047 showed that the subject was only to be held until 9/05/09, juvenile cases are always bail not required.

I contacted Sgt Myers and explained the situation. Sgt Myers contacted Deputy Flowers to transport subject to the jail for immediate release. Deputy Prohaska is transporting subject at the time of this memo.

In issuing the suspension on April 26, 2010, Sheriff David A. Clarke, Jr. incorporated the following Attachment to County of Milwaukee Notice of Suspension:

On October 16, 2009, the MCSO-Internal Affairs Division was directed by Inspector Kevin Carr to investigate the alleged workplace rule violation of Detention Services Bureau (CCFC) Jail Records Deputy Richard Kruszka (Date of Hire: 04/14/95) in reference to an inmate (S*/D* FB; 08/12/91), who was not released in a timely manner.

¹ To protect the juvenile's identity, I have used her initials.

On September 25, 2009, CCFC inmate D.S. (Sentenced after Revocation – Retail Theft Misdemeanor) was scheduled for a Good Time Release from jail. On September 4, 2009, 3rd Shift Jail Records Deputy Richard Kruszka prepared the Arrest Detention Report packet for release. He noted the disposition status of a juvenile capias (OTPR-09JC000285) in the CJIS computer system as stating “BNQ” or Bail Not Required. He changed the disposition from Bail Not Required to “REM” or Remanded. This computer action, in effect, changed inmate S.’s pending release to a remand into custody for the juvenile case. According to Jail Records Administrative Assistant Kathryn Fitzgerald-Sokol, Detention Services Bureau standard administrative procedure is that all juvenile capias cases are processed as Bail Not Required cases and as such, automatic releases from custody.

During his Internal Affairs Division interview, Deputy Kruszka stated he recalled setting up inmate S for release as part of his Jail Records duties. He had specific questions relative to the release status of the juvenile capias. After he changed the computer disposition to prevent a possible improper release of an inmate, Kruszka stated he left a written inquiry note for 1st Shift Jail Records Clerical Assistant Mark Tillman (Transportation/Juvenile OTPR). Clerk Tillman stated he did not receive a written inquiry from Kruszka regarding the matter.

Kruszka acknowledged he did not directly follow-through with juvenile specialist Tillman or a Jail Records supervisor regarding his pertinent questions regarding the inmate’s pending release. As a result, inmate S. inappropriately remained in custody until her scheduled juvenile capias court date on September 11, 2009. The Jail Transportation Division transported S. to Children’s Court where a family member brought to the attention of a bailiff the improper custody status of S. On this date, measures to correct the error with Jail Records were coordinated and she was release from custody.

After an initial overview of the ADR packet, Deputy Kruszka erred (sic) on the side of caution when he delayed the release of inmate S. by changing the case disposition. As an experienced Jail Records deputy, Kruszka acknowledged he failed in diligently investigating the circumstances surrounding the scheduled release of the inmate. This resulted in the inmate remaining in custody for an additional week past her release date.

Based on the aforementioned, I propose disposition of **SUSTAINED** for violation of the following rules:

Milwaukee County Sheriff’s Office Rules:
202.20 Efficiency and Competence

Milwaukee County Civil Service Rule VII, Section 4(1):

(l) Refusing or failing to comply with departmental work rules, policies or procedures, (u) Substandard or Careless Job Performance.

At hearing, Kruszka testified that when he checked the filing cabinet there was no 10-47 form, so in order to prevent an improper release he changed D.S.'s bail type status from Bail Not Required to Remanded. He testified he wrote a note, "Court? No paperwork" on a print out, which he left in Tillman's in-box. Kruszka did not follow-up with Tillman, or inform any supervisor of the situation.

The Detention Services Bureau of the MCSO has promulgated a Jail Records procedures manual which includes the following:

OP 6.10 Release

Jail Records Officers will ensure that all packets that enter the release process are thoroughly checked and that no inmate is released improperly.

No prisoner will be released until they are identified by fingerprints.

Jail Records Officers will include the following information in an ADR packet prior to sending the packet to release:

- Arrest Detention Report
- CR0215 Form
- The last completed 10-47 for every charge that the inmate is being released on

...

The MCSO has promulgated a Jail Records Procedure document which includes the following:

3. Jail Records/Booking Clerks are responsible for updating the court dispositions. Since maintenance of those dispositions is currently a computer entry the following procedures should be implemented:
 - a. Handwritten 1047s will be retrieved in the current fashion. Jail Records/Booking Clerks, working Dispo's, will pick up the 1047's from Court Staging and Intake Court. The Municipal Court Bailiff will continue to bring the 1047's to Jail Records.
 - b. All those 1047's must be completely filled out with concise, correct and legible information concerning the following areas:

- 1) Adjourned date and time
 - 2) Type of proceeding coming up.
 - 3) Branch case is assigned to
 - 4) Is the defendant needed for the next proceeding.
 - 5) Current bail information from the case file. **The use of Same Bail is not acceptable. (emphasis in original).**
 - 6) Complete dispositions for completed or disposed of cases.
- c. Any 1047 that does not meet the above standards will be returned to the court from which it was issued for correction. This will cause an unnecessary and disruptive delay in updating an inmates cases.
- d. In order to track the dispositions for each inmate's cases, a handwritten "Dispo Maintenance Sheet" will be maintained for each inmate. That maintenance sheet will contain all the dispositions received by an individual inmate on all cases being tracked (see attached sample Dispo Maintenance Sheet).
- e. Any 1047 received that indicates an inmate could or should be released on that case will be designated as such on the maintenance sheet.
- f. Those maintenance sheets will be maintained in alphabetical order, in a series of three (3) ring binders, and will be kept in the Dispo area.
- g. Maintenance sheets will not be removed from their binders for any reason.
4. All handwritten 1047's will be maintained by date order under the adjourned date for each case. This file will be used the day before to determine who will be needed for court the next day. The 10-47's will be pulled and distributed to the proper courts by means of the court chutes in Jail Records.

On April 28, 2010, a 1047 was prepared for a juvenile showing REM as the bail type. On June 29, 2010, Fitzgerald-Sokol wrote an email, with the subject line, "Bail Type for juvenile & TP cases," as follows:

Hello, When I called the sergeant phone number for juvenile courts I got your voice. Aren't you the lucky girl.

This is what my problem is. There is a heated discussion going on about the OTP&R's on juvenile cases.

Hello,

I spoke with Dan Barlich the AA in charge of the court clerks in juvenile court pertaining to the "bail type" that we should be entering on the state OTP&R's.

Per Dan, these court hearing (sic) do not involve bail at all. They are generally a court hearing pertaining to custody rights. I read Dan the options that we have and he stated that it should be "BNQ" because bail is not a requirement in these cases.

A new e-mail will be going out to the clerks informing them that the correct entry for bail type for all juvenile & TP cases is BNQ.

Since January, 2007, a sign has hung in Kruszka's work area, reading as follows:

**JAIL RECORDS DEPS,
REGARDING RELEASE
PACKETS ...

WHEN IN DOUBT, DON'T
SEND THE PACKET OUT!
ALSO, MAKE SURE ALL
THE REQUIRED
DOCUMENTS, CHECKS
AND NOTIFICATIONS
ARE IN THE PACKET.
DOUBLE CHECK YOUR
WORK PLEASE.
THANKS,
-321**

Kruszka has had five disciplinary suspensions (two for five days, and one each for one day, two days and three days) sustained since 2007, including a two-day suspension in 2003 for improperly releasing an inmate a year prior to the inmate's proper release date. A ten-day suspension/stayed in 1998 was also sustained.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the association asserts and avers as follows:

The Sheriff did not have just cause to suspend Deputy Kruszka because he did not violate any departmental rules. The department's claim that it is standard procedure for all juvenile capias cases to be processed with the code Bail Not

Required is not supported by any written rule or policy. Nor is it supported by the facts.

Kruszka is practically a jail records expert, having worked in jail records for 12 years and having written Post Order Rules for jail records. He has never heard of the alleged "standard procedure" claim, nor had Sergeant Graber, despite the fact that he has been approving release packets in jail records for five years. Even the county witness Fitzgerald-Sokol backed off her claim, admitting the alleged standard procedure was "not so clear." She could also not explain why staff members were having a "heated discussion" about the issue nine months after this incident if the policy were so clear and standard, or why a 10-47 seven months after the incident referenced REM instead of BNQ. Kruszka should not be suspended for violating a rule that does not exist.

The department's alleged standard procedure in handling juvenile capias cases is not standard; it has no policy or procedure, manual, directive, report of posting requiring that all such cases have the bail code BNQ. Indeed, the county's own witness admitted the alleged standard procedure was "not so clear." Kruszka, who is practically a jail records expert, with 12 years experience, has never heard of this alleged standard procedure.

Kruszka acted reasonably under the circumstances and did his job properly. The department stresses that employees should err on the side of caution and not release an inmate if there are questions about the release. The official policy states that jail records officials "will ensure that all packets that enter the release process are thoroughly checked and that no inmate is released improperly." The inmate's release packet was missing the 10-47, which is required before a release packet can go forward. Kruszka was concerned that a mistake may have been made so he changed the code so the inmate would not be released the next day. He wrote a note about his concern which he placed in Tillman's in-box, which was standard procedure.

Although Tillman states he did not receive the note, he also testified he had no reason to doubt that Kruszka did in fact leave it. As Tillman acknowledged, no other jail record officers follow up with him when they leave notes in his inbox, because they assume he will handle the issue.

Kruszka's job performance met the standard of his assigned position. He followed department policy, and violated no rule or procedure. His actions can hardly be seen as substandard or careless. His actions met or exceeded the department's standard operating procedures.

Even if it is determined that just cause supports a finding that Kruszka violated one or more rules, just cause does not support the seven-day suspension.

Kruszka has worked in Jail Records for 12 years, and has never been disciplined for entering the wrong bail code. The county has offered no evidence that this discipline was appropriate given Kruszka's employment history and the facts of the case. The just way to remedy this incident would be for the department to issue a new rule or policy on the required procedures, and give Kruszka a verbal counseling on the matter.

