BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION and ONEIDA COUNTY	Case 67 No. 42600 MA-5745

Appearances:

Mr. Richard Thal, Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, WI 53703, appearing on behalf of Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

Mr. Lawrence R. Heath, Corporation Counsel, at hearing and on brief, and Mr. Paul Schaumburg, Assistant Corporation Counsel, on reply brief, Oneida County, Courthouse Building, P.O. Box 400, Rhinelander, WI 54501, appearing on behalf of Oneida County.

ARBITRATION AWARD

Wisconsin Professional Police Association/Law Enforcement Employee Relations Division (hereinafter Association) and Oneida County (hereinafter County or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of disputes concerning the interpretation or application of said agreement by an Arbitration Board. Said Board is composed of one member selected by each party and a chair selected by the two other members. On June 14, 1989, the Association filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission (hereinafter Commission). Said request stated that the Association had chosen Glenn S. Schaepe as its member of the Arbitration Board and that the County had selected Charles A. Rude as its member. On July 18, 1989, the Association advised the Commission that the two members of the Arbitration Board had selected James W. Engmann, a member of the Commission's staff, as chair of the Arbitration Board. Subsequently, the Commission appointed the undersigned as the impartial arbitrator in this matter. A hearing was held on September 12, 1989, in Rhinelander, Wisconsin, at which time both parties were afforded the opportunity to present evidence and to make arguments as they wished. No transcript was made of the hearing. The parties submitted briefs and reply briefs, the last of which was received October 31, 1989. On April 24, 1990, the Chair

of the Arbitration Board sent an unsigned draft of the award to Arbitrator Schaepe and Arbitrator Rude. On April 26, 1990, Arbitrator Rude replied, stating

he concurred with the draft award. On May 23, 1990, Arbitrator Schaepe replied, requesting reconsideration of the draft award. In a letter dated June 6, the Chair of the Arbitration Board advised Arbitrators Schaepe and Rude that he was in the process of revising the draft of the award. On June 27, 1990, the Chair of the Arbitration Board sent a revised draft of the award to Arbitrators Schaepe and Rude. On July 5, 1990, Arbitrator Schaepe replied, stating he concurred with the draft Award. On July 27, 1990, Arbitrator Rude replied, stating he disagreed with the revised award and with the process. In a letter dated July 30, 1990, the Chair of the Arbitration Board advised Arbitrator Rude that he could submit a written dissent if he wished and that he should advise the Chair by August 10, 1990, if he desired to do so. Said date passed. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

Prior to April, 1986, Oneida County deputy sheriffs performed dispatcher duties. In April, 1986, the County Board approved the hiring of civilian dispatchers on a trial basis. Subsequently, the County made the position of civilian dispatcher a permanent job classification. In 1987, a dispute arose between the Association and the County as to whether the civilian dispatchers should be included in the existing law enforcement bargaining unit. That dispute was resolved in November 1987 when the parties agreed that the dispatchers would be included in the bargaining unit. On October 5, 1988, the Association and the County agreed on a wage schedule for the civilian dispatchers with a starting wage rate for the dispatchers of $6.05 per hour, effective January 1, 1988.

On January 5, 1988, the County created the temporary position of Dispatcher/Jailer for fiscal year 1988. This position was designed to permit the County to assign the employe in that position as either a dispatcher or a jailer, depending on the County's staffing needs. The County hired Sue Sommers to fill the position. On September 19, 1988, Sommers vacated the temporary position of Dispatcher/Jailer to take a permanent dispatcher position. On October 17, 1988, Sheriff Charles Crofoot (hereinafter Sheriff) requested that the County make the temporary position of Dispatcher/Jailer a permanent position. In mid-October the Sheriff interviewed Roger Prien (hereinafter Grievant) for the Dispatcher/Jailer position vacated by Sommers. The Sheriff explained to the Grievant that the pay rate for performing civilian dispatcher duties was $4.13 per hour. The Grievant told the Sheriff he could not afford to work for $4.13 per hour. The Sheriff told the Grievant that the rate would go to $6.05 per hour if the position became permanent because the County and Association had agreed to that rate for the permanent dispatchers. The Grievant took the job at $4.13 per hour on the chance that the position would become permanent. Cn November 15, 1988, the County Board approved the Sheriff's request to make the position of Dispatcher/Jailer permanent, effective January 1, 1989.

