BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 793
No. 71724
MA-15198

(James Urban Suspension Appeal)

Appearances:

Graham Wiemer, MacGillis Wiemer, Attorneys at Law, 11040 West Bluemound Road, Suite 100, 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 James Urban's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on November 29, 2012. The hearing was not transcribed. The parties filed briefs and reply briefs, whereupon the record was closed on February 1, 2013. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

7860

ISSUE

The parties stipulated to the following issue:

Was there just cause to suspend Deputy James Urban 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.

One of the units where deputies can be assigned to work is the civil process unit. The deputies who work in that unit are charged with serving legal documents on people. Specifically, they serve subpoenas, restraining orders, injunctions, summons and complaints. There is no set amount of time it takes to effectuate service. Sometimes, documents can be served in a matter of minutes; sometimes, it takes longer. When a deputy serves a legal document on someone, they are supposed to do it in person. The deputy is not supposed to leave the document with someone else, or slide it under a door. Instead, they are supposed to personally hand the document to the person who is to receive it.

James Urban is a deputy sheriff. He has been with the Department for 18 years. When this matter arose, he was assigned to work in the process unit. Prior to the incident involved here, he had no history of problems performing that work (i.e. serving legal documents). Additionally, he had not been counseled about wasting time or poor work performance as a process server. Prior to the matter involved herein, Urban had a clean disciplinary history with the Employer. Specifically, he had received no written warnings or suspensions. That changed in 2012 when he was suspended for ten days.

FACTS

This case involves the ten-day suspension just referenced.

On April 5, 2011, Urban was working as a process server on the first shift. That day, he was assigned to serve Mark Critton with two restraining orders. At the time, Critton was an inmate of the Milwaukee County Jail, but he was not at the Jail. Instead, Critton was being held at St. Luke's Hospital in Milwaukee where he was being treated for a serious foot injury. Since Critton was not at the jail, deputies were assigned to watch him 24/7 as part of a "hospital watch." The Sheriff's Department has very detailed rules which apply to deputies watching inmates in hospitals as part of a "hospital watch". One of the rules is that the inmate is supposed to be shackled with restraints. Another rule is that when an inmate is in the bathroom, the bathroom door is supposed to be partially open (i.e. not closed). The deputy who was responsible for watching inmate Critton at the hospital during the first shift on April 5, 2011 was Deputy David Mezwinski.

Deputy Urban arrived at Critton's hospital room sometime after 1:00 p.m. When Urban went into the room, Critton was not in his hospital bed, and the shackles used to restrain him were still attached to the bed. That meant that Critton was not in restraints. Urban saw Mezwinski (who he knew) in the hospital room, and told him he was there to serve Critton with some papers. Mezwinski responded by saying that everything was okay, and that Critton was in the bathroom by himself and had been there for awhile because he was constipated. The bathroom door was closed, so neither Urban nor Mezwinski could see into the bathroom. While Critton was supposed to be in restraints (and was not), and the bathroom door was supposed to be partially open (and was not), Urban did not say anything to Mezwinski about either matter. Instead, Urban accepted Mezwinski's assurance that everything "was okay". Urban also did not attempt to open the bathroom door to serve Critton with his papers. Urban's stated reason for not knocking on the bathroom door and serving Critton with his papers was that he (Urban) knew that being constipated is difficult, and he did not want to "exacerbate" Critton's situation. Urban then waited in the hospital room with Mezwinski for Critton to come out of the bathroom. Specifically, he waited there between 45 minutes and one hour. During that time period, Critton stayed in the bathroom behind the closed bathroom door, and Urban and Mezwinski talked to each other in the hospital room.

About 2:00 p.m., the next deputy arrived at the hospital room to relieve Mezwinski and begin his shift watching Critton. The next deputy was Deputy Tim Mooney. When Mooney arrived in the room, Mezwinski told him (Mooney) that Critton was in the bathroom without restraints and was constipated. The bathroom door was still closed. Mezwinski then left the room. Mooney then talked to Critton through the closed door, and told him to finish up. While Mooney was talking to Critton, Mooney heard the sound of something metal hitting the floor in the bathroom. Mooney immediately opened the bathroom door and went inside. Once inside, Mooney searched Critton and secured him without incident; then, he moved Critton out of the bathroom. After doing that, Mooney searched the bathroom floor and found a metal fork. Mooney then moved Critton back to the hospital bed, where he secured him.

