

In the Matter of the Arbitration  
Between:

COUNTY SHERIFFS LOCAL

Union,

-and- **Case: Lyons #5**

COUNTY SHERIFF,

Employer.

Gr: Cathy Red/Suspension

### **OPINION AND AWARD**

#### **BACKGROUND/FACTS**

The hearing in the above-referenced case was held on December 15, 1995 at the offices of the Employer. The grievance protests the three day disciplinary suspension of Officer Cathy Red. (See p. B, Employer Ex. 1, Disciplinary Packet).

The Grievant was charged with violation of County Sheriff's Department Departmental Policy Manual, Sections 3.1 - Neglect of Duty; 3.5 - Unsatisfactory Performance; Section 14.0 - Jail Rules and Regulations Manual, Subsection 3-1-E3.

The Notice of Departmental Charges and Hearings, Administrative Review and Determination Hearing, was dated October 23, 1995. The incidents occurred on

or before June 20, 1995. Apparently the Grievant's signature was waived and the Union received the documents on November 13, 1995.

The recommendation for Administrative Review and Determination Hearing was submitted by Commander Flower, Police Disciplinary Unit on October 23, 1995. It states in relevant part the factual basis for the allegations:

The Internal Affairs Section investigation indicated that sometime prior to June 20, 1995, you observed an inmate in Jail Division I in possession of an ink pen. At that time you failed to take action to confiscate the contraband, nor did you notify anyone of the situation. An ink pen is considered contraband as it can be used as a weapon. Your failure to act constitutes neglect of duty and unsatisfactory performance.

The Internal Affairs Section investigation further indicates that prior to June 20, 1995, you provided an inmate with fingernail polish and two colored markers. Officers are prohibited from providing special favors to inmates without proper authorization. Such actions breed familiarity and compromise your role in inmate supervision. . . .

(See p. 6, Disciplinary Packet, Employer Ex. 1).

The Union filed the instant grievance on behalf of Officer Red. It states in relevant part:

On November 15, 1995, an Administrative Review and Determination Hearing was held. The Department found the officer guilty on all charges and suspended her for (3) days.

The Union views this suspension to be a violation of the Officer's Due Process Rights and the "Just Cause" standard contained in the Collective Bargaining Agreement.

Therefore, the Union demands arbitration and that arbitration be held within (30) calendar days from receipt of this grievance as called for by the Collective Bargaining Agreement.

The parties have modified their collective bargaining agreement. They have eliminated the Trial Board procedure under the disciplinary procedures as

contained in Article 9 of the new Collective Bargaining Agreement (See Joint Ex. 1).

Regardless, the disciplinary standard of review is one of just cause. Section 9.08 states "All discipline action shall be for just cause." In addition, arbitral review of the Administrative Review and Determination Hearing is De Novo as provided in Section 9.13.

Other relevant provisions are:

Section 9.17. The Arbitrator shall conduct a hearing and the burden of proof shall be upon the Department to prove the charges brought against the employee.

Section 9.18. The Arbitrator shall make a determination of guilt based upon the evidence presented before him or her. In the event the Arbitrator determines an employee is not guilty of the charges, the employee's personnel file shall be cleared of any and all communications relating to said charges.

Section 9.19. In the event the Arbitrator determines the employee guilty of the charges but finds the discharge imposed or recommended suspension is unreasonable under all the circumstances, the Arbitrator may modify the discipline accordingly and the decision shall be final and binding upon the employee and the parties.

Section 9.20. All past arbitration decisions not in conflict with the disciplinary provisions of the Collective Bargaining Agreement shall continue to apply and be binding as to the procedural requirements.

Section 9.21. In all disciplinary proceedings, the Department shall carry the burden of proof in order to substantiate the charges and the standard shall be proof beyond a reasonable doubt. In application of this standard, the parties understand that all Department charges and hearings are non-criminal in nature.

(See Joint Ex. 1 - Collective Bargaining Agreement).

This case is one of the first cases being reviewed under the new procedure.

The just cause standard of review is continued; the burden of proof is beyond a reasonable doubt as set forth in 9.21..