The Grievant started working full-time as a Dispatcher/Jailer on October 24, 1988. On or about November 28, 1988, the Grievant received a payroll information form that stated that he would receive $6.05 per hour effective October 24, 1988. The form was signed by Personnel

Director Carey Jackson (hereinafter Personnel Director). The form stated that the reason for the pay rate was "1988 salary increase - contract negotiations". On December 12, 1988, the Personnel Director placed a revised payroll information form in the Grievant's mail slot. This form changed the effective date for the Grievant's pay rate of $6.05 per hour to January 1, 1989. The Grievant received $4.13 per hour for all hours he worked as a dispatcher between October 24, 1988 and December 31, 1988.

PERTINENT CONTRACT LANGUAGE

> Section 1.01 - Recognition: The County hereby recognizes the Association as the exclusive bargaining agent for the following permanent positions in the Oneida County Sheriff's Department: Investigator, Sergeant, Patrolman, Jailer, Cook/Clerk/Matron, Clerk Matron and Civilian Dispatcher; excluding the Sheriff and Chief Deputy; hereinafter called the employees for the purpose of bargaining collectively in the matters pertaining to wages, hours and conditions of employment.
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> . . .
>
> APPENDIX "A" WAGES
>
> . . .
>
> Effective January 1, 1988, the civilian dispatchers shall be compensated according to the following hourly wage scale:
>
> | CLASSIFICATION | START |
> |---|---|
> | Civilian Dispatcher | $ 6.05 |

STATEMENT OF THE ISSUE

The parties stipulated to the framing of the issue as follows:

> Did the County violate the collective bargaining agreement when it failed to pay Roger Prein the contractually agreed upon rate for civilian dispatchers for hours worked between October 24, 1988, and January 1, 1989?
>
> If so, what is the remedy?

POSITION OF THE PARTIES

A. Association

On brief, the Association argues that the Dispatcher/jailer position is a bargaining unit position; that, therefore, the rate of pay is determined by the collective bargaining agreement; that the position is a combination of two bargaining unit classifications; that when the Grievant worked in two bargaining unit positions, his rate of pay for the work in each position was established by the collective bargaining agreement; that the contract clearly provides for a starting rate of pay for dispatchers at $6.05 per hour effective January 1, 1988; that since the Grievant started working as a dispatcher on October 24, 1988, his rate of pay should have been $6.05 per hour instead of $4.13 per hour; that the County has maintained that the Dispatcher/jailer position was not a permanent position until January 1, 1989; that this fact is immaterial to this grievance; that employes who temporarily perform work are still covered by a collective bargaining agreement unless the agreement explicitly states otherwise; that the parties' collective bargaining agreement does not distinguish between wage rates for permanent and temporary employes; and that, therefore, the fact that the Grievant's position was not officially a permanent position until 1989 does not affect his 1988 wage rate.

The Association also argues that the Employer should be estopped from paying the Grievant a wage rate less than $6.05 per hour; that the County promised the Grievant that it would pay him $6.05 per hour for dispatcher work; that, therefore, it must pay him that rate; that an employer may be bound by an oral assurance; that arbitrators can decide issues on the basis of estoppel; that the promise need not be in writing for the doctrine of equitable estoppel to apply; that the fact that the employer is part of a municipality does not make it immune from the doctrine of equitable estoppel; that on two separate occasions the County promised the Grievant that he would receive the rate of $6.05; that the Grievant reasonably believed these promises and started work in reliance upon them; that, consequently, the elements of estoppel are fulfilled in this matter; and that the Gounty should be estopped from reniging on its promise to pay the Grievant $6.05 per hour.

On reply brief, the Association argues that the County relies on the content of a nonprecedential settlement agreement when it contends that the hourly rate of pay for the Grievant's position should have been $4.13 per hour; that in order to promote the settlement of disputes, nonprecedential settlements are generally given no weight in later grievances; that, consequently, the content of said settlement agreement should have no bearing on the present grievance; that it is well established that a legislative body may not unilaterally modify the terms of a collective bargaining agreement; and that, even if the Gounty Board did budget the position at $4.13 per hour, the Grievant is still entitled to receive the $6.05 per hour rate established in the lawfully bargained labor agreement.

