

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION**  
and  
**MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)**

Case 685  
No. 68869  
MA-14376

(Floryance Grievance)

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In the Matter of the Arbitration of a Dispute Between  
**MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION**  
and  
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Case 686  
No. 68870  
MA-14377

(Worden Grievance)

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**Appearances:**

Vanden Heuvel & Dineen, S.C. Attorneys at Law, by **Mr. Graham P. Wiemer**, W175N11086 Stonewood Drive, P.O. Box 550, Germantown, Wisconsin 53022-0550, appears on behalf of the Milwaukee Deputy Sheriffs' Association.

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

### **ARBITRATION AWARD**

Milwaukee Deputy Sheriffs' Association, hereafter the Association, and Milwaukee County (Sheriff's Department), hereafter Employer or County, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. On May 6, 2009, the Association filed a request to initiate grievance arbitration requesting the Commission to appoint a WERC Commissioner or staff member to arbitrate two grievances. Pursuant to this request, the Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Pursuant to the agreement of the parties, the two grievances were consolidated for the purpose of hearing and decision. The arbitration hearing, which was held on August 27, 2009 in Milwaukee, Wisconsin, was not transcribed. The parties filed post-hearing written argument by November 3, 2009 and the record was closed on November 6, 2009; following the receipt of a delayed exhibit.

### **ISSUES**

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

Was there just cause to suspend Detective Worden and Deputy Floryance for four days?

If not, what is the appropriate remedy?

### **APPLICABLE RULE PROVISIONS**

#### **MILWAUKEE COUNTY SHERIFF'S OFFICE RULES AND REGULATIONS**

##### **202.20 Efficiency and Competence**

Members shall adequately perform the duties of their assigned position. In addition, sworn members shall adequately perform reasonable aspects of police work. "Adequately perform" shall mean performance consistent with the ability of equivalently trained members.

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

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(u) Substandard or careless job performance.

### **RELEVANT BACKGROUND**

Special Operations is the division of the Milwaukee Sheriff's Department which has the responsibility to serve civil process, including evictions. At times, Deputies serving evictions work with a partner.

If a Deputy needs to enter property in order to properly execute the eviction and the Deputy does not have a key that unlocks the door, then the Deputy may be required to force a door. The Deputies generally notify their supervisor and the property owner of a forced door. The property owner has the option to file a claim for damages with the County.

On December 23, 2008, Deputy Floryance, hereafter Deputy F, and Detective Worden, hereafter Detective W, were partners assigned to execute evictions. Detective W kicked in the door of one of the properties.

Deputy F subsequently informed the property owner of the forced entry and the property owner responded that she had provided a key to that door. Deputy F then examined the eviction paperwork packet and discovered that it contained a key to the door. Deputy F notified Lieutenant Kernan of these events.

Following an Internal Affairs investigation, Sheriff David A. Clarke issued Order No. 1348 and 1349 imposing a four-day suspension, without pay, on Deputy F and Detective W, respectively, for violating Milwaukee County Sheriff's Office Rules and Regulations Efficiency and Competence and Milwaukee County Civil Service Rule VII, Section 4(1) - (u) Substandard or careless job performance.

The Association and the affected Officers grieved the suspensions. Thereafter, the parties submitted the grievance to arbitration under their labor contract.

### **POSITIONS OF THE PARTIES**

#### **County**

Deputy F and Detective W are experienced Deputies and each has served in the process area for some time. Each is aware of the rules governing the conduct of members of the Department by virtue of their training, experience, publication of rules and policies, as well as having rulebooks and manuals available to them in their work unit.

It is the Deputy's responsibility to review the documentation to assure adequate and successful job performance. Had Deputy F checked the eviction paperwork, then he would have discovered the key prior to the forced entry. As recently as 2008, Deputy F received discipline in the form of a written reprimand for violating Department rules concerning efficiency and competence.

Prior to forcing entry, Detective W did not check the documentation or ask Deputy F if the documentation contained a key. Detective W admitted that he did not adequately communicate with his partner.