The Union filed two written motions (see Union Ex. 1) to dismiss charges based on due process arguments. First, they urge that this case should be dismissed on due process grounds because there was an unreasonable time delay between the alleged misconduct on or before June 20, 1995, but the charges were made on October 23, 1995. Second, the procedures of Section E, Subsection 1.1 of Joint Ex. 2, Departmental Policy Manual, were not followed by the Department. They urge that Lt. A. C., the shift commander, should have filed a report. Moreover, she was not subsequently ordered to file a conduct instant report by Commander W. The Union suggests that this is a violation of policy and the rules. It submits the Walt Arbitration Award, 80-001, in support of this theory.

Procedural issues must be resolved before proceeding to the merits of this case.

Resolving procedural matters is not new to the parties. In fact, the two awards that are submitted hold that the parties cannot ignore due process procedural rights that may affect the results. Arbitrator Walt quoted Arbitrator George Roumell who held that substantive procedural rights should be honored. The Union's argument was similar in that case. Alan Walt - 80-001, as well as Elaine Frost (M and P) decided cases on procedural grounds. That is, the Arbitrators ruled in those cases that the Employer, the County Sheriff, violated employees' due process rights by not bringing charges in a timely fashion, (Frost Award), and by not complying with the requirements of Section E, 1.1 of the Department Manual that requires that "incident reports shall be submitted

forthwith to the Division Inspector within forty-eight hours of the alleged violation . . . ". (Walt, 80-001).

As stated, there are two procedural objections that have been made by the Union. Quite frankly, a resolution of the first objection, untimeliness in bringing the charges against the Grievant, is dispositive of this case. It is not necessary to go beyond this issue.

The incident allegedly occurred on or before June 20, 1995. An investigation was ordered, and Detective H was assigned on July 3 to complete the investigation. There were eight extension requests submitted by the Detective. A total of 94 days lapsed between the alleged misconduct date and the charges of October 23. The Union argues that the investigation was complete on July 30 based on the testimony of Detective H and the exhibits contained within Employer Ex. 1 - the disciplinary packet. The Grievant was alleged to have granted special favors to an inmate trustee. That inmate was interviewed by Detective H, but the Union was not able to question his statement or evidence because he had already been released by the time the charges were proffered. There was another inmate involved who made certain statements relative to this case. He was also released by the time of the charges. Neither were available for questioning. Their statements and testimony go directly to the heart of the charges in this matter. They were unavailable to the Grievant and the Union to cross examine. The right to examine witnesses is part of due process. Arbitrator Frost quoted George Roumell in Case No: 75-0007 and Case 76-002 that deal with a procedural issue of impermissible delay. In both cases the Arbitrator found, based on the circumstances, that the delay

between the alleged event and the charge were so long "it was inconsistent with the concept of just cause", because the delay denies due process.

Arbitrator Frost quotes Mr. Roumell as he explains:

. . . This is clearly a matter of degree, but certainly 30 days is too long. It would seem that a week, in most cases, would be the maximum period for bringing a charge. The Arbitrator would make it clear, that it is very possible that the Department may have a matter under investigation for weeks, months, and even years before bringing a charge, simply because the Department had not been able to bring together and collect all the evidence. Once the Department has the evidence or should have had the evidence, however, then the Department must act with dispatch..

In that case, No. 76-0002 the discipline was set aside where it was served one month after the alleged misconduct. Arbitrator Frost concurred that the circumstances of each case must be considered where a charge is brought more than one week from the occurrence of the alleged misconduct.

