STATE OF WISCOSNIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION, Complainant,

vs.

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT), Respondent.

Case 671
No. 68270
MP-4453

Decision No. 32590-A

Appearances:

Matthew Granitz, Cermele & Associates, Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53213, appeared at the hearing on behalf of the Complainant Association.

Linda Vanden Heuvel and Victor Forberger, Vanden Heuvel & Dineen, S.C., W175 N11086 Stonewood Drive, P.O. Box 550, Germantown, Wisconsin 53022-0550, appeared on the brief on behalf of the Complainant Association.

Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appeared on behalf of the Respondent County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On September 8, 2008, Milwaukee Deputy Sheriffs' Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against Milwaukee County. The complaint alleged that when the Sheriff promulgated a directive dealing with overtime, that directive altered the parties' collective bargaining agreement and/or repudiated a prior arbitration award which dealt with overtime. The complaint contended that this action, in turn, violated Secs. 111.70(3)(a)5, Stats. On October 22, 2008, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Secs. 111.07(5) and 111.70(4)(a), Stats. On December 1, 2008, the County filed an answer denying the allegations. Hearing on the complaint was held on December 4, 2008 in Milwaukee,

Wisconsin. At the hearing, the Association amended the portion of the complaint dealing with the remedy sought. The original complaint sought to have Directive 13-08 completely rescinded. The amendment seeks to have two lines of that directive deleted. Following the hearing, the Association changed its legal representation from Cermele & Associates to Vanden Heuvel & Dineen. The parties then filed briefs and reply briefs, the last of which was received on May 19, 2009. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Respondent Milwaukee County, hereinafter the County, is a municipal employer with its principal offices located at 901 North Ninth Street, Milwaukee, Wisconsin 53233. The County is the employer of all deputy sheriffs and sergeants in the Milwaukee County Sheriff's Department. At all times material herein, David A. Clarke, Jr. has been Sheriff of Milwaukee County and Inspector Kevin Carr has been second in command in the Milwaukee County Sheriff's Department.

2. Complainant Milwaukee Deputy Sheriffs' Association, hereinafter the Association, is a labor organization with its offices located at 821 West State Street, Milwaukee, Wisconsin 53233. At all times material herein, the Association is, and has been, the certified exclusive collective bargaining representative of all law enforcement employees of the Milwaukee County Sheriff's Department holding the rank of deputy sheriff and sergeant. At all times material herein, Roy Felber has been the Association President.

3. The County and the Association have been parties to a series of collective bargaining agreements which govern the wages, hours and working conditions of the employees in the bargaining unit referenced in Finding 2. The parties' most recent collective bargaining agreement was in effect from January 1, 2007 through December 31, 2008.

4. The collective bargaining agreement referenced in Finding 3 contains an overtime provision. That provision is Sec. 3.02 and provides thus:

3.02 OVERTIME

(1) All time credited in excess of eight (8) hours per day or forty (40) hours per week shall be paid in cash at the rate of one and one-half (1½) times the base rate, except that employees assigned to continuous jury sequestration shall be paid sixteen (16) hours at their base rate and eight (8) hours at the rate of one and one-half (1½) times the base rate for each 24-hour period of uninterrupted duty, and except that first shift hours worked in excess of forty (40) per week shall be paid at the rate of one and one-half (1½) times the base rate.

(2) Overtime needs and required staffing levels shall be determined by the Sheriff.

(3) All scheduled overtime shall be assigned within classification as follows:

(a) Employees shall volunteer for overtime and their names shall be placed on a list in seniority order within each work unit.

(b) When necessary to schedule overtime the assignment shall be rotated by seniority among all volunteers on the list within the work unit where the overtime is being scheduled.

(c) In the event an employee refuses to accept an overtime assignment or there are insufficient volunteers for the work unit where overtime is required, the least senior employee in the classification in the work unit shall be required to work the overtime assignment.

(d) Employees will not be scheduled for overtime when they are liquidating accrued time off or during an approved leave of absence or disciplinary suspension.

(e) For an event identified by the Sheriff as a Special Event, the above procedure shall be utilized on a departmental basis. In the event there are insufficient volunteers for a Special Event overtime assignment the Sheriff shall rotate in the inverse order of seniority among all employees in the department in the classification.

(f) Employees shall not be permitted to volunteer to work during a period of scheduled vacation, personal time, holiday time or compensatory time unless approved to work by the Sheriff. However, for Special Events as defined in (e) above, employees shall have the opportunity to work overtime hours in accord with the above procedures when they are on vacation, on their normal off days, or are using holiday or personal days only under the condition that the Sheriff's Department is under contract to be reimbursed for the non-tax levy overtime expenses incurred for the Special Event.

(4) Employees shall have the option of accumulating one hundred twenty (120) hours of compensatory time, exclusive of holidays, in lieu of cash, within twenty-six (26) pay periods, provided that such compensatory time may be liquidated only with the consent of the department head and if the County determines staffing is adequate and if no overtime assignment will result employees will be allowed to liquidate their accrued compensatory time. If, because of the needs of the department, such compensatory time is not liquidated within the time limited, the unliquidated balance shall be compensated in cash.