After Critton was secured in the hospital bed, Urban served him with the restraining orders and left the hospital room.

. . .

The Employer later opened an internal investigation into the matters referenced above. The investigation was conducted by Lt. Douglas Holton of the Department's Internal Affairs Division. As part of his investigation, Holton interviewed Mezwinski, Urban and Mooney. Holton interviewed Mezwinski and Urban twice.

On May 9, 2012, Lt. Holton submitted a report known internally as an "Investigative Brief". In that report, he recommended that the "disposition" of the "complaints" against Mezwinski, Urban and Mooney be "sustained". That is the jargon used in the Department which means that the employee has been charged with a rule violation.

In the portion that report that related to Mezwinski, Holton reached the following conclusions about Mezwinski's conduct:

> Based on witness statements, along with written entries in the Hospital watch log, Dep. Mezwinski failed to follow proper policy which states, "When the inmate uses the bathroom, the Deputy shall apply belly chains before removing the leg iron or handcuff attached to the bed. If belly chains must be removed, the Deputy shall call for assistance from the institution Deputies and apply leg irons." He also failed to properly document his hospital log, which per policy, should've included bathroom entries along with any issues that Dep. Mezwinski had with his handcuff key.
>
> Instead, Dep. Mezwinski allowed Critton to use the bathroom door with the door closed and without proper restraints for at least 40 minutes. A metal fork would later be located by Dep. Mooney inside the bathroom. Dep. Mezwinski did not have Critton "under control" which is a violation of Policy 202.44 Attending Prisoners.
>
> If Dep. Mezwinski had problems with his handcuff key, he should have contacted dispatch and requested a back-up squad to assist him. Dep. Mezwinski admitted that he did not. Dep. Mezwinski's actions put his safety and the safety of other Deputies at serious risk.

Based on that conclusion, Holton found that Mezwinski committed three department rule violations and three county civil service rule violations. Those rules need not be identified here because Mezwinski's discipline is not being reviewed herein.

In the portion of that report that related to Urban, Holton reached the following conclusion about Urban's conduct:

> Dep. Urban admitted that if he would have been the hospital watch Deputy, he would have left the door partially open in order to properly supervise an inmate, as is policy. Dep. Urban observed possible rule violations and failed to question Dep. Mezwinski as to why the door was not partially open, which would have allowed Dep. Mezwinski to properly supervise the inmate.

Based on that conclusion, Holton found that Urban committed one department rule violation and two county civil service rule violations. The department rule Urban was accused of violating was 202.20. It 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 rules Urban was accused of violating were subparagraphs (l) and (u) of Rule VII, Section 4(l). Subparagraph (l) prohibits "Refusing or failing to comply with departmental work rules, policies, procedures" and subparagraph (u) prohibits "Substandard or careless job performance."

In the portion of that report that related to Mooney, Holton reached the following conclusion about Mooney's conduct:

> Based on the investigation, Dep. Mooney understood that Critton was inside the bathroom and not restrained per policy. Dep. Mooney should have questioned Dep. Mezwinski further about why Critton was not properly restrained. Dep. Mooney should have immediately contacted a supervisor and had Dep. Mezwinski assist him in safely removing Critton from the bathroom.

Based on that conclusion, Holton found that Mooney committed the same department rule violation and county civil service rule violations as Urban did.

Lt. Holton's findings relative to Deputy Urban were subsequently reviewed by Inspector Richard Schmidt. On July 12, 2012, Inspector Schmidt issued a "Notice of Suspension" which indicated that Urban was suspended for ten days. The "Notice of Suspension" document repeated verbatim all of Holton's findings from the "Investigative Brief", and then added the following final paragraph:

> Dep. Urban also spent a total of one hour and fourteen minutes at St. Luke's Hospital waiting for this subject while he was in the bathroom. This time could have been better spent on other work related activities.

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

. . .

The record shows that Mezwinski was suspended for 60 days for his conduct on April 5, 2011. He did not serve that suspension though because he resigned from the Department. His resignation date is not in the record.

