

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 MANITOWOC COUNTY SHERIFF'S :
 DEPARTMENT EMPLOYEES, LOCAL 986B, :
 AFSCME, AFL-CIO :
 :
 : Case 217
 and : No. 42039
 : MA-5539
 MANITOWOC COUNTY :
 :

Appearances:

Mr. Michael J. Wilson, Staff Representative, P.O. Box 370, Manitowoc, Wisconsin, appearing on behalf of the Union.
Mr. Mark Hazelbaker, Corporation Counsel, Manitowoc County, 1010 South Eighth Street, Room 308, Manitowoc, Wisconsin, appearing on behalf of the County.

ARBITRATION AWARD

Manitowoc County Sheriff's Department Employees, Local 986B, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Manitowoc County, hereinafter referred to as the County, are parties to a collective bargaining agreement, effective January 1, 1987 through December 31, 1988, which provides for final and binding arbitration of any differences which may arise between the parties as to the meaning or application of the collective bargaining agreement. Pursuant to a request for arbitration the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the posting and overtime pay of a position. Hearing on the matter was held in Manitowoc, Wisconsin on May 23, 1989. Post-hearing arguments and reply arguments were received by the undersigned by October 9, 1989. Full consideration has been given to the testimony, evidence and arguments presented in rendering this Award.

ISSUES:

During the course of the hearing the parties agreed upon the following issues and the County raised a procedural question to be resolved. The undersigned frames the procedural issue as follows:

1. Are the grievances arbitrable?

If yes,

2. Was there a "vacancy" and/or "new position" to post regarding the current work assignment(s) of Patrol Officer, Elijah C. Humphreys?

3. Has the overtime worked by Elijah C. Humphreys during 1989 violated the terms of the collective bargaining agreement?

If either 2 or 3 is yes the arbitrator is requested to retain jurisdiction for thirty (30) calendar days to enable the parties to fashion their own remedy.

PERTINENT CONTRACTUAL PROVISIONS

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ARTICLE 2 - SENIORITY

A.Seniority: It shall be the policy of the Sheriff's Department to recognize seniority.

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ARTICLE E - MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

Manitowoc County shall have the sole right to contract for any work it chooses and to direct its employees to perform such work wherever located subject only to the restrictions imposed by this Agreement and the Wisconsin Statutes. In the event the Employer desires to subcontract any work which will result in the layoff of any County employees, said matter shall first be reviewed with the Union.

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of its department. The Employer may adopt reasonable work rules except as otherwise provided in this Agreement.

The Employer agrees that all amenities and practices in effect for a minimum period of twelve (12) months or more, but not specifically referred to in this Agreement shall continue for the duration of this Agreement. The parties recognize the County's right to implement an Employee Assistance Program. Practices and policies established pursuant to the Employee Assistance Program shall not be considered a past practice, regardless of how long they exist. The County reserves the right to modify or discontinue any portion or all of the program shall not be subject to the grievance procedure.

The term "Employee Assistance Program" refers to a system of employee referral and counseling which helps employees with emotional, mental, chemical dependence and other personal problems. Referrals and counseling shall be confidential and shall not be disclosed or considered except as expressly authorized by the employee in writing.

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ARTICLE 8 - GRIEVANCE PROCEDURE

A.Definition of Grievance: Should any differences arise between the Employer and the Union as to the meaning and the application of this Agreement, or as to any question relating to wages, hours

and working conditions, they shall be settled under the provisions of this Article. (Emphasis added)

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Step 4. Arbitration

. . .

e. Decision of the Board: The Arbitrator shall not modify, add to, or delete from the terms of the Agreement. (Emphasis added)

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ARTICLE 10 - DEFINITIONS OF EMPLOYEES

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D. Temporary: A temporary employee is one hired for a specified period of time (not to exceed six (6) months) and who will be separated from the payroll at the end of such period. Temporary employees receive none of the benefits contained in this Agreement. Temporary employees shall not be used to replace, reduce or displace regular employment. (Emphasis added).