Each Deputy has admitted their mistake, but neither wishes to be held accountable for the consequences of his conduct. If indeed there is some sense of remorse for their negligence, it is only appropriate that there be accompanying discipline to bring true atonement.

### **Association**

If there were any inefficiency present on December 23, 2008, it was that the Department had issued no rule or directive relative to an indication in the eviction paperwork that a property owner had provided a key. After December 23, 2008, the Department issued rules relative to eviction paperwork; which rules included the requirement that the form be clearly labeled "Key" to indicate that a property owner had provided a key. After the implementation of these rules, there has not been a wrongful breach.

Under just cause, the employer bears the burden to prove wrongdoing and that the punishment imposed for proven wrongdoing is appropriate under all relevant facts and circumstances. The relevant facts and circumstances do not justify a four-day suspension.

The Sheriff imposed excessive discipline after these Deputies turned down an offer from their supervisors that they considered extremely unethical. This offer was that if they paid for a replacement door personally, they would avoid any discipline relative to this matter. The Department should not be able to elevate discipline arbitrarily.

The Association and the Grievant Deputies respectfully urge the Arbitrator to find no rules violation. If the Arbitrator concludes that the Deputies have violated rules as charged, then the Arbitrator should hold that the level of discipline imposed is inappropriate and reduce the discipline accordingly.

## **DISCUSSION**

### **Just Cause Standard**

In the present case, the parties have agreed that the County's right to discipline the Grievants is subject to "just cause." Under the just cause for discipline standard, the employer has the burden to prove that the employee has engaged in behavior for which the employer has a disciplinary interest. If the employer sustains this burden, then the employer has the burden to prove that the discipline imposed for this behavior is appropriate based upon relevant facts and circumstances.

## Alleged Misconduct

### Deputy F

As set forth in the “Attachment to County of Milwaukee Notice of Suspension,” the charges against Deputy F were sustained on the basis that:

Deputy Floryance failed to adequately review the packet of paperwork provided to him for the eviction in question. Had he gone through the packet he would have found the envelope containing the key to the apartment. Whereas, the procedure was changing to have the clerk write “Keys” on the top of the paperwork it is still the officer’s responsibility to check the paperwork they have prior to making an execution of service for any special circumstances, or in this case, keys.

On December 23, 2008, Deputy F was the partner who had the responsibility to handle the eviction paperwork. At the time of the incident, Deputy F had more than fifteen years of experience with the Department.

Deputy F states that, prior to October 2008, he had not executed evictions, but he had served other types of civil process. According to Deputy F, his training in evictions began in early December of 2008; this training consisted of thirteen days of partnering with Detective Nilsen; and that, on December 23, 2008, he did not “know evictions one hundred percent.” Deputy F states that Detective Nilsen normally controlled the paperwork. Deputy F further states that, in his experience, if the eviction paperwork packet contained a key, then the packet generally would have the word “key” or the letter “K” written on the outside of the packet. Deputy F does not recall any instruction to feel the eviction paperwork packet to determine if it contained a key. During the Internal Affairs investigation, as well as at hearing, Deputy F stated that he did not examine the eviction paperwork packet for a key until after the property owner told Deputy F that she had provided a key and that he apologized to the property owner for his mistake.

### Detective W

As set forth in the “Attachment to County of Milwaukee Notice of Suspension,” the Sheriff sustained charges against Detective W on the basis that:

Detective Worden failed to adequately communicate with his partner relative to the circumstances surrounding the particular eviction they were serving relative to this incident. Prior to forcibly making entry to the apartment, Detective Worden did not ask Deputy Floryance whether they possessed keys to the apartment.

Detective W, who began his employment with the Department in January of 1995, has been a Detective for approximately five years. On December 23, 2008, Detective W gained entrance to the property by forcing the door.