The record further shows that Mooney received a written warning for his conduct on April 5, 2011.

POSITIONS OF THE PARTIES

Association

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

The Association begins by maintaining that Urban did nothing wrong on the date in question. As the Association sees it, Urban's sole job that day was to serve papers on Critton. According to the Association, he did his job in that respect because he did, in fact, serve the papers on Critton. Building on that, the Association submits that Urban committed no misconduct for which he could be disciplined.

Next, the Association tries to put Urban's actions in Critton's hospital room an overall context. It notes at the outset that Mezwinski was the "watch" deputy that day. The Association contends that it was his job – and his job alone – to supervise Critton while he was in the hospital and oversee his security and safety. For whatever reason, Mezwinski let Critton go to the bathroom unattended, without being in restraints, and close the door. The Association emphasizes that all that happened before Urban arrived at Critton's hospital room. Thus, when Urban arrived, Critton was not in his bed but was inside the bathroom with the door closed. While the Association does not explicitly admit that the conduct just noted constitutes wrongdoing, it does acknowledge that the Employer had a problem with what Critton was allowed to do (i.e. go to the bathroom unattended, without being in restraints, and close the door). The Association argues that if a deputy in that hospital room failed to adequately perform their job, it was Mezwinski – and not Urban. Said more pointedly, any wrongdoing that occurred in that hospital room is Mezwinski's fault, not Urban's. Once again, that's because Mezwinski was the "watch" deputy. That was his job, and his alone. The Association therefore maintains Urban is not responsible for Mezwinski's mistakes.

As part of its argument concerning the foregoing, the Association notes that Urban has known Mezwinski for years. According to the Association, Urban's prior work experiences with Mezwinski led him to trust Mezwinski. Because of that trust, Urban thought that Mezwinski had a good reason for allowing Critton to be in the bathroom with the door closed. Urban also believed that Mezwinski had properly searched and secured the bathroom before allowing Critton to use it with the door closed. Finally, the Association avers that "nothing bad happened to anyone at all" (as a result of Critton being in the bathroom unattended) "other than Critton's attempts to alleviate his constipation being summarily interrupted."

Second, the Association addresses the length of time that Urban spent in the hospital room before he served Critton the papers. As the Association sees it, the time matter was not the "big deal" that the Employer makes it out to be. According to the Association, waiting for long periods of time before effectuating service is not uncommon. It notes in this regard that Urban testified he routinely waits long periods of time to effectuate service in other cases.

Building on that, the Association submits that, as an example, if service was being made on an employee at a manufacturing facility, Urban might have to wait until the next schedule break in production before serving a person. The Association argues that the fact that Urban was required to wait to effect service in this instance for 45 minutes was not, in and of itself, wrong or a rule violation.

The Association argues in the alternative that even if Urban did commit workplace misconduct on the day in question, there still was not just cause for the level of discipline imposed on him. Here's why. First, the Association emphasizes that prior to this case, Urban had a clean disciplinary record with no prior discipline of any sort, including suspensions. Second, the Association points out that Urban is a veteran employee with 18 years of service. Third, the Association emphasizes that he's worked in the civil process unit for five years. During that time, his work as a process server has never been found to be inefficient and he has never been previously accused of incompetently performing his duties in any way. Finally, the Association characterizes the length of the suspension that was imposed (i.e. ten days) as excessive and heavy handed. In its view, the number of days was seemingly chosen at random. The Association therefore asks the arbitrator to rescind the ten day suspension and reduce Urban's punishment. The level of punishment it suggests as appropriate is a written warning.

County

The County's position is that just cause existed for Urban's ten-day suspension. In its view, Urban committed workplace misconduct on the date in question. Building on that premise (i.e. that Urban committed workplace misconduct), the County maintains that the discipline which was imposed on him for that misconduct was warranted under the circumstances. It elaborates as follows.

The County characterizes this case as "simple and direct" and maintains that there is no dispute about the facts. It summarizes the facts thus. When Urban showed up at the hospital to serve Critton his papers, Critton was in the bathroom with the door closed. Urban knew that was wrong and that the door should have been partially opened so that the inmate could be watched/supervised by the deputy. Urban didn't question Mezwinski about why the door was closed. Urban then waited until Critton came out of the bathroom to serve him with his papers. Specifically, he waited about an hour. During that time period, Urban did nothing but talk with Mezwinski in the hospital room. He never checked on Critton in the bathroom or did anything else to supervise him.

