

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SHEBOYGAN COUNTY LAW
ENFORCEMENT EMPLOYEES,
LOCAL 2481, AFSCME, AFL-CIO

and

SHEBOYGAN COUNTY

Case 117
No. 41780
MA-5461

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME,
AFL-CIO, appearing on behalf of the Union.

Mr. John Bowen, Personnel Director, Sheboygan County, appearing
on behalf of the County.

ARBITRATION AWARD

The Union and the County named above are parties to a 1987-1988 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance concerning a bailiff position. The undersigned was appointed and held a hearing on April 6, 1989 in Sheboygan, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript of the hearing was made, both parties filed briefs, and the record was closed on May 18, 1989.

ISSUE:

The parties stipulated that the following issue is to be decided by the Arbitrator:

Did the Employer violate the Contract when it assigned Mark Heronymus rather than William Spelshaus to Court Branch O? If so, what is the appropriate remedy?

CONTRACT PROVISIONS:

V

MANAGEMENT RIGHTS

Except as otherwise provided in this Agreement, the Employer shall have the right to:

1. Carry out the statutory mandate and goals assigned to the County utilizing personnel, methods and means in the most appropriate and efficient manner possible. It is understood and agreed, however, that should new classifications, reclassifications, reallocation or substantial changes in job duties occur, the parties agree to meet and negotiate wages, hours and working conditions for any such positions.
2. To hire, promote, transfer, demote, discipline, suspend or discharge for just cause its employees.
3. To determine the specific hours of employment, the length of the work week and make such changes in the various details of the employment it from time to time deems necessary for the effective and efficient operation of the Sheriff's Department. It is understood and agreed that shift rotation during the term of this Agreement shall remain the same as scheduled prior to the effective term of this Agreement.
4. To adopt reasonable rules and policies and amend the same from time to time.

...

X

WAGES, WAGE ADMINISTRATION AND WORK WEEK

...

IV. WORK WEEK

The standard work week for full-time employees shall be as follows:

. . .

3. For Bailiff, five (5) consecutive workdays, Monday through Friday. The workday shall be 8:00 a.m. to 12:00 noon and 1:00 p.m. to 5:00 p.m., a total of eight (8) hours.

. . .

6. For the remaining work force - Patrol Officers, Correctional Officers, Dispatchers and Cook/Matron the standard work week shall be 6-3, 6-2 at eight (8) hours per day. These employees may work three (3) additional work days during the calendar year on a voluntary basis at their straight time rate of pay with mutual scheduling between the employee and their supervisor.

. . .

XXIV

SENIORITY

- A. Sheboygan County, shall, during the life of the herein contract for the employees covered by the same, recognize seniority as herein provided.
 1. When it becomes necessary to reduce the work force the last person hired shall be the first person laid off and subsequent to any layoff the last person laid off shall be the first person offered reinstatement.
 2. In determining shift preference where similar classifications are involved the shift preference shall be given to the employee with the longer period of seniority.
 3. Seniority shall be accumulated on a month-to-month basis or major portions thereof for continuous months of service. Absence from work because of illness, layoff, suspension for less than thirty (30) days, or

authorized leave shall not interrupt the accumulation of seniority.

4. Seniority shall be determined by the date of hiring; In the event two (2) members of the Sheriff's Department were hired on the same dates, seniority shall be determined by the member's position or rank on the eligibility list, in effect on the date said two (2) members were hired.

XXV

VACANCIES/PROMOTIONS

Whenever a vacancy exists for a non-entry level union position, notice of said vacancy shall be posted for ten (10) days on a bulletin board in the department for the information and signature of all interested eligible employees. The position shall be awarded to the most qualified employee. The promotional procedures contained in Sec. 1-6-1 of the Sheriff's Department Policy and Procedures manual, as they exist at the time of posting, shall be used to determine qualifications. Section 1-6-1 of the Sheriff's Department Policy and Procedures shall not be changed unless mutually agreed upon by the Union and the employer.

