

CITY OF OCONOMOWOC POLICE DEPARTMENT
POLICIES & PROCEDURES

DATE: September 7, 2020

HISTORY: April 11, 2016

SUBJECT: Criminal Trespass to Dwelling;
Mandatory Arrest

POLICY NUMBER: 16-061

I. PURPOSE

The purpose of this policy is to conform to the provisions of 2015 Wisconsin Act 176 creating Wis. Stat. 175.403, "Trespassing; Arrest and Removal", and Wis. Stats. 943.14(1) and 943.14(2) pertaining to criminal trespass to dwelling. Wis. Stat. 704.055 was also created dealing with personal property left behind by a trespasser.

II. POLICY

It is the policy of this agency to make full-custody arrests from criminal trespass to dwelling offenses as mandated by Wis. Stat. 175.403(2) if a trespassing suspect refuses to voluntarily vacate the premise of a lawful owner/occupant. All such arrests shall be based upon probable cause as determined by the totality of the circumstances.

III. A law enforcement officer shall not remove a person from dwelling in a landlord-tenant dispute or a dispute between residents, pursuant to Wis. Stat. §175.403(2), unless:

- A. The law enforcement agency or law enforcement officer has received a complaint alleging a violation of the criminal trespass statute; and,
- B. The officer has probable cause that the person to be removed is committing a violation of the criminal trespass statute.

IV. Adherence to this policy is required because the department and officers may be liable for unlawful evictions. *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 872 (7th Cir. 1983) (upholding a sheriff's liability for his department's pattern and practice of not following Wisconsin's civil eviction process).

A. As detailed below, an officer should understand:

- 1. A person may be a tenant with legal rights to remain on the premises, even if that person is not named in a written rental agreement. Removing a person simply because the person is not named in a written rental agreement could result in the officer effecting an unlawful eviction.
- 2. A person may be lawfully present on the premises because the person is an allowable guest. The officer must determine whether the person had consent to enter or remain in the dwelling.
- 3. The person should not be removed unless the person's unlawful entering or remaining on the premises tends to create or provoke a breach of the peace. Good faith landlord-tenant disputes or genuine uncertainty about a person's status as a tenant tend not to create or provoke a breach of the peace because the civil eviction process is designed to peaceably resolve these issues. When a person breaks into a vacant residence and "squats", a breach of the peace is more likely to occur.

V. As outlined below, in many landlord-tenant situations, investigating whether or not an individual is a tenant is factually complex. It is the policy of this agency to investigate alleged violations of Wis. Stat. § 943.14; however, these investigations shall not take priority over critical victim and community protection priorities, such as investigating and responding to violent crimes.

- VI.** Because establishing probable cause in landlord-tenant situations is factually complex, if probable cause cannot be established after a reasonable investigation, the officer shall not remove the individual and shall refer the complaining party to the civil eviction process.
- VII.** In order for a law enforcement officer to have probable cause that a person is committing a violation of the criminal trespass statute, the officer must establish probable cause as to each element of trespass.
- A. Is the person a tenant?:** As an initial matter, the officer must establish that person alleged to be committing the violation is not a tenant who has a legal right to remain on the property.
1. Legal Background
 - a. Under Wisconsin law, the absence of the person's name on a written rental agreement does not establish that the person is not a tenant.
 - b. A tenancy may be created by verbal agreement between the landlord and the tenant. Wis. Stat. §704.01(3m). Like other forms of tenancy, a tenancy established under a verbal rental agreement may only be terminated with proper notice and through the civil eviction process. Therefore, a person who is a tenant and who has not been evicted by the sheriff through the civil eviction process is not trespassing.
 - c. Further, a tenancy at will is created when a person resides in a dwelling "with permission of the tenant's landlord **without** a valid lease and under circumstance **not** involving the periodic payment of rent." Wis. Stat. §704.01(5). Therefore, someone may be a tenant, even if the person does not pay rent on a regular basis. Once a tenancy at will is established it may only be terminated with proper notice and through the civil eviction process. Therefore, a person who is a tenant at will and not evicted by the sheriff through the civil eviction process is not trespassing.
- VIII.** Steps to Investigation. In order to establish probable cause that a person is not a tenant, an officer must do all of the following:
- A.** Establish probable cause that no written or verbal lease agreement existed between the person and landlord nor between the person and any agent of the landlord.
1. Ordinarily, this would require interviewing the landlord, the landlord's agents, the alleged trespasser and any other individuals, such as other residents, who may have knowledge as to the existence of a written or verbal rental agreement.
 2. Reviewing any written lease agreements may be helpful, but the existence or absences of a written agreement does not establish that a separate verbal agreement did not exist.
- B.** Establish probable cause that the person is not a tenant at will.
1. A tenancy at will exists whenever the person resided at the dwelling with the permission of the landlord. The existence or absence of a written rental agreement is generally not relevant to whether or not the person is a tenant at will. To establish the existence or absence of permission, in addition to interviewing relevant individuals, the officer shall investigate all of the following:
 - a. Whether the person lived at the dwelling for a length of time as evidenced by:
 1. The presence of the person's belongings, such as clothes, appliances and other possessions; or,
 2. Whether or not the address of the dwelling is listed on the person's mail, ID or other documents

- b. Whether the landlord or landlord's agent knew of the person's presence at the dwelling and agreed to the person's presence or did not object to the person's presence, as evidenced by:
 1. Whether or not the landlord or landlord's agent had occasion to learn of the person's presence during maintenance or other visits to the property;
 2. Whether of not the landlord or landlord's agent accepted rent from the person; or,
 3. Other relevant information

C. For persons who are not tenants, did the person intentionally entering or remaining without consent. In other words, is the person a guest?

1. Did the person intentionally enter or remain in the dwelling of another without the permission of a person lawfully present? For persons who the officer has established probable cause to believe are NOT tenants, the officer must proceed to consider whether there is probable cause to believe the person intentionally entered or remained in the dwelling without the consent of some person lawfully upon the premises.
2. Or, if no person is lawfully upon the premises, did the person intentionally enter or remain in the dwelling of another without the consent of the owner of the property that includes the dwelling? For persons who the officer has established probable cause to believe are NOT tenants, and when no person is lawfully upon the premises, the officer must proceed to consider whether there is probable cause to believe the person intentionally entered or remained in the dwelling without the consent of the owner of the property that includes the dwelling.

D. Was the non-consensual entry or remaining on the premises under circumstances that tend to create or provoke a breach of the peace?

- Criminal trespass under Wis. Stat. §943.14 requires more than non-consensually entering or remaining on the dwelling. The person must enter and remain under circumstances that tend to create or provoke a breach of the peace.
1. An example of a circumstance that tends to create or provoke a breach of the peace is when a person establishes a dwelling as his or her residence and with the permission of tenant or property owner and later remains on the property with the belief that he or she is a tenant. Wisconsin law contains a civil legal process for handling these situations, which landlords typically use. Landlord-tenant situations which are typically peaceable resolved by the civil legal process are not circumstances that tend to create or provoke a breach of the peace.
 2. An example of a circumstance that may tend to create or provoke a breach of the peace is when a person unlawfully enters a vacant dwelling. In this situation, it is reasonable to expect that neighbors or the owner of the property may be concerned. Particularly if the person who entered the vacant dwelling is confronted and refuses to leave, the circumstances would tend to create or provoke a breach of the peace.
 3. Because creating or provoking a breach of the peace is an element of criminal trespass, it is the policy of this department not to arrest persons in landlord-tenant situations when the person did not enter or remain in the dwelling under circumstances that tend to create or provoke a breach of the peace.

- IX.** If an officer is sent to investigate a violation of Sec. 943.14 (criminal trespass) and, based on his or her investigation, establishes probable cause that the person present (1) is not a tenant, (2) entered a premises or remains on a premises without consent of a tenant or landlord, and (3) that entry or remaining is tending to create or provoke a breach of the peace, the officer shall remove the person from the premises.

X. EXCEPTIONS TO THIS POLICY MAY BE AUTHORIZED ONLY BY THE CHIEF OF POLICE

This policy is effective immediately
and will supersede any directives or understandings in conflict