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ARTICLE 22 - JOB POSTING

A. Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs on the bulletin board in the department as well as the bulletin board in the office of the County Clerk for five (5) working days. Any employee desiring to fill any such posted vacancy or new position shall make application in writing and submit it to the Personnel Office. After the conclusion of the posting period, the envelope shall be opened at the Personnel Office in the presence of a representative of the Union and a representative of the County Personnel Committee, or its designee, at a time to be mutually agreed upon.

B. Whenever any vacancy occurs it shall be given to the employee with the greatest seniority, provided the applicant for such position is qualified and eligible for the position. The awarding of the position shall occur within seven (7) work days after the completion of the posting period.

C. When objections are made by the Sheriff's Department regarding the qualifications of an employee to fill the position, such objections shall be presented to the employee and the Union in writing by the Sheriff or the Sheriff designee.

D. If there is any difference of opinion as to the qualifications of an employee, the County Personnel Committee and the Union Committee shall take the matter up for adjustment through the grievance procedure.

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ARTICLE 23 - OVERTIME - COMPENSATORY TIME - HOLIDAY PAY

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I. The employees and Union acknowledge that reasonable overtime which is assigned must be accepted. It is further understood and agreed that overtime shall be distributed equally so far as its practical and within classifications. (Emphasis added)

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ARTICLE 25 - SHIFT PREMIUM PAY STEP-UP PAY

All employees who are permanently assigned to night shifts shall receive an additional thirty-five (35.00) per month as night shift premium pay. All employees who are on a regular rotating day and night shift shall receive twenty-five (\$25.00) per month as night shift premium. No shift premium shall be paid for those permanently assigned to day shifts. An employee shall be deemed to be assigned a night shift if the majority of his or her scheduled hours of work fall between the hours of 6:00 p.m. and 4:00 a.m.

Whenever an employee is assigned to perform the work of a higher classification, the next higher pay step of the new classification is paid provided the employee works eight (8) consecutive hours or more at the higher classification. (Emphasis added).

BACKGROUND

The County, amongst its various governmental functions, operates a law enforcement department. The head of the department, the Sheriff, is an elected official who derives his authority from the State of Wisconsin's Constitution. The instant matter arose when designees of the Sheriff, Undersheriff Richard Andrews and Deputy Inspector Kenneth Peterson, reassigned Deputy Elijah Humphreys from patrol duties to work in the County's Metro Drug Unit effective January 2, 1989. The Drug Unit is a cooperative enforcement program involving the County and municipal police agencies. In addition, Humphreys' wage rate was changed from the patrol officer rate (\$12.40 per hour) to the detective rate (\$13.33 per hour). Humphreys' duties were to involve undercover work and the assignment was to be temporary, six (6) months to three (3) years, not permanent. At the time of the hearing no evidence was introduced that specified exactly when Humphreys' reassignment would terminate.

At the hearing Peterson testified that Humphreys was selected in an attempt to reinvigorate the County's drug investigation program. Peterson also testified that he considered Humphreys the best qualified to handle the undercover assignment by reason of training and experience. Peterson did acknowledge that other patrol officers might be assigned to do undercover patrol work in the future.

The record demonstrates Humphreys at the time of the hearing had been compensated for three hundred and twelve (312) hours of overtime. Humphreys testified he was not assigned to regular patrol duties and that the overtime was primarily a result of working on cases and meetings with Metro Drug unit members. Humphreys also testified that it was important that his name was not divulged and that it would be impractical to assign other officers to handle individual cases. Further, part of his duties dealt with developing informants, and informants may not work with anyone but the officer who developed the informant.

After Humphreys was assigned the drug enforcement duties the instant grievance was filed and processed to arbitration in accordance with the parties' collective bargaining agreement.

COUNTY'S POSITION

The County contends the undersigned lacks jurisdiction in the instant matter and therefore the grievance must be dismissed. The County asserts the collective bargaining agreement cannot limit the Sheriff's exercise of his constitutional powers. The County argues that the power to assign deputies to suppress crime is a constitutional power of the Sheriff. The County contends the collective bargaining agreement can only reserve rights which could potentially be taken away. To allow the agreement to determine which officers may be assigned to which duty places intolerable constraints on the Sheriff.