BACKGROUND:

The Grievant, William Spelshaus, has been a deputy with the Sheboygan County Sheriff's Department since July 1, 1969. This grievance arose when another deputy, Mark Heronymus, who has been with the Department since January 24, 1983, was chosen by the County to be a bailiff in Court Branch 0.

The Sheriff's Department has three main divisions --- patrol, criminal investigation, and support services. The bailiffs work in the support services division, but are called deputies, like those deputies who work in the patrol division. There is no separate classification for bailiff, and deputies may work as patrol officers, bailiffs or process servers. The position of deputy is an entry level position. Movement into bailiff or process server positions are lateral transfers across division lines, but there is no change in wages or classification.

On November 29, 1988, the County posted an opening in the support services division for the position of bailiff. The Grievant and 10 other deputies signed the posting, indicating their interest. The posting specified that interviews would be held with each deputy. No interviews were conducted in the past for a bailiff position. This was the first time that the County formed an

interview board of three members of management--Sergeant William Kraemer, Deputy Inspector James Hoffmann, and Captain Keith Potter--who questioned those signing the posting. The questions had been drawn up by Deputy Inspector Tim Grasse, and the interview team asked each deputy the same questions. The interview team was looking at demeanor, appearance, interest, initiative, career goals, and knowledge of the bailiff's position. The Grievant estimated his interview lasted about three minutes. He was asked if he ever read the Standard Operating Procedure (SOP) regarding the bailiff's job, if he knew the specific duties of a bailiff, if he would do demeaning work, and if he would have problems working with the people in the court system. The interview team recommended that Heronymus fill the bailiff position, and Sheriff John Webb, relying on that recommendation, made the decision to put Heronymus in the bailiff job.

The Grievant applied for the bailiff position three times including this last time. He was offered the bailiff position the first two times when he indicated his interest. However, he declined it both times because he was working as a canine handler and preferred to continue doing that work. When the Grievant applied the second time, Sheriff Webb suggested that he try the job for two weeks. After trying the job, the Grievant still wanted to work with his dog and went back to patrol. The Grievant's dog was retired a couple of years ago, and when this bailiff opening came up, the Grievant decided that it was time to get off patrol and into the bailiff's position.

One of the reasons the Grievant wanted the bailiff position was because of the different hours and the schedule with weekends off. As a patrol deputy, the Grievant works a day shift from 7:00 a.m. to 3:00 p.m., and has a 6-2-6-3 work week schedule. The bailiff's hours are 8:00 a.m. to 5:00 p.m., with a noon hour, and a 5-2 or a Monday through Friday work week.

Only eight deputies in the Department have more seniority than the Grievant. Of those eight, two are detectives, two work as civil process servers, two are bailiffs, and two are in the patrol division. Immediately behind the Grievant in seniority is Deputy Jerome Blomberg, who is currently serving as a bailiff. Blomberg was involved in a seniority dispute with another deputy, John Sprosty, four years ago.

In 1985, Blomberg signed up for a bailiff position on a sign-up sheet in the squad room, but he did not receive the position. He found out that Sprosty was filling the bailiff position in Branch 1, and he protested to Sheriff Webb. The Sheriff told Blomberg that Sprosty had more seniority than Blomberg. Blomberg replied that he had more seniority than Sprosty. After checking the seniority list (Blomberg's starting date was October 8, 1969, and Sprosty's was January 1, 1970), the Sheriff told Blomberg that he would get the bailiff's position. Blomberg then told the Sheriff that he was going on vacation, and that the Sheriff should leave Sprosty in the position until Blomberg got back. During Blomberg's vacation in March of 1985, a Circuit Court Judge asked Sheriff Webb to relieve Deputy Kenneth DoBas of his duties as bailiff for Branch 4 of Circuit Court. Therefore, another bailiff position became open. When Blomberg

returned from his vacation, he was given a choice of replacing Sprosty in Branch I or taking the open position in Branch 4. Blomberg said that he did not care which bailiff position he took, and so Sprosty stayed in Branch I and Blomberg took Branch 4.