B. County

On brief, the County argues that by statute and the express terms of the collective bargaining agreement, the County has the sole authority to hire County employes; that the intent of the County Board was clear that it was creating the position of one temporary Dispatcher/jailer for fiscal year 1988; that the Sheriff, the Law Enforcement Committee and the Personnel Committee understood that intent when they respectively monitored the utilization of the temporary position to determine whether the position should become permanent at the end of the year trial period; that the Sheriff and the two committees recommended to the Gounty Board on November 16, 1988, that the temporary position become permanent effective January 1, 1989; that the amount of money budgeted for that recommendation pertained only to 1989; that the County Board made no provision for an adjustment of the wage rate for the temporary position of Dispatcher/jailer for 1988 above the rate of $4.136 per hour; that the Association recognized the correct hourly rate of pay for the Dispatcher/jailer in a joint memorandum dated December 22, 1988; that, other than one mistake which was acknowledged and corrected by the Personnel Department, the County has been consistent in treating the position of Dispatcher/Jailer as temporary throughout 1988; that neither the mistake of the Personnel Department nor the decision of the Association to grieve this matter should be able to undermine the exclusive authority of the County to determine what positions are to be created and when they are to become effective.

On reply brief, the County argues that the evidence shows that the County never had a permanent job position of Jailer/Dispatcher until January 1, 1989; that a trial or experimental position of Jailer/Dispatcher did exist in 1988; that the rate of pay for said position was $4.13 per hour; that the recognition clause does not mention a position of Jailer/Dispatcher; that the Grievant was hired to fill a trial or experimental position under the County's exclusive authority to hire personnel; that the Grievant's position was not part of the collective bargaining agreement; and that the Grievant's wage rate of $4.13 per hour was appropriate for 1988. The County also argues that there is no evidence of any promise to pay the Grievant $6.05 per hour; that the testimony of both the Sheriff and the Grievant demonstrated that the Grievant agreed to work for the rate of $4.13 per hour when performing dispatcher duties; that it was only a hope on the part of the Grievant that the position would become permanent and that he would be hired to fill the position; that the Sheriff expressed only his wish that the position would be made permanent; that the Sheriff made no promise to the Grievant that any retroactive pay increase would be paid to the Grievant; and that there were no promises made to the Grievant that he would be paid $6.05 per hour.

DISCUSSION

A. Estoppel

The Association argues that the County should be estopped from paying the Grievant less than the contractual rate, based upon oral promises allegedly made by the Sheriff and the Personnel Director that the Grievant would receive the rate specified in the agreement. According

to the Union argument, the Grievant reasonably believed these promises and started work in reliance upon them.

The alleged promise of the Personnel Director came in a payroll information form. The Personnel Director testified credibly that this was an error on his part which he corrected two weeks later. Besides, the Grievant did not get the form until he had worked a month. He did not rely on this alleged promise in taking the position.

The second alleged promise came from the Sheriff. Yet the Grievant testified on cross examination that the Sheriff told him the position was temporary, that his best guess was that the position would become permanent, and that the Law Enforcement and the Personnel Committees had recommended that the position be made permanent. He also testified that the Sheriff did not tell him that he would receive the retroactive pay increase which the civilian dispatchers received and that he took the risk that the position would become permanent. So even if the Association could enforce an oral promise outside the agreement through this Arbitration Board, the record is clear that no such promise was made.

B. Position

The County argues that the Recognition Clause excludes the position of Dispatcher/Jailer in two ways. First, the Recognition Clause is limited to permanent positions and the position of Dispatcher/Jailer was a temporary position until January 1, 1989. Second, the Recognition Clause lists the permanent postions covered by the agreement, and the position of Dispatcher/Jailer is not included in said list.

On first blush, the County's argument has great appeal. It is undisputed that the position of Dispatcher/Jailer was a trial position for the year 1989. On its face, the Recognition Clause does not include a position entitled Dispatcher/Jailer. Thus, it would be easy to say that said position is not a permanent position listed in and covered by the agreement, and to deny and dismiss the grievance.

But the Association argues that the Dispatcher/jailer position is a combination of two bargaining unit classifications and that, as the Grievant worked in two bargaining unit classifications, his rate of pay for work in each position was established by the agreement. The Association's use of the word "position" differs from the use of that word by the County, and therein lies the crux of the problem.

Throughout this case, including this Award, the entity of Dispatcher/jailer has been referred to as a "position". But that word has several definitions, several uses. For example, add another deputy sheriff to the staff and you have added another position, in the sense of the number of posts to be filled. Create a "Chief Deputy" and promote a deputy sheriff to Chief Deputy and you have added a new position in terms of job classification, even though you may not have added

to the number of employes. Combine the jobs of traffic officer and deputy sheriff and you have the position of traffic sheriff, a new position in terms of job assignment. Decide to call the employes Deputy Sheriff's I, II and III, based on experience, and you have new positions in terms of job titles. All of these examples, limited as examples are, show some of the uses of the word "position".

The Association's argument is based on a definition of position related to job classification; that is, the "method of arranging job into various categories or classes in a particular company or industry. . ." 1/ In essence, the Association argues that since the job classification of dispatcher and the job classification of jailer are positions listed in the Recognition Clause, the combination of the two classifications is included. And since the positions of dispatcher and jailer are permanent positions, it is only the combination of the positions that is temporary.

The County, on the other hand, uses the term "position" in two ways. First, it asserts a definition of position which is related to job title; that is, the "name or other designation which is used to identify the particular work." It argues, in essence, that since it has created a temporary or trial job title, it has created a temporary or trial position. Since the new job title is temporary and not included in the Recognition Clause, the County argues that the position is not covered by the agreement. Second, the County asserts a definition of position which is related to job assignment; that is, the "allotting or assigning of specific duties and responsibilities to a person." Since the job assignment of the Dispatcher/jailer is the combination of the job asssignments of the dispatcher and the jailer positions, the county argues that it has created a new position.

But this is not a case where the employer created a new position with a totally unique job assignment. Nor is this a case where the employer created a new position by combining two positions into one. In this case, when the Grievant was acting as a dispatcher, he had the same job description as the other dispatchers. When he was acting as a jailer, again, he had the same job description as the other jailers. The job assignments are not new, nor are the job descriptions. What is new is that one person has been hired, in essence, for two part-time jobs. It was done for a very sound reason; this allows the County to use the Grievant where it needs him most --- as a dispatcher one day, as a jailer the next. As such, the job title of Dispatcher/jailer does not hold any real substance. The duties are not combined at any time and, therefore, the Grievant is never acting as a Dispatcher/jailer. At any specific time, he is either acting as a dispatcher or as a jailer, never in a way that combines both jobs.

The definition of "position" used in the Recognition Clause is not limited to job titles; if it was, the Employer could change everyone's job title and exclude everyone from the coverage of the agreement. Nor is the definition based on job assignments, at least as it is related to the

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1/ Roberts, Harold S., Roberts Dictionary of Industrial Relations, Third Edition, (BNA, 1986). All definitions quoted are from this source.

positions of dispatcher and jailer. It is related to job classifications. As such, two classifications included in the Recognition Clause as permanent are dispatcher and jailer. What is temporary about the Dispatcher/Jailer position is not the job classifications but the combination of the classifications. Since the classifications of dispatcher and jailer are permanent positions listed in the Recognition Clause as covered by the agreement, and since the position of Dispatcher/jailer is only a trial or temporary combination of those two permanent positions listed in the Recognition Clause, the Grievant is covered by the collective bargaining

agreement; therefore, he should have been paid at the contractually agreed upon rates for his duties as dispatcher.

But the County argues that it has exclusive authority to determine what positions are to be created and when they are to become effective. Nothing in this decision disputes the County's right to create positions; however, in this case, the County did not create a position so much as it combined two positions on a trial basis. While the County may have intended to create a temporary or trial position, what it did was create a trial or temporary combination of two permanent positions. As such, the Grievant was covered by the collective bargaining agreement and should have been paid in accordance with said agreement.

For these reasons, based upon the foregoing facts and discussion, the Arbitration Board issues the following

AWARD 2/

1. That the County violated the collective bargaining agreement when it failed to pay the Grievant the contractually agreed upon rate for civilian dispatchers for hours worked between October 24, 1988, and January 1, 1989.

2. That the County make the Grievant whole for any losses he incurred as a result of the County's action.

Dated at Madison, Wisconsin this 15th day of August, 1990.

By James W. Engmann /s/
James W. Engmann, Arbitration Board Member

I concur.

/s/ Glenn S. Schaepe
Glenn S. Schaepe, Arbitration Board Member

I dissent.

2/2/ On reply brief, the Association asserts that County Exhibit 1 is a settlement agreement of another grievance between the parties which, by its own terms, does not set a precedent of any kind. The Association asserts that the content of said exhibit should have no bearing on this grievance. The Association is correct and, therefore, no weight was given to said exhibit in determining this Award.

/s/ Charles A. Rude
Charles A. Rude, Arbitration Board Member