BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION for and on behalf of MONROE COUNTY PROFESSIONAL POLICE ASSOCIATION

and

COUNTY OF MONROE

Case 185
No. 65738
MA-13306

Appearances:

Gordon McQuillen, Attorney at Law, 822 South Gammon Road #2, Madison, Wisconsin 53719-1377, for the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, for and on behalf of Monroe County Professional Police Association, which is referred to below as the Association.

Ken Kittleson, Personnel Director, 14345 County Highway B, Room 3, Sparta, Wisconsin 54656, for the County of Monroe, which referred to below as the County or as the Employer.

ARBITRATION AWARD

The Association and the County 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 parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin to resolve Grievance number 05-559, filed on behalf of Daryl Kirchner, who is referred to below as the Grievant. Hearing was set for June 13, 2006 on Grievance 05-559 and two other grievances. On that day, hearing was conducted in Sparta, Wisconsin on one of the three grievances, another grievance was settled, and the parties agreed to reschedule hearing for Grievance 05-559.

By July 7, 2006, the parties had agreed to reschedule the hearing for September 19, 2006. In a September 14, 2006 e-mail, the Union requested that the hearing be rescheduled. The parties ultimately agreed to reschedule the hearing, with the agreement that County

liability for back pay, if the grievance was found meritorious, would not include any period of time attributable to the rescheduling. The grievance was ultimately rescheduled for March 21, 2007 in Sparta, Wisconsin. The hearing was not transcribed. The parties submitted briefs and a reply brief or a waiver of a reply brief by August 2, 2007.

ISSUE

The parties did not stipulate the issues for decision. The Association states the issues thus:

> Did the County violate the collective bargaining agreement when the County awarded the position of Sheriff Patrol Officer to (the Grievant) on December 13, 2005 (effective January 1, 2006) through the internal promotion/job posting process, and subsequently demoted him without just cause on December 23, 2005, the basis for which is unsubstantiated accusations of evasiveness and/or untruthfulness by (the Grievant) during the promotion process?

The County states the issues thus:

> Did the County violate the collective bargaining agreement when it rescinded its conditional offer of a patrol deputy position to the Grievant?
>
> If so, what is the appropriate remedy?

I adopt the following issues as those appropriate to the record:

> Did the County violate the collective bargaining agreement when Sheriff Quirin refused to place the Grievant in the position of Sheriff Patrol Officer effective January 1, 2006?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2. MANAGEMENT RIGHTS

> The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law.
>
> These rights include, but are not limited to the following:
>
> . . .

B. To establish reasonable work rules;

C. To hire . . . promote, transfer . . . and assign employees to positions within the County;

D. To suspend, demote, discharge and take other disciplinary action against employees for just cause . . .

L. To determine the . . . personnel by which County operations are to be conducted . . .

N. No Article or Section of this Agreement shall be interpreted to abridge the duties or powers of the Sheriff as outlined in appropriate State Statutes relative to the operation of the jail . . . or any other statutory duties or powers of the Sheriff's Office.

The County's exercise of the foregoing functions shall be limited only by the express provisions of this Agreement. If the County exceeds this limitation, the matter shall be processed under the grievance procedure. . . .

ARTICLE 3. GRIEVANCE AND ARBITRATION PROCEDURE

. . .

F. Arbitration:

. . .

6) Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restrained solely to interpretation of the Agreement in the area where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the express terms of this Agreement. . . .

ARTICLE 16. JOB POSTING

Section 1. Whenever a vacancy occurs, or a new position is created, said vacancy or new position shall be posted . . . The posting shall set forth the job requirements, qualifications and rate of pay. Interested bargaining unit employees shall sign the posting indicating such interest. Bargaining unit employees shall be given first opportunity to fill such position openings provided they meet at least the minimum entry level qualifications for the position. Probationary employees (employees who are on their initial hire twelve (12) month probation), are limited to the employer's outside hiring process; these employees may not utilize the posting process as do other bargaining unit employees. The employer must first comply with the job posting provisions for nonprobationary employees before considering the outside hiring process.

> Outside applicants may not be considered for an opening unless there exists no interested bargaining unit employee possessing at least the minimum entry level qualifications. . . . It will be the policy to fill positions with the best qualified candidate available with the attempt to provide County employees with career advancement opportunities.

BACKGROUND

The Grievant and the Association filed Grievance 05-559 on January 16, 2006. The grievance form alleges that the County violated Article 2, Sections B and D, as well as Section 1 of Article 16, "when the County awarded the position of Sheriff Patrol Officer to Daryl Kirchner on December 13, 2005 (effective January 1, 2006) through the internal promotion/job posting process, and subsequently demoted him without just cause on December 23, 2005". The form seeks that the County promote the Grievant to Sheriff Patrol Officer, "with all wage and benefits associated with the position retroactive to January 1, 2006."

Then incumbent Sheriff Peter Quirin denied the grievance in a memo dated January 18, 2006, which states:

> . . .
>
> 2. I made the decision to offer you the position of patrol officer on December 13, 2005 contingent upon you successfully completing five requirements: . . . 3) a psychological evaluation . . . Failure to be successful in any one of these requirements would understandably be an eliminator for the position.
>
> . . .
>
> 3. You were provided the first opportunity to fill the patrol vacancy as outlined in Article 16 even though there is a Letter of Understanding dated May 29, 1998 . . . I offered you this position in good faith with the understanding that you would be successful in fulfilling all the requirements that have been established for the job. I cannot in clear conscience offer you a position in which a Psychologist that specializes in police evaluations does not recommend you.
>
> 4) When I offered you the position of patrol officer it was with the understanding that your background was clean. In the process of gathering information to answer questions presented to me by your evaluating psychologist after her interview with you I learned some issues in your background that are cause for concern. . . . These issues along with an incident in the jail and the Psychologist evaluation made it clear in my mind that I needed to reverse my decision to offer you the vacant position of patrol officer. . . .