(5) Any overtime in excess of thirty-two (32) additional hours worked in a pay period will require the advanced approval of the Sheriff or his designee.

. . .

The collective bargaining agreement also provides that unresolved grievances can be appealed to final and binding arbitration. That language is not reproduced here.

5. The following facts have been extrapolated from the Arbitration Award referenced in Finding 6. On December 9, 2005, an overtime situation arose in the jail unit when several first shift deputies called in sick. What would normally happen under the circumstances is that the scheduling sergeant would consult the so-called overtime list (which is a list of employees who have previously indicated they are available to come in to work on short notice while off duty) and offer the open shift to the senior employees on that list. However, on that date the scheduling sergeant felt he did not have time to use the overtime list to fill the open shifts, and he instead used a different procedure. The procedure he used that day was this: he asked the employees on the preceding shift for volunteers and assigned two of them (to work the overtime). One of the employees who stayed over and worked overtime that day was less senior than Deputy Karabon. Karabon was off-duty at the time and was on the overtime list, but was not called and offered the overtime. Karabon filed a grievance which contended he should have been offered the December 9, 2005 overtime. The County denied the grievance on the grounds that the overtime in question was unanticipated and unscheduled, and it had the right to fill unscheduled overtime by any reasonable means.

6. The grievance referenced in Finding 5 was appealed to arbitration. No hearing was held on the matter. Instead, the parties submitted the grievance to an arbitrator upon a stipulation of facts and exhibits. On November 10, 2006, Arbitrator John Emery issued an Arbitration Award on the grievance. His Award provided in pertinent part:

ISSUES

The parties stipulated to the following statement of the issues:

Did the County violate Section 3.02 of the Agreement when it failed to offer the 12/09/05 overtime assignment to Deputy Karabon?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

1.03 MANAGEMENT RIGHTS

. . .

3.02 OVERTIME

. . .

STIPULATION OF FACTS

1. The issue to be decided by the Arbitrator is:

   Did the County violate Section 3.02 of the Agreement when it failed to offer the 12/09/05 overtime assignment to Deputy Karabon? If so, what is the appropriate remedy?

2. Deputy Karabon is more senior than the Deputy who was offered the 12/09/05 overtime assignment, as Deputy Karabon was hired on 9/22/94 and Deputy Jackson on 9/11/98.

3. Detention Services is a work unit.

4. Deputy Karabon's name was on the volunteer list for 12/09/05.

5. On 12/09/05, Deputy Karabon was on a regular off-day. Thus, he was not liquidating accrued time off, was not on leave of absence, was not on a disciplinary suspension, and was not using scheduled vacation, personal time, holiday time or compensatory time.

6. Three (3) first shift Deputies called in sick for 12/09/05. The first call was made on 12/08/05 at approximately 6:30 p.m.; the second call was made on 12/09/05 at approximately 1:30 a.m.; and the third call was made on 12/09/05 at approximately 5:15 a.m.

7. Other than Sec. 3.02 of the Agreement, there is no document containing guidelines or procedures for overtime assignments.

8. The 8 hour shift on 12/09/05 would not have caused Deputy Karabon to be in excess of 32 additional hours as described in Sec. 3.02(5) of the Agreement.

9. 12/09/05 was not a "Special Event" as described in Sec. 3.02(3)(e) and 3(f) of the Agreement.

10. Primary briefs shall be postmarked by **7/21/06**. Reply briefs shall be postmarked by **8/04/06**. All briefs shall be exchanged through the parties.

11. The grievance packet filed on March 31, 2006 shall be considered **Joint Exhibit 1**. It includes the Grievance Initiation Form dated 12/12/05, the Grievance Disposition Form dated 2/01/06, the Labor Relations Disposition dated 3/14/06, and the 2005-2006 Agreement. This Stipulation shall be considered **Joint Exhibit 2**. **No other documents or facts shall be made a part of this record unless mutually agreed by the parties.**

POSITIONS OF THE PARTIES

The Union

The Union asserts that the grievance is supported by the plain language of the contract. Section 3.02 clearly states that overtime is to be allocated by seniority among the volunteers within each unit. The sole criterion is seniority, without reference to other factors, such as convenience, unanticipated absences, or shifts. The Grievant was in the Jail work unit, was on the volunteer list and was senior to the employee who was offered the overtime. Based on the plain language of the contract, the grievance should be upheld.

Section 3.02 provides exceptions, but none apply here. The County appears to believe that there is a practice of disregarding seniority in cases of

"unanticipated absence," which contravenes the contract language. A practice, even if it exists, however, does not supersede plain contract language.

