

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 WISCONSIN PROFESSIONAL POLICE :  
 ASSOCIATION/LAW ENFORCEMENT :  
 EMPLOYEE RELATIONS :  
 :  
 and : Case 66  
 : No. 43056  
 : MA-5883  
 DOOR COUNTY (SHERIFF'S DEPARTMENT) :  
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Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, by Mr. Richard Thal, appearing on behalf of the Union.  
Mr. Dennis D. Costello, Corporation Counsel, appearing on behalf of the County.  
Mr. William W. Graper, Attorney at Law, appearing on behalf of LeRoy Klein.

ARBITRATION AWARD

Pursuant to a request by the Wisconsin Professional Police Association/Law Enforcement Employee Relations, herein the Union, and the subsequent concurrence by Door County, herein the County, the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission on December 27, 1989 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on March 23, 1990 at Sturgeon Bay, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on June 5, 1990.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties stipulated to the following issue:

How much bargaining unit seniority does LeRoy Klein have under the parties' collective bargaining agreement upon his return to the bargaining unit?

BACKGROUND:

LeRoy Klein began employment as a Door County Deputy Sheriff on May 16, 1975 (his seniority date) and has been continuously employed by the County since that date. On August 9, 1982, Klein requested and was granted a leave of absence to run for Sheriff of Door County. On September 15, 1982, Klein won the primary election. On September 16, 1982, Klein was appointed Sheriff by the Governor of Wisconsin as there was no incumbent Sheriff. Klein held the position of Sheriff until January 2, 1989. On January 3, 1989, Klein returned to the classified service of Door County as a Deputy Sheriff. He was given credit by the County for only the seven years of seniority accumulated prior to August 9, 1982.

Klein has requested accumulated seniority for the time spent as Sheriff and that seniority has been denied by the County. The Union agrees with the County's position.

Klein's seven years of bargaining unit seniority places him sixth on the Deputy Sheriff's seniority list. If the County were to credit Klein with six additional years of seniority for his service as Sheriff, Klein would rank third on that seniority list. That would place him above M. Rispins, and below A. Birnschein and B. Schultz. It would also place him above P. Mickelson, Union President. Seniority for Deputy Sheriffs as determined by rank on the seniority list is significant because it may determine shift assignments and vacation picks.

The County had previously allowed an employe from the County Highway Department (Edmund Paul II) to transfer from the County Highway Department to the Sheriff's Department with credit given for seniority accumulated as a County Highway employe. This occurred sometime in the early to mid 1970's.

Formulation of the aforesaid stipulated issue comes from a Memorandum Decision and Order of the Door County Circuit Court. 3/ That Court deferred this matter to arbitration. The Court held:

The present dispute is not ripe for judicial determination because the controversy concerns an

interpretation of the labor agreement. Such an interpretation would be most suitably made by an arbitrator who is an expert in the field of labor relations. In other words, an arbitrator should first interpret the collective bargaining agreement. Then, if need be, a court may review the arbitrator's award in accordance with Chapter 788, Stats. 4/

PERTINENT CONTRACTUAL PROVISIONS AND STATUTES:

ARTICLE VI - SENIORITY

Section 6.01 - Definition of Seniority: It shall be the policy of the department to recognize the seniority principle. On any particular question or decision, when all other factors involved are equal, seniority will be recognized. Seniority time shall consist of the total calendar time elapsed since the date of original employment with the Employer provided, however, that no time prior to a discharge for cause or a quit shall be included, and provided, that seniority shall not be diminished by temporary lay-offs or leaves of absence or contingencies beyond the control of the parties of this Agreement.

Section 6.08 - Loss of Seniority: Seniority shall be lost if an Employee:

1. Is discharged for cause;
2. Retires or voluntarily quits;
3. Is absent without notice for three (3) consecutive work days (unless the failure to provide notice is due to incapacity beyond the control of the employee);
4. Upon recall, fails to notify the County within one (1) week of his or her intentions or fails to report for work at the end of one (1) week following receipt of notice of recall unless illness or other justifiable circumstances prevent him or her from doing so;
5. Fails to return to work from a leave of absence within seven (7) days of expiration of said leave, unless physically unable to return to work; or
6. Is on layoff for a period of time equal to one (1) year or the length of employment, whichever is less. (An employe shall not accrue seniority while on layoff.)