The Grievant was the only Jailer who signed the posting for Patrol Deputy. The posting was in effect from November 30 through December 6, 2005, and is referred to below as the Posting.

The Posting states:

> . . . To be eligible you must have a valid Wisconsin driver's license, certification by the Wisconsin Law Enforcement Standards Board as being qualified to be a law enforcement officer in Wisconsin, and have at least 60 college credits in law enforcement. You must also be off probation in your current assignment. Experience in a law enforcement area is preferred.
>
> . . . A written exam, psychological evaluation, and/or oral interview may be held at later dates. . . .

The requirements stated in the first paragraph of the Posting are included in the position description for "Sheriff Patrol Officer." Those of the second paragraph are not. The position description for Deputy Sheriff/Jailer includes the following as "Qualifications": a valid Wisconsin driver's license; "Computer literacy"; and a preference for "law enforcement experience and/or education beyond high school graduation."

On or about December 13, 2005, Quirin informed the Grievant that he would become a Patrol Deputy effective January 1, 2006, but would first have to take a psychological evaluation. Sometime in mid-December, Quirin learned from Michael Kass, the Chief of Police of Sparta, the identity of the firm that administered such evaluations for Sparta. Quirin contacted the firm, Martin-McAllister, and learned that it could administer a pre-employment evaluation for the Grievant. On December 16, he directed the Grievant to report to Martin-McAllister in Minneapolis on December 21, 2005 for the screening process.

On December 21, 2005, Quirin faxed to Martin-McAllister a report concerning an incident involving the Grievant at the Monroe County Jail. Quirin included the following note on the cover page of the fax:

> Attached are the Reports on the Jail incident . . . It is a cause for concern especially if we are thinking of putting him alone out on the road as a patrol officer. Can he take the verbal abuse that he may be subject to.

The Grievant's supervisor had issued the Grievant a "Memorandum of Counseling" for this incident, which occurred on May 3, 2005. The Memorandum notes that it "should not be considered a written disciplinary action" but "is to explain the importance of the improvement suggestions and explain that future occurrences could result in progressive disciplinary action." The Memorandum characterizes the incident thus:

> On May 3, 2005 (the Grievant) was involved in a use of force incident with (an) inmate . . . During this use of force a wall stun technique and compliance holds

> were utilized by (the Grievant) in order to gain control . . . During this incident, two actions that took place are inappropriate. First was the fact that (the Grievant) opened the door to the cell . . . This was done in order to deliver a meal tray during mealtime. Noted on the pass down were directions from Chief Deputy Lisa Josvai. These instructions stated that all inmates were to be fed through the food slot only. The second was a comment from (the Grievant), by his own admission stated to Inmate . . . "you're going to be someone's bitch in prison for a couple of years anyway, so I'm not worried."

The Memorandum notes that to improve, the Grievant had to follow directives and had to realize that, "Even though confronted with threats and statements of harm to his family and himself, comments such as these are both unprofessional and could escalate a situation."

> In a memo to the Grievant dated December 23, 2005, Quirin stated:
>
> Reference our conversation on the afternoon of December 22nd 2005 about the preliminary results of your patrol deputy psychological evaluation.
>
> I was advised by . . . the psychologist that interviewed you that you were not recommended for a position as a patrol officer. . . . (A)s I understand it the basis of her determination was that there were too many concerns about integrity issues and too many evasive answers to questions that were presented to you during the interview.
>
> Adding to my concern are numerous background issues that surfaced when you applied for patrol officer positions at Tomah and Sparta Police Departments. We discussed these issues in detail on the afternoon of December 22nd. Some of these issues included 3 Disorderly Conduct Charges that you received in La Crosse County and an incident in the jail on May 3rd 2005 . . .
>
> It is indeed unfortunate that such a situation should arise but I must consider the future of the . . . department. Hiring the right person for a job is one of the most critical decision making processes that I must make and based on the information outlined above I cannot in good conscience continue to consider hiring you as a Patrol Deputy . . .

This memo prompted the grievance.

Norma DiLorenzo supervised the Grievant's psychological evaluation and authored the "Personnel Evaluation Report" supplied by Martin-McAllister to the County. Her report is dated December 27, 2005, and its concluding paragraph reads thus:

RECOMMENDATION

> (The Grievant) is psychologically fit for law enforcement duties. However, on the basis of this evaluation, we do not recommend him for a Deputy Sheriff position with the Monroe County Sheriff's Department. We believe that his developmental needs are substantive in nature. In particular, his difficulty in being completely honest and upfront about matters precludes us from recommending him for a law enforcement position.

The "matters" referred to concerned DiLorenzo's reaction to the Grievant's discussion of his future with Monroe County, and specifically whether he was less than candid regarding the extent of his search for employment with other departments.

The Grievant completed his probation period as a Jailer effective January 18, 2005. In the evaluation that moved him off of his probation period as a Jailer, the Grievant received an "Overall Performance Rating" of "Acceptable in majority of areas." In the "Employee Self-Appraisal" portion of the evaluation, the Grievant noted as one of his "goals for the upcoming year", that "I am continually applying to agencies that have positions for patrol officers."

Sometime in late January or early February of 2005 the Grievant asked Quirin for a reference to assist him in applying for patrol openings in other departments. Quirin, who was appointed Sheriff in January of 2005, agreed and issued an undated, "To whom it may concern" letter that states:

> . . . (the Grievant) has served with the Monroe County Police Department since October 2003. (His) reputation has been flawless. His work ethic is unquestionable and he has dedicated himself to being possibly one of the best officers in our department. (He) is fair and respectful to the inmates he works with yet firm when necessary.
>
> (The Grievant) is well liked and respected by his co-workers and his determination to do the best possible job is unwavering. He uses his work time very efficiently and effectively and sets a very positive example for others to follow. (He) is a very dedicated officer. He has the education and the potential to be a very through and effective law enforcement officer.
>
> Although it would be a significant loss to our department, I would highly recommend (the Grievant) to any law enforcement position for which he might apply.