THE PARTIES' POSITIONS:

The Union submits that the County violated Article XXIV, Section A, 2, which calls for the use of seniority for shift preference. Additionally, the Union submits that its case is supported by past practice.

The Union points out that the Grievant has about 14 years of seniority over Deputy Heronymus, who received the bailiff position. The Union notes that bailiffs, process servers, and deputies are all within the same Deputy classification, and that there is no separate classification of bailiff. Even the County's posting for the position in dispute (County Exhibit 6) called for a "Deputy." Thus, the position of bailiff is a deputy with the deputy rate of pay. Deputies are interchangeable with bailiffs, with the Union noting that bailiffs were used as patrol deputies during the last Kohler strike. When Deputy Kenneth DoBas was relieved of his duties as a bailiff, he returned to being a patrol deputy. The Union also states that the County's exhibit from an interest arbitration proceeding (Union Exhibit 3) shows that the County does not distinguish between a deputy and a bailiff in classification.

Turning to the parties' past practice, the Union contends that the record shows that seniority has been followed in appointing the most senior deputies to the job of either bailiff or process server. More importantly, the Union stresses that when seniority was not followed in one case, it was corrected voluntarily by the County. The Union calls attention to the 1985 situation involving Deputies John Sprosty, Jerome Blomberg and the Grievant. The Grievant was offered the bailiff position twice in the past, but declined it because he preferred being a canine handler. The second time the Grievant was offered the position, he agreed to try the position for two weeks, but again went back to patrol to continue to work with his dog. Sprosty received that bailiff position. However, Blomberg complained to the Sheriff, noting that he had more seniority than Sprosty. Blomberg then received the bailiff position but agreed to delay starting it until after his vacation. During his vacation, another bailiff position became available, and Sprosty stayed on as bailiff in the court in which he had been originally trained, and Blomberg filled the other opening. The Union argues that seniority prevailed in this situation, and none of this was rebutted by Sheriff Webb who was in attendance at the arbitration hearing.

Further, the Union submits that seniority was used in appointing process server positions. The Union finds no precedent in the County's filling of a position in the criminal investigation division, since that position was temporary.

Finally, the Union notes that the Grievant was never deemed to be unqualified for the

bailiff position. He was allegedly not the most suitable candidate chosen by those who took part in a new interview process. However, the Union contends that the Sheriff previously encouraged and allowed the Grievant to perform the bailiff job, and that the Grievant can perform this job. Therefore, the Union asks that the grievance be sustained.

The County:

The County submits that its decision was proper and within the management rights clause, which grants it the right to use personnel in the most appropriate and efficient manner and to transfer employees. The County's position is that this is not a function of seniority for shift preference within a similar classification but rather an assignment of duties in a classification.

The County claims that the job of bailiff is a duty assignment, and the assignment to criminal investigation, patrol, or support services is a matter of the Sheriff's discretion. With the exception of detectives, deputies are considered entry level positions. The County used the following factors in selecting a deputy to serve as bailiff: appearance, demeanor, ability to think logically, ability to work under stress, ability to anticipate personal action of the general public, courtesy, firmness, and knowledge of court functions. The County argues that in addition to criminal investigation, patrol and support service assignments, the County selects deputies for special teams such as the SWAT Team, Diving Team and Boat Patrol, after competitive interviews. Such team assignments are made regardless of seniority and classification. The County can point to specific cases where seniority was not used as criteria, and the selected individual was chosen for his qualifications and potential for transferability.

The County notes that although Blomberg had more seniority than Sprosty, neither Blomberg nor the Union submitted a grievance when Sprosty was selected as bailiff. The County notes that Blomberg was assigned to the second opening due to his previous indication of interest.