Section 7.02 - Continuous Service: Continuous service shall include all of the time which an Employee has in a continuous employment status in any position within the County employment. Any absence, including lay-off, of more than thirty (30) calendar days in a year shall not be considered continuous service. Military leave or leave due to sickness or injury arising out of County employment shall be counted as continuous service.

Section 11.06 - Return from Leave: Upon return from a leave of absence, the Employee will be assigned to his or her former position.

Section 63.065, Wisconsin Statutes. Elected county or state officers.

A permanent employe in the classified service of any county having a population of 500,000 or more, who is elected to a county or state office shall be granted a leave of absence without pay from a position for the period of his or her entire service as an elected county or state officer and thereafter shall be entitled to return to the former position or to one with equivalent responsibility and pay in the

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4/ Id. p.5.

classified service without loss of seniority or civil service status. At the discretion of the civil service commission, any elected state officer, while on leave of absence, may also be permitted to return to a former position or to one with equivalent responsibility and pay in the classified service for such periods of time as may be set by the commission. This section shall not apply to any department head in the classified service whenever the commission has established a list of department heads or employes of any county department under s. 46.215.

UNION'S POSITION:

The Union argues that Klein should maintain his previously accrued seniority of seven years as a deputy sheriff but that he should not accumulate bargaining unit seniority for time served outside the bargaining unit as Sheriff. In this regard the Union supports the position of the County when it credited Klein with seven years seniority upon his return to the bargaining unit.

In support thereof, the Union maintains that Klein's bargaining unit seniority was not diminished as argued by Klein when upon his return to the bargaining unit the County determined he had seven years seniority based solely on his service as a deputy sheriff in the unit. (emphasis supplied) The Union primarily relies on the parties' collective bargaining agreement to reach this conclusion. First, the Union notes that under the recognition clause the Sheriff is explicitly excluded from bargaining unit membership and therefore Klein could not accrue seniority during the period he served as Sheriff. The Union also points out that the definition of seniority set forth in Section 6.01 is consistent with the County's determination that Klein did not accrue bargaining unit seniority while Sheriff. In providing that seniority should not be "diminished" by a leave of absence, the Union argues that the aforesaid contract provision does not provide that seniority is gained while a person has voluntarily left the unit and is serving as a public official. The Union adds: "To diminish means to lessen or reduce. In fact, Klein's bargaining unit seniority has never been lessened or reduced; rather, it was frozen at seven years during Klein's tenure as sheriff."

The Union relies on several arbitration decisions, and the principles enumerated in Elkouri and Elkouri, How Arbitration Works, p. 588-590 (4th Ed. 1985) in support of its reasoning noted above. In particular, the Union cites Wyoming Public Schools, 77 LA 295 (Ketch, 1981) in support of the arbitral principle that an employe who returns to a bargaining unit is not entitled to accrue seniority except in those rare cases when the collective bargaining agreement explicitly states as much or when both parties to a contract agree to count time spent outside the bargaining unit as bargaining unit seniority.

Contrary to Klein's position, the Union argues that the Arbitrator's main function is to interpret the agreement, not Section 63.065, Stats. The Union concedes that an arbitrator may look at laws "(just as he or she may look at all relevant factors) to determine whether the relevant laws serve to clarify an ambiguous contractual provision." The Union feels, however, that the aforesaid statutory section is no clearer on the issue in dispute than the parties' contractual seniority provisions; and, therefore, cannot serve to clarify the contract.

Assuming arguendo that the Arbitrator must interpret Section 63.065, Stats., as if the arbitrator were a judge of law, the Union contends Klein's position still must fail. In this regard the Union claims state law does not conflict with the positions of the Union and the County. The Union states its position on this point as follows:

This claim for seniority credit--like Klein's contractual claim--must fail. Section 63.065 provides that an elected county officer is entitled to return to the bargaining unit "without loss of seniority." It does not provide that an elected officer gains bargaining unit seniority while out of the bargaining unit. Thus, the question of interpretation raised by this statute is similar to that raised by the collective bargaining agreement, namely, is seniority lessened or diminished if Klein receives full credit for his prior bargaining unit service as a deputy sheriff, but not credit for his time as sheriff. Like section 6.01 of the collective bargaining agreement, section 63.065, Stats., guarantees that Klein retained but did not accumulate bargaining unit seniority while sheriff.

In addition, the Union argues that the Attorney General's Opinion 5/ on

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5/ OAG 3-89 (January 23, 1989).

Section 63.065, Stats., is not binding on the Arbitrator in this case; and is not directly on point or even persuasive.

Finally, the Union maintains that Sections 6.08 and 7.02 of the agreement do not support Klein's position. In this regard the Union argues that despite listing conditions where tolling or non-accrual of seniority would apply in Section 6.08 there is no evidence that the parties to the agreement ever contemplated what seniority a sheriff would have upon his return to the unit. Likewise, the Union rejects Klein's reliance on Section 7.02. The Union argues that Section 7.02 defines the term "continuous service" for the purpose of determining the number of weeks of vacation an employe has earned, and does not address the issue of whether an employe outside the bargaining unit may accrue bargaining unit seniority.

For all the reasons stated above, the Union requests that the Arbitrator find that Klein did not accrue additional years of seniority during the period when he was outside the bargaining unit serving as Sheriff; and issue an Order affirming the County's determination that Klein was entitled to seven years of seniority herein.

#### COUNTY'S POSITION:

The County first argues that its civil service rules in effect when Klein ran for Sheriff would not allow the years he was Sheriff to count as tenure. The County adds that the civil service language is important to show the intent of the County Board in not wanting time Deputies were on a leave of absence to count as tenure.

The County next argues that the proper definition of the term "without loss of seniority" as used in Section 63.065 Stats., means return to seniority existing at the time Klein became Sheriff.

The County also rejects Klein's reliance on the aforesaid Opinion of the Attorney General. In this regard, the County notes:

The Attorney General ignored the best available interpretative aids and, instead, relied upon a dictionary definition, inapplicable statutes and remote case law. In addition, the result of the Attorney General's interpretation is that the phrase, "without loss of seniority" confers "additional seniority"; a result that does violence to the plain meaning of "without loss".

The County concludes that the parties' collective bargaining agreement provides the best answer to the question of how much seniority Klein is entitled to upon his return to the bargaining unit. In particular, the County cites Sec. 11.06 for the proposition that any employe who returns from a leave of absence will be assigned to his or her former position. In the County's opinion the above contractual language means that the seniority of an employe shall not accumulate during the period of separation.

In the alternative the County argues that a different Attorney General's Opinion (OAG 05-89 dated February 16, 1989) favors both the County's and Union's position. In this regard, the County makes the following claim:

In an opinion dated February 16, 1989, the Attorney General concluded the employee was not entitled to reinstatement because that right was not provided pursuant to a properly authorized classified service system program or collective bargaining agreement. In so concluding the Attorney General made it very clear that proper analysis of the "rights" of an employee seeking return to a prior position requires consideration of the collective bargaining agreement in addition to the existence and content of a classified service regulation. Even a written notice describing the consequences of separation from the officer's non-elected position was considered. . . .

The County further argues that it entered into a collective bargaining agreement with the Union pursuant to its duty to bargain under MERA; and, therefore, the seniority provisions contained therein should be harmonized with Section 63.065 Stats., to support the Union's and County's position. In particular, the County cites Section 7.02 which states that any absence of more than thirty (30) days in a year shall not be considered continuous service for the proposition that because Klein was absent from his position as deputy sheriff during his six years as Sheriff he did not accumulate seniority during this period. The County also argues that because Section 6.01 states seniority shall not be diminished by leaves of absence Klein is entitled to return to his former position as deputy sheriff with the same accumulated seniority he had when he left said position. As noted above Section 11.06, in the opinion of the County, further reinforces its position that Klein does not lose seniority as a result of his leave of absence, nor does he accrue seniority during his

absence. Likewise the County concludes, the aforesaid statute provides that Klein's seniority is entitled to return to his former position "without loss of seniority or civil service status."

Finally, the County maintains that a single incident relating to one individual who worked for the County's Highway Department; went into the military service; and returned to employment with the Sheriff's Department without loss of seniority does not establish a past practice that may be relied upon by Klein herein.

Based on all of the above, the County requests that the Arbitrator deny Klein's claim for more seniority, and uphold its action granting Klein seven years seniority upon his return to the bargaining unit as a Deputy Sheriff.

#### KLEIN'S POSITION:

Klein basically argues that Section 63.065 Stats., requires that his seniority include all of the time he served as Sheriff. (" . . . shall be entitled to return to the former position. . . without loss of seniority or civil service status.") (emphasis supplied) Klein contends that the collective bargaining unit should be harmonized to reach the same result.

With respect to the collective agreement, Klein notes that seniority is measured, according to Section 6.01, based upon "the date of original employment with the employer." Klein points out that Section 7.02 provides that: "Continuous service shall include all of the time which any Employee has in a continuous employment status of any position within the County government." (emphasis supplied) Klein adds that the agreement does not provide for tolling of seniority i.e. while on a leave of absence serving as Sheriff, except as noted in Section 6.08. There, according to Klein, the parties specifically listed certain conditions providing for loss of seniority but did not include leaves of absence. Klein concludes, "It is clear that tolling or non-accrual of seniority was contemplated in drafting the collective bargaining agreement but that it was limited to the provision regarding layoffs. [Section 6.08(6)]"

Klein further maintains that under a set of facts almost identical to those in this case, the Attorney General issued an interpretation of Section 63.065 Stats., which supports his position that seniority must include all of the time he spent as Sheriff.

Klein rejects the County's reliance on its civil service ordinance stating that said ordinance cannot limit or affect seniority rights conferred by contract and law. Nor can said ordinance demonstrate "intent" of the parties to limit accumulation of seniority to time spent in the bargaining unit, Klein claims, since the "County has twice bargained away that right to toll seniority in the collective bargaining agreement." Klein also argues that the Attorney General's opinion relied upon by the County is distinguishable from the instant dispute. Finally, Klein argues that the Union acted improperly herein to protect the interests of its President.

Based on all of the foregoing, Klein requests that the Arbitrator sustain his claim and order the County to credit him with 15 years of seniority.

#### DISCUSSION:

At issue is how much bargaining unit seniority does LeRoy Klein have under the parties' collective bargaining agreement upon his return to the bargaining unit. When Klein returned to the classified service of Door County as a Deputy Sheriff, the County allowed him to maintain his previously accrued seniority of seven years as a Deputy Sheriff. The Union agrees with the County's determination. Klein believes that he should receive full seniority credit for the years when he was Sheriff.

A review of the parties' collective bargaining agreement supports the County's and Union's position. Section 6.01 provides that "seniority shall not be diminished by temporary lay-offs or leaves of absence. . . ." (emphasis supplied) Diminished is defined by The American Heritage Dictionary of the English Language, New College Edition, (10th Ed. 1981) p. 370 as to "make smaller or less." It does not mean to increase or make larger. The County gave Klein credit for seniority accumulated while a Deputy Sheriff but refused to let Klein increase his seniority by counting time Klein served as Sheriff out of the bargaining unit. As such, the County complied with the requirements of Section 6.01.

A conclusion along these lines is supported by the language of Section 7.02. Said section defines continuous service as "all of the time which an Employee has in a continuous employment status in any position within the County employment." However, the section also provides that "Any absence. . . of more than thirty (30) calendar days in a year shall not be considered continuous service." (emphasis added) Since Klein's absence while serving as Sheriff was for longer than 30 days in a calendar year it cannot count as continuous service for seniority purposes. The last sentence of Section 7.02 provides for two exceptions (military leave or leave due to sickness or injury

arising out of County employment) to the rule that absences longer than 30 days shall not be considered continuous service. Klein's leave of absence while Sheriff, however, does not fall into either of these two categories.

Klein argues contrary to the above that the agreement does not provide for tolling or reduction of seniority except under the conditions specifically enumerated in Section 6.08. It is true that Section 6.08 entitled "Loss of Seniority" provides seniority shall be lost under six conditions listed therein. However, that is not at issue here. Klein has not lost any seniority accumulated as a Deputy Sheriff in the bargaining unit. He has just not accumulated or gained any seniority for time spent out of the unit as Sheriff. Therefore, Section 6.08 is not applicable to the instant dispute.

Klein does not agree with the conclusions reached above. Klein feels that the aforesaid contractual language supports a finding that his seniority must include all of the time he served as Sheriff. Such a result, Klein opines, is consistent with Section 63.065 Stats., which provides that he should be returned to his former position as Deputy Sheriff without loss of seniority. However, Section 63.065 Stats., does not say this. It merely states that a person in Klein's situation may be permitted to return to his former position "without loss of seniority." It does not state that he should accumulate or gain seniority for time spent out of the unit. As noted above, the County did not reduce or eliminate Klein's bargaining unit seniority after he left the unit. He was credited with the entire amount of seniority he accumulated as Deputy Sheriff upon his return to the unit. Based on these facts, the Arbitrator finds that the County has complied with the requirements of Section 63.065 Stats. Such a finding is consistent with my conclusion that the County acted properly under the collective bargaining agreement in permitting Klein to maintain his previously accrued seniority of seven years as a Deputy Sheriff but refusing to allow him to accumulate bargaining unit seniority for time served outside the unit as Sheriff.