The Grievant has applied for patrol openings in Sparta, Tomah and the Town of Madison. He applied to the Town of Madison in November or December of 2004; to Tomah early in 2005; and to Sparta in April of 2005.

Quirin did not review the Grievant's personnel file prior to directing him to undergo the psychological evaluation. The Grievant's employment application, submitted on June 7, 2003, states "Yes" to the question, "Do You Have A Criminal Record Or Conviction(s)", and specifies them thus:

> 1993 – LaCrosse – Disorderly Conduct (Ordinance Violation)
> 1994 – LaCrosse – Disorderly Conduct (Ordinance Violation)
> 1994 – LaCrosse – Disorderly Conduct (Ordinance Violation)

Quirin did not learn of these incidents until after the Grievant signed the Posting. From a discussion with Kass, Quirin understood that Sparta was concerned with the existence of the disorderly conduct violations. Quirin was unaware of the violations until that point.

The reference to a "Letter of Understanding" in Item 3 of Quirin's January 18, 2006 memo refers to a document dated May 29, 1998, which was signed by the then incumbent Sheriff and the then incumbent Association President. The Letter of Understanding is referred to below as the MOU and states:

> This letter is to serve as a Letter of Understanding between the association and management, concerning a change in the current hiring/posting procedure now being utilized. Said change effecting Article 16, Section 1 of the union contract. This letter will replace the wording found under Section 1, wherein it may be applicable as to the posting of jobs.
>
> It is understood that as of May 1, 1998, it will become an acceptable practice wherein management may be allowed to require bargaining unit members from the jail and/or dispatch to compete with outside applicants when applying for positions within the patrol division. (i.e., patrol, investigation, etc.). This is mainly due to the vast differences in minimum requirements needed to qualify for these areas of employment.
>
> It is further understood that all employees hired prior to May 1, 1998, shall be grandfathered under the former language of the contract which means said employees may be eligible to sign said job postings in any division provided they meet the minimum requirements as stated on said posting.
>
> This letter of understanding is intended to better the quality of employee's in each of it's sections and maintain the highest standards possible. Any changes and or concerns must be mutually agreed upon between management and this association.

The parties have continued the MOU through the term of the current collective bargaining agreement.

Sometime early in 2005, the Grievant was encouraged to apply to become a member of the County Jail's Correctional Emergency Response Team (CERT). The Grievant indicated his interest, completed the necessary SWAT training and was made a member of the CERT team in March of 2005. He is trained to be the point man in entry situations, and is trained to control inmates in crisis situations. The Grievant is also a member of the Combined Tactical Unit (CTU), which is an emergency response team composed of volunteers from the County Sheriff's Department and the police departments of Sparta and Tomah. The CTU responds to situations requiring a strong, armed response to critical situations beyond the capabilities of each law enforcement agency acting alone. In February of 2006, Quirin issued the Grievant a carbine to use while serving with the CTU. The Grievant has been part of CTU operations that have received commendations.

The balance of the background is best set forth as an overview of witness testimony.

Clayton Tester

Tester is an Investigator for the County. He was hired on a part-time basis in 1996, and became full-time in 2000. He took a psychological examination at the time of his transition from part-time to full-time. Tester serves as a CERT team leader, and has known the Grievant throughout his tenure as a full-time employee. He believes the Grievant has served "very well" on the CERT since its creation in 2003. Tester serves on the CTU as an Assistant Team Leader, and has not observed any problems regarding the Grievant's service with the CTU.

Linda Klafka

Klafka is a Sergeant in the County Jail, and started County employment in August of 2005. She took a written test and went through an interview process to be hired by the County. She did not have to take a psychological evaluation. She has served with the Grievant in the Jail since September of 2005, and believes he is one of the best Jailers in the County. He is "confident", knowledgeable and competent. He is the first employee she looks to in emergency situations. She knew of three other County employees who had to take a psychological evaluation on hire and one who took one on a promotion.

Robert Conroy

Conroy is a Lieutenant, who serves the County as a Jailer/Administrator. Quirin hired Conroy in March of 2005. Conroy has observed the Grievant's work and has confidence in his ability. The Grievant has suggested improvements for the Jail and has taken responsibility for his conduct, including Conroy's investigation of incidents within the Jail. Conroy did not have to undergo a psychological evaluation, but he was aware of two employees other than the Grievant who did. Quirin and Conroy have discussed, and share, an interest in the use of psychological evaluations for hire or promotion. Conroy views the Grievant as a friend and continues to socialize with him, although less frequently than in the past. This reflects, in part, a disciplinary incident in which he, the Grievant and another deputy were disciplined for reporting to work with alcohol in their system.

The Grievant

The Grievant started work for the County on a part-time basis in October of 2003, and became a full-time Jailer in January of 2004. He has responded to a number of crisis situations as a CERT member and as a CTU member. After the completion of the posting period, Conroy approached the Grievant and informed him that he would become a Patrol Officer effective January 1, 2006. Quirin confirmed this, and mentioned an agility test. He did not mention a psychological evaluation until later that day or perhaps the following day. Quirin asked the Grievant if he had any concern regarding the evaluation and the Grievant responded in the negative. Quirin then set a date for the evaluation.