In the event the Arbitrator finds the contract language to be unclear, however, the Union also asserts that there is no evidence of a past practice that would support the County's action. The record contains no evidence of the Union's knowledge of, or acquiescence to, such a practice, nor is any instance cited where it was followed. Even if evidence of the practice were provided, however, that would not establish acquiescence and, therefore, would not bind the Union. In fact, Sec. 3.02 already provides for unanticipated absences by providing a volunteer list of employees prepared to work on particular days. The County was bound to follow the contractual procedure and the grievance should be sustained.

The County

The grievance is brought under Section 3.02 of the contract, which deals with "scheduled overtime." The overtime in question here was both unscheduled and late developing. The sergeant learned of three absences within an hour of the beginning of the shift. The Grievant was not on duty. In such cases, the Department uses an overtime book, the pertinent entries of which are unavailable for this arbitration. The book would show whether the Grievant signed up for overtime, but in its absence it is the Union's burden to establish that fact. Due to the short time before the shift and the critical need for adequate staffing, the sergeant asked the employees on the preceding shift for volunteers and assigned two of them, one of whom was junior to the Grievant.

There is no evidence that the procedure followed by the County was inconsistent with existing practice under such circumstances and the contract language cited deals with only scheduled overtime. Thus there was no established violation of the contract. The Union would have the Arbitrator apply Sec. 3.02(3) to all overtime, but words have meaning and "scheduled" means scheduled. If the parties intended the section to have a different meaning they would have said so. They did not and the Arbitrator should apply the contractual language according to its terms.

The Union in Reply

The County's defense is limited to just one word – "scheduled." The County would have the Arbitrator take that word out of context and give it an absurdly narrow interpretation. Sec. 3.02(3) refers to scheduled overtime in the sense that the County, according to Sec. 3.02(2) has determined that overtime is necessary. A determination by the Sheriff that overtime is needed, which happened here, triggers Sec. 3.02(3). There is no contractual distinction

between "scheduled" and "unscheduled," which would be the case if the parties had intended such. The Union recognizes the potential for late developing overtime, which is why there is a sign up book for volunteers available to come in on short notice. Finally, the County asserts it is the Union's burden to show that Deputy Karabon was on the overtime list, but the parties stipulated to that fact, which should resolve the issue.

The County in Reply

The Union ignores the use of the critical word "scheduled" in Sec. 3.02(3). The overtime here was unanticipated and unscheduled, so Sec. 3.02(3) is irrelevant to this proceeding. Sec. 3.02(2) is not and vests the Sheriff with authority to determine overtime needs and staffing levels. Absent contrary language the County retains that management right. The lack of language in Sec. 3.02 regarding unscheduled overtime requires the Arbitrator to rely on the practice applied by the Sheriff or the County's reserved management rights under Sec. 1.02.

DISCUSSION

The Union asserts that under Sec.3.02 of the contract, the Grievant was entitled to be called in for overtime on November 9, 2005 ahead of a less senior Deputy, who was offered the overtime instead. In its rebuttal, the County appears to argue in the alternative that (1) in the absence of the relevant entries in the overtime book, the Union has failed to establish that the Grievant was signed up for voluntary overtime on the day in question and (2) even if he was signed up, paragraph 3.02(3) only applies to scheduled overtime, as opposed to the overtime arising here which the County characterizes as unanticipated and unscheduled.

The County's first assertion can be dealt with quickly. Stipulation #4, above, states: "Deputy Karabon's name was on the volunteer list for 12/09/05." Since the parties agreed to this admission of fact being entered into the record, I take it as established that the Grievant was signed up for voluntary overtime on the date in question. That being the case, the discussion moves to the question of whether the County was required to refer to the overtime list in filling the shift openings in this instance.

The second question centers on the use of the word "scheduled" contained in paragraph 3.02(3). The County asserts that "scheduled" means anticipated overtime, which is planned in advance, not overtime that arises as a result of an unexpected contingency. In this regard, the County distinguishes Sec. 3.02(2), which states that: "Overtime needs and required staffing levels shall be determined by the Sheriff," and does not use the word "scheduled." In

the County's opinion, this gives the Sheriff authority to fill "unscheduled" overtime by any reasonable means. I disagree.

The entire section regarding overtime must be read together in order to properly discern the intended process for filling overtime. Paragraph 3.02(2) refers to the Sheriff's discretion to address "overtime needs." Paragraph 3.02(3)(a) establishes the use of a voluntary overtime list on which employees' names shall be listed by seniority. Paragraph 3.02(3)(b) states: "When necessary to schedule overtime the assignment shall be rotated by seniority among all volunteers on the list within the work unit where the overtime is being scheduled." In my view, the phrase "when necessary to schedule overtime" in 3.02(3)(b) relates back to a finding by the Sheriff under 3.02(2) that there are overtime needs. So, a determination by the Sheriff that there are overtime needs under 3.02(2) necessitates scheduling of overtime under 3.02(3)(b), which is to be done by first using the volunteers on the overtime list. In fact, in its initial brief the County admits that the overtime book is ordinarily used in such circumstances. While it may be that on this occasion the scheduling sergeant felt there was not time to refer to the overtime list to fill the shift, the procedure to be followed is clearly delineated in the contract and there is no evidence of an established contrary practice being used under these circumstances.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The County violated Section 3.02 of the Agreement when it failed to offer the 12/09/05 overtime assignment to Deputy Karabon. The County shall make the Grievant whole by paying him for the overtime shift on November 9, 2005 at one and one-half times his normal rate of pay as of that date and shall henceforth follow the contractual procedure set forth in Sec. 3.02 in assigning overtime.