The County also argues the undersigned lacks jurisdiction because no valid provision of the agreement can be at issue herein. The County asserts the grievance procedure only applies to issues which are part of the collective bargaining agreement, or mandatory subjects of bargaining. The County contends

the agreement does not contain any provision which limits the Sheriff's power to assign deputies. The County concludes the only result of sustaining the grievance would be an unconstitutional limitation of the Sheriff's power to direct his deputies.

Turning to the merits of the instant grievances, the County contends that even if the undersigned considers the merits of the instant grievance, the grievance must be dismissed. The County asserts the Union has failed to sustain the allegation that the temporary assignment of Humphreys' to drug work was a "vacancy" which should have been posted as a new position and offered to most senior qualified person. The County points out that patrol officers are regularly assigned all kinds of special duties and that these assignments are the prerogative of the Sheriff. The County argues the assignment at issue herein differs only in kind, not in principal, from the parties' past practice.

The County acknowledges that the term "vacancy" is not defined in the agreement. However, the County points out it has a County Ordinance which requires the approval of the entire County Board before new positions may be established and filled. The County asserts no additional positions have been created in the Sheriff's Department under the ordinances procedures. The County contends no vacancy has been created, that the evidence only demonstrates a deputy has been assigned to undercover investigation duties which are within the scope of his job description. The County points out Humphreys was told his assignment was temporary, would not lead to a permanent change in his status, and was for a specific limited purpose. The County argues that because no vacancy was created the Sheriff had no obligation to post a position in accordance with Article 22 of the collective bargaining agreement.

The County also argues that nothing in the agreement restricts the Sheriff's right to temporarily assign deputies in the manner complained of in the grievance. In support of its position the County points to Article 3, Management Rights Reserved. The County argues that the only provision which deals with assignments is Article 25, Section B, Step-Up-Pay. The County contends that by providing step-up pay to an employe who works in a higher classification this provision inherently recognizes the Sheriff has the right to assign his deputies to perform work without first posting the assignment as a vacancy. The County also asserts that this provision while containing a minimum of at least eight (8) consecutive hours, does not contain a maximum.

The County also contends the undersigned cannot sustain the grievance without exceeding his delegated authority. The County argues that the only way the grievance can be sustained is if the undersigned imposes a time limit on the duration of an assignment by the Sheriff, a time limit not found in the agreement.

The County also contends the Union has failed to demonstrate that overtime has not been equally shared. The County does not dispute that Humphreys worked a substantial amount of overtime on undercover drug investigations. However, the County points out Article 23 requires the sharing of overtime to the extent practical. The County argues that the record demonstrates the overtime work performed Humphreys could not practically be distributed among other officers without jeopardizing informant relationships, development of cases, and preventing enforcement of the law. The County argues the Union presented no evidence to refute its defense nor did the Union present any evidence which

would demonstrate inequitable distribution of overtime during the relevant time period.

UNION'S POSITION

The Union contends that the County has established a new position, that the County failed to post the position in accordance with Article 22, Job Posting, and that any conditions, such as job stress, do not circumvent the agreement's job posting provision. The Union argues that the County's argument that the position is so stressful no one employe can endure permanent assignment, but that when the position requires overtime the overtime cannot be shared, is not supported by any proof in the record. The Union asserts such convoluted reasoning ignores the parties' agreement that the Sheriff's Department shall recognize seniority. The Union contends the County's approach to the collective bargaining agreement is patronizing and that the County is attempting to change the agreement to allow the County to do what the County feels is in the best interest of the employe.

The Union also argues that the Arbitrator has the authority to interpret the agreement and that the dispute herein is within the jurisdiction of the arbitrator to decide. The Union asserts the collective bargaining agreement does not unlawfully limit the constitutional authority of the Sheriff. The Union points out that the Sheriff's choice of deputies is not constitutionally protected, yet the County claims the Sheriff's assignment of deputies is protected. The Union argues neither assignment or promotion is a Sheriff's duty which is constitutionally protected. The Union also argues the County's reliance on Wisconsin Professional Police Association v. Dane County, 149 Wis.2d 699 (Ct.App. 1989) is misplaced because this decision did not deal with the assignment of deputies to particular jobs.

The Union asserts the collective bargaining agreement lawfully limits the Sheriff's assignment of duties to deputies. The Union also asserts that since the issue herein relates to the meaning and application of the agreement, the Arbitrator has the jurisdiction to hear the Union's grievance. The Union stresses that the County's actions constituted the filling of a vacancy and that the County failed to abide by the agreement when it filled the vacancy.

DISCUSSION

Article 8 - Grievance Procedure, Section A of the parties' agreement specifically defines a grievance as any difference which arises between the parties over the meaning or application of the agreement. The undersigned finds that the issues raised by the Union clearly falls within this definition. Thus, the question of whether the County created a vacancy or new position and failed to post it and whether the County failed to equally distribute overtime are clearly within the undersigned's authority to determine. The record demonstrates that the instant matter is not one where the authority of the Sheriff to assign work to an employe is in question but rather whether the parties have agreed promotional opportunities shall be offered to the most senior qualified employe who is eligible for the position. While the undersigned believes the questions on the merits herein do not infringe on the constitutional authority of the Sheriff, if the provisions herein do so arbitration is not the proper arena for resolving such matters. The undersigned does not have the authority to alter or delete from the parties' agreement. Therefore, the undersigned finds the grievance to be properly before the arbitrator.

The undersigned also finds that the record clearly demonstrates the County created a new position which it failed to post. Whether or not there are internal procedures which the County must follow in establishing new positions and whether these procedures were followed is irrelevant. The County was attempting to improve its drug investigations. Prior to the instant matter no one employe spent one hundred (100) per cent of their time involved with drug investigations and coordination of efforts with other law enforcement agencies. When the County determined to have one employe perform these duties on a full-time basis it created a new position, particularly when the County by its own actions paid the position's incumbent the Detective's rate of pay. The undersigned finds no merit in the County's contention the instant matter is a temporary assignment, thus falling within the purview of Article 25's step-up-pay provision. Contrary to the County's arguments, the parties have defined temporary in Article 10, Section D as a time period not to exceed six (6) months. While nothing in the agreement restricts the County's ability to create a position greater than six (6) months but with a limited duration, such a position is clearly not temporary but a new position. Article 22 clearly requires new positions to be posted. While Article 25 could be used by the County to fill a position pending the completion of the posting process, it cannot be used to render Article 22 meaningless, thus Article 25 can not be used to evade the agreement's requirement that the County post new positions. The undersigned therefore concludes that the County violated Article 22 when it created the drug investigation position, i.e. the current work assignments of Officer Humphreys, and failed to post the position.

Article 23, Section I, requires that the County, so far as is practical, equally distribute overtime. Herein, as the County has pointed out, while

Humphreys worked three hundred and twelve (312) hours of overtime there is no evidence that this is an unequal distribution of overtime. Nor did the Union present any evidence which would refute Humphreys' testimony that his overtime hours cannot be shared with other employes due to the nature of his investigations, work with informants and coordination of work with other law enforcement agencies. Therefore, the undersigned concludes the Union has failed to demonstrate that the County violated Article 23, Section I.

Based upon the above and foregoing, and the testimony, evidence and arguments presented the undersigned concludes the grievances are arbitrable, the County violated Article 22 when it failed to post the current work assignment of Officer Humphreys, and that the County did not violate Article 23, Section I when it did not equally distribute overtime performed by Humphreys.

AWARD

1. The grievances are arbitrable.
2. The County violated Article 22 when it failed to post the current work assignment of Officer Humphreys.
3. The County did not violate Article 23, Section I when it failed to distribute equally overtime hours worked by Humphreys.

The undersigned will retain jurisdiction for thirty (30) days pending the parties' efforts to fashion their own remedy.

Dated at Madison, Wisconsin this 16th day of November, 1989.

By _____
Edmond J. Bielarczyk, Jr., Arbitrator