The Grievant took the evaluation on December 21. On his next scheduled workday, he reported for work and found a note in his mail box directing him to Quirin's office. He reported to Quirin's office sometime around 3:00 p.m., found that Quirin was on the phone, and waited in the hallway. From that position, he could hear that Quirin was talking with a Martin-McAllister representative. He heard Quirin's side of the conversation, which covered the Grievant's disorderly conduct violations, his application to three other law enforcement departments, Quirin's concern with his fitness for patrol duty, and a concern with the truthfulness of his answers during the evaluation. At the end of the portion of the conversation that the Grievant could overhear, Quirin noted that his concerns regarding the Grievant would not warrant termination. He then noted his satisfaction that the results of the evaluation were sufficient to keep the Grievant off the road. When the conversation ended, Quirin summoned the Grievant to his office, where the Grievant advised him that the Grievant overheard the conversation. Quirin said "good" and invited him to discuss the matter. They met for perhaps twenty minutes.

During their meeting, Quirin advised the Grievant that he had failed the evaluation because Martin-McAllister would not recommend his hire as a Patrol Deputy. The Grievant told Quirin that he would not and could not lie during the evaluation. Quirin was unwilling to change his mind.

When called in rebuttal to DiLorenzo's testimony, the Grievant noted that he mentioned his application to Sparta because DiLorenzo questioned him regarding the disorderly conduct violations. The Grievant responded that Kass had not seemed concerned. DiLorenzo then questioned him regarding whether his application to Sparta was his only attempt to switch departments. He responded in the negative because Sparta was the most recent and he had no other pending applications. He did embellish the response with an elaboration of his desire to find a career with the County. He did so in all candor and did not lie. He and DiLorenzo discussed their differences regarding the interview roughly two weeks after the interview. She noted her surprise at his interview responses, but the discussion had no impact on her report.

Peter Quirin

Quirin is a retired Lieutenant Colonel with thirty years of experience in the Army. He started work for the County as a part-time Jailer in November of 1998. He was appointed Sheriff

in January of 2005. December 31, 2006 was his final day as Sheriff. On January 1, 2006 Dennis Pederson assumed the office.

At least two of his command staff voiced concerns that the Grievant was the only employee to sign the Posting. Quirin had worked with the Grievant in the Jail and had found him a hard worker. Thus, he decided to award the position to the Grievant provided he passed an agility test and a psychological evaluation.

Early in his tenure, he became aware of the use of psychological evaluations as a hiring and promotional tool. His Chief Deputy, Lisa Josvai, supported its use as did Michael Kass, Sparta's Chief of Police, as did a number of sheriffs with whom he spoke. The Grievant was the first employee Quirin subjected to the process. The Posting was conditional because, at the time of its issuance, he had not yet secured anyone to perform a psychological evaluation. Kass recommended Martin-McAllister. Quirin acted on this recommendation and directed the evaluation because of the promptness of Martin-McAllister's response. Had the response not been as prompt, he would not have required the evaluation.

Quirin thought Kass informed Quirin of the disorderly conduct violations on the same day that Quirin and DiLorenzo spoke on the phone. When DiLorenzo informed Quirin of her conclusions, Quirin became convinced he could not fill the position with the Grievant. Kass had alerted him to the existence of the disorderly conduct violations; he already had concerns regarding the Grievant's judgment during the May 3 incident; and the psychological evaluation solidified Quirin's concerns to the point he could not make the Grievant a patrol deputy.

Quirin could not specifically recall how he directed Martin-McAllister regarding the evaluation. He believed he told them he wanted their recommendation and that he was sending them a pretty good Jailer whose fitness for road work needed to be assessed. Quirin did not dispute the Grievant's recollection of his phone conversation with DiLorenzo, and did not object to the Grievant's overhearing it. Quirin suffers from a hearing loss and knew he spoke loudly over the phone. He thought he would have left the area had he been in the Grievant's position, but he did not object to the Grievant's presence.

Norma DiLorenzo

DiLorenzo is a licensed Psychologist with a doctorate in Psychology from the University of Minnesota. The Grievant's evaluation lasted four to five hours and included a California Psychological Inventory; three problem solving exercises; a writing regarding a conflict situation; and an interview with a psychologist and another assessor. Her conclusions rested on this process and any material supplied by the County. This process is standard for an entry level patrol position. She was present for the interview portion of the Grievant's evaluation.

DiLorenzo and Quirin spoke prior to the evaluation so that she could learn what the County considered important. She understood Quirin to be concerned with the Grievant's calmness under pressure and understood that these concerns traced to the May 3 incident.

After the evaluation and prior to her drafting of a final report, she and Quirin discussed the evaluation. DiLorenzo was most troubled by the Grievant's discussion of his vocational aspirations during the interview. Late in the interview, he acknowledged applying to Sparta to become a police officer. She had understood the Grievant's prior responses to indicate a strong preference to stay with the County and an unequivocal desire not to apply to other departments. When DiLorenzo asked if he had applied to other departments while in County employment, he responded in the negative, then embellished the response with an extensive elaboration of why he liked working for the County and hoped to make it his career. This triggered a concern on DiLorenzo's part regarding the integrity of his answers. When she discussed the point with Quirin, she learned of the two other applications, and her concerns grew to the point she did not feel she could recommend his hire. A lie is a bar to a recommendation, and in her view, the Grievant had lied. The lie was based not only on the Grievant's failure to disclose all of the applications, but also on his elaboration on why he wanted to stay with the County after her questioning whether he had made any other applications.

In her experience, an evaluation always includes a non-binding recommendation from Martin-McAllister. Her conclusion that the Grievant was fit for duty means only that he suffers from no diagnosable disorder. The evaluation is not limited to that conclusion.