Detective W states that, as a Detective, he has experience in serving civil process, including evictions, and that he received on-the-job training in evictions by partnering with Detective Nilsen. According to Detective W, generally, he does not handle the paperwork on evictions. Detective W states that, because of his experience, he knows that the eviction paperwork packet sometimes contains a key to the property and that a Deputy would know there was a key by feeling the bottom of the packet. In Detective W's experience, the Officer handling the paperwork will state that he has keys to the property. Detective W recalls that, prior to December 23, 2008, he had not worked with Deputy F on evictions. Detective W states that, on December 23, 2008, he did not examine the eviction paperwork packet to determine if it contained a key prior to forcing the door. Detective W further states that he made a mistake when he did not ask Deputy F if Deputy F had a key to the property prior to kicking the door.

### **Summary**

On December 23, 2008, Deputy F and Detective W each knew that the eviction paperwork packet could contain a key that opened the door to the apartment. Given this knowledge, as well as the likelihood that forcing a door would cause damage to private property and make it difficult to secure the door upon leaving, each Officer should have made a reasonable attempt to verify that the eviction paperwork packet did not contain a key prior to forcing entry.

Deputy F, the partner in charge of the paperwork, did not adequately examine the eviction paperwork packet to determine if it contained a key prior to the forced entry. Detective W forced the door without either examining the eviction paperwork packet to determine if it contained a key or asking Deputy F, the partner in charge of the paperwork, if the eviction paperwork packet contained a key.

Neither Officer made a reasonable attempt to verify that the eviction paperwork packet did not contain a key prior to forcing entry. As a result, the Officers caused unnecessary damage to the apartment door and exposed the Department to preventable liability. These two Officers have engaged in behavior for which the Department has a legitimate disciplinary interest.

### **Appropriate Level of Discipline**

Captain Richards, who conducted the Internal Affairs investigation in this matter, states that there have been similar cases in which Officers executing evictions forced doors when the Officers had keys to the doors. Captain Richards does not recall any other IAD case involving

this conduct. Captain Richard recalls that, in the past, these cases have been resolved by issuing an EAD that counsels the Officer not to repeat the conduct.

Sergeant Graber is aware of a Department Officer who kicked in the wrong door when serving an eviction. According to Sergeant Graber, this Officer received a written reprimand.

Sergeant Liebenthal did not testify at hearing. The record includes a copy of the transcript of his IAD interview. In this interview, Sergeant Liebenthal indicated that, in the past, the Department would have responded with something, such as an EAD, written reprimand or referral to IAD. Sergeant Liebenthal did not identify the factors relied upon by the Department in determining which of the three responses were appropriate. Nor did he identify the specific conduct that warranted a referral to IAD, rather than the issuance of an EAD.

According to Captain Richards, the Sheriff has the view that there is an on-going problem with forcing doors when a key is available; that, therefore, the Department's prior responses to this behavior have not been successful in correcting this behavior; and that, therefore, the Sheriff needs to impose a higher level of discipline to correct the problem. Captain Richards does not claim to have personal knowledge of such an on-going problem. Nor does she claim to have personal knowledge of any instance in which an employee received an EAD for forcing a door when a key was available and, thereafter, repeated such conduct.

According to Detective W, supervisors at roll call have not stated that they were coming down harder on evictions gone awry. Detective W also states that, if the Department had been having an on-going problem with Officers mistakenly forcing a door, then he would have heard that there was such a problem. Deputy F states that he had not received prior notice of mistakes in evictions or that the Sheriff was "coming down" on eviction mistakes.

Sergeant Graber states that, in some instances, the Sheriff is high in accountability and has made public statements to that effect. Neither Sergeant Graber, nor any other witness, recalled any Sheriff statement that Officers who force a door when a key is available will be held to a higher standard of accountability.

At hearing, and during the IAD investigation, Detective W claimed that the manner in which the Department processed his case was unusual and troubling. Detective W recalls that, when he initially contacted Lieutenant Kernan to report the incident, Lieutenant Kernan did not say much. Detective W further recalls that, subsequently, this Lieutenant told him to write a report and that Detective W placed this report in the computerized system as a draft. According to Detective W, Sergeant Liebenthal told Detective W that, if Detective W paid for the door, then there would be no need for an investigation. Detective W states that he considered this offer ethically questionable and, therefore, asked to speak with Deputy Inspector Welch, a Department supervisor. Detective W recalls that Deputy Inspector Welch confirmed that, if Detective W paid for the door, then there would be no need for an

investigation. Detective W understands that this offer originated with Inspector Carr. According to Detective W, he declined to pay for the door and his case went to IAD.