An examination of Employer Ex. 1, the disciplinary packet reveals the following:

<u>Date</u>	<u>Extension Request</u>
07/17/95	Writer respectfully requests a first 14-day extension in order to collect evidence and interview all parties involved. (p. 17)
07/31/95	Writer respectfully requests a second 14-day extension. Writer is waiting to conduct a polygraph of one of the witnesses. (p. 18)
08/14/95	Writer respectfully requests a third 14-day extension. Writer had been waiting to conduct a polygraph of one of the witnesses; however, the witness has since been discharged and is unavailable for testing. Writer has also been on special assignment since July 31, 1995. (p. 19)
08/28/95	Writer respectfully requests a fourth 14-day extension to compile the investigative findings of this case. (p. 20)

09/11/95                      Writer respectfully requests a fifth 14-day extension to compile the summary report. (p. 21)

09/25/95                      Writer respectfully requests a sixth 14-day extension for typing and supervisory review. (p. 22)

10/09/95                      Writer respectfully requests a seventh extension for (2-days) supervisory review. Two interviews conducted October 6 and 7, 1995, were added. (p. 23)

10/11/95                      Writer respectfully requests an eighth (2-days) to re-interview Deputy Red for clarification purposes (p. 24)

As previously noted, Detective H of the Internal Affairs Section was assigned to investigate the allegations in this case. He testified honestly, and was very open in that he was placed on a number of major investigations, including a special assignment as body guard to one of the judges after a threat had been received. I take it from the testimony of the officer that there was not enough time in the day; he was simply too busy at times to conclude this report because he admitted on cross-examination that there were periods of time when nothing was done. This was pointed out in the Union argument that during the period of time between July 31 and September 25, there was virtually nothing done to wrap up or conclude the investigation. From September 25 through October 11 there was no action of any kind. This dead time was due to the fact that Detective H simply didn't have the time to complete. While this may be true, it is not a reason sufficient to satisfy due process.

The decision in this matter is in no way a reflection of the work of Detective H. However, the investigation of this matter, based on the circumstances of this case, should have been concluded within a more reasonable time. Ninety-four days,

in this kind of case is simply inappropriate. This is especially true, since one of the principal witnesses, the trustee inmate had been released and was not available to the Grievant or Union for examination.

The standard of disciplinary review as set forth in the contract is one of just cause. Due process considerations, are part of the just cause review. See the Arbitration Awards of Roumell, Walt and Frost. Section 9.20 provides: "All past arbitration decisions not in conflict with the disciplinary provisions of the Collective Bargaining Agreement shall continue to apply and be binding as to the procedural requirements." This decision is consistent with the awards discussed. While the Arbitrator can appreciate the individual circumstances of Detective H, the Employer knows well the requirements of timely charges. In this case, it is the finding of the Arbitrator that the charges were not filed on time and therefore the three day disciplinary suspension should be set aside. The County did not act with "dispatch" by filing the charges some 94 days after the alleged incident in this case.

Section 3.1 of Joint Ex. 2, the Departmental Policy Manual, Section 3 states:

The Internal Security Bureau shall promptly respond to all orders requiring an investigation of alleged misconduct by a Deputy Sheriff. In the event that the investigation should lead to criminal charges, the departmental disciplinary procedure shall proceed in an orderly fashion. Internal Security Bureau investigation reports shall be completed and delivered to the Sheriff within fourteen (14) calendar days regardless of who initiates the investigation. The Sheriff may grant additional time for more lengthy investigations upon receiving a written request from the Internal Security Bureau.

As we can see, there were eight requests for extension. During that period of time there were several gaps. There was a period of approximately two months



when nothing was done to complete the investigation. Regardless of the requirements that an extension may be requested, extensions are an internal management procedure, however, in this case, due process required more. It required that the investigation be completed and that the report recommending charges, if any, be made more timely.

This Award does not in any way condone the activity of the Grievant. Security measures within the jail cannot be taken lightly. With her experience, she should have known that she cannot fraternize with, or provide "special favors" to any inmate. She should have known that providing nail polish and colored markers regardless of the innocent motive was improper and is prohibited by the Rules and Regulations. Likewise, the failure to report possession of an ink pen by an inmate was equally improper. The Grievant admitted as much, however, based on the requirements of procedural due process, this case must be set aside.

#### AWARD

The grievance is granted. The Grievant is to be reimbursed for the three day suspension and all evidence of this incident should be removed from her disciplinary record.

Respectfully submitted,



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John A. Lyons, Arbitrator

Dated: January 12, 1996