Dennis Pederson

When Pederson learned of the grievance arbitration, he contacted Martin-McAllister to assure that DiLorenzo would be available to testify. He supplied her with documentation of the May 3 incident. In his view, Quirin's offer of the Patrol Deputy position to the Grievant was conditional. It was appropriate that a conditional offer be made, because the medical nature of the evaluation indicates it should not be pursued as an option unless all the other requirements for hire have been met.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Association's Initial Brief

After a review of the evidence, the Association notes that the grievance "seems not to be difficult", since the Grievant met "all of the posted qualifications but for the recently added possible requirement" that he may have to undergo a psychological evaluation. The Grievant was the first to undergo a psychological evaluation and "was found by the psychologist who evaluated him to be fit for law enforcement work". Thus, he met the contractual requirements to fill the position.

The psychological evaluation cannot be seen as a reasonable work rule. That the Grievant met all posted position requirements prior to being subjected to the evaluation "was appropriate". This establishes that two parts of the Sheriff's "three pronged" rationale for rescinding the job

offer can play no reasonable role in applying the contract to the grievance. The attempt to use a fitness for duty evaluation as a means to bolster pre-existing doubt regarding the Grievant's ability is "utterly disingenuous."

A review of the evidence establishes that DiLorenzo found the Grievant "psychologically fit for duty", but concluded that she could not recommend his hire due to his lack of candor in the testing process. The Sheriff "expanded considerably on the basis for her disinclination to recommend" the Grievant's hire. Examination of Quirin's rationale establishes that the rationale "for the withdrawal of the offer of employment . . . is replete with errors." The County hired the Grievant knowing that he had a record including three disorderly conduct charges. Since Quirin failed to review the Grievant's personnel file, including the job application noting those charges; since Quirin failed to bring up his concern with those charges during the hiring process; and since Quirin never directed DiLorenzo to undertake the background check he neglected to do for himself, it follows that Quirin's concerns cannot be held against the Grievant. Beyond this, Quirin wrote a letter of reference for the Grievant to assist his search for another law enforcement position. This underscores the Grievant's fitness for duty. Quirin's mention of the May 3, 2005 incident ignores that the incident occurred in a County facility and preceded the posting of the position at issue here. Neither this incident nor any other documentation advanced by the County at hearing can grant any solid foundation for Quirin's concern for the Grievant's ability to perform as a road deputy.

Since Quirin noted he might not have used a psychological evaluation if it could not be completed prior to January 1, 2006, it is unpersuasive to conclude that the evaluation can be used to establish the Grievant's failure to meet the minimum qualifications for the position. That this evaluation "was only one of three possible additional requirements" further undercuts its persuasive value under the labor agreement. More significantly, evidence establishes that Quirin viewed the Grievant as a qualified applicant. This is established by Quirin's issuance of a carbine to the Grievant for his use in the CTU, as well as by the Grievant's membership in the CERT. Testimony underscores that the Grievant enjoys the respect of workers and supervisors.

Viewing the record as a whole, the Association concludes that "the County violated the Agreement as charged in the grievance." More specifically, the County violated "the job posting language, the just cause provision and the management rights provision." It follows that the Grievant should "be reinstated to the patrol officer position to which he had been appointed effective January 1, 2006, and that he be made whole for any losses in pay and benefits caused by the withdrawal of the Sheriff's offer of the patrol deputy position retroactive to January 1, 2006." Because the parties "have agreed that there ought to be some reduction of the back pay to which (the Grievant) is otherwise entitled" and since there may be a dispute on the precise scope of a back pay award, "the Arbitrator (should) retain jurisdiction over this case".

The County's Initial Brief

After a review of the evidence, the County notes that as late as the "mid 1990's" the County was using a "'bottom feeder' approach for filling patrol officer positions", which the County characterizes thus:

1. A citizen with an interest in law enforcement volunteers for the Sheriff's Reserve.
2. If the person shows up when called and doesn't cause any problems, he/she is offered an on-call jailer position.
3. If the on-call jailer shows up when called and doesn't cause any problems, he/she is offered a full-time jailer position.
4. The full-time jailer signs a posting when a patrol deputy position becomes vacant and, if the jailer is the senior signer, is awarded the patrol officer position based upon departmental seniority.

Certification requirements changed this process as did County policy decisions to "eliminate the past practice of progressing from jailer to patrol deputy based on seniority". More specifically, the MOU "delineated a clean break between jailer and patrol officer". Even though the Grievant was the sole signer of the posting at issue here, "the Sheriff was free to pursue the open recruitment process".

Quirin "could have required (the Grievant) to apply along with outside applicants if he so chose," but opted instead "to consider the grievant as an outside applicant using the same hiring requirements that he would use for outside applicants". The Grievant is not subject to the grandfathering portion of the MOU, and thus was subject to the screening process Quirin determined to use. It is conceivable that the Grievant would have received the position had he been within the grandfathered group of employees. The Grievant is, in any event, not the first County law enforcement applicant "required to undergo a psychological evaluation".

A review of the evidence establishes that DiLorenzo declined to recommend the Grievant's hire and that Quirin's "own background investigation" led Quirin "to rescind his conditional offer to the grievant and to advertise the patrol deputy position to outside candidates." His decision reflects that "he was trying to avoid liability issues for the county, and to improve the overall quality of the patrol division in the department."

Thus, the evidence shows that Quirin could have denied the Grievant the position and encouraged him to participate in the outside applicant process. Had he done so, it is conceivable there would have been no grievance to hear. To grant the grievance fulfills the adage that "no good deed should go unpunished." The MOU demands that the grievance be denied.

The Association's Reply Brief

The Association characterizes the "bottom feeder" analysis as "a curious and somewhat demeaning statement", which is, in any event, entirely irrelevant to the grievance. Quirin chose to post the position under the labor agreement and is bound to its requirements. What the grandfather clause of the MOU may or may not mean as a quid pro quo simply has no bearing on this posting dispute. Rather than hinging on the MOU, the grievance relies on the unambiguous terms of the labor agreement rather than County speculation. The County chose to focus on the terms of the agreement and is bound to that course. Should the County's reply brief raise arguments not yet asserted, the Association should be permitted to file a reply or the County's new arguments should be stricken from the record.

