BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GENERAL TEAMSTERS UNION LOCAL 662	
and	Case 164 No. 41789 MA-5462
EAU CLAIRE COUNTY (SHERIFF'S DEPARTMENT)	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. Frederick Perillo, on behalf of General Teamsters Union Local 662.
Mr. Keith R. Zehms, Corporation Counsel, on behalf of Eau Claire County.

ARBITRATION AWARD

General Teamsters Union Local 662, hereinafter the Union, and Eau Claire County, hereinafter the County, jointly requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the County in accordance with the grievance and arbitration procedures contained in the parties' labor agreement, and the undersigned was appointed to arbitrate in the dispute. A hearing was held before the undersigned on April 20, 1989 in Eau Claire, Wisconsin. There was a stenographic transcript made of the hearing and the parties completed the submission of initial briefs in the matter by June 19, 1989. On August 23, 1989 the undersigned issued an Interim Award wherein he decided that he would address the issue on substantive arbitrability. The parties completed briefing of that issue by September 7, 1989. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The County has raised the issue of whether the grievance is substantively arbitrable. In the Interim Award issued on August 23, 1989, the undersigned decided that he would address the issue of substantive arbitrability. Therefore, the threshold issue may be stated as follows:

Is the grievance substantively arbitrable?

If it is held that the grievance is substantively arbitrable, the parties have stipulated to the following statement of the issue on the merits:

Did the County breach the collective bargaining agreement by creating the position of Civilian Correctional Officer. If so, what is the remedy?

CONTRACT PROVISIONS

The following are provisions of the parties' 1988-1989 Agreement:

AGREEMENT

. . .

B.This Agreement recognizes that all protective service employees hereunder are subject to civil service laws and ordinances. Protective service employees are those employees required by the Employer to qualify as permanent deputies under the provisions of the County Civil Service Code, Chapter 3.51 of the County Code. Civilian employees are those employees not required to qualify as permanent deputies covered under this collective bargaining agreement. This Agreement shall supersede all County Civil Service ordinances which are in conflict herewith, without specific enumeration.

. . .

ARTICLE I

RECOGNITION AND FAIR SHARE

1.01The Employer hereby recognizes and acknowledges that the Union is the exclusive representative in collective bargaining with the Employer for all full-time Deputy Sheriffs (including part-time

per 8.01 e.) excluding Supervisory Unit personnel and all regularly employed cooks of the Eau Claire County Sheriff's Department on all matters pertaining to wages, hours and working conditions.

. . .

ARTICLE 3
MANAGEMENT RIGHTS

3.01 Subject to the terms of this Agreement, the Employer shall have the right to:

(a) Carry out the statutory mandate and goals assigned to the Employer utilizing personnel, methods, and means in the most appropriate manner possible.

(b) Manage the employees, to hire, promote, transfer, assign or retain employees and in that regard, to establish written, reasonable work rules.

. . .

ARTICLE 5
GRIEVANCE PROCEDURE

5.01 A grievance is defined to be a controversy between the employee and the Employer as to:

(a) A matter involving the interpretation of this Agreement.

(b) Any matter involving an alleged violation of this Agreement in which the employee or the Union maintains that any of their rights or privileges have been impaired in violation of this Agreement.

(c) Any matter involving wages, hours or working conditions.

. . .

ARTICLE 6
ARBITRATION PROCEDURE

6.01 Final and binding arbitration may be initiated by either party serving upon the other party a notice in writing of an intent to proceed to arbitration. Said notice shall identify the Agreement provision, the grievance or grievances, the department and the employee(s) involved.

. . .

6.03 The Arbitrator shall expressly confine himself to the precise issues submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination.

. . .

6.06 The Arbitrator shall neither add to, detract from, nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for arbitration within the limitations expressed herein. The arbitrator's decision shall be final and binding on both parties.

. . .

ARTICLE 8
HOURS

8.01 The Employer agrees to continue the present method of scheduling hours in the various departments unless otherwise mutually agreed.

. . .

(b). . .

In the event it becomes necessary to schedule personnel for overtime work to cover emergencies or absences of regular employees, such work will be offered first to senior employees, in order of their seniority, in the division where need occurs. Such divisions are understood to be Patrol, Jail, Process/Bailiff and Cooks. In no case shall an employee work more than sixteen (16) consecutive hours in the jail or twelve (12) consecutive hours on the road in a twenty-four (24) hours period unless directed by the Employer.

It is recognized that it is desirable to maintain a viable reserve force for emergency use. In order to maintain this force and continue their training, reserve forces may be used to fill the above emergencies and absences of regular employees after complying with the procedure outlined in the preceding paragraph.

. . .

ARTICLE 17
SENIORITY

. . .

17.12 In no event shall the Sheriff assign civilian employees to protective service positions, or vice versa.

BACKGROUND

Since 1971 the Union has been the exclusive bargaining representative for all full-time deputy sheriffs, excluding supervisory personnel, in the Eau Claire County Sheriff's Department. The County has maintained and operated a county jail which in the past has been staffed by Jailers who are deputies. There are three divisions in the Department: Jail, Patrol, and Process, containing 18, 12 and 6 bargaining unit positions, respectively. There is a mixture of low seniority and high seniority employes working as Jailers, and at times when employes have for various reasons been unable to do patrol work, they have been temporarily assigned to jailer positions. The only non-sworn or non-unit employes who in the past have been employed in the jail were Cooks Helpers and Cook/Matrons in the 1970s and non-unit Reserve Deputies, whose use is addressed by the Agreement. In 1976 the Cook/Matrons were placed in the bargaining unit and first appeared in the parties' 1977 Agreement.

In 1985 three Cook/Matrons filed a complaint with the State's Equal Rights Division, naming the County and Union as defendants and alleging sex discrimination. The complaint was settled by a Stipulation and Consent Order issued on March 6, 1986. That Order contained provisions that required the County to create four full-time female jailer positions and one part-time position and the following non-civil service, non-protective service positions: one full-time Head Cook, one full-time Cook, and one full-time Cook (relief). The female jailer positions required the persons to fill those positions to successfully complete law enforcement training. The result was that two of the Cook/Matrons opted to be Cooks with no jail duties, i.e., non-protective, and there were four full-time and one part-time female Jailers. In arriving at that settlement, the County and the Union agreed to a number of changes in their Agreement, as set forth in a letter of October 17, 1985 from the County's Corporation Counsel, Keith Zehms, to the Union's Business Representative, Merle Baker. The changes in the Agreement included the addition of the present Section 17.12 which, along with other changes, was included in the parties' 1986-87 Agreement.

In 1987 the County's Board of Supervisors authorized the construction of a three-story addition to the Courthouse which included increased jail space for approximately 60 additional inmates. In October of 1987 the parties commenced negotiations for the 1988-89 Agreement. There is a dispute as to what was said or not said by the Sheriff during those negotiations with regard to the use of civilians in the jail. The Union asserts the Sheriff expressly assured the Union bargaining team at the table that under no circumstances would civilian jailers be used in the jail. The County asserts that the Sheriff only promised he would not revert the deputized jailers to civilian status. The parties eventually did reach agreement in 1987 on a successor Agreement for 1988-89. Sometime in 1988 the County Board approved additional staffing for the jail in the form of Civilian Correctional Officers (CCO's), with four to be employed on January 1, 1989 and an additional two to be employed on June 1, 1989 pursuant to Section 3.08.100 of the Eau Claire County Code. The Correctional Officers are not required to complete the 320 hour basic recruit course law enforcement training that is required for sworn deputies, but are required to attend a 96 hour jailers' school. Four CCO's were in fact hired and at the time of hearing were employed in the jail as

such.

The Union filed the instant grievance in November of 1988 in anticipation of the hiring of the CCO's in the jail, and the grievance was subsequently denied by the County. The parties attempted to resolve their dispute, but were unable to do so and proceeded to arbitration before the undersigned. At the hearing, the County raised the issue of whether the grievance was substantively arbitrable.

SUBSTANTIVE ARBITRABILITY

COUNTY:

The County takes the position that the Sheriff's constitutional and statutory authority must be considered in deciding the issue of arbitrability. The County asserts that "since assignment for personnel is part of the Sheriff's constitutional and statutory authority, it cannot be limited in any way by the Collective Bargaining Agreement." Citing, Wisconsin Professional Police Association v. Dane County, 106 Wis.2d 303 (1982). The dispute relates to a matter outside the scope of the Agreement, and therefore, is outside the scope of the grievance procedure. Citing, Jackson County (Courthouse), Case 59 No. 40423 MA-5064 (1988).

In support of its position, the County cites Article XI, Section 4 of the Wisconsin Constitution, establishing the position of Sheriff, which provides:

> "(1)...shall be chose by the electors of the respective counties once in every 2 years.
>
> (3) Sheriff shall hold no other office. Sheriffs may be required by law to renew their security from time to time, and in default of giving such new security their office shall be deemed vacant.
>
> (4) The Governor may remove any (Sheriff)...giving to (him) a copy of the charges and an opportunity of being heard."

The County also cites Sec. 59.23(1), Stats., which states that the Sheriff shall:

> "Take the charge and custody of the jail maintained by his county and the persons therein, and keep them himself or by his deputy or jailer."

The County asserts that in State ex rel. Kennedy v. Brunst, 26 Wis. 412 (1870) the Wisconsin Supreme Court "specifically recognized that custody of the common jail and of the prisoners therein was one of the Sheriff's constitutional powers", holding:

> "The office of sheriff, in a certain sense, is a constitutional office; that is, the constitution provides that sheriffs shall be chosen by the electors of the respective counties, once in every two years and as often as vacancies shall happen. Sec. 4, art. 6. Now, it is quite true that the constitution nowhere defines what powers, rights and duties shall attach or belong to the office of sheriff. But there can be no doubt that the framers of the constitution had reference to the office with those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted. Among those duties, one of the most characteristic and well acknowledged was the custody of the common jail and of the prisoners therein. ... And it seems to us unreasonable to hold, under a constitution which carefully provides for the election of sheriffs, fixes the term of the office, etc., that the legislature may detach from the office its duties and functions, and transfer those duties to another officer." (At p. 414).

According to the County, the issue then is "whether the duties performed by the (civilian correctional officers) are among the principal important duties which characterize the office of sheriff so that the sheriff may not be restricted as to whom he appoints to perform the functions." Citing, Wisconsin Professional Police Association, 106 Wis.2d at 312. The County asserts that since the CCO's in question are employed in the County's jail and have custody of the prisoners, under Brunst the duties performed by the CCO's are among the principal important duties which characterize the office of Sheriff, and the Sheriff may not be limited by a collective bargaining agreement as to whom he appoints to perform those functions. Citing, Wisconsin Professional Police Association, 106 Wis.2d at 305. If the Arbitrator were to hold that the Agreement limits the Sheriff's authority to assign personnel in the jail, such an award would be "illegal and void." Citing, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division v. Dane County, No. 880253 (Ct.App. 1989).

UNION:

The Union first states that by submitting its brief on this issue, it does not waive its position that the Arbitrator lacks authority to decide the issue of substantive arbitrability and objects to the Arbitrator rendering a decision on that issue in the absence of a mutual stipulation pursuant to Section 6.03 of the parties' Agreement.

Regarding the issue of substantive arbitrability, the Union takes the position that the County's claim that the position advanced by the Union conflicts with the constitutional prerogatives of the Sheriff is without merit. In support of its position the Union asserts that the constitutional prerogatives of the Sheriff are not infringed by the enforcement of Section 17.12 of the Agreement prohibiting the assignment of jailer work to civilians. The Union asserts that the County's reliance on Wisconsin Professional Police Association for the proposition that the grievance is not arbitrable is misplaced, as that case did not involve the issue of arbitrability, but concerned only the enforcement of an award already rendered. While Wisconsin courts have ruled in certain circumstances that the prerogatives of a constitutional officer warrant vacation of an award, there

are no reported appellate decisions that conclude that a dispute under a collective bargaining agreement is not arbitrable in the first instance based on an alleged potential conflict with constitutional prerogative. All of the decisions assume the Arbitrator will be permitted to interpret the Agreement, and only after the Agreement has been interpreted by the Arbitrator will the court look to see whether the Agreement conflicts with some constitutional provision.

The Union distinguishes the instant case from Wisconsin Professional Police Association relied upon by the County. First, in this case the Sheriff was an active participant in the negotiations and was the key spokesperson for the County on the issue in question and responded to the Union's questions regarding this matter. Thus, unlike the Sheriff the other case, here the Sheriff cannot credibly claim that he was an outsider to the negotiations. As an active participant in the negotiations, he was a party to, and bound by, the representations he made at the bargaining table. This conclusion is supported by the fact that the Sheriff purports to sign letters of understanding on behalf of himself and the County. Citing, Joint Exhibit 14. Second, the Sheriff in this case actively participated in the arbitration proceedings and was allied with the County. By themselves, these two factors are sufficient to overcome the force of the holding in Wisconsin Professional Police Association that the Sheriff who is not a party to the negotiations cannot be bound by them in matters concerning his constitutional prerogatives. Citing, Brown County Sheriff's Department, Case 372, No. 40898 MA-5218 (Arbitrator Gratz).

The Union contends there are also several other important distinguishing factors in this case. First, this case involves the right of the County to establish a new civilian jailer classification whose only function will be to take over the duties of the sworn personnel who are in the bargaining unit. The reason for the change is to have the same work now performed by deputies done cheaper, i.e., it is an attempt to avoid the terms of the parties' Agreement. Secondly, the Sheriff conceded that regardless of who staffs the jail, he will still supervise those personnel, sworn or non-sworn. He also admitted that he does not have the power to appoint civilians or to create new civilian classifications, that only the County can establish such classifications and their wage rates through negotiations with the Union. The Union asserts that these factors are significant because the holding in Wisconsin Professional Police Association was limited to only the constitutional prerogatives of the office of Sheriff that constituted the core of the office at common law. Incidental powers or powers the Sheriff shares with other offices are not of constitutional dimension, but are purely statutory and therefore must be harmonized with the County's obligations under the Municipal Employment Relations Act (MERA). Citing, Glendale Professional Policemen's Association v. Glendale, 83 Wis.2d 90 (1978).

It is contended by the Union that the County essentially created a new civilian job classification and undercut the wage rates contained in the parties' Agreement. Neither of these actions were taken by the Sheriff nor are they constitutional appurtenances of his office. Implementing the will of the County in that regard is not acting according to a historic constitutional prerogative of the office of Sheriff. The Sheriff did not have power to appoint civilian employes or to assign them jailer duties under the common law. He also did not have the authority to set salaries for civilians. Such fiscal concerns have never been a part of the "unique attributes of being a Sheriff." To the extent such powers are possessed by a Sheriff, they are purely statutory. In Brunst, the Court held that having "exclusive charge and custody" of the County jail and the prisoners is a function of the Sheriff. However, in that case the legislature had sought to completely remove the Sheriff from any authority over the jail and to vest that authority in an inspector. In a subsequent case the Court explained that the defect was not the legislature's attempt to regulate a constitutional prerogative but to take it away completely. State ex rel. Milwaukee County v. Buech, 171 Wis.2d 474 (1920). See also, Schultz v. Milwaukee County, 245 Wis. 111, 115 (1944). The Union cites case law in support of the proposition that while the legislature cannot remove from the office of Sheriff the powers over the care and custody of prisoners, it can regulate that care and custody significantly. While at common law the Sheriff had some say in some of the areas that can be regulated, those areas are not constitutional prerogatives of his office, because they are not peculiar to the Sheriff and do not give character and distinction to that office. According to the Union if that is true, "then a fortiori the Sheriff has no power of constitutional dimension over civilian employees." The creation of civilian jailer posts is purely a statutory innovation. While counties have the power to create such civilian positions via State statute, they are not required to have them, and the Sheriff had no common law authority to employ civilians other than by deputizing them. The decision to provide the Sheriff with civilian jailers is "therefore not a decision of constitutional dimension". While the Sheriff has considerable authority over the deputies, Buech makes it clear that that authority is not unlimited, and there is nothing in the case law to indicate that the Sheriff has similar authority over civilian employes.

The Union concludes that there are two clear distinctions between the Wisconsin Professional Police Association case and the instant one. Here the Sheriff was an active participant in the negotiations and in the arbitration.

Secondly, the "work preservation clause" of the Agreement "in no sense removes from the Sheriff his power over the care and custody of prisoners in the jail." The Sheriff ultimately remains the supervisor over the personnel employed in the jail and retains all of the common law authority he possessed over the deputies assigned to the jail. Since the Sheriff had no common law authority to appoint civilian employes or replace deputies with civilians, the restriction to the sworn personnel will not infringe upon any of the "historic or unique characteristics" of the office of Sheriff. Thus, the two main bases of the decision in Wisconsin Professional Police Association are missing in this case. Therefore it must be concluded that the instant grievance is substantively arbitrable.

DISCUSSION

The parties have submitted lengthy argument regarding a sheriff's powers and duties under the Wisconsin Constitution and statutes as they relate to the staffing of jails. However, the determination of whether the grievance is substantively arbitrable must be based upon the parties' Agreement, and especially, the arbitration clause in the Agreement. The arguments presented as to the Sheriff's constitutional and statutory powers may be relevant to the question of whether the contract, as interpreted by the Union, or an award so interpreting the contract, would be legally valid. As the Union asserts, however, that issue is beyond the scope of this proceeding, 1/ and it is not necessary to address the issue in determining whether the grievance is arbitrable under this Agreement.

In the public sector in Wisconsin the standard applied by the courts and the Wisconsin Employment Relations Commission 2/ in determining substantive arbitrability was established in Jt. School District No. 10 v. Jefferson Education Association, 78 Wis.2d 94 (1977). In that case the Wisconsin Supreme Court held that the standard to be followed by courts in determining whether a grievance is substantively arbitrable is "whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it." 78 Wis.2d at 111. Section 5.01 of the parties' Agreement provides the following definition of a grievance:

> 5.01A grievance is defined to be a controversy between the employee and the Employer as to:
>
> (a)A matter involving the interpretation of this Agreement.
>
> (b)Any matter involving an alleged violation of this Agreement in which the employee or the Union maintains that any of their rights or privileges have been impaired in violation of this Agreement.
>
> (c)Any matter involving wages, hours or working conditions.

Section 5.02, Step 4, provides:

> Step 4. If the grievance is not settled by the preceding steps, the grievance may be taken to Arbitration by either party within thirty (30) days of completion of Step (3). All time limits as set forth in 5.02 of the Article may be extended by mutual agreement.

Section 6.01 of the Arbitration Procedure in the Agreement provides:

> 6.01Final and binding arbitration may be initiated by either party serving upon the other party a notice in writing of an intent to proceed to arbitration. Said notice shall identify the Agreement provision, the grievance or grievances, the department and the employee(s) involved.

As can be seen from the above, the parties' Agreement contains a broad definition of a grievance and an equally broad arbitration clause. The Union asserts that the County, by its actions in creating Civilian Correctional

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1/ It is noted that in the Brown County case the Arbitrator was required to address the sheriff's constitutional powers due to the contract provision in question in that case which required a determination as to whether the decision to staff the jail with civilians was a mandatory subject of bargaining in that it was a decision that "affect(s) wages, hours and conditions of employment of Association members as outlined in Section 111.70." Such a determination is not necessary in this case and would, therefore, be precluded by Section 6.03 of the parties' Agreement.

2/ See Milwaukee Board of School Directors, Dec. No. 24948-C (WERC, 9/89).

Officer positions and employing them to perform work now performed by Jailers, violated Section B, Section 1.01, Section 8.01, b, and Section 17.12, of the parties' Agreement. The County in turn has asserted that it had the right to take such actions pursuant to Section B and Section 3.01, (a) and (b), of the Agreement, and that Section 17.12 was not intended to apply to this situation and, at any rate, cannot be read to abrogate the Sheriff's constitutional powers. The grievance then, turns on the interpretation of the provisions of the Agreement, and there is no provision cited as expressly excluding the grievance from arbitration. Therefore, applying the standard set forth in Jefferson, it must be concluded that the instant grievance is arbitrable.

MERITS

POSITIONS OF THE PARTIES

UNION:

Regarding the merits of the dispute, the Union takes the position that the Agreement precludes the County from assigning bargaining unit work in the jail to civilian employes. In support of its position the Union first asserts that the plain and unambiguous language of the Agreement forbids the Sheriff from assigning civilian employes to protective service positions. According to the Union, that is exactly what has been done. CCO positions, which are really nothing other than Deputy Jailer positions by another name, are now doing bargaining unit work formerly performed by protective service employes. Hence, the plain and unambiguous language of Section 17.12 of the Agreement has been violated. The County claims that Section 17.12 was designed to only prohibit assignments across seniority lists, however, if that were the intent, the parties could have simply stated that. The language of Section 17.12, however, clearly and unambiguously provides that no civilians will be assigned to protective service positions under any circumstances. Even if the language were considered ambiguous, however, it could not be construed to permit the actions taken by the County. "The well-established rule of construction is that ambiguous language should be construed against the party who drafted the language." Citing, Elkouri & Elkouri, (4th Ed.) 362. The County drafted the language of Section 17.12, and therefore, bears the risk of ambiguity. In this case the language is not ambiguous and there is no need to resort to interpretation. The Union cites several arbitration awards for the proposition that the arbitrator must not ignore the clear language of the contract and will ordinarily give the language its plain meaning. Also cited is Elkouri & Elkouri for the proposition that "arbitrators apply the principal that parties to a contract are charged with full knowledge of its provisions and the significance of its language. The clear meaning is therefore enforced even though the results are contrary to the original expectations of one of the parties." While the County claims it only intended to agree to a restriction upon transfer of work between seniority lists, that is not what the contract states, nor is that what the Union's negotiator, Merle Baker, understood the clause to mean. The County's interpretation is "purely unilateral" and was never expressed to the Union. The Union asserts that in such cases arbitrators hold that the broader, literal meaning of unambiguous language must be enforced. The Union cites several arbitration awards in support of that proposition.

The Union also contends that the County's actions in transferring bargaining unit work to outsiders violates the Agreement as a whole. It is asserted that "it is axiomatic that a collective bargaining agreement would be a meaningless document if management could, at will, transfer work covered by the bargaining out from under the contract." Citing Elkouri & Elkouri, the Union asserts that in the absence of clear contract language, arbitrators review ten factors in determining whether a unilateral transfer of work violates the contract as a whole or is justified due to special circumstances: (1) quantity of the work; (2) whether the work is supervisory; (3) whether the assignment is temporary; (4) whether the work is covered by the contract; (5) whether the work is experimental; (6) whether there is a past practice of non-bargaining unit employes performing the work; (7) whether there has been a change in the character of the work; (8) whether the transfer is necessitated by technological change; (9) whether there is an emergency; and (10) whether there is some other special situation or need. (4th Ed.) 548-49. The Union asserts that considering all of the above factors, the results strongly militate against the transfer of work. The work involved in this case is not de minimis as it constitutes a majority of the unit work. The work is not supervisory, temporary, experimental and is covered by the contract. Bargaining unit personnel perform the work with the only exceptions being those carefully negotiated by the parties, e.g., reserve officers or those that have been "purely incidental and temporary in nature", e.g., Cook/Matrons in the past. There has been no change in the character of the work or any technological change which would require that it be performed by civilians, and there is no emergency or special circumstances involved. According to the Union, the County is simply attempting to get bargaining unit work performed for less money than it pays under the Agreement negotiated with the Union. It is asserted that "the great weight of arbitral authority therefore holds that such unilateral attempts to transfer work covered by the contract out of the unit violate the entire collective agreement." (Citing awards where the arbitrators relied on the recognition clause and/or seniority rights provisions

in holding that the Agreement was violated by the transfer of bargaining unit work out of the unit.) Dane County, 83 L.A. 1205 (Briggs, 1984), is cited for the proposition that the fact that the County is a public employer does not change that principal. Even though in this case no current member of the unit has lost his job yet, some unit positions have been eliminated without being replaced, and the County clearly has plans to replace all bargaining unit Jailers with civilian jailers. As a majority of the bargaining unit consists of Jailers, a substantial number of unit positions would be lost. That would be the case even if the County adds patrol position for every jail position eliminated. The Union asserts that the unit is getting relatively smaller as jobs and positions are being lost even when no employes are being laid off, and that in any event, even if patrol positions were added, the Union would already represent any additional patrol positions by virtue of the recognition clause in the Agreement. Virginia Power and Electric Company, 48 L.A. 305, (Porter 1966), is cited for the proposition that the Agreement does not only preclude the assignment of all of the unit work to non-unit employes, but necessarily extends that prohibition to lesser assignments as well as they would substantially curtail the work opportunities available to members of the unit and therefore undermine the unit's integrity. The Union, however, does not consider this to be just a case of "whittling away" the unit.

The Union also argues that the issue of whether the use of civilian employes in the jail is a permissive subject of bargaining is irrelevant in this case. The issue here is not whether the Union has a right to bargain over the use of civilian jailers, rather, the issue is whether an existing provision in the Agreement already prohibits assigning unit work to civilian jailers. Whether the subject was permissive when it was negotiated is irrelevant, since a permissive subject, once bargained into the agreement, is just as enforceable as any other provision. The Union asserts that, at any rate, the subject is a mandatory subject of bargaining. In support thereof, the Union cites Dane County, Dec. No. 25650 (WERC, 8/88), as holding that a provision such as Section 17.12, designed to protect against the displacement of sworn protective service personnel by outsiders, is a mandatory subject of bargaining. 3/

As a remedy, the Union requests that the County be ordered to cease and desist from using civilian jailers to perform bargaining unit work and to award backpay at overtime rates to existing jail employes for the work performed by the CCO's.

COUNTY:

The County takes the position that the creation of positions and utilization of personnel is solely and exclusively the right of management. The County first asserts that the Agreement "clearly and unequivocally gives management the right to create positions, hire employes, determine which employes will be protective service employes and assign employes." The Preamble to the Agreement provides at Section B that:

> . . .Protective Service employees are those employees required by the Employer to qualify as permanent deputies under the provisions of the County's Civil Service Code, Chapter 3.51 of the County Code. Civilian employees are those employees not required to qualify as permanent deputies under this Collective Bargaining Agreement. . . .

Section 3.51.010, A. of the County Code provides:

> The classification and maximum number of permanent deputy sheriff positions shall be established under 3.08.100(t).

Section 3.08.100(t) shows current staffing of the Sheriff's Department as including six correctional officer positions. The County Code provisions not only do not conflict with the Agreement, but are in strict conformance with it.

The County also relies upon Section 3.01(a) of the Agreement which gives the County the right to:

> Carry out the statutory mandate and goals assigned to the Employer utilizing personnel, methods, and means in the most appropriate manner possible.

The County has to staff a 60 bed addition to the jail and has not contractually surrendered or limited its hiring authority. Absent any contractual restriction, the County may carry out its statutory mandate and goals of staffing the jail in the appropriate manner of hiring Civilian Correctional

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3/ The Union made this argument in its brief on arbitrability, but since the County raised it as an argument on the merits, it has been placed in that section of the Award.

Officers. Also, Section 3.01(b) of the Agreement gives the County the right to "Manage the employees, to hire, promote, transfer, assign or retain employees and in that regard, to establish written, reasonable work rules." There is no restriction in the Agreement on the County's ability to hire new employes, such as Civilian Correctional Officers. The only arguable limitation is in Section 17.12, which simply does not apply since it deals with the Sheriff's authority to assign employes. Also, that language was specifically intended to implement a consent award in the jail matron litigation. Finally, the assignment of personnel within the jail is a constitutional and statutory duty of the Sheriff which cannot be abrogated by the Agreement. While the Agreement grants employes certain contractual rights, those rights do not create any contractual guarantee to new positions, nor do they require the maintenance of a minimum number of deputy sheriff positions, nor do they require that additional positions traditionally staffed by deputy sheriff's continue to be staffed by such employes. The County asserts that if the Union desires to have the CCO positions in the unit, it can request accretion, and that if the Union feels that it impacts on wages, hours and working conditions, it can demand to bargain the impact of the decision, but the Union has done neither.

The County reiterates its position that it considers the assignment of personnel within the jail to be within the constitutional and statutory authority of the Sheriff which cannot be abrogated by the collective bargaining agreement, as asserted in its arguments on arbitrability.

The County also contends that the decision to create the position of civilian correctional officer and to hire personnel into those positions is primarily related to public policy and only derivatively to wages, hours and conditions of employment. The County contends that in Dane County (Sheriff's Department), Dec. No. 22681-A (Honeyman, 11/85) it was found that the decision to institute a civilian process server classification, even where a lower wage level was a substantial factor in implementing the classification, was related to the qualifications for the position and, hence, primarily related to matters of public policy only derivatively related to wages, hours and conditions of employment. It is asserted that this same reasoning directly applies in this case. The County points out that no deputy sheriffs have been displaced, reclassified or laid off as a result of the County's actions. The CCO positions are new positions and there has been no adverse relationship to the wages, hours and working conditions of presently employed deputy sheriffs, in fact, the creation of the new positions has increased promotional opportunities for existing deputies. The County also relies on City of Waukesha (Fire Department), Dec. No. 17830 (WERC, 5/80) as holding that a proposal to require a municipal employer to establish or maintain certain positions is a permissive subject of bargaining. It is asserted that an employer has no duty to bargain with respect to the number of classifications established or the minimum qualifications applicable to those classifications. Citing, Brown County (Department of Social Services), Dec. No. 28084 (WERC, 11/81). It is asserted that if there is an impact, the Union can demand to bargain, but in this case has not done so, even though the County is willing to bargain the impact of its decision.

The County also takes issue with the Union's assertions that only sworn deputy sheriffs with the power of arrest are capable of staffing the jail, or that officers who for some reason or another are not capable of performing patrol duties should be permitted to "retire to the jail." Regarding any assertion that the Sheriff guaranteed during the 1988-89 negotiations that he would not hire civilians for the new addition to the jail, the County asserts the Sheriff not only does not have authority to make such a guarantee, he only informed the deputies employed that they would not lose their protective service status and they have not.

The County concludes that, based on the above, the grievance must be denied.

DISCUSSION

It is first noted that it is clear from the record that the work being performed by the CCO's is essentially the same as that performed by the Jailers, i.e., it is bargaining unit work. By hiring and assigning the CCO's to perform Jailer duties the County has assigned bargaining unit work to non-bargaining unit employes.

The County contends that it has reserved the right to assign employes and to determine which employes will be protective service employes. The County relies on Section B of the Preamble to the Agreement. Contrary to the County's contention, that provision defines "protective service employees" and "civilian employees", it does not grant such substantive rights as the County claims in this case. Section 3.51.010, A of the County Code merely states that the classification and maximum number of deputy sheriff positions will be established by Sec. 3.08.100(t) of the Code, and the latter provision sets forth the staffing levels, i.e., the number of positions in each classification. The issue here; however, has not so much to do with the number of deputy sheriff positions - Jailers in this case, although that is affected, rather, it concerns non-bargaining unit personnel performing bargaining unit work. The Arbitrator does not read the Union as arguing that the County must

maintain a certain number of Jailer positions, rather, it is arguing that Jailer duties must be performed by Jailers, and not CCO's.

The County also relies on Article 3, MANAGEMENT RIGHTS, 3.01 (a) and (b), of the Agreement. That provision states that:

> 3.01 Subject to the terms of this Agreement, the Employer shall have the right to:
>
> (a) Carry out the statutory mandate and goals assigned to the Employer utilizing personnel, methods, and means in the most appropriate manner possible.
>
> (b) Manage the employees, to hire, promote, transfer, assign or retain employees and in that regard, to establish written, reasonable work rules.

As can be seen, the reservation of rights claimed by the County is prefaced by the qualification that the exercise of those rights is "subject to the terms of this Agreement. . . ." The question then becomes whether the terms of the Agreement limit the right claimed by the County in this case. The County asserts that there are no contractual limitations on the right in the first instance and that, at any rate, the authority to assign personnel within the jail is a constitutional and statutory duty of the Sheriff "which cannot be abrogated" by the Agreement.

The Union relies on Article 17, SENIORITY, Section 17.12, and the Agreement as a whole, as restricting the County's right to assign unit work to non-unit personnel. The County has asserted that Section 17.12 does not apply to this situation, but was intended to only deal with assigning employes across seniority lists and not with the County's ability to create and fill new positions. The County's position is unpersuasive for a number of reasons. First, although there is no dispute that Section 17.12 was placed in the Agreement as part of the settlement of the Cook/Matron litigation, the wording of the provision is broader than the limited meaning the County would give it. The only "civilian" employes in the bargaining unit are Cooks; by using the term "civilian", instead of Cooks, the wording indicates a broader scope. In that regard, the Union accurately notes that:

> Arbitrators apply the principle that parties to a contract are charged with full knowledge of its provisions and the significance of its language. The clear meaning is therefore enforced even though the results are contrary to the original expectations of one of the parties.

Citing, Elkouri & Elkouri, 349 (4th Ed. 1985). The County's argument that Section 17.12 does not apply in this case since it deals with the Sheriff's authority to assign employes, is a bit of legerdemain. To permit the County to create new civilian positions to perform the same work performed by employes in the protective service position of Jailer on the basis that to do so is not the assignment of work intended to be covered by Section 17.12 would be to ignore the plain wording of that provision and certainly its intent.

Perhaps more importantly, the provisions of the parties' Agreement, as a whole, evidences the parties have recognized that they have negotiated a set of wage rates, hours and conditions of employment for those employes who perform the work done by the bargaining unit, including the work performed by Jailers. While the Sheriff testified that part of the reason for the change to CCO's was a wish to change the type of training jail personnel received, i.e., more specialized training aimed at jailer-type duties, he conceded that another reason was the cost-savings gained by using the lower-paid CCO's, as opposed to the Jailers whose higher rate is contractually set forth in the Agreement.

It is also noted that Article 17, SENIORITY, is concerned with protecting the employes' right to the work in their respective classifications and in the unit. Sections 8.01, (b) and 17.03, of the Agreement, as they deal with the use of "reserve deputies," also evidence an intent to limit the County's ability to utilize non-unit personnel to perform bargaining unit work. Notwithstanding the fact that no current Jailers have been laid off due to the County's use of CCO's to perform Jailer duties, bargaining unit employes have suffered a loss of job security, loss of potential over-time work, and loss of potential positions into which they could transfer. Given the County's avowed intent to eventually replace all Jailers with CCO's by way of attrition, transfer or promotion out of the classification, and the magnitude of the loss of bargaining unit work that has been, and will be, affected, the undersigned is of the same mind as Arbitrator Wallen:

> Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies.* * *

> The transfer of work customarily performed by employees in the bargaining unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes.

New Britain Machine Co., 8 LA 720, 722 (1947).

This is not a case where the employer has assigned some portion of the duties of a bargaining unit position to non-unit personnel, rather, it is a case of the entire duties of an entire classification eventually being assigned to non-unit positions. In this case the County is avoiding a major portion of the parties' Agreement by its assignment of what are essentially Jailer duties 4/ to the non-bargaining unit CCO's. The record indicates this is also not a case of a temporary assignment, or a change in the character of the work, or of a change in technology necessitating a transfer of the work, or of special circumstances that would justify the transfer of the work out of the unit.

It is therefore concluded that by creating the position of Civilian Correctional Officer and assigning the duties of Jailer to the position, the County violated the parties' Agreement. As noted previously, the County's assertion that no provision of the Agreement may abrogate the Sheriff's constitutional and statutory authority to assign jail personnel goes beyond the scope of the Arbitrator's authority, which is limited to the four corners of the Agreement. Similarly, the County's argument that the decision to create the CCO positions and fill them is a permissive subject of bargaining ignores the fact that the issue here is whether the existing terms of the Agreement have been violated, not whether the County has a duty to bargain over its decision.

The Union has requested as a remedy that the County be ordered to cease and desist from assigning bargaining unit work to the CCO's and that backpay be awarded at overtime rates to existing Jail Division employes. While such a remedy might be considered a "windfall", to limit the relief to only an order that the County cease using the CCO's to perform Jailer duties would permit the County to retain a substantial benefit (lower wages paid) from its violation of

4/ As the Union noted, and the Sheriff conceded on cross-examination, except for the equipment section and the training requirements, the job descriptions are identical for the CCO's and Jailers.

the Agreement and would do little to discourage future violations of this type. Therefore, as set forth more fully below, the Union's requested remedy will be granted.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. The grievance is arbitrable.

2. The grievance is sustained. Therefore, the County is directed to immediately cease and desist from using Civilian Correctional Officers to perform the duties of Jailers, and is further directed to pay backpay in an amount based on the number of hours worked by the Civilian Correctional Officers, with the hours to be divided equally amongst those employes in the Jailer classification, at the overtime rate based on the rates in effect at the relevant times for the Jailer classification.

Dated at Madison, Wisconsin this 2nd day of November, 1989.

By _____
David E. Shaw, Arbitrator