

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

KEWAUNEE COUNTY (SHERIFF'S  
DEPARTMENT)

and

KEWAUNEE COUNTY LAW ENFORCEMENT  
EMPLOYEES, LOCAL 1778, AFSCME,  
AFL-CIO

Case 27  
No. 43309  
MA-5949

Appearances:

Ms. Elma E. Anderson, Corporation Counsel, Kewaunee County, on behalf of the Employer.

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 1778.

ARBITRATION AWARD

According to the terms of the 1989-90 collective bargaining agreement between Kewaunee County (hereafter County) and Kewaunee County Law Enforcement Employees, Local 1778, AFSCME, AFL-CIO (hereafter the Union) the parties, having agreed to waive their right under Article 16 of the Agreement to have a TriPartite Arbitration Board decide this case, requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving whether bargaining unit employees have a right to work unfilled shifts (at straight time) before casual nonbargaining unit employees are allowed to fill these shifts. The undersigned was designated arbitrator and made full written