The County's Reply Brief

Via a July 31, 2007 e-mail, the County waived the filing of a reply brief.

DISCUSSION

I have not adopted either party's statement of the issues. Each presumes fact that is disputed. This may preface their view of the contract, but glosses over the differences to be addressed. The Association's presumes that what the County views as a conditional offer was an "award" of the position, thus making the failure to place the Grievant in the position a disciplinary act. Its reference to "unsubstantiated accusations . . . of untruthfulness" poses legitimate questions regarding the evaluation, but its phrasing states an issue as established fact. The County's presumes fewer facts, but its assumption of a conditional offer glosses over evidence, including Quirin's testimony, that indicates the evaluation reversed a previously made decision. In doing this, the County obscures legitimate questions regarding the evaluation process. My statement of the issues is more generic and broad enough to incorporate the parties' differences.

The interpretive issues focus on Articles 2 and 16. In my view, Article 16, Section 1 governs the grievance. Application of that provision, however, must be prefaced by consideration of Article 2, particularly Section D.

Article 2, Section B plays no persuasive role in the grievance. There was no County policy regarding psychological evaluations at the time of the Posting. Whether or not County use of the psychological evaluation process has become codified as policy, such policy is difficult to fit into Article 2. Work rules, under Article 2, govern general requirements regulating employee conduct at work, see, for example, *Roberts Dictionary of Industrial Relations* (BNA, 1994) at 598. The psychological evaluation process disputed here is the means by which the County assesses the qualifications of an individual employee to perform the duties of a position other than the one the employee currently works. This is specifically governed by Article 16, and difficult to address as a work rule generally binding all employees under Article 2.

The role of Article 2, Section D poses more troublesome points. The parties dispute whether Quirin made a conditional offer to the Grievant. Resolution of this point skirts the dispute, because the parties point to different portions of an ongoing process. There is no contract provision that sheds light on whether Quirin's first or second discussion with the Grievant constitutes a binding offer. Rather, the issue is the contractual validity of Quirin's refusal to place the Grievant in a patrol position on January 1, 2006. That issue spans events from the issuance of the posting through the conclusion of the evaluation. Governing contractual provisions turn on whether Quirin's refusal is an exercise of his authority to "demote" or to take "other disciplinary action" under Article 2, Section D or an appropriate exercise of discretion under Article 16, Section 1.

A demotion or "other disciplinary action" invokes the just cause provision of Article 2, Section D. Quirin's actions cannot persuasively be made a demotion. The Grievant did not suffer any loss of pay or adverse action against his position as Jailer. The Association notes that Quirin authorized the issuance of a carbine for the Grievant to use in his CTU duties, asserting this underscores the Grievant's qualifications for patrol duties. This took place after Quirin denied the Grievant the patrol position, thus underscoring that Quirin has taken no adverse action toward the Grievant as a Jailer. The absence of any adverse action points away from an issue of discipline and toward an issue of qualifications. The Association notes that in his initial communication with the Grievant on December 13, 2005, Quirin did not mention a psychological evaluation, but did mention that the Grievant could fill the job as of January 1, 2006. To conclude this constitutes a binding offer ignores that even under the Grievant's testimony Quirin brought up the evaluation later in the day or on the following day. In any event, the Posting's language undercuts the assertion of an unconditional offer, since it states that the Grievant might have to undergo "A written exam, psychological evaluation, and/or oral interview . . . at later dates." There is no persuasive evidence that the County ever informed the Grievant that it would not assert that contingency. In sum, the grievance poses issues better analyzed as a dispute regarding qualifications under Article 16 than regarding discipline under Article 2, Section D.

The more difficult issue regarding Article 2, Section D is whether the psychological evaluation can be considered a demotion or "other disciplinary action" if it operates as a bar to another promotional opportunity. That issue, however, is better addressed as a function of applying Article 16.

The application of Article 16 is troublesome, particularly regarding its relationship to the MOU. However, Quirin's January 18, 2006 memo establishes that he acted without regard to the MOU. Examination of his exercise of discretion starts from that point and thus must focus on Article 16, Section 1.

As a non-probationary employee, under Article 16, Section 1, the Grievant had the "first opportunity" to fill the patrol position provided he possessed "at least the minimum entry level qualifications for the position." As the Association persuasively notes, Quirin's responses to the grievance highlight three bases for concern that the Grievant did not have these

qualifications. The first is the disorderly conduct violations. The second is the May 3, 2005 incident. The third is Martin-McAllister's refusal to recommend his hire. Ultimately, the application of Article 16, Section 1 turns on whether Quirin could rely on the psychological evaluation without abusing his discretion under Article 16, Section 1. With reluctance, I conclude that he could.

The force of the Association's arguments regarding each of the three asserted bases must be acknowledged. Their persuasive force cannot, however, eliminate any of them as a basis to support Quirin's judgment. The Grievant supplied the information regarding the disorderly conduct violations on his job application, which was part of the personnel file Quirin declined to examine until the posting process neared its end. This cannot obscure that Article 16, Section 1 turns on the Grievant's qualifications. Even if Quirin was negligent, his negligence cannot constitute a qualification for the Grievant any more than failure to verify the Grievant's possession of a valid driver's license could grant him a license. At the time Quirin told the Grievant that he could become a patrol officer, Quirin was aware of the May 3 incident. This does not, however, strip the incident of meaning in the assessment of qualifications. If, as the Association persuasively asserts, examples of solid performance, such as the Grievant's conduct in CTU action that resulted in commendation, can be considered in the assessment of qualifications, then so can examples of questionable performance. Beyond this, it is unpersuasive to conclude that Quirin could not consider an excessive force incident to determine whether an employee could be considered qualified to move from a jail environment of close supervision to a road environment with virtually no supervision.