It's the Employer's view that Urban engaged in workplace misconduct and violated Rule 202.20 via the foregoing actions. It characterizes the Association's contention that Urban did nothing wrong as "laughable". Here's why.

First, the Employer avers that when Urban learned that the inmate was behind a closed bathroom door, he should have either questioned Mezwinski about it or done something to

remedy the clearly improper situation. However, Urban didn't do that. Instead, he did absolutely nothing to stop the ongoing rule violation. The Employer sees that as problematic because it turned out that Critton had a metal fork with him inside the bathroom. The Employer characterizes that as a "particularly dangerous situation" because he (Critton) could have used that fork to either harm himself or others. The Employer opines that "the threat to the safety of the deputies, hospital employees, patients, and their visitors [was] palpable." The Employer maintains that while the threat ultimately didn't materialize, that doesn't change the fact that Urban allowed a "particularly dangerous situation" to continue unabated.

As part of its argument on this matter, the Employer contends that at the hearing, Urban tried to shift the blame for the closed bathroom door to Mezwinski. The Employer asks the arbitrator to dismiss that attempt as unavailing. The Employer asserts that while Mezwinski was the "initial wrong doer" in this matter because he was the "watch" deputy, Mezwinski "does not stand alone" because Urban was in the room with Mezwinski for an hour. The Employer argues that by being with Mezwinski in the room for that long, Urban "effectively became part of the hospital watch." Building on that premise, the Employer concludes that Urban could have and should have done something in that time period to lessen the potentially dangerous situation (and check on Critton in the bathroom). He didn't though, and instead simply stood by as a "spectator". The Employer finds fault with Urban for doing that.

Second, the Employer addresses the fact that by his own admission, Urban then waited until Critton came out of the bathroom – almost an hour later – before he served him with his papers. The Employer contends that Urban waited "far too long" to serve the papers on Critton. According to the Employer, that was an "inefficient use of his time" because Urban "could have used his time to address other work related matters."

Turning now to the level of discipline which was imposed, the Employer argues that a ten-day suspension was warranted under the circumstances. In making that argument, the Employer relies solely on what Urban did on the day in question, and repeats the facts already referenced. It makes no arguments whatsoever about progressive or comparable discipline, or the length of the suspension imposed herein. Instead, it simply requests that the arbitrator give deference to the discipline imposed by the Inspector, and uphold Urban's ten-day suspension.

DISCUSSION

The parties stipulated that the issue to be decided here is whether there was just cause to suspend Deputy Urban for ten days. My answer to that question is split as follows. I find that the Employer did have just cause to discipline Urban for engaging in misconduct on the day in question. I'll explain why later. However, I further find that the discipline which the Employer imposed on Urban for that misconduct (i.e. a ten-day suspension) is excessive for the reasons noted later. Accordingly, I reduce Urban's discipline from a ten-day suspension to a two-day suspension. 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 it imposed on the employee 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.

While the Employer's "Notice of Suspension" did not explicitly say so, that document can fairly be read to charge Urban with two deficiencies in his work conduct on April 5, 2011. Those alleged deficiencies will be identified and addressed in the discussion which follows.

Before I identify and address the first charge though, I'm going to review some facts which, in my view, help put that charge in context.

I begin by reviewing Mezwinski's conduct. Mezwinski was assigned to watch Critton as part of a "hospital watch". The Sheriff's Department has very detailed rules which apply to deputies watching inmates in hospitals as part of a "hospital watch". One of the rules is that the inmate is supposed to be shackled with restraints. Another rule is that when an inmate is in the bathroom, the bathroom door is supposed to be partially open (i.e. not closed). For whatever reason, Mezwinski let Critton go to the bathroom unattended, without being in restraints, and close the door. Not surprisingly, given the rules just referenced, the Employer had a problem with how Mezwinski "watched" Critton. Specifically, the Employer avers that Mezwinski should not have allowed Critton to go to the bathroom unattended, without being in restraints, and close the door. It's the Employer's view that by allowing the foregoing to occur, Mezwinski violated the rules just referenced.

While I'm not reviewing Mezwinski's discipline in this case, I find it necessary to nonetheless address one aspect of it because that one aspect is linked to Urban's discipline. What I'm referring to is this: as was noted at the end of the preceding paragraph, it's the Employer's view that Mezwinski violated various departmental rules in his interaction with Critton at the hospital. I have no trouble accepting that premise. Thus, for the purpose of discussion, it is assumed that Mezwinski did, in fact, violate various departmental rules in his interaction with Critton at the hospital.

Having so found, the focus now turns to a review of Urban's conduct. When Urban arrived at Critton's hospital room, Urban saw that Critton was not in his bed, and the shackles

used to restrain him were still attached to the bed. That meant that Critton was not in restraints. Then, Mezwinski told Urban that Critton was in the bathroom by himself. When Urban looked at the bathroom door, he could see that the door was closed. What Urban did next (after encountering the foregoing) can be succinctly put: he did nothing but talk with Mezwinski.

The first charge which the Employer made against Urban starts with the premise that Urban encountered ongoing rule violations when he went into Critton's hospital room. As already noted, I've accepted that premise. Next, building on that premise, the Employer faults Urban for not doing anything to correct/change the ongoing rule violations which existed in Critton's hospital room.

I begin my discussion on this charge by noting that Urban is an experienced deputy. As such, he knew – when he encountered all the foregoing – that Mezwinski was not following Department rules dealing with inmates in hospitals. Taking that point one step further, Urban knew or should have known that Mezwinski was violating Department rules by his actions.

The Association contends that Urban's inaction was an acceptable response under the circumstances. Here's why. First, the Association emphasizes that Mezwinski told Urban that everything (with Critton) was okay, and that Urban trusted Mezwinski's professional judgment. According to the Association, Mezwinski's assurance, plus the fact that Urban trusted Mezwinski's professional judgment, should excuse Urban's inaction. I disagree. It would be one thing if Mezwinski had specialized knowledge about Department rules dealing with hospital watches that, for whatever reason, Urban did not possess. If that was the case, I could understand Urban deferring to Mezwinski's judgment. However, as already noted, that was not the case. Urban knew the rules covering hospital watches, and he knew that Mezwinski was not following them. Under these circumstances, any trust that Urban placed in Mezwinski's professional judgment was, in a word, misplaced.

Second, the Association contends that Urban is not responsible for Mezwinski's mistakes because it was Mezwinski who was the "watch" deputy. I could easily accept this premise if the record facts dealing with Urban's conduct were different. For the sake of discussion, let's assume that Urban came into Critton's room, served him the papers in the bathroom, and immediately left the room. Had that happened, I'd have no trouble finding that Urban wasn't there long enough to fairly share any responsibility with Mezwinski for Mezwinski's misconduct. However, that's not what happened because Urban didn't go in, serve the papers and immediately leave. Instead, by his own admission, he waited in the hospital room for close to an hour. During that time period, Urban did nothing but talk with Mezwinski in the hospital room. He never checked on Critton in the bathroom or did anything else to supervise him. I concur with the Employer that by being with Mezwinski in the room for that long, Urban effectively became part of the Department's hospital watch team (i.e. he became a de facto member of the watch team along with Mezwinski). Because of that, Urban should have done something in that time period to address the rule violations and potentially dangerous situation that existed (with Critton being in the bathroom unattended). He didn't

though. Consequently, I find that this first charge contains a valid criticism of Urban's work conduct on the day in question.

The second charge which the Employer made against Urban deals with the amount of time Urban spent in Critton's room. Specifically, the Employer faults Urban for waiting until Critton came out of the bathroom – almost an hour later – before he served him with his papers.

I've decided to begin my discussion on this point by noting that there are no express time limits for a deputy to serve papers. That said, none of the examples which Urban cited at the hearing of instances where it took a long time to effectuate service are applicable here. That's because in this instance, Urban knew exactly where Critton was within seconds of walking into the hospital room. He was, of course, in the bathroom behind the closed door.

Faced with that situation, Urban decided he didn't want to simply open the bathroom door and serve Critton with his papers while he was on the toilet. Instead, he'd wait and serve Critton with his papers after he left the bathroom.

Having made that decision though (i.e. the decision to wait and serve Critton after he left the bathroom), the ball was then in Urban's court, so to speak, to move this waiting process along. He could have done that by telling Critton he was waiting for him to exit the bathroom, and giving him some sort of timeline to comply with. However, Urban didn't do that. Instead, he just waited and waited and waited without doing anything to move the process along. As a result, Critton didn't even know that Urban was waiting for him to exit the bathroom. By his own admission, Urban waited about an hour for Critton to exit the bathroom, at which point Urban finally served him the papers. Not surprisingly, the Employer contends that Urban waited too long to serve the papers. I'm hard pressed to disagree. Here's why. Public employers have a legitimate and justifiable public relations interest in ensuring that their employees perform their work in a timely fashion, or at a minimum, at least give that appearance. The reason I've decided to note this basic common sense principle is because Urban seemed oblivious to the way his waiting could be perceived, and the stereotype it perpetuated about public employees. Simply put, Urban should not have waited as long as he did to serve Critton the papers. Consequently, I find that this second charge also contains a valid criticism of Urban's work conduct on the day in question.

The Employer contends that by engaging in the above-noted conduct, Urban violated Department Rule 202.20. That rule specifies that deputies are to "adequately perform" their duties. I find, just as the Employer did, that Urban failed to "adequately perform" his work duties on the day in question. It follows from this finding that since Urban committed a rule violation, he committed misconduct for which he could be disciplined.

. . .

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

I begin by noting that I've 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 that's in the record is the discipline imposed on Mezwinski and Mooney. That's it. Their discipline will be addressed below.

I find that 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, let's look at Urban's disciplinary record. Arbitrators routinely review the employee's disciplinary record when assessing the punishment which an employer has meted out to an employee. The record shows that Urban is a long-term employee who, prior to this incident, had a clean disciplinary record. What I mean by that statement is that he had no prior reprimands/warnings or suspensions in his personnel file. Additionally, he had not been counseled about wasting time or poor work performance as a process server. These objective facts militate against a ten-day suspension for a first offense.

Second, when an employer decides 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 Inspector decided that a suspension of that length was not long enough, and he imposed a ten-day suspension. At the hearing, the Employer's representatives offered no explanation regarding why the Inspector selected the number he selected, or offered an objective basis to justify that number. That's problematic, because it gives the appearance that the number of days was selected at random.

Third, the Employer offered no evidence to show that Urban's misconduct was similar to other cases where a ten-day suspension was imposed. In making that statement, I'm well aware that the Employer imposed a 60-day suspension on Mezwinski for his misconduct. However, Mezwinski's misconduct was different from Urban's misconduct. Additionally, it's important to note that Mezwinski did not serve that suspension. He resigned before he could serve it. Even if it is assumed that Mezwinski resigned to avoid serving the 60-day suspension, his (Mezwinski's) resignation meant that Urban served more of a suspension than Mezwinski did.

Given the foregoing, I find that a ten-day suspension was excessive under the circumstances.

That finding still leaves open the question of what discipline is appropriate for Urban. The Association asks me to reduce Urban's punishment to a written warning. I'm not going to do that. Here's why. Were I to do that, Urban would get the exact same punishment as Mooney got. That would be patently unfair because Urban's misconduct in this matter certainly exceeded Mooney's. Of the three officers involved in this matter, Mooney got the lightest punishment because he was the least culpable. Accordingly, I find that Urban's misconduct warrants more severe discipline than what Mooney got.

After considering all of the above, I find that Urban's misconduct warrants a two-day suspension. I arrived at that number via this process: Urban committed two acts of misconduct, and in my view, each one warrants a day off. Consequently, Urban's discipline is reduced from a ten-day suspension to a two-day suspension. The Employer shall make Urban whole for the eight-day difference between these two levels (i.e. ten days and two days).

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

AWARD

1. That there was just cause to discipline Deputy Urban for his misconduct on the day in question; and

2. That just cause does not support a ten-day suspension for that misconduct. That punishment was excessive. The ten-day suspension is therefore reduced to a two-day suspension. The County is directed to make Urban whole for the eight-day difference by paying him eight days' pay.

Dated at Madison, Wisconsin, this 16th day of April, 2013.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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