Detective W states that Lieutenant Kernan told Detective W to remove his draft report from the system and destroy the draft. According to Detective W, he asked the Lieutenant if he could keep a copy of this draft; that the Lieutenant stated that he could; and that, while Detective W followed this directive of the Lieutenant, the Lieutenant's directive was highly unusual.

Lieutenant Kernan did not testify at hearing. The Internal Affairs "Investigative Brief" summarizes an interview with Lieutenant Kernan. According to this summary, Lieutenant Kernan ordered Detective W and Deputy F to write a report, but rescinded this order after Detective Inspector Welch told him to write it up as an Internal Affairs investigation.

Deputy F states that, on December 26, 2008, Deputy Inspector Welch spoke with him; that he told her what had happened on December 23, 2008; and that, later that day, Sergeant Liebenthal told Deputy F that, if Deputy F would be willing to pay for the door, then the IA case would go away. According to Deputy F, he was stunned and made no response. Deputy F states that, previously, he had not heard of the Department making such an offer. Deputy F states that he understood that Deputy Inspector Welch had asked Sergeant Liebenthal to relay the offer to Deputy F.

In his interview, Sergeant Liebenthal recalled a conversation between Detective W and Deputy Inspector Welch in which the Deputy Inspector reiterated that Detective W could pay for the door or the matter would go to Internal Affairs. Sergeant Liebenthal further recalled that Detective W responded to Deputy Inspector Welch by indicating that such a payment would be inappropriate, perhaps extortionate, and that, if he did something wrong, then the Department should refer the matter to IAD. Sergeant Liebenthal recalled that Deputy Inspector Welch responded that Detective W's payment was voluntary. According to Sergeant Liebenthal, he understood that Deputy Inspector Welch had relayed an offer that originated with Inspector Carr.

In his interview, Sergeant Liebenthal stated that, in his opinion, it was inappropriate to ask the two officers to pay out of their own pocket for a mistake that occurred in the line of duty. Captain Richards states that, in her personal opinion, it would not be appropriate to make an offer to pay for the door or go to IAD, but that she is not aware of such an offer.

Deputy Inspector Welch and Inspector Carr did not testify at hearing. Nor is it evident that Internal Affairs interviewed either.

According to Captain Richards, the normal procedure for reimbursement of damage to private property is that the property owner files a claim with the Sheriff's Department or County; that the Department investigates the claim; and that IAD makes a decision to refer the



claim to the County Corporation Counsel, with a recommendation to pay or negotiate. In his interview, Sergeant Liebenthal stated that, as of the date of his interview on January 9, 2008, the property owner had not filed a claim.

Captain Richards states that Officers do not write reports on matters referred to IAD. Captain Richards agrees that it is not common to remove a report after that report is in the system.

### **Summary**

Under the just cause standard, the purpose of the discipline is to correct behavior for which an employer has a disciplinary interest, rather than to punish an employee. To that end, progressive discipline is a generally recognized component of the just cause standard. Under the just cause standard, the level of discipline imposed must be reasonably related to the magnitude of the employee misconduct and employees who engage in similar behaviors must not be the recipient of unfair disparate treatment.

It is not evident that, in his fifteen years with the Department, Detective W has received any prior discipline. Deputy F's testimony indicates that, in nearly eighteen years of employment, he has had one prior discipline, *i.e.*, a written reprimand. This discipline, which occurred in 2008, was for violating Rule 202.20. The record fails to establish the nature of the conduct that gave rise to this rules violation.

The conduct for which IAD sustained charges and the Sheriff imposed discipline involved a lapse in judgment, rather than intentional misconduct. The lapse in judgment displayed by Deputy F and Detective W on December 23, 2008 is not misconduct of a magnitude that would warrant immediate suspension rather than the imposition of progressive discipline. Deputy F and Detective W's good work records over an extended period, as well as their willingness to acknowledge that they had made a mistake, reasonably indicate that counseling in the form of an EAD is likely to correct the behavior for which they received discipline.