The force of the Association's arguments is that these considerations would not have barred the Grievant from the patrol position without the adverse conclusion of the psychological evaluation. Examination of Quirin's discretion turns on this point. The parties' arguments focus less on the contractual validity of the examination as a hiring tool than on its use in this case, and this analysis follows that focus. As preface, it should be noted that Quirin's statement that he may not have used the evaluation had Martin-McAllister been less available establishes an unfortunate circumstance from the Grievant's perspective, but affords no basis to question the validity of the evaluation. The Posting noted an interview or written test could have been used, and had the Grievant failed that portion of the process the result would be no more fortunate. More to the point, the interpretive issue remains.

Significant issues surround the evaluation. Quirin spoke to DiLorenzo before the evaluation and before DiLorenzo issued her final conclusion. In that dialogue, Quirin noted that he had concerns traceable to the May 3 incident. DiLorenzo accepted those concerns and County documentation of them. There is no evidence she viewed those concerns or documentation critically. Rather, the evidence indicates she took them as fact. As the Association forcefully argues, this may have biased her view of the Grievant. This concern is, however, academic on this record. DiLorenzo testified that her perception of the Grievant's lack of candor was the primary basis for her adverse conclusion. There is no reliable evidence to indicate that Quirin's concerns had any bearing on the portion of the interview process

which prompted her concern. Beyond this, Quirin's statement of his concerns was above-board and did not seek to bias the evaluation against the Grievant. In any event, Quirin acknowledges that the May 3 incident colored his view of the Grievant. His communication of that concern to DiLorenzo opened his concern to a testing process. There is no dispute that Quirin could have interviewed the Grievant himself under Article 16, Section 1. It is unpersuasive to conclude that by opening his concern to testing by a third party, he compromised the discretion granted the County under Articles 2 and 16.

The Association's concern that the legitimate use of Martin-McAllister ends with a determination of psychological fitness for duty affords no persuasive basis to question Quirin's exercise of discretion. DiLorenzo testified that this conclusion indicates only that the Grievant did not suffer from any diagnosable psychological disorder. It is unpersuasive to assert that "no diagnosable psychological disorder" constitutes "at least the minimum entry level qualifications" for a Sheriff Patrol Deputy. At a minimum, this reads the "at least" references of Article 16, Section 1 out of existence. In any event, the County can reasonably assert that being free of diagnosable psychological disorders does not establish minimal fitness to work the road, bearing the power of arrest and the authority to use armed force in doing so.

The fundamental strength of the Association's position is rooted in whether DiLorenzo's testimony that the Grievant essentially lied tainted Quirin's exercise of discretion. If that issue was the contractually determinative point, then the grievance would, in my view, have to be sustained. I do not, however, believe that is the contractually determinative point.

The labor agreement grants Quirin discretion in assessing qualifications. Article 2, Sections C, L and N, which are not in dispute here, generally grant the County and Sheriff authority over employee promotion and assignment. More specifically, the "provided they meet at least the minimum entry level qualifications for the position" and the "possessing at least the minimum entry level qualifications" references of Article 16, Section 1 establish that Quirin has some discretion to determine whether an employee qualifies to fill a vacancy. The labor agreement is less than precise on the degree of that discretion. The "policy" reference to the "best qualified candidate available" in the final sentence of the section underscores that this discretion involves a qualitative judgment.

There was no competition resulting from the posting, so the judgment involved turns on whether Quirin's view that the Grievant lacked the minimum qualifications constitutes an abuse of discretion. This, in turn, focuses on Martin-McAllister's conclusion that it could not recommend his hire.

Neither the formal report nor Quirin's responses to the Grievant rest on lying. Rather, they rest on the Grievant failing the interview portion of the evaluation due to "integrity" concerns. That failure, in turn, rests on DiLorenzo's shock that the Grievant chose not to fully detail the extent of his applications to other departments after having been specifically asked, coupled with his embellishing in detail on a desire to pursue a career with the County. The Grievant's testimony on rebuttal to DiLorenzo's does not significantly challenge the underlying

factual basis for her adverse reaction. It is evident that she reacted strongly to the means by which the Grievant attempted to "sell" his interest in County employment. Applicants have failed interviews for failing to "sell" themselves aggressively enough. An interview process is inevitably a gauntlet for an applicant and inevitably subjective. In this case, the testimony does not support a conclusion that the Grievant was tricked or misunderstood the dialogue. Rather, he responded aggressively to some initial questions regarding his criminal history. By mentioning Kass, he opened up the Sparta issue. DiLorenzo chose to pursue the point and the Grievant chose to be less than candid in response, highlighting what he hoped was a selling point. DiLorenzo reacted strongly and adversely.

This reaction, in turn, played into Quirin's concerns that the Grievant had reacted too aggressively to a jail incident and had a history of aggressive behavior. The Grievant did not have a long employment history to fall back on and the patrol position is essentially a promotion to a position of higher responsibility coupled with less supervision. Quirin had an objective basis in fact for the concerns that prompted the interview and the interview confirmed his concerns. In my view, I cannot set aside Quirin's judgment without voiding the interview process as a promotional tool. I believe that on these facts this amounts to substituting my judgment for Quirin's. That would be an abuse of the authority granted an arbitrator under Article 3.