Dated at Fond du Lac, Wisconsin, this 10th day of November, 2006.

John R. Emery /s/
John R. Emery, Arbitrator

7. After the Arbitration Award referenced in Finding 6 was issued, the County complied with it.

8. On July 15, 2008, Sheriff Clarke issued Directive No. 13-08 which dealt with overtime. It provided thus:

202.08 Overtime

202.08.1 Purpose

The purpose of this document is to maintain operations within the agency that balance efficiency with fiscal responsibility.

202.08.2 Policy

It is the policy of the Sheriff's Office to keep overtime expenditures to a minimum. The agency will attempt to minimize overtime through the proper scheduling of staff. If overtime work is necessary, it will be assigned in accordance with applicable labor agreements.

202.08.3 Definition of Terms

Anticipated Overtime: Overtime occurring with more than 1 ½ hours notice as a result of a pre-scheduled need such as vacation coverage, approved leave of absence, special events, etc.

Involuntary Overtime: Overtime made available on a mandatory basis to staff using a systematic approach starting with the least senior employee.

Overtime: Time credited in excess of eight (8) hours per day or 40 hours per week for Deputy Sheriffs and DC48 employees. Overtime is defined as hours worked in excess of 8 hours per day or 40 hours per week for Federation of Nurses and Health Professionals. DC 48 hourly employees, and non-represented employees identified in Chapter 17.16 of the County General Ordinances.

Shift Extension: Shift assignments continued beyond a scheduled tour of duty.

Unanticipated Overtime: Overtime occurring with less than two (2) hours notice as a result of a sick call, failure of an employee to report for work, etc.

Voluntary Overtime: Overtime made available to staff based on seniority using a system of free choice starting with the most senior employee.

202.08.4 References

Deputy Sheriff's Association Memorandum of Agreement, Section 3.02(3)(f)

Milwaukee County Code of General Ordinances, Volume 1, Chapter 17.16

202.08.5 Procedures

Voluntary/Involuntary Overtime

Unless other procedures are outlined in a contractual agreement with a specific group of employees, or outlined in the Bureau/Division overtime policy, unanticipated and anticipated overtime will be scheduled based on the process listed below.

General Procedures

- Bureaus/Divisions shall maintain a separate voluntary overtime sign-up list on every shift. Voluntary overtime will be assigned to the most senior person assigned to the shift where the overtime will be worked. If no one from the shift has signed up for the overtime, it will be given to the most senior person division wide.

- Overtime that is agency wide will be assigned on an agency wide seniority basis within the bargaining units.

- Employees who are off duty whose names appear on the sign-up list shall have an attempt made via telephone to offer the overtime in seniority order. If there is no answer, or the employee refuses the overtime, a notation shall be placed next to the employee's name on the sign-up list by the supervisor making the call. If the overtime is accepted, the employee must be able to report within 45 minutes of the call.

- If an employee is called in to work overtime and he/she reports within the allotted 45 minutes, he/she will receive a minimum of three (3) hours overtime.

- Refusals to work involuntary/voluntary (which has been accepted) overtime will be investigated and may lead to disciplinary action.

- Unless other procedures are outlined in a contractual agreement with a specific group of employees, employees selected to work overtime from a mandatory overtime list must work at least 60 minutes for the period to count as a mandatory overtime assignment.

- No employee will be permitted to work more than 16 hours in succession whether the overtime is voluntary or involuntary.

- The only exception to this rule will be governed by Administrative review.

- It is the employee's responsibility to notify their supervisor when they anticipate working more than 16 hours in succession.

- It shall be the employee's responsibility to notify their supervisor when they have worked, or expect to work, 40 hours of overtime in a pay period. The employee will also notify his/her immediate supervisor of any scheduled or involuntary overtime outside of his/her home bureau/division. Any overtime in excess of 40 hours in a pay period will require the advance approval of the Sheriff or his/her designee.

- Any employee who substitutes for another employee on a mandatory overtime assignment shall not have his/her name removed from the mandatory overtime list. Substituting for another employee does not constitute a mandatory assignment.

- Management retains the general right to refer overtime assignments to the Division or Unit that may best respond to the unique needs of the assignment.

202.08.6 Sworn Personnel

As stated in the Deputy Sheriffs' Association Memorandum of Agreement, Section 3.02(3)(f):

Employees shall not be permitted to volunteer to work during a period of scheduled vacation, personal time, holiday time or compensatory time unless approved to work by the Sheriff. However, for Special Events as defined in (e) above, employees shall have the opportunity to work overtime hours in accord with the above procedures when they are on vacation, on their normal off days, or are using holiday or personal days only under the condition that the Sheriff's Department is under contract to be reimbursed for the non-tax levy overtime expenses incurred for the Special Event.

202.08.7 Supervisory Authorization

All overtime shall have prior authorization from a supervisor. In cases where emergencies arise creating overtime issues, a supervisor shall be notified in person or via Communications as soon as the situation is deemed under control or enough officers are on the scene to maintain control. The supervisor shall determine whether staff on overtime may be released.

Approved:

David A. Clarke, Jr. /s/
David A. Clarke, Jr., Sheriff
Milwaukee County

. . .

This directive applies to all members of the Sheriff's Department – not just those represented by the Association.

9. The Association did not file a grievance relating to the issuance of Directive No. 13-08. Instead, it filed the instant complaint which alleged that the Sheriff's overtime directive altered the parties' collective bargaining agreement and/or repudiated the Emery Arbitration Award.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

Inasmuch as the 2007-08 collective bargaining agreement between the Association and the County provides for final and binding arbitration of disputes which are not resolved by the parties, the Commission will not assert jurisdiction over the Association's allegations that the Sheriff's overtime directive altered the parties' collective bargaining agreement and/or repudiated the Emery Arbitration Award, and constituted a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

Based on the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

The complaint is dismissed.

Dated at Madison, Wisconsin, this 3rd day of July, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

As noted in this decision's prefatory paragraph, the complaint alleged that the Sheriff's overtime directive altered the parties' collective bargaining agreement and/or repudiated the Emery Arbitration Award. The Association contends that the directive violated Sec. 111.70(3)(a)5, Stats. The County's answer denied it violated Sec. 111.70(3)(a)5, Stats., by its actions and alleged that the Sheriff's overtime directive could be challenged via the contractual grievance procedure, including arbitration, but that the Association had failed to use that agreed-upon procedure.

POSITIONS OF THE PARTIES

Association

The Association's position is that the Sheriff failed to abide by the Emery Arbitration Award when he issued Directive 13-08. According to the Association, the reference in that directive to "unanticipated overtime" established that the Sheriff has refused to accept the terms of the Emery Award and is no longer abiding by it. The Association argues that under these circumstances, the directive violated Sec. 111.70(3)(a)5. It makes the following arguments to support these contentions.

First, for background purposes, it notes that the parties have negotiated a contractual process/procedure for handling voluntary overtime situations when there are sudden absences from work (such as when deputies call in sick). It avers that the procedure is found in Sec. 3.02(3) of the parties' collective bargaining agreement. It points out that the term "unanticipated overtime" is not included in that language. Building on the foregoing, it's the Association's view that an overtime situation which arose as a result of someone calling in sick would be covered by the procedure found in Sec. 3.02(3).

The Association distinguishes the overtime situation just noted (i.e. where someone calls in sick) from the examples cited during the hearing in this matter where a deputy is already on duty and they have to extend their work time/shift because an emergency of some kind requires them to stay beyond the end of their regular shift. The Association acknowledges that seniority is not an issue in that type of situation. That said, the Association emphasizes that that emergency type of overtime situation is not involved herein; what's at issue here is deputies who are called in for overtime assignments arising from other deputies' sudden absence from work.

Having given that contractual background, the Association notes that several years ago, an overtime assignment dispute arose when the Employer had to fill some shifts after some deputies called in sick. In that instance, the Employer did not follow the procedure specified

in Sec. 3.02(3); instead, the scheduling sergeant asked for volunteers from the preceding shift. One of those volunteers had less seniority than Deputy Karabon, who was available at the time to work the overtime in question. Karabon grieved, contending that he should have gotten the overtime instead. When that grievance went to arbitration, the Employer argued that the overtime that Karabon was seeking was what it called unscheduled or unanticipated overtime. Building on that premise, the Employer argued that the collective bargaining agreement was silent on the subject of "unanticipated overtime", so the overtime Karabon sought was not covered by the procedure specified in Sec. 3.02(3) and therefore the Employer did not have to fill the overtime by seniority off the overtime list. The Association emphasizes that Arbitrator Emery rejected that proposed interpretation in his decision.

The Association contends that when the Sheriff implemented Directive 13-08, he used it (i.e. the directive) to "get around" the Emery Award because the directive contained an explicit reference to "unanticipated overtime". Obviously, that particular phrase has meaning. To the extent that the County implies that its meaning is inconsequential, then the Sheriff should have no objection to removing this reference from Directive 13-08. That hasn't happened though, so the Association believes that establishes that its "reasons for bringing this complaint are meritorious." As part of its argument on this point, the Association emphasizes that the Employer makes the same arguments about "unanticipated overtime" in this case as it did in the Karabon case (namely that: 1) the Sheriff has constitutional authority to make a rule regarding unanticipated overtime, and 2) unanticipated overtime has always existed.) The Association avers that Arbitrator Emery rejected these allegations in 2006, so "the County should not be allowed to put forward this same argument a second time about the same issue." The Association avers that if the County wants a change in the process for awarding voluntary overtime assignments for sudden absences from work, the County should negotiate with the Association for such a change (rather than make that change unilaterally via a directive).

Next, responding to the County's argument that the complaint should be dismissed because the Association failed to exhaust the parties' grievance and arbitration process, the Association argues that contention is baseless because "exhaustion of the grievance-arbitration process is immaterial to the alleged prohibited practice." It cites a prior complaint case between the parties – MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT), DEC. NO. 32257-C (WERC, 12/08), specifically footnote 5 – for the proposition that "exhaustion of the grievance and arbitration process is only required for claims alleging that some part of the labor agreement has been violated." The Association emphasizes that here, though, it already grieved and won an arbitration decision in which the Sheriff argued that "unanticipated overtime" fell outside the process for assigning voluntary overtime spelled out in Sec. 3.02 of the Agreement. Because the Sheriff is again contending that "unanticipated overtime" falls outside the process for assigning voluntary overtime spelled out in Sec. 3.02 of the Agreement, the Association argues in this proceeding that the Sheriff is refusing to accept the terms of the Emery Arbitration Award. In other words, the Association is asking in this prohibited practice proceeding that the Emery Award be held final and binding on the parties. It maintains that to hold otherwise "would render collective bargaining agreements unenforceable and the

collective bargaining process itself little more than a make-work program for labor relations staffers and arbitrators."

Finally, responding to the County's argument that the reference to "unanticipated overtime" is needed in the directive because it concerns other bargaining units, the Association argues that this contention is irrelevant to the overtime procedures of deputies that have been negotiated between the parties. It argues in the alternative that if this contention is relevant, there is no evidence in the record for assessing the merits of this claim. It notes in this regard that the County did not put into the record the collective bargaining agreements that cover these other bargaining units, nor did it indicate how the overtime procedures in these bargaining units compare to the overtime procedures that exist for deputies. Accordingly, even if this argument is relevant, it has no evidentiary significance.

In sum, the Association sees its complaint as an attempt to enforce the Emery Arbitration Award. It asks the Examiner to find that the County violated Sec. 111.70(3)(a)5 when the Sheriff issued Directive 13-08. The remedy which the Association seeks is as follows: 1) it asks that all references to "unanticipated overtime" be struck from Directive 13-08; 2) it asks that the Sheriff be ordered to "abide by" the Emery Arbitration Award; and 3) it asks that the Sheriff be directed to post a notice "regarding these actions".

County

The County's position is that it did not violate Sec. 111.70(3)(a)5 when Sheriff Clarke issued Directive 13-08. As the Employer sees it, the Association's entire case "rests upon the premise that the mere publication of the directive somehow represents a refusal to comply with an arbitration award." It not only disputes that premise, but also asserts that the Association "failed to demonstrate even one example of how this is so." As a result, it's the Employer's view that the Association did not establish that the Employer violated the Emery Arbitration Award by issuing the directive in question. It elaborates on these contentions as follows.

First, the Employer comments on the Emery Arbitration Award. It notes that in 2006, Arbitrator Emery issued an Arbitration Award involving an overtime grievance that arose in 2005. The Employer describes the award as being very "fact specific to a discrete circumstance." It also avers it "did not involve an 'interpretation' as that term has meaning under the collective bargaining agreement."

Next, the County addresses the directive that forms the basis for the Association's complaint. It begins by giving the following context. It maintains that the Sheriff wants to manage the affairs of the agency in an efficient and cost effective manner. It further avers that the Sheriff must also run the agency in a fashion to comport with the contracts of multiple collective bargaining units. Building on the foregoing, the Employer submits that there is a compelling need for all agency personnel, of whatever bargaining unit, represented or not, to have a common set of definitions of overtime terms which might impact their jobs and which are not articulated anywhere else. As it sees it, that's what Directive 13-08 tried to do.

Having given that context, the County acknowledges that Directive 13-08 deals with overtime, just like the Emery Award did. It further acknowledges that the directive contains a glossary of definitions of various overtime terms including the term "unanticipated overtime." While the Association sees the inclusion of that term as significant, the Employer disputes that assertion. Additionally, it argues that the Association did not prove how its inclusion in the directive constitutes a violation/repudiation of the Emery Award. Aside from that, the County avers that the portion of the directive that is of greater import to this case (than the "unanticipated overtime" language) is Sec. 202.08.2 which provides in pertinent part: "The agency will attempt to minimize overtime through the proper scheduling of staff. If overtime work is necessary, it will be assigned in accordance with applicable labor agreements." As the Employer sees it, that section "subsumes and honors all the relevant collective bargaining agreements." Second, the County contends that if the Association "is to be believed, the mere publication of a directive, without more, to all Sheriff's Department employees stands as a prohibited employment practice under the Statute." It disputes that assertion. It specifically notes in this regard that the Association did not allege, much less prove, that the County has assigned or allocated any overtime in contravention of either the collective bargaining agreement or the Emery Award. The County put it this way in their brief: "The Union also failed to show that there was a single instance in which the Sheriff or his designees ever violated the terms of the arbitration award upon which this entire complaint is premised." Third, the Employer points out that the directive (including the reference to "unanticipated overtime") applied to <u>all</u> Sheriff's Department employees irrespective of their union representation.

Next, the County argues that since the Association raises a Sec. 111.70(3)(a)5 claim (i.e. a breach of the contract claim), that claim is pre-empted by the parties' grievance arbitration process. In that regard, it calls attention to the following. First, it notes that prior to filing the instant complaint, the Association did not discuss the directive with the management in the Sheriff's Department. Second, the County notes that while the Sheriff is authorized via the collective bargaining agreement and his constitutional authority to make rules, the Association has the right to challenge rules that it believes are unreasonable. In other words, the Association could have filed a grievance which challenged the reasonableness of the directive. The County emphasizes that the Association did not do that (i.e. file a grievance challenging the validity of the directive), nor did the Association offer a reason/excuse "as to why the Union eschewed its own contract and grievance procedure." According to the County, that fact is fatal to the Association's statutory complaint.

Finally, the County comments on the remedy sought by the Association. It notes that in the original complaint, the Association sought recission of the entire directive. At hearing though, the Association amended the complaint relative to the relief sought and asked the Examiner to simply delete the two lines that define the term "unanticipated overtime".

Based on the foregoing, the County asks that the complaint be dismissed.

DISCUSSION

Since the complaint alleges that the Sheriff's issuance of Directive 13-08 constitutes a violation of Sec. 111.70(3)(a)5, Stats., my discussion begins with a review of that provision. That section makes it a prohibited practice for a municipal employer:

> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees,. . .or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

This section gives the Commission statutory authority to interpret and enforce a collective bargaining agreement.

The statutory provision just noted provides one forum for litigating the contractual propriety of an employer's actions. It is not the only forum available though. Another forum for litigating the contractual propriety of an employer's actions is via grievance arbitration. Thus, in Wisconsin's public sector, there are two litigation forums available for enforcing a collective bargaining agreement: the statutory route under Sec. 111.70(3)(a)5 or the grievance arbitration route.

The reason the foregoing has been noted is because in this case, the parties dispute which of those forums will be used to litigate the County's actions involved herein (namely, whether the Sheriff's overtime directive altered the parties collective bargaining agreement and/or repudiated the Emery Arbitration Award). The Association contends that it should be the former (meaning the statutory route under Sec. 111.70(3)(a)5), while the County contends that it should be the latter (meaning the contractual grievance arbitration route). Based on the rationale which follows, I find that the latter route (meaning the contractual grievance arbitration route) needs to be used to litigate the instant matter because the Emery Arbitration Award cannot be separated from the contract language which it interpreted and applied. The two are inextricably linked together. Whoever reviews the Association's claims that the Sheriff's overtime directive altered the parties' collective bargaining agreement and/or repudiated the Emery Arbitration Award will have to review both the language contained in the directive as well as the contract language upon which the Arbitration Award was based. While this point will be addressed in more detail below, it suffices to say here that in their collective bargaining agreement, the parties have agreed that that review will be done by a grievance arbitrator.

The Commission does not generally exercise its statutory complaint jurisdiction to determine the merits of breach of contract claims under Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides a grievance procedure with final and binding arbitration. See, for example, CITY OF MADISON, DEC. NO. 28864-A (Crowley, 1/97), *aff'd* DEC. NO. 28864-B (WERC, 10/97). Another way of stating this principle is to say that where

the contractual grievance arbitration clause is the exclusive remedy for contractual claims, the Commission will not generally exercise its jurisdiction under Sec. 111.70(3)(a)5, Stats., to determine whether a contract has been violated. The rationale for this is to give full effect to the parties' agreed-upon procedures for resolving disputes arising under their contract. A grievance arbitration procedure is presumed to be the exclusive remedy for alleging a violation of the contract unless the contract explicitly states otherwise. MAHNKE V. WERC, 66 Wis. 2D 524, 529, 225 N.W. 2D 617, 621 (1975). Here, the parties' collective bargaining agreement provides for final and binding arbitration and contains no express language that it is not the exclusive remedy. Thus, in this case, grievance arbitration was available as a forum for litigating the instant dispute. It is undisputed that the Association did not file a grievance relating to the issuance of Directive 13-08. Nor did it file a grievance contending that the Employer had disregarded/repudiated the Emery Arbitration Award. It should have done so because that was the process it had bargained with the County as the exclusive way of resolving contract claims. If it had followed that process, there is no reason to believe it would not have received a ruling on the merits of its claims from the County. Even if the County had denied the grievance, the Association then had access to a final and binding arbitration proceeding in which it could seek to persuade an arbitrator that the Employer's issuance of Directive 13-08 either altered the parties' collective bargaining agreement, or disregarded/repudiated the Emery Arbitration Award, or both.

In some situations though, the Commission will assert its jurisdiction in breach of contract claims under Sec. 111.70(3)(a)5 even though the grievance arbitration procedure has not been exhausted. The facts which are traditionally cited in Commission cases as offering a justifiable excuse for failing to exhaust the contractual grievance procedure are: 1) where the employee alleges denial of fair representation by the union in processing his or her grievance; 2) where the parties have waived their arbitration provision; and 3) where a party ignores or rejects the arbitration provision in the contract. See CITY OF MADISON, DEC. NO. 28864-B, *supra*, page 7, footnote 1. However, none of those exceptions are present in this case. Additionally, the Association provided no persuasive reason why it was not obligated to use its contractual remedy to seek redress of its claims.

The Association cites just one case to support its contention that exhaustion of the grievance arbitration process is immaterial to its Sec. 111.70(3)(a)5 claim. It's the recent decision of MILWAUKEE COUNTY, DEC. NO. 32257-C (WERC, 12/08). However, I find that decision does not stand for the proposition asserted. The following shows why. In that case, the complaint alleged that the County retaliated (and illegally discriminated) against two employees because they had filed numerous grievances. Thus, the Association raised a Sec. 111.70(3)(a)3 claim against the County – not a Sec. 111.70(3)(a)5 claim as is raised here. The Examiner found that the County illegally discriminated against the two employees by transferring them to other assignments. MILWAUKEE COUNTY, DEC. NO. 32257-B (Jones, 8/08), *aff'd* DEC. NO. 32257-C (WERC, 12/08). One of the County's arguments on appeal to the Commission was that the Examiner erred when he failed to dismiss the complaint because the Association did not use the contractual grievance arbitration procedure to litigate the propriety of the County's actions. The Commission rejected that argument because the

Commission had jurisdiction to resolve the statutory issues raised in the complaint (i.e. illegal discrimination). In its discussion, the Commission addressed the topic of deferral, where the Commission sometimes defers statutory claims to the contractual arbitration process. After discussing deferral, the Commission then went on, in footnote 5, to address Sec. 111.70(3)(a)5 claims. In that footnote, the Commission opined:

> . . . The only exception to this rule is where the complaint alleges a violation of contract (See Sec. 111.70 (3) (a) 5, Stats.) and the contract contains a grievance arbitration provision for the resolution of such contractual disputes. With limited exceptions not relevant here, although we have statutory jurisdiction over the alleged violation of contract claim in the complaint, we elect not to exercise that jurisdiction because the contractual grievance arbitration is presumed to be the exclusive mechanism for resolving such disputes. MAHNKE V. WERC, 66 Wis. 2D 524 (1974); CITY OF MADISON, DEC. NO. 28864-B (WERC, 10/97). Thus, had the instant complaint included a violation of contract allegation under Sec. 111.70(3)(a)5, Stats., and assuming a contract was in effect and contained an applicable grievance arbitration procedure, we would have dismissed that allegation whether or not a grievance had been filed. However, despite the language in Part 1.02 of the contract and an existing contractual grievance arbitration procedure, we would not dismiss the alleged interference (Sec. 111.70(3)(a)1, Stats.) and discrimination (Sec. 111.70(3)(a)3, Stats.) allegations in this case and would, at most, defer further processing until any pending grievance arbitration was completed.
>
> DEC. NO. 32257-C, page 7.

In my view, this footnote hardly bolsters the Association's contention. To the contrary, it undermines it.

. . .

As of the date of the hearing in this matter, the terms of the parties' 2007-08 collective bargaining agreement were still in effect. Thus, the parties were not in a contract hiatus period. That meant that the parties still had a contract which contains a grievance procedure which culminates in final and binding arbitration. The parties have contractually agreed to have an arbitrator decide claims which are not resolved by the parties through the grievance procedure.

That agreement must be given effect since none of the previously identified exceptions exist here. To that end, the Examiner declines to assert the Commission's jurisdiction over the Association's allegations that the Sheriff's overtime directive altered the parties' collective bargaining agreement and/or repudiated the Emery Arbitration Award. If the Examiner were to assert the Commission's jurisdiction over those claims, I would be inappropriately undermining the parties' agreement to have an arbitrator decide those issues and would be

acting in a manner contrary to the presumed exclusivity of the contractual procedure. It follows from that decision that I cannot address the merits of the Association's claims that the Sheriff's overtime directive altered the parties' collective bargaining agreement and/or repudiated the Emery Arbitration Award. That's for an arbitrator to decide. Consequently, the Sec. 111.70(3)(a)5 claim has been dismissed.

Dated at Madison, Wisconsin, this 3rd day of July, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

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