It is evident that, in the past, Officers have engaged in the same type of conduct for which Detective W and Deputy F received discipline. The record indicates that these Officers received counseling in the form of an EAD and that the Department did not refer these Officers to IAD for an investigation of a possible rules violation. It is not evident that, prior to December 23, 2008; an Officer who received such an EAD failed to correct his/her behavior.

The County has a procedure for evaluating a property owner's claim for damages and the County's liability therefore. In the present case, the property owner did not file a claim for damages in accordance with the County's procedure and there had been no evaluation, under the County's procedure, of the reasonableness of the property owner's claims. Given this deviation from established procedure, as well as the lack of evidence that Officers who damage

private property during the execution of an eviction have any obligation to pay for such damage, Detective W's refusal to pay damages is reasonable.

### **Conclusion**

Under the just cause standard, the conduct of Detective W and Deputy F, as well as the Department's response thereto, must be evaluated on the relevant facts and circumstances. By referring Detective W and Deputy F to Internal Affairs for an investigation, the Department treated Detective W and Deputy F differently than other employees who have engaged in similar conduct. The record provides no justification for this difference in treatment.

In referring Deputy W and Deputy F to Internal Affairs for an investigation, the Department subjected these Officers to unfair disparate treatment. Accordingly, neither the referral to Internal Affairs, nor the decision that resulted from this referral, *i.e.*, that Deputy F and Detective W violated Milwaukee County Sheriff's Office Rules and Regulations 202.20 Efficiency and Competence and Milwaukee County Civil Service Rule VII, Section 4(1) - (u) Substandard or careless job performance, comports with the just cause for discipline standard.

The Employer does not have just cause to suspend Detective W and Deputy F for four days, or for any other length of time, because a discipline of suspension is excessive. Upon consideration of the relevant facts and circumstances, including the Officers' work records, the nature of their conduct on December 23, 2008, and the Department's prior response to such conduct, the undersigned concludes that the Department's disciplinary interest in this matter is served by the issuance of an EAD. The Employer has just cause to issue an EAD to Detective W and Deputy F counseling each not to repeat their December 23, 2008 conduct of failing to make a reasonable attempt to determine if the eviction paperwork packet contains a key prior to forcing the door.

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

### **AWARD**

1. There was not just cause to suspend Deputy Floryance and Detective Worden for four days.
2. The appropriate remedy for this unjust discipline is for the County and the Office of the Sheriff to immediately:
  - a) rescind the Internal Affairs decision to sustain charges against Deputy Floryance and Detective Worden;

- b) rescind Office of the Sheriff Orders No. 1348 and 1349, dated April 23, 2009 and accompanying “The County of Milwaukee Notice of Suspension” and the four days suspension referenced therein;
  - c) expunge from Deputy Floryance and Detective Worden’s personnel files all references to the Internal Affairs decision to sustain charges against Deputy Floryance and Detective Worden and to the four-day suspension that is the subject of Office of the Sheriff Orders No. 1348 and 1349, dated April 23, 2009, and accompanying “The County of Milwaukee Notice of Suspension;”
  - d) make whole Deputy Floryance and Detective Worden by restoring to each all wages and benefits lost because of their unjust suspension of four days.
3. A supervisor in the Milwaukee County Sheriff’s Department with authority to issue EADs to Officers who execute evictions may, if he/she so chooses:
- a) counsel Deputy Floryance by issuing an EAD not to repeat his December 23, 2008 conduct of failing to make a reasonable attempt to determine if the eviction paperwork packet contains a key prior to forcing the door;
  - b) counsel Detective Worden by issuing an EAD not to repeat his December 23, 2008 conduct of failing to make a reasonable attempt to determine if the eviction paperwork packed contains a key prior to forcing the door.

Dated at Madison, Wisconsin, this 25th day of November, 2009.

Coleen A. Burns /s/  
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Coleen A. Burns, Arbitrator

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