

BEFORE THE ARBITRATOR

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

and

**MILWAUKEE COUNTY**

Case 756  
No. 70451  
MA-14967

(Scott Woida Suspension Appeal)

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**Appearances:**

**Graham Wiemer**, MacGillis Wiemer, Attorneys at Law, 2360 North 124<sup>th</sup> Street, Suite 200, Wauwatosa, Wisconsin 53226, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

**Roy Williams**, Principal Assistant Corporation Counsel, Milwaukee County, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

**ARBITRATION AWARD**

The Milwaukee Deputy Sheriffs' Association, hereinafter referred to as the Association, and Milwaukee County, hereinafter referred to as the County or the Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of all disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide the appeal of Deputy Scott Woida's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on July 13, 2011. The hearing was not transcribed and the parties did not file briefs. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

**ISSUE**

The parties stipulated to the following issue:

Was there just cause to suspend Deputy Scott Woida for three days? If not, what is the appropriate remedy?

## **BACKGROUND**

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs. Scott Woida is a deputy sheriff who has been with the Department for ten years.

The record reflects that Woida has the following disciplinary history. He received written reprimands in 2003 and 2009 for matters not identified in the record. Prior to the incident involved here, he had never been suspended before.

## **FACTS**

On March 5, 2010, Woida was working at the front desk in the jail. He has worked this post numerous times before and was familiar with the applicable department policies. One of his job duties was to ensure that no contraband entered the jail. On that day, an inmate's caretaker brought in a bag containing medications for an inmate. Woida took possession of the bag and searched it. The bag was a plastic Walgreen's bag. While Woida searched the bag, there was something in the bag that he missed. What he missed, and did not find, was a knife. After Woida searched the bag, the bag was sent to the jail's medical unit. Once it was there, the jail's medical physician searched the bag to inventory the items contained therein. In the course of doing that, the jail's medical physician found a folding knife in the bag. A knife is considered contraband and should not have entered the jail.

The next day, Woida was shown the knife which he missed when he searched the bag the previous day. He then wrote a report about the matter which provided in pertinent part: "Unfortunately, I didn't shake the bag out, and underneath the paperwork contained the knife (and toothpick) revealed to me today."

That same day, Woida's supervisor, Sergeant James Novotny, sent a report to Internal Affairs known as an "Investigation Authorization Request" concerning Woida's failure to find the knife in the bag that he searched. Novotny's request for an investigation was approved, and the Department's Internal Affairs Division opened up a case against Woida.

On October 19, 2010, about seven months later, Lt. Scott Stiff of the Internal Affairs Department interviewed Deputy Woida about what happened on March 5, 2010. In that interview, Woida acknowledged that when he searched the bag containing the medications, he did not find the knife.

Per the Department's standard procedure, Lt. Stiff subsequently wrote a report known as an "Investigative Summary". In that report, Stiff reached the following conclusions about Woida's conduct on March 5, 2010:

During the interview, Deputy Woida acknowledged that upon his search of the bag, he did not locate the knife. He stated that he should have removed all of the contents and shook the bag upside down. He added that he is aware that the knife is considered contraband and should not have entered the facility.

Based on those conclusions, Stiff found that Woida committed a departmental rule violation and a county civil service rule violation. The department rule Woida was accused of violating was 202.20 (Efficiency and Competence), which provides thus:

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.

The County civil service rule Woida was accused of violating was subparagraph (u) of Rule VII, Section 4(l). Subparagraph (u) prohibits "Substandard or careless job performance".

Lt. Stiff's findings were subsequently reviewed by the Sheriff. On November 29, 2010, Sheriff David Clarke issued Order No. 2051 which indicated that Deputy Woida was suspended for three days for violating the two rules just referenced. Attached to Order No. 2051 was a "Notice of Suspension". The wording in the "Notice of Suspension" was verbatim to that contained in Lt. Stiff's "Investigative Summary". As a result, it is apparent that the Sheriff adopted Lt. Stiff's findings as his own and disciplined Woida for the reasons set forth in Stiff's "Investigative Summary".

Based on the parties' collective bargaining agreement, Woida's suspension was appealed to arbitration.

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Some additional facts are referenced in the DISCUSSION below.

**POSITIONS OF THE PARTIES**

**Association**

The Association's position is that just cause did not exist for Deputy Woida's three-day suspension. The Association asks that the discipline be rescinded or reduced. It elaborates as follows.

The Association first addresses the facts. It acknowledges that on March 5, 2010, Woida searched a bag at the jail's front desk which contained a knife, and that he failed to find it (i.e. the knife) in the bag.

As the Association sees it, Woida's failure to find the knife in the bag should be considered in the following context. First, it avers that in many employee misconduct cases, it (i.e. the Association) challenges whether employee misconduct actually occurred. Here, though, that is not the case because Woida has admitted from the get-go that he failed to find the knife when he searched the bag and additionally, that he should have found it. Second, the

Association emphasizes that Woida admitted that that was a mistake. The Association sees that admission as significant. Third, the Association avers that what happened here was atypical because Woida normally performs his work carefully.

Having given that context, the Association next addresses the Employer's contention that by failing to find the knife in the bag when he searched it, Woida violated two rules (one departmental and one county-wide). According to the Association, the County did not sufficiently link Woida's conduct on March 5, 2010 to either of those rules. Aside from that, the Association emphasizes that an employee is not responsible for disproving the charges levied against him; instead, the Employer must substantiate the charges. It's the Association's view that the County did not meet its burden of proving that Woida violated the two rules as charged. Consequently, as the Association sees it, the County's allegation of two rule violations was not substantiated.

Finally, the Association argues that even if Woida did violate a rule when he failed to find the knife in the bag he searched on March 5, 2010, there still was not just cause for the level of discipline imposed on him. Here's why. First, with regard to Woida's past disciplinary history, the Association emphasizes that Woida had not been suspended prior to this matter. The Association contends that under these circumstances, a three-day suspension was not warranted. As the Association sees it, a lesser form of discipline – such as a one-day suspension – would have satisfied the Department's objective and gotten Woida's attention. Second, addressing the matter of comparable discipline, the Association argues that the arbitrator should be guided by the two incidents that Association President Felber testified about where contraband got into the jail (namely, the Sheriff Clarke incident in 2006 and the Deputy Morgan incident in 2008). The Association emphasizes that in those two instances, the employees were not disciplined for what they did, whereas Woida was disciplined (and suspended for three days). As the Association sees it, Woida was subject to disparate (disciplinary) treatment. Accordingly, the Association asks the arbitrator to reduce Woida's punishment to a level more fitting his past disciplinary history.

## County

The County's position is that just cause existed for Woida's three-day suspension. In its view, on the day in question, Woida failed to properly perform his duty when he searched an inmate's bag of medications and failed to find a knife in the bag. As the County sees it, that action constituted workplace misconduct which warranted the discipline imposed. It elaborates as follows.

First, the County reviews the following essential facts about the incident. It notes that a part of Woida's job on March 5, 2010 was to search bags for contraband. While Woida did, in fact, search the bag in question, he did not perform a thorough enough search because he failed to find a knife that was in the bag. Although the knife was found when the bag was searched (for a second time) when it arrived in the jail's medical unit, it is the Employer's view that that does not militate against what happened (namely, that Woida allowed contraband to make it into the jail). According to the Employer, letting the knife get into the jail was a serious breach of security.

Second, the County asserts that to his credit, Woida did not claim to be innocent in terms of his culpability in the incident. Instead, he admitted that he made a mistake in not finding the knife. As the County sees it, it follows from that admission that Woida also acknowledged that he violated two department rules governing employee conduct which, in turn, constituted just cause for discipline.

Finally, with regard to the level of discipline which was imposed, the Employer argues that a three-day suspension was reasonable under the circumstances. With regard to the two incidents which Association President Felber testified about (which the Association cited to try to prove disparate treatment), the Employer avers that those two instances are factually distinguishable from what happened here. Additionally, the County maintains that the employees involved in those instances (one of which is the Sheriff) have employment histories that are different from Woida's. Building on the foregoing, the County maintains that disparate (disciplinary) treatment was not shown. The County requests that the arbitrator give deference to the discipline imposed by the Sheriff. It therefore asks that Woida's three-day suspension be upheld.

### DISCUSSION

The parties stipulated that the issue to be decided here is whether there was just cause to suspend Deputy Woida for three days. I answer that question in the affirmative, meaning that I find the Employer did have just cause to impose a three-day suspension on Woida. My rationale follows.

The threshold question is what standard or criteria is going to be used to determine just cause. The phrase "just cause" is not defined in the collective bargaining agreement, nor is there contract language therein which identifies what the Employer must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. While there are many formulations of "just cause", one commonly accepted approach consists of addressing these two elements: first, did the employer prove the employee's misconduct, and second, assuming the showing of wrongdoing is made, did the employer establish that the discipline which it imposed was justified under all the relevant facts and circumstances. That's the approach I'm going to apply here.

As just noted, the first part of the just cause analysis being used here requires a determination of whether the employer proved the employee's misconduct. Attention is now turned to making that call.

Before I address what Woida did, I've decided to review the following background to give context to what happened. On that day, Woida was working at the jail's front desk. One of his job duties was to ensure that no contraband entered the jail. An inmate's caretaker brought in a bunch of medications for an inmate. The medications were in a plastic bag. Given the job duty just referenced, Woida was obligated to search the bag and ensure that anything that qualified as contraband did not make it into the jail. Woida searched the bag. While he thought he searched the bag completely, he missed something inside the bag – namely, a knife. Thus, there was a

knife in the bag, but Woida did not find it when he searched the bag. After Woida searched the bag, he sent it to the medical unit (which is in the jail itself). Once the bag was sent to the medical unit, the jail's medical physician, Dr. Blanco, searched the bag to inventory the medications contained therein. In the course of doing that, Dr. Blanco discovered that there was a knife in the bag.

Sometimes when an employee is charged with committing workplace misconduct, they deny that any misconduct occurred. That is not the situation here. In this case, Woida has acknowledged all along that he failed to find the knife when he searched the bag and should have. He admitted that when he wrote a report about the matter, he acknowledged it to Internal Affairs when he was questioned about it, and he admitted it when he testified at the hearing. Given those admissions, there is no question that Woida did what he was charged with doing (i.e. failing to find the knife when he searched the bag).

Woida averred that his failure to find the knife in the bag was unintentional, and the Employer does not dispute his assertion. That being so, it is presumed by the undersigned that Woida's failure to find the knife was unintentional (as opposed to being intentional).

Building on that premise, I have decided to begin the next part of my discussion with the old adage that accidents happen. While accidents do indeed happen, someone is often held accountable for them afterwards.

The first question to be answered here is whether fault can fairly be assigned to Woida for missing the knife in the bag when he searched it. I find that it can. Simply put, Woida should have found the knife in the bag. Even if it is assumed that Woida was normally careful when searching bags for contraband, he was not careful enough in this particular instance because he missed the knife. The knife constituted contraband and should not have made it into the jail. While in this instance the knife did not compromise jail security, everyone involved in this matter agrees that a knife certainly could have compromised jail security. That being so, the failure to find the knife in the bag when it was searched at the jail's front desk was an egregious mistake. In some disciplinary cases, an employee's conduct can be mitigated or excused because of the conduct of others. That is not the situation here. In this case, Woida alone was responsible for checking the bag and ensuring that contraband therein did not get into the jail. The fact that Woida missed the knife when he searched the bag cannot be attributed to anyone else. It was solely his mistake.

The next question to be answered here is whether Woida's conduct warranted discipline. I find that it did for the following reasons. Employers have a legitimate and justifiable interest in ensuring that employees perform their work competently and accurately. Employers that tolerate incompetent and sloppy work by their employees can, under certain circumstances, expose themselves to legal and financial risks for doing so. That is why the County has adopted a civil service rule which prohibits "substandard or careless job performance" by employees and why the Sheriff's Department has adopted a work rule requiring department members to "adequately perform" their job duties. The crux of these rules is that if an employee does not perform their work competently, they can be held accountable for that (i.e. disciplined). Said another way, employees who fail to perform their work competently do so at their own peril. As the County

sees it, Woida's work performance on March 5, 2010 fits into both categories of prohibited behavior. I concur, and find that on that day, Woida failed to "adequately perform" his job when he searched a bag and failed to find a knife that was inside the bag, and that this constituted "substandard or careless job performance." Since Woida violated both those rules, he committed misconduct for which he could be disciplined.

The second part of the just cause analysis being used here requires a determination of whether the penalty which the Employer imposed for this misconduct (i.e. a three-day suspension) was appropriate under the circumstances. I find that it was for the following reasons. First, the arbitrator is well aware that up until this matter arose, Woida had not been previously suspended; rather, he had just received two written warnings. The Association contends that under these circumstances, the Employer should have given Woida a one-day suspension (rather than a three-day suspension). While employers oftentimes do start the suspension part of the progressive disciplinary sequence with a one-day suspension (as opposed to a multiple day suspension), this collective bargaining agreement does not require that result. In other words, there is nothing in this collective bargaining agreement that says that the Employer has to impose a one-day suspension (on an employee) before it imposes a three-day suspension. That being so, the Employer has retained the right to impose a multiple day suspension – as opposed to a one-day suspension – when an employee hits the suspension part of the progressive disciplinary sequence. Next, in many disciplinary cases, the Union makes a disparate treatment argument that attempts to show that other employees engaged in the same type of misconduct, but received lesser discipline (than was imposed here). In this case, the Association tried to show that via Felber's testimony on two matters (i.e. the Sheriff Clarke matter and the Deputy Morgan matter). However, I find that Felber's testimony on those matters did not establish disparate treatment. The following shows why. In 2006, Sheriff David Clarke wore his holstered gun into a restricted area of the jail (namely, the booking area). This incident occurred after an escaped killer was recaptured and returned to the Milwaukee County jail, and Sheriff Clarke escorted the prisoner into the booking area. In doing that, the Sheriff walked past a sign telling officers not to bring their weapons into the booking area. The Association sees this matter as applicable here on the grounds that Sheriff Clarke brought contraband (i.e. his gun) into the jail. I don't see it that way. In my view, that scenario posed the question of whether the Sheriff committed a rule violation by bringing his gun into the booking area. That's a different scenario from what happened here. In this case, Woida didn't bring any contraband into the jail himself – someone else did. That being so, I find that the situation where Sheriff Clarke brought his gun into the booking area is inapplicable here. The second instance which Felber testified about (i.e. the Morgan matter) is factually more on point, but is still insufficient to prove disparate treatment. In 2008, Deputy Brian Morgan arrested someone and put the suspect in the back seat of his squad car. Unbeknownst to Deputy Morgan, the suspect had a gun in his possession that the officer did not find. Later, another deputy searched the suspect again, and this (second) deputy found the gun. Deputy Morgan was not disciplined for not finding the gun on the suspect. While the Morgan matter is factually similar to the Woida situation in the sense that both deputies missed contraband which they should have found, the Morgan matter is not enough to prove disparate treatment. Here's why. No other specifics were provided about Deputy Morgan, his length of service, or his disciplinary history. Those matters are all crucial to proving disparate treatment and are lacking here. Thus, more evidence about Morgan's employment history was needed to prove disparate treatment. Putting the foregoing together

then, I find that Woida's three-day suspension was not excessive, disproportionate to the offense, or an abuse of management discretion, but rather was reasonably related to his proven misconduct. The County therefore had just cause to suspend Woida for three days.

Based on the foregoing and the record as a whole, the undersigned enters the following

**AWARD**

That there was just cause to suspend Deputy Scott Woida for three days. Therefore, the appeal is denied.

Dated at Madison, Wisconsin, this 12th day of August, 2011.

Raleigh Jones /s/

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Raleigh Jones, Arbitrator