Likewise, the Arbitrator rejects Klein's reliance on the aforesaid Attorney General's Opinion (OAG 3-89, January 23, 1989). In doing so the Arbitrator first notes that opinions or administrative rulings by governmental agencies may be considered by an arbitrator, but an arbitrator is not bound by such opinions or rulings. In said Opinion the Attorney General found that Section 63.065 Stats., permits a person to return from an approved leave of absence to classified service without loss of seniority. This means, according to the Attorney General, that the person is treated for seniority purposes as though he or she never left the position in classified service. (The Attorney General was commenting on a case, similar to the dispute herein, where an incumbent Sheriff was defeated for reelection, and inquired about his rights to rejoin the department as a Deputy Sheriff. The question posed to the Attorney General, and answered as noted above, was whether the person in question "returns with the same seniority he had when he left to become Sheriff, or whether it means he returns with credit toward seniority for the time spent as Sheriff in addition to the seniority he held when he left the department.")

The Attorney General opines in the aforesaid Opinion that "continuous service that is the basis for seniority is usually not considered broken by an approved leave of absence." The Attorney General goes on to cite a dictionary definition, the state civil service code, and judicial interpretation of the Selective Training and Service Act of 1940 in support of his conclusions. However, the precedent relied upon by the Attorney General, unlike the situation herein, clearly and specifically supports the proposition that a person accumulates seniority while on an approved leave of absence. The instant collective bargaining agreement makes no such provision. To the contrary said agreement provides for a distinctly different result as noted above.

Klein also points out that the County had previously allowed an employe from the Highway Department to transfer from the County Highway Department to the Sheriff's Department with credit given for seniority accumulated as a County Highway employe. Klein feels that the County is obligated to treat him the same way. The County argues, on the other hand, in order to be binding a past practice must be unequivocal; clearly enunciated and acted upon by the parties; and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both the Union and the Employer. The Arbitrator agrees. One incident affecting one individual sometime during the 1970's does not a past practice make. Therefore, the Arbitrator rejects this claim by Klein.

Klein further argues that the Union is acting unfairly herein. In this regard, Klein makes the following claim:

The majority of the Union members (9 out of 12) are not affected. Thus the Union's position as to fairness apparently only applies to how this matter is treated vis a vis the Union President. That claim seeking fairness smacks of a personal interest of Mr. Mickelson's rather than the interests of the Union's members at large.

Klein, however, did not offer any persuasive evidence that Mr. Mickelson acted improperly in the instant case. To the contrary, Mr. Mickelson, as Union President, has a responsibility to administer the contract for bargaining unit members and preserve its integrity. In addition, while it may be true that 9 out of 12 bargaining unit members would not be affected adversely if the Arbitrator rules in Klein's favor, the Arbitrator points out that Mickelson is not the only bargaining unit member who would have less relative seniority as a result of a favorable ruling to Klein as Klein suggests. (Two other bargaining unit members would also have less seniority in the bargaining unit.) 6/ Therefore, based on the above the Arbitrator rejects this claim of Klein's.

Finally, Klein argues that the Arbitrator should not consider the County's brief because it was untimely filed. There was no agreement between the parties that the briefing schedule would be followed strictly, and that if a brief was late it would not be considered. In fact, the parties generally did not file their briefs precisely on time. In addition, there has been no showing that Klein was adversely affected by the County's late filing herein. Based on same, the Arbitrator rejects this argument of Klein's as well.

Based on all of the above, the Arbitrator finds that the answer to the issue as stipulated to by the parties is that LeRoy Klein has seven years of bargaining unit seniority under the parties' collective bargaining agreement upon his return to the bargaining unit as previously determined by Door County.

In light of the foregoing and the record as a whole, it is my

AWARD

That Klein's claim for more seniority is denied, and the County's action granting Klein seven years seniority upon his return to the bargaining unit as a Deputy Sheriff is affirmed.

Dated at Madison, Wisconsin this 3rd day of July, 1990.

By \_\_\_\_\_  
Dennis P. McGilligan, Arbitrator