In support of its position that the grievance should be denied, the county asserts and avers as follows:

Despite Jail Records Clerical Specialist Mark Tillman's known expertise regarding juvenile cases, Deputy Kruszka changed the inmate's status to Remanded because he had specific questions regarding her release status. In effect, he changed her pending release to a remand into custody for her juvenile case. However, standard administrative procedure is that juvenile cases that are not warrant cases are processed as BNQ cases. This was not a warrant case, but an Order to Produce and Release case. Nevertheless, she was not released from custody for another seven days because of Deputy Kruszka's actions.

After changing the inmate's status, the only action Kruszka took was allegedly placing a note in Tillman's inbox. However, Tillman stated he never received such a note, and Kruszka acknowledged that he did not follow through with Tillman regarding his questions. The association's own witness, Sgt. Graber, testified he would have followed up by returning the packet to get a 1047.

DISCUSSION

It is of course well-settled that the employer has the burden to establish that it had just cause to impose discipline.

The county has not disputed that release packets must contain a form 1047, and that D.S.'s packet did not contain such a form when Deputy Kruszka reviewed it shortly before her scheduled release. Given that Kruszka works in an area where there is a sign warning, "Regarding Release Packets ... when in doubt, don't sent the packet out! Also, make sure all the required documents, checks and notifications are in the packet. Double check your work please," the absence of a required document was certainly something that he rightfully took seriously.

The county has not cited a single entry in the Jail Records Policy & Procedure handbook, the Detention Services Bureau Jail Records OP, the Records Post Orders or the Juvenile Warrant Policy Manual stating that all juvenile capias cases be processed as Bail Not Required. Nor has the county effectively responded to the association's commentary that if it were so well-understood that all OTP&R juvenile cases were to be handled as "Bail Not

Required,” there should not have been a “heated discussion going on” about that matter more than nine months later.

As the Internal Affairs attachment stated, Kruszka “errored (sic) on the side of caution when he delayed the release” of D.S. In so doing, he was complying with the cautionary notice posted in his work area, and not violating any published or universally understood policy or procedure.

However, the simple fact remains that the only reason D.S. was kept in custody for a full seven days beyond her release date was the Deputy Kruszka unilaterally changed her release code from Bail Not Required to Remanded and then did not follow up on the matter. That BNQ release code had been entered by juvenile specialist Tillman, recognized as the expert on such matters. Kruszka testified that he left a written note in Tillman’s in-box, inquiring about the matter, but acknowledged that he did not follow up. Tillman testified he never received such a note. When an individual deputy acts unilaterally to override a release order, it is incumbent on the deputy to take reasonable steps to monitor the situation – otherwise, an inmate who should have been released could get lost in the system. Exactly as happened here.

An inmate who should have been released was improperly kept in custody for seven additional days. The association cannot seriously maintain that the employee responsible for such a situation should go unpunished. The only person who bears responsibility for what happened to D.S. is Deputy Kruszka. If he had undertaken even the simplest and easiest efforts at following up – another note to Tillman, maybe even an email – this miscarriage of justice could have been avoided. Kruszka testified he had “no reason to think” he had to follow up with Tillman after he put a note in his box. But he did. Indeed, having apparently come upon a serious processing error – the unexplained and improper absence from the file of the necessary 1047 – Kruszka’s first error was in not alerting a supervisor to the situation at the outset.

Although the association correctly states that Kruszka has “never been disciplined for entering the wrong bail code,” his disciplinary record is not particularly impressive. He has been suspended for 16 days for five separate incidents since 2003, including a two-day suspension for releasing an inmate a year before the proper release date. He also had a ten day suspension/stayed sustained in 1998.

Deputy Kruszka did not violate any published departmental work rule, policy or procedure. But by failing to take reasonable and necessary steps to communicate with Tillman to ensure that D.S. was not kept in custody longer than necessary to ensure that her release was proper, Deputy Kruszka did engage in a substandard and careless job performance. Given the egregious and totally unacceptable impact on the juvenile D.S., and Kruszka’s disciplinary record, a suspension is warranted.

The county has not explained how it arrived at a seven-day suspension, nor provided evidence on what other sorts of offenses have occasioned such a level of discipline. The

suspicion arises that the suspension was seven days because the improper hold of D.S. was for seven days.

As noted, Kruszka was suspended for two days in 2003 for releasing an inmate a year before the proper release date. I do not know which is worse – the potential threat to society by releasing an inmate a year early, or the very real injustice to a single individual (and her family) by releasing an inmate a week late. I only know that this is the only evidence in the record indicating what level of discipline is imposed for errors related to the release of inmates.

Progressive discipline is intended to be corrective rather than punitive. But to be corrective, it must increase when an employee repeats an offense. In 2003, Kruszka was suspended for two days for an error regarding the release of an inmate. In 2010, Kruszka again made a serious error regarding the release of an inmate.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied in part and sustained in part. The seven-day suspension is modified to a four-day suspension. The grievant shall be made whole for the three days of wages and benefits, representing the difference between the discipline the Sheriff imposed and the discipline I have found to be with just cause.

Dated at Madison, Wisconsin, this 23rd day of February, 2011.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator