BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 771
No. 70899
MA-15079

(Kevin Johnson Suspension Appeal)

Appearances:

Graham Wiemer, MacGillis Wiemer, Attorneys at Law, 2360 North 124th 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 Kevin Johnson's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on October 20, 2011. The hearing was not transcribed. The parties filed briefs, and the Association filed a reply brief. On December 2, 2011, the Employer waived the filing of a reply brief, whereupon the record was closed. 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 Kevin Johnson for ten 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. Kevin Johnson is a deputy sheriff who has been with the Department for 16 years.

The record reflects that Johnson has the following disciplinary history. In March of 2011, he received a written reprimand. He had no prior suspensions in his disciplinary file when he was suspended for ten days in July, 2011.

FACTS

This case involves the ten-day suspension just referenced.

On March 4, 2011, Johnson was working in the Department's civil process division, eviction unit. The deputies assigned to that unit perform eight or more evictions per shift all over the county. Because of that, Johnson was familiar with eviction work and the eviction process.

On that day, Johnson worked the first shift. He was partnered that day with Detective Brian Anderson. The pair was assigned to evict Nicole Brickner from her apartment at 3433 South Wollmer Road in West Allis. Brickner was residing in Apartment 103.

Before they left for that assignment, Johnson and Anderson agreed amongst themselves who would do what (relative to the eviction). Specifically, they agreed that Johnson would drive the squad car and Anderson would handle all the eviction paperwork. The record indicates that the latter job (i.e. handling the eviction paperwork) includes the following tasks: first, it involves learning the address/apartment number where the eviction is to occur and the name of the person being evicted; second, it involves calling the property manager to ensure that someone from the property management company (i.e. the landlord) is there during the eviction; and third, it involves completing the paperwork involved in an eviction (known internally as a 50-A process report). The record indicates that at the time, this was the way employees in the eviction unit divided the work amongst themselves (i.e. that in a two-man eviction team, one person would be the driver and the other person would handle all the eviction paperwork).

On their way to the Brickner eviction, Johnson did not review any of the paperwork connected with that eviction. As a result, he did not know the name of the person to be evicted or what apartment they resided in. Anderson was supposed to know that information because, as noted above, that was one of his responsibilities (since he was in charge of all the eviction paperwork). As Johnson drove the squad car, Anderson called the property manager for the Wollmer apartment complex and told him they were en route. The property manager advised Anderson that he would have a representative of the management company meet them when they arrived. When the deputies arrived at the Wollmer apartment complex, they were greeted by William Gehrke, the maintenance man for the Wollmer apartments. Gehrke identified himself and told the deputies he had a key to the apartment (where they were to evict the tenant) and said "right this way".

Anderson and Johnson then followed Gehrke into the apartment building. Gehrke walked up to the third floor of the building with Johnson and Anderson right behind him. Gehrke stopped in front of Apartment 301 and said something to the effect of this is it (meaning this is the apartment where the tenant is to be evicted). Johnson then knocked on the door of Apartment 301. There was no reply. After several moments of knocking without answer, Gehrke used his key and unlocked the door. As the door was pushed inward, a security chain on the inside of the door tightened to the door frame and prevented the door from being opened. Based on past experience, the fact that the security chain was attached told the officers that someone was probably inside the apartment. Johnson then said "now what" to Gehrke. Gehrke responded by telling Johnson to force the door open and break the security chain, which Johnson did.

Once the door was open, the two deputies and Gehrke entered Apartment 301. As they entered, both deputies yelled "police" "sheriff's department" and "we're here to evict you." As Johnson walked down the apartment's hallway, he heard water running from a shower in the bathroom. The bathroom door was open, so Johnson again yelled "we're here to evict you." The person in the shower was Aideliz Guadalupe, the tenant of Apartment 301. Guadalupe, who was irate and angry over having strangers in her locked apartment, yelled "What the fuck are you doing in my apartment?" Johnson responded that they were there to evict her. Guadalupe responded: "There can't be an eviction; I paid my rent." At that point, Detective Anderson asked if she was Nicole Brickner, and Guadalupe responded that she was not Nicole Brickner, nor did she know who that was. Guadalupe then told the officers that they were in the wrong apartment. Anderson then checked the eviction paperwork he had in his possession which said that the person to be evicted was in Apartment 103. Anderson asked Guadalupe if they were in Apartment 103, to which Guadalupe responded, "No, it's not; it's 301." Anderson then went and checked the number on the apartment door. After doing so, Anderson came back to Johnson and exclaimed, "Oh shit, we're in the wrong apartment." Both deputies then apologized to Guadalupe for entering her apartment by mistake and left the apartment. As they were leaving Guadalupe's apartment, Johnson heard Gehrke say that he would fix the (broken) door chain and that the property manager would probably give her (Guadalupe) free rent for the mistake.

After Johnson, Anderson and Gehrke left Apartment 301, they went downstairs to Apartment 103. There, they completed the eviction on Apartment 103 without further incident.

Afterwards, Anderson notified the supervisor that he and Johnson had entered the wrong apartment (specifically, that they had entered Apartment 301 rather than 103). Later, Anderson and Johnson wrote incident reports about the matter.

On March 18, Guadalupe filed a complaint with the Department concerning the March 4 incident at her apartment.

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The Employer then opened an internal investigation into the matter referenced above. The investigation was conducted by Lt. Fred Rutter of the Employer's Internal Affairs Division. As part of his investigation, he interviewed Johnson and Guadalupe. Anderson was not interviewed because he had retired from the Department by that time. Afterwards, Rutter wrote a report known as an "Investigative Summary". In that report he acknowledged that, following this incident, the Department changed its procedure regarding evictions. He then identified the new procedure. Then, he reached the following conclusions:

> Even though the above procedure was not in formerly in place [sic] on March 4, 2011, Deputy Johnson did have an obligation to a level of shared responsibility on each eviction to the information provided to him by his partner and their tactics. Deputy Johnson knew Det. Anderson had conversation with representatives of the property management in regards to having someone meet them with a master key, should the tenant not be present. Upon arrival at the address, Deputy Johnson followed the maintenance man, who he believed knew which apartment they were to evict, to the apartment on the third floor. Deputy Johnson did not have any information that contradicted the apartment he was led to, nor did he attempt to confirm the correct apartment with Det. Anderson. Deputy Johnson has a duty to be certain the eviction is done properly and legally.
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> Deputy Johnson stood outside the apartment door and attempted to announce his presence and receive an acknowledgement from any occupant inside the apartment. Absent a response from inside the apartment, the maintenance man used the master key to open the door to #301. Deputy Johnson again attempted to gain acknowledgement from possible occupants. Deputy Johnson also became aware that the interior security chain was engaged and could only be done by someone inside the apartment. Deputy Johnson did not stop to verify the numbers on the door with the eviction paperwork Det. Anderson possessed. There was no pause by Deputy Johnson to discuss a tactical approach to entering

> the apartment with his partner, even though Deputy Johnson suspected the apartment might be occupied.
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> These considerations should have been made for an officer safety purpose as well as a liability protection purpose prior to Deputy Johnson forcing the door open, which resulted in very minimal damage to the door and a broken security chain that was replaced by the maintenance man. Only after Deputy Johnson and Det. Anderson had entered the apartment did the officers recognize that they were at the wrong apartment.

Based on those conclusions, Rutter found that Johnson committed two departmental rule violations and three county civil service rule violations. The department rules he was accused of violating were 202.20 (Efficiency and Competence) and 202.26 (Attention to Duty). The former 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 latter provides thus:

> 202.26 Attention to Duty
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> Members shall devote their whole time and attention to the performance of their duties. Members are prohibited from engaging in any other activity, business or occupation while on duty. Members shall not sleep on duty. This section of the rule is not applicable to sworn members assigned to sequestered juries.

The County civil service rules he was accused of violating are part of Rule VII, Section 4(l). He allegedly violated subparagraph (l) which prohibits "Refusing or failing to comply with departmental work, policies or procedures"; subparagraph (t) which prohibits "Failure or ability to perform the duties of assigned position"; and subparagraph (u) which prohibits "Substandard or careless job performance".

Lieutenant Rutter's findings were subsequently reviewed by the Sheriff. On July 21, 2011, Sheriff Clarke issued Order No. 2252 which indicated that Deputy Johnson was suspended for ten days for violating the five rules just referenced. Since the five rule violations referenced in Order No. 2252 are the same as the five rules referenced in Lieutenant Rutter's "Investigative Summary", it is apparent that the Sheriff adopted Lieutenant Rutter's findings as his own and disciplined Johnson for the reasons set forth in Rutter's "Investigative Summary".

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

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While Johnson received a ten-day suspension for his involvement in the botched eviction, Anderson was not disciplined at all. The Employer's stated reason for not disciplining Anderson for his involvement in the botched eviction was that he (Anderson) retired before the Employer could impose discipline. The record does not indicate when Anderson retired, but it can be surmised from the record that it was after the March 4, 2011 botched eviction, and before July 5, 2011 (which was the date on Lt. Rutter's "Investigative Summary" documents for both Anderson and Johnson). In the Anderson document, Rutter found that Anderson committed the same five rule violations as Johnson did. Rutter then wrote: "Should Det. Anderson return as an employee of the MCSO, this case will be re-opened."

. . .

The record indicates that following the botched eviction referenced above, the Department changed its procedure regarding evictions. Under the new procedure, both of the officers on the eviction team are to review the paperwork for each eviction and sign the form 50-A process report. As part of that process, each officer is to recite out loud the address and apartment number for the (next) eviction. The purpose of the new procedure is to ensure that both officers are familiar with the site of each eviction and the name of the tenant. Also, in the event that officers enter the wrong address, there are now six specific steps they are to take afterwards. (Note: Those six steps are not identified here). This new eviction policy is known informally among the deputies as the Anderson/Johnson rule.

POSITIONS OF THE PARTIES

Association

The Association's position is that just cause did not exist for Deputy Johnson's ten-day suspension. According to the Association, Johnson did not commit the rule violations he was charged with committing. The Association asks that the discipline be rescinded or reduced. It elaborates as follows.

The Association contends that Johnson's actions prior to and during the eviction in Apartment 301 were reasonable and consistent with the eviction unit's standard operating procedure as it existed at the time. For background purposes, the Association notes that before Johnson and Anderson arrived at the Brickner apartment, they split up the work per the eviction unit's normal procedure and had one person be the driver and the other handle the eviction paperwork. Specifically, they agreed that Johnson would be the driver and Anderson would handle the eviction paperwork. The Association maintains that given that division of the

workload, it was Anderson's responsibility to know the name of the person being evicted and what apartment they lived in. Said another way, it was not Johnson's responsibility to know the name of the person being evicted and what apartment they lived in because he was just the driver. The Association also points out that as Johnson drove the car to Brickner's apartment, he never saw any of the paperwork dealing with the Brickner eviction; Anderson kept that paperwork in his possession. To the extent that the Employer implies Johnson should have taken the eviction paperwork away from Anderson and checked the address and apartment number (before they broke into Apartment 301), the Association submits that's not how partners normally interact. The Association submits that police officers have to be able to rely on and trust their partners. It asks rhetorically otherwise, what good is a partner? As for Johnson's actions during the eviction in Apartment 301, the Association asserts that Johnson followed Department procedure. After he discovered he was in the wrong apartment, he apologized and left. The Association opines that the Employer's allegation that Johnson should have discussed a tactical approach with Anderson before entering the apartment is a red herring because Johnson was not required to consult with Anderson before entering the apartment.

As part of its defense of Johnson, the Association points the finger of blame (for what happened in Apartment 301) at others. First, as already noted, it points the finger of blame at Detective Anderson. The Association repeats the assertion it made earlier that it was Anderson's responsibility to know the correct address of the apartment where the eviction was to be performed; not Johnson's. According to the Association, since Anderson had the eviction paperwork in his possession, he should have known when they went up to Apartment 301 that they were at the wrong apartment and that they were supposed to be at Apartment 103. Building on that, the Association opines that Anderson should have told Johnson they were at the wrong apartment (before they broke into Apartment 301). Second, the Association also points the finger of blame at Gehrke (the apartment building's maintenance man). The Association emphasizes that it was Gehrke who led the deputies to Apartment 301. That apartment, of course, was the wrong apartment. As the Association sees it, it was reasonable for Johnson to assume that Gehrke knew which tenant was to be evicted from his building, and for Johnson to rely on Gehrke's statement to him (when they were outside of Apartment 301) that this was the apartment where the eviction was to occur. The Association repeats that while it ultimately turned out that they entered the wrong apartment, Gehrke thought it was the correct apartment at the time. The Association argues that what happened afterwards was that the Employer held Johnson responsible for the mistakes of others (namely, Anderson and Gehrke). The Association believes that is unfair.

Next, the Association points out that immediately after the eviction in question occurred, the Employer changed the rules regarding eviction procedure. The old procedure was to have just one officer control the eviction paperwork, and for that one officer to know the address for the eviction. The new eviction procedure changed that, and requires both deputies to recite the address to each other before performing the eviction and sign Department form 50-A to verify knowledge of the address of the eviction. According to the Association, "this dramatic rule change was not implemented to change the behavior of Johnson and Anderson, it was implemented to correct what the Department apparently believed to be a bad

practice." According to the Association, what the Employer is essentially doing here is retroactively enforcing its new procedure on Johnson's behavior during the March 4, 2011 eviction. The Association contends that the Employer cannot do that (i.e. hold Johnson to a rule that was not in effect on March 4, 2011).

The Association argues in the alternative that if Johnson did commit a rule violation by his conduct on March 4, 2011, there still was not just cause for the level of discipline imposed on him. Here's why. First, the Association notes that prior to this case, Johnson had not previously been suspended. The Association contends that under these circumstances, a ten-day suspension was excessive. Second, the Association essentially makes a burden of proof argument, and contends that the Employer did not prove that a ten-day suspension was warranted given Johnson's relatively clean disciplinary history and the fact that mistakes were made by others (namely, the maintenance man and Anderson). Third, the Association implies that maybe the reason Johnson was punished so severely was because Anderson's retirement precluded the Employer from punishing him. As the Association sees it, Anderson's retirement left Johnson holding the proverbial bag. Accordingly, the Association asks the arbitrator to either rescind Johnson's punishment in its entirety or reduce it to a written warning.

County

The County's position is that just cause existed for Johnson's ten-day suspension. According to the County, Johnson committed workplace misconduct when he and his partner entered the wrong apartment during an eviction. As the County sees it, that misconduct warranted the discipline imposed. It elaborates as follows.

The County begins by reviewing the following facts to give context to what happened. It notes at the outset that on March 4, 2011, Deputy Johnson and Detective Anderson were assigned to evict Nicole Brickner from her apartment on South Wollmer Road. She resided in Apartment 103. For whatever reason, Johnson and Anderson did not go to that apartment. Instead, they went to the wrong apartment – namely Apartment 301 – where they broke the chain lock on the door and interrupted the resident of that apartment in the shower. After a verbal exchange with that resident, the officers realized they were in the wrong apartment. Not surprisingly, the resident in Apartment 301 was angry over the officers being in the wrong apartment.

Having given that factual context, the Employer makes two main arguments. The first can be stated simply: the officers should not have gone into the wrong apartment (namely, Apartment 301). Instead, they should have gone to the correct apartment (namely, Apartment 103) in the first place. According to the Employer, the officers' mistake was indefensible. Assuming for the sake of discussion that there was a legitimate reason for the mistake, it's the Employer's view that the Association did not proffer a legitimate reason(s) for the mistake.

The Employer's second main argument can also be stated simply: since the officers were partners on the eviction, they were equally responsible for the botched eviction. The Employer implies that fault for the botched eviction should not be apportioned more to Anderson than to Johnson. Instead, fault should be apportioned equally to both. In making that argument, the Employer acknowledges that Johnson was the driver while Anderson was in charge of the eviction paperwork. Be that as it may, it's the Employer's view that both of the officers were jointly responsible for the eviction – or in this case – the botched eviction.

Putting the foregoing points together, the Employer maintains that it had just cause to discipline Johnson for his involvement in the botched eviction. To support that premise, it cites Association President Felber's testimony that there have been other bad evictions in the Department's history, and that the employees involved in same were disciplined. As the Employer sees it, that (disciplinary) history establishes that the Department considers bad evictions to be employee misconduct warranting discipline.

Next, the Employer addresses the matter of the level of discipline which was imposed here. It initially notes that in many discipline cases, the Association raises a disparate treatment claim. It points out that here, though, that didn't happen. According to the Employer, the reason the Association didn't raise a disparate treatment claim is because "that argument has been taken from them" by Detective Anderson's retirement. The Employer avers that if Anderson had not retired, he would have been disciplined (just as Johnson was). However, Anderson retired before he could be disciplined. The Employer believes it is significant that the final page of the "Investigative Summary" document states that "should Detective Anderson return as an employee of the MCSO, this case will be reopened." Next, the Employer argues that a ten-day suspension was reasonable under the circumstances. It acknowledges that prior to this case, Johnson had not been previously suspended. Be that as it may, the Sheriff decided that a ten-day suspension was warranted. According to the Employer, that discipline should pass muster in light of the comments made about Johnson by management officials in the "Individual Comments" document (i.e. Jt. Ex. 7). The County therefore requests that the arbitrator give deference to the discipline imposed by the Sheriff, and uphold Johnson's ten-day suspension.

DISCUSSION

The parties stipulated that the issue to be decided here is whether there was just cause to suspend Deputy Johnson for ten days. My answer to that question is split as follows. I find that the Employer did have just cause to discipline Johnson for being part of the eviction team that entered the wrong apartment on March 4, 2011. That should not have occurred. However, I further find that a ten-day suspension was not warranted under the circumstances because fault for that misconduct primarily lies with others. Accordingly, I reduce Johnson's discipline to a written warning. 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.

Normally, when I address this part of the just cause analysis, I focus first on the employee's conduct and then address whether that conduct constitutes misconduct warranting discipline. In this case though, I've reversed that normal order. Thus, I'll address Johnson's conduct in this saga after I comment on the following.

I'm going to start my discussion by addressing the overall big picture. Although the Association never acknowledged it at the hearing or in its briefs, the Anderson/Johnson eviction team screwed up when they entered the wrong apartment on March 4, 2011. Simply put, that should not have happened. It is noted at the outset that law enforcement officers are empowered to break locks and enter residences without the resident's consent under certain circumstances which need not be elaborated on here. When they do so though, it certainly behooves them to be where they are supposed to be (meaning the correct place). If they aren't, and enter the wrong place, they expose themselves and the Employer to legal and financial risks for doing so. For that reason, the Employer has a legitimate and justifiable interest in ensuring that deputies who are performing evictions – and entering locked residences – be at the correct place. That didn't happen, of course, on March 4, 2011. On that date, the officers who were to evict Brickner went to Apartment 301 instead of Apartment 103. Then, they broke into Apartment 301 which was the wrong apartment. Not surprisingly, the resident of that apartment (i.e. Apartment 301) was angry over their mistake and violation of her privacy. While the officers apologized to that tenant for their mistake, their apology did not wipe the slate clean, so to speak. The fact remains – they shouldn't have broken into the wrong apartment in the first place.

While the Employer does not have an express work rule which says that officers who perform evictions are not to enter the wrong residence, it doesn't need one because that is implicit. As was noted earlier, that simply isn't supposed to happen. Besides, employees are supposed to perform their work competently. To that end, 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 Anderson/Johnson eviction team violated the two

work rules just noted when they entered the wrong apartment on March 4, 2011. Given that finding, it's my view that I need not address the other three alleged rule violations.

Next, the Association's strategy in this case is to deflect attention away from Johnson and onto others who were involved in this saga, namely Gehrke and Anderson. I'll review their conduct before I review Johnson's conduct.

When the officers arrived at the Wollmer apartment complex to do the Brickner eviction, apartment maintenance man Gehrke met them and said "right this way". The officers then followed Gehrke into the apartment building. Gehrke walked past the first floor where Brickner resided in Apartment 103 and went up to the third floor, specifically to Apartment 301. Then, Gehrke said something to the effect of this is it (meaning this is the apartment where the tenant is to be evicted). The clear implication from the foregoing is that Gehrke thought the tenant to be evicted was in Apartment 301. He was wrong. One would think that the apartment maintenance man would know which tenant was to be evicted. The fact that Gehrke led the officers to the wrong apartment makes him partially responsible for what happened next (i.e. for the officers breaking into the wrong apartment).

The focus now turns to Anderson's conduct in this matter. Anderson was in charge of the eviction paperwork. As such, it was his job to know the name of the person being evicted and what apartment they lived in. The eviction paperwork Anderson had in his possession clearly indicated that the person to be evicted (Brickner) lived in Apartment 103. Given what happened here, it is apparent that Anderson dropped the proverbial ball and did not check the eviction paperwork he had in his possession before he and Johnson broke into Apartment 301. He should have. Had he done so (i.e. checked the Brickner eviction paperwork), he would have seen that the person to be evicted was in Apartment 103 – not Apartment 301. The fact that Anderson failed to check the eviction paperwork in his possession before he and Johnson broke into Apartment 301 makes Anderson partially responsible for what happened (i.e. for the officers breaking into the wrong apartment).

While I just found that Gehrke and Anderson were both partially responsible for what happened, I further find that Johnson was the least culpable (meaning the least at fault) of the three. Here's why. First, as already noted, when Johnson arrived at the apartment complex, Gehrke said "right this way" whereupon Gehrke led Johnson to Apartment 301. Gehrke then authorized Johnson to break the lock of that apartment. Under these circumstances, I think it was reasonable for Johnson to assume that Gehrke knew which tenant was to be evicted from his building, and for Johnson to rely on Gehrke's statement to him (when they were outside of Apartment 301) that this was the apartment where the eviction was to occur. Second, Johnson was the driver that day. When this incident occurred, the practice in the eviction unit was that the driver did not review the paperwork for the next eviction; the other officer had that duty. Consistent with that practice, Johnson did not see or review the Brickner eviction paperwork prior to the officers breaking into Apartment 301. Thus, he did not know they were to evict the tenant in Apartment 103. Under these circumstances, I think it was reasonable for Johnson to assume that Anderson knew which tenant was to be evicted because Anderson had that

information in the eviction paperwork in his (i.e. Anderson's) possession. Additionally, as previously noted, it was Anderson's job to know that information.

Not surprisingly, after the botched eviction in question occurred, the Employer changed the rules governing eviction procedure. As previously noted, the old procedure was to have just one officer control the eviction paperwork, and for that one officer to know the address for the eviction. The new eviction procedure changed that. Specifically, the new rule requires both deputies on an eviction team to be familiar with the information relative to each eviction. Now, both officers are to know the site for each eviction and the tenant's name. While the Employer certainly has the right to change the eviction procedure so that a screw up like the one which occurred here doesn't happen again, changes in procedure have to be applied prospectively. They cannot fairly be applied retroactively. What the Employer is trying to do in this case is apply its new procedure retroactively so as to hold Johnson responsible for Anderson's failure to know where the eviction was to occur. Simply put, it can't do that. Said another way, the Employer can't fairly hold Johnson to a rule that was not in effect on March 4, 2011.

I've decided to summarize my decision thus far as follows: it was misconduct for the Anderson/Johnson eviction team to enter the wrong apartment on March 4, 2011. Simply stated, that should not have happened. That said, fault for that misconduct primarily lies with Gehrke and Anderson for the reasons stated above. Of the three people involved in this matter, Johnson was the least culpable.

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Having so found, the focus now turns to the second part of the just cause analysis being used here (namely, that the employer establish that the penalty imposed was appropriate under all the relevant facts and circumstances).

When employers decide that an employee's misconduct warrants a suspension of some sort, they usually start with a relatively short suspension of, say, one or two days. That didn't happen here. Instead, the Sheriff decided that a suspension of that length was not long enough, and he imposed a ten-day suspension. At issue here is whether that decision passes arbitral muster.

In addressing that point, I've decided to begin by noting that the undersigned has arbitrated many suspension appeal cases with these parties over the years. In those hearings, what usually happened was that one side or the other offered some evidence to support their position that the discipline which the Employer imposed on the employee involved was either consistent with, or inconsistent with, the discipline imposed on similarly situated employees.

In this case, all the record shows via Felber's testimony is that some employees have been disciplined for what can generically be referenced as bad evictions. However, in and of itself, that general information doesn't provide much guidance because no specifics were

identified concerning the facts of those cases, the employees involved, their work records, and what their discipline was. For example, was it a written warning, a one-day suspension, a five-day suspension, etc.? The record is silent on same.

In this case, that lack of evidence cuts against the Employer. Here's why. When the Employer imposes a multi-day suspension, it has to base the length of the suspension on some objective factors which can withstand arbitral scrutiny. Said another way, the Employer has the burden of showing that the punishment it meted out was not excessive. I find it did not meet that burden for the following reasons. First, the record shows that Johnson is a long term employee with no prior suspensions and a relatively clean work record (but for a recent written warning). The Employer's attempt to sully Johnson's work record by relying on Joint Exhibit 7 is unsuccessful. That document contains notations wherein various supervisors memorialized meetings and/or counseling sessions they had with Johnson concerning a variety of work-related matters. It suffices to say here that that document contains some negative comments about Johnson. Be that as it may, none of those negative comments and/or counseling sessions dealt with Johnson's past eviction work. Insofar as the record shows, Johnson has no history of problems performing evictions. When the objective facts just referenced are considered together, they militate against a ten-day suspension for Johnson's involvement with the botched eviction. Second, it would be one thing if the Employer had shown that Johnson's eviction misconduct was similar to other eviction misconduct cases where a multi-day suspension was imposed. However, as previously noted, the Employer did not show that. Third, I previously found that Johnson was less culpable for what happened at the botched eviction than Anderson was. Building on that premise, one would think that Anderson would have received a punishment that was at least equal to, if not greater than, that imposed on Johnson. However, that didn't happen. I'm well aware that Anderson retired following the botched eviction. Even if it is assumed that he retired to avoid punishment for same, his (Anderson's) retirement left Johnson holding the proverbial bag for the botched eviction. That's problematic because – as just noted – he was the least culpable for the botched eviction, but was the only one who was disciplined for it. Rhetorically speaking, where's the fairness in that? The answer, of course, is that it wasn't fair. The Employer seeks cover from this obvious unfairness by pointing out that Rutter's "Investigative Summary" document contains the notation at the end that says: "Should Detective Anderson return as an employee of the MCSO, this case will be reopened." I find that notation to be an insufficient reason to give the Employer a pass on this matter, so to speak. The simple fact of the matter is that Anderson received no punishment whatsoever for his part in the botched eviction while Johnson, who was less culpable for what happened than Anderson was, essentially took the fall for what happened. That doesn't pass muster under a just cause standard and needs to be remedied.

Given the foregoing, I find that a ten-day suspension was excessive under the circumstances. Accordingly, I reduce Johnson's discipline from a ten-day suspension to a written warning. The Employer shall make Johnson whole for the ten days he was suspended.

In light of the above, it is my

AWARD

1. That there was just cause to discipline Deputy Johnson for being part of the eviction team that entered the wrong apartment on March 4, 2011; and

2. That just cause does not support a ten-day suspension for that misconduct. That punishment was excessive because fault for that misconduct primarily lies with others. The ten-day suspension is therefore reduced to a written warning. The County is directed to make Johnson whole for the ten days he was suspended.

Dated at Madison, Wisconsin, this 9th day of January, 2012.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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