As noted above, I reach this conclusion with reluctance. The contractual basis for that reluctance warrants some discussion. The conclusion stated above grants some deference to Quirin's use of a single interview and his reliance on a single interviewer's conclusion at a specific point in the Grievant's career. If the interview or its conclusions were asserted as a bar to the Grievant's assumption of a future patrol position, the conclusion would not stand. The creation of a permanent bar to patrol would make the determination a demotion or "other disciplinary action" under Article 2 Section D, since it would deny the Grievant access to a contractual promotional process otherwise available to Jailers. This constitutes adverse action against the conditions of employment of an individual employee. This cannot persuasively be characterized an assessment of "qualifications" unless a psychological evaluation can be made a character judgment, binding for all time. Doing so would be ironic at a minimum. DiLorenzo noted that her "psychologically fit for law enforcement duties" conclusion denoted no more than that the Grievant did not manifest a diagnosable disorder. Assuming that what makes a disorder diagnosable makes it treatable, the Grievant would have been better off being diagnosed with a disorder than being perceived as less than candid, if his lack of candor in this interview bars future consideration for patrol positions. More to the point, the issue posed here is contractual, and the attempt to make the single exercise of discretion addressed here valid for a future opening moves the act of discretion involved from Article 16, Section 1 to Article 2, Section D.

Nothing stated above should be read to indicate acceptance of the assertion that the Grievant "lied" during the interview. This assertion is unproven and unnecessarily clouds the record. The Association properly objects to the ambiguity surrounding both the questions and the responses that prompted DiLorenzo's shock. To the extent DiLorenzo felt qualified to testify that the Grievant's responses were untruthful, they did not merit such mention in her formal report. That report is itself a troublesome guide to the issues posed by the grievance. To the

extent the report's assertion that "his developmental needs are substantive in nature" translates to "he lied", what is to be taken from this? "He lied" states a moral judgment. Turning moral judgment to scientific fact brings no benefit to morality or to science. More to the point, it becomes fact only to the extent Martin-McAllister is in a position to determine the Grievant's intent. Did he intend to "sell himself", which is the stock in trade of every job applicant, or to misrepresent fact? Did DiLorenzo ask for every job application or simply the most recent? Even if she asked for every job application, did the Grievant accurately perceive the question? Did he try to sell a desire to work "in" the County, or "for" the County? Did DiLorenzo know that two of the departments with which he sought employment are "in" Monroe County? Did she realize that the CTU uses officers from the County, Sparta and Tomah? No certainty is available in the evidence on these points. More significantly, why would the same applicant who informed the County and Quirin in writing that "I am continually applying to agencies that have positions for patrol officers" shield the extent of his search from DiLorenzo?

In sum, the conclusions reached above do not rest on the Grievant's "lying" during the interview. That assertion is unproven. Rather, they rest on DiLorenzo's discomfort with a series of responses that manifested to her a greater willingness on the Grievant's part to aggressively market himself than to respond candidly and completely to a basic request for fact. That reaction has sufficient support in the evidence to play a valid role in her conclusions regarding the January 1, 2006 opening. This conclusion, coupled with the concerns Quirin bore regarding the Grievant's disorderly conduct violations and his response in the May 3, 2006 incident support Quirin's conclusion that the Grievant did not possess "at least the minimum entry level qualifications for the position" of Patrol Deputy as of January 1, 2006.

Before closing it is appropriate to tie this conclusion more closely to the parties' arguments. That the conclusion stated above cannot be stretched beyond this record bears repeating. The "Bottom Feeder" argument is a rhetorical device to highlight the need for rigor in the assessment of qualifications in the move from Jailer to Patrol Deputy. This cannot obscure that the Grievant has performed well enough to gain the respect of co-employees and supervisors, including Quirin. He bears arms in the CTU, which responds to crisis situations. None of the participating departments should be presumed to supply any "warm body" to fill those vacancies, and the contractual issue regarding the Grievant's qualifications is as much about the deference due Quirin as a decision maker under Articles 2 and 16 as it is about the Grievant.

The issue regarding the Grievant's qualifications is more complicated than the Association urges. Quirin issued his letter of recommendation for the Grievant within his first month as Sheriff. It was based on his working with the Grievant as a Jailer, preceded the May 3, 2006 incident, and preceded his awareness of the disorderly conduct violations. The promotion came up less than one year after the Grievant came off probation as a Jailer. That Quirin could have good faith doubt about the Grievant's readiness for the promotion is a more considerable point than the Association's arguments allow.

The MOU plays no role in the conclusions stated above. To the extent it is considered, it supports those conclusions by underscoring the contractual significance of the move from Jailer to Patrol. This supports some deference to Quirin's judgment.

The deference afforded Quirin strains the bounds of reasonableness. I am not convinced his decision could withstand a just cause analysis. However, a single promotional opportunity, not discipline, is at issue here, and the assessment of minimum qualifications has a subjective element. Quirin's decision would violate the labor agreement if he had determined that he could secure a more qualified applicant than the Grievant. However, it is established that Quirin's concerns for the Grievant traced to his qualifications to assume the post January 1, 2006. The evaluation was the "final straw" in Quirin's concerns. Martin-McAllister's failure to recommend addresses not optimal qualifications, but minimal qualifications. As noted above, its "integrity" concerns have a basis in fact to the extent the concern is that the Grievant's aggressive marketing of his desire to work for the County overcame his candor in supplying fact. This is a fine point, but I do not feel I can overturn Quirin's decision without supplying my judgment for his. The contract does not grant that authority. This conclusion marks the difference between this grievance and that addressed in MONROE COUNTY, MA-13305 (McLaughlin, 2/7/07). That matter involved a disciplinary act against an employee with a longer record of competence in the duty at issue. This grievance would, however, come to resemble MA-13305 to the extent the County treats DiLorenzo's evaluation as a bar to a future patrol opening. This decision establishes only that Quirin could reasonably rely on Martin-McAllister's conclusion that the Grievant had a sufficiently poor interview to preclude a recommendation for hire to a vacancy to be filled as of January 1, 2006.

AWARD

The County did not violate the collective bargaining agreement when Sheriff Quirin refused to place the Grievant in the position of Sheriff Patrol Officer effective January 1, 2006.

The grievance is, therefore, denied.

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

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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