The County points out that in 1988, the Sheriff selected Deputy Robert Shield for a criminal investigation position, although Deputy Byron Schaefer had more seniority and had also applied for the position. Further, the County looks to the two process server positions filled in 1988, pointing out that Deputy Anthony Akright was selected, although two other deputies had more seniority. Moreover, the County contends that it had the right to remove Deputy DoBas as bailiff and return him to patrol, and that right was not questioned even though a more junior employe was appointed as bailiff.

It is the contention of the County that the Sheriff's Department will not make lateral transfers or reassignments unless it is for the efficient operation of the Department. The deputies are selected for reassignment based on their knowledge, goals and interest in the job.

The County quotes from Elkouri and Elkouri, Third Edition, pages 458-466, noting that

management has the right to assign duties and tasks as it deems necessary, and that employees are not entitled to exercise seniority to select the duties or machines which they particularly prefer within their classification. Moreover, the County submits that a decision in favor of the Grievant would have adverse effects, such as making the Sheriff's Department incapable of assigning jobs based upon suitability. The County contends that the intent of the contract is to have the most qualified interested employee who can contribute to the efficient operation of the Department. Therefore, the County asks that the grievance be denied.

DISCUSSION:

The Union looks both to the language of Article XXIV and to the past practice of honoring seniority to fill a bailiff position. The relevant contract language is the following: "In determining shift preference where similar classifications are involved the shift preference shall be given to the employee with the longer period of seniority." The County does not dispute that the bailiff and patrol duties are "similar classifications," although Deputy Inspector Grasse's first response to the grievance was that ". . . management does not consider the classifications of bailiff and patrol officer similar." (Joint Exhibit 2, page 2.)

The parties have never negotiated a classification of bailiff. Under Article V, the Management Rights clause, the parties have agreed to negotiate new classifications. The classification of deputy encompasses patrol deputies, process servers and bailiffs. There is no promotion involved in moving from the position of a patrol deputy to a bailiff or process server. Accordingly, the movement from a patrol deputy to a bailiff is a movement within the same classification. Article XXIV is thereby triggered if the movement also includes a preferred shift.

The position of bailiff has both different hours and a different work week than the patrol deputy position. The Grievant works the 7:00 a.m. to 3:00 p.m. shift, a day shift granted to him by virtue of his seniority. The bailiff hours noted in Article X, Section IV, 3, call for a work day of 8:00 a.m. to 12:00 noon and 1:00 p.m. to 5:00 p.m., and five consecutive work days, Monday through Friday. While Article X, Section 111, refers to shift differential, the contract is substantially silent as to the meaning of "shift preference" as used in Article XXIV.

The best interpretation of the parties' contract as is that which they have given it. The Union correctly argues that the parties' own past practice has been to interpret the exercise of seniority as extending to the filling of the bailiff position. The Grievant testified that the bailiff position has been filled by seniority ". . . as long as I've been here," some 20 years, according to his starting date. The Grievant was offered the position twice in the past at times when he declined to accept it due to his work as a canine handler.

The Blomberg-Sprosty incident indicates exactly how the parties treated the exercise of seniority in the past. The County argues that Blomberg and the Union did not submit a

grievance alleging a contract violation. However, Blomberg did complain to the Sheriff, which is a form of a grievance brought informally and orally. 1/ When the Sheriff resolved the dispute in favor of Blomberg, there was no need to file any formal grievance.

The County also characterizes the Blomberg-Sprosty dispute as Blomberg being assigned to the second opening due to his showing of interest. Nonetheless, Blomberg clearly testified that the Sheriff reversed his decision to give Sprosty the bailiff position, after determining that Blomberg had more seniority than Sprosty, and that Blomberg could have displaced Sprosty in Branch 1 if he chose to do so. Instead, when the second bailiff position became open during Blomberg's vacation, he agreed to go to Branch 4 and leave Sprosty in Branch I where Sprosty had started and worked during Blomberg's vacation. 2/ The County settled a grievance --- albeit an informal one --- by acquiescing to a position now being advanced by the Union. Normally, a single incident is insufficient to establish a past practice. However, where the precise situation does not arise often, a single incident carries more weight, particularly where, as here, the incident is identical to the current situation --- namely, two deputies vying for the same bailiff position, one arguing that he should have it due to his seniority over the other . I conclude that due to the County's handling of the Blomberg-Sprosty incident, the offer of the position to the Grievant twice in the past, and the Grievant's recollections, the parties have considered the bailiff position to be a preferred shift, triggering an exercise of seniority.

The County argues that Elkouri and Elkourl state that management has the right to assign duties and tasks as it deems necessary. Looking at the Third Edition cited by the County, I note that it is also stated: "In general management is permitted to exercise much more discretion in assigning individual duties and tasks to workers than it is permitted in assigning workers to regular

1/ Under the parties' current contract, an aggrieved employee "shall present the grievance to the direct supervisor" in Step One, and "may appeal the grievance to the Sheriff" in Step Two. Blomberg's complaint to the Sheriff could be considered to be either a Step One or Step Two grievance, as the contract does not specifically call for a written grievance. However, there is no evidence in the record of whether the current language of Article XXVI is the same language that existed in 1985 when this incident arose.

2/ I credit Blomberg's testimony in its entirety. Sheriff Webb heard Blomberg's testimony at the arbitration hearing and did not rebut it. Even when Grasse attempted to shed doubt on Blomberg's testimony by giving his own opinion that the Sheriff did not reverse a decision due to seniority, the Sheriff was not called back to the stand to confirm Grasse's opinion. Additionally, Blomberg's testimony that he was given a choice of Branch I or Branch 4 indicates that the Sheriff agreed that Blomberg had the right to displace Sprosty, and the only reason for such a right was Blomberg's greater seniority.

jobs. While the assignment of workers to regular jobs often requires the observation of contractual 'seniority' and 'fitness and ability' considerations, collective agreements much less frequently contain direct restrictions upon the right of management to assign duties and tasks to workers." (Emphasis added, footnote deleted.) The assignment of a deputy to the bailiff position is a regular job. It is considered a regular full-time position. Management still retains the right to assign duties and tasks to the bailiff performing that job. Despite the County's attempt to characterize this as an assignment of duties, the real effect of the assignment to the bailiff position is an assignment to a regular job, whereas the County's examples of the Diving Team, the SWAT Team, and the Boat Patrol, are more akin to the assignment of duties.

Also, the County argues that it selected deputies out of seniority order for positions of criminal investigation and process servers. Deputy Inspector James Hoffmann testified that in the selection of a deputy to the position in the criminal investigation division, R.W. Shield was selected after interviews, even though Byron Schaefer had more seniority and signed the posting for the position. However, the posting specifically limited the position to a temporary position of approximately one year (see County Exhibit 7). Therefore, the criminal investigation position is not similar to the bailiff's position at issue in this case, since the bailiff's position is contemplated to be a permanent and regular position.

Prior to the instant case, the County posted open positions for two civil process servers in March of 1988. One position was for a shift of 11:00 a.m. to 7:00 p.m., and the other for a shift of 3:00 p.m. to 11:00 p.m. Deputy Anthony Akright was selected for the first position, although Akright had less seniority than Deputies Dale Williamson and Dennis Luedtke, who signed the posting. Williamson was selected for the second position. There is no evidence in the record

1/ Under the parties' current contract, an aggrieved employee "shall present the grievance to the direct supervisor" in Step One, and "may appeal the grievance to the Sheriff" in Step Two. Blomberg's complaint to the Sheriff could be considered to be either a Step One or Step Two grievance, as the contract does not specifically call for a written grievance. However, there is no evidence in the record of whether the current language of Article XXVI is the same language that existed in 1985 when this incident arose.

2/ I credit Blomberg's testimony in its entirety. Sheriff Webb heard Blomberg's testimony at the arbitration hearing and did not rebut it. Even when Grasse attempted to shed doubt on Blomberg's testimony by giving his own opinion that the Sheriff did not reverse a decision due to seniority, the Sheriff was not called back to the stand to confirm Grasse's opinion. Additionally, Blomberg's testimony that he was given a choice of Branch I or Branch 4 indicates that the Sheriff agreed that Blomberg had the right to displace Sprosty, and the only reason for such a right was Blomberg's greater seniority.

regarding which shift Williamson sought, but presumably, he or the Union could have grieved Akright's selection to the 11:00 to 7:00 shift had Williamson wanted that shift. Union president Thomas Epping stated that the Union could file a grievance without an individual bringing a complaint, but in the Williamson case, the Union would also need a remedy, and if Williamson did not want the first shift, the Union would not file a grievance. Luedtke had less seniority than Williamson but more than Akright. If Luedtke wanted the shift that Williamson took, he could not have grieved Williamson's selection. While Luedtke or the Union could have filed a grievance if Luedtke wanted Akright's shift, no grievance was filed. The Union could have filed grievances asking for cease and desist orders, whether or not Williamson or Luedtke wished to grieve Akright's selection.

Based on the record presented concerning the civil process servers, it is not clear to the Arbitrator that the County previously did indeed select a deputy out of seniority order for process server, due to the two different positions and the lack of evidence regarding who preferred which shift. Accordingly, I find that the selection process used for civil process servers vacancies in 1988 does not diminish the Union's position that bailiffs have been selected by seniority in the past. Moreover, the contract language favors the Union in this case.

Article XXV calls for the awarding of non-entry level positions to be based on qualifications. There is, however, no contract language regarding the filling of vacancies in entry level positions, and it is undisputed that the bailiff position is an entry level position. Therefore, Article XXV does not apply. Article XXIV, A, 2, does apply, as similar classifications are involved.

The County does not contend that the Grievant is not qualified to perform in the bailiff's position. The Grievant was offered the job previously, and even during the new interview process, those conducting the interviews did not deem the Grievant to be unqualified. Hoffmann recalled that the Grievant knew more than some candidates and less than others about the position, and that the Grievant indicated that he had done some prior preparation.

Sergeant Kraemer testified that the job of bailiff demands a little more today--that there is more activity, more cases, more pressure on the courts and clerk of courts, and that the bailiffs are now handling the court scheduling, although that has gone on for the last five or six years. Sheriff Webb testified that he wants well-qualified individuals, and that bailiffs tell him that the job requires a lot of concentration. By adding an interview process designed to select the most qualified persons, the County is attempting to treat the position of bailiff as a promotion, which would fall under Article XXV. In non-entry level positions, the County must award a position to the most qualified applicant. However, the bailiff position is an entry level position with the same rate of pay as a deputy. If the County wanted to upgrade the bailiff position, it could have negotiated a new classification with the Union, under Article V. But the County cannot have it both ways--it cannot treat this position as a promotion, which calls for the most qualified employe,

and yet leave it as an entry level position.

Because the parties have in the past treated the bailiff's position as a preferred shift and honored seniority in filling that position, I conclude that it would be improper to disturb that relationship and interpretation of their contract. As a result, I will sustain the Union's grievance. Since there is no issue as to the amount of back pay, the only remedy is for the County to give the bailiff position currently held by Mark Heronymus to the Grievant, William Spelshaus, as soon as feasible upon the receipt of this Award.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Employer violated the Contract when it assigned Mark Heronymus rather than William Spelshaus to Court Branch 0.

2. That the Employer is ordered to assign William Spelshaus to the position of bailiff in Court Branch 0 as soon as feasible upon the receipt of this Award.

Dated at Madison, Wisconsin this 4th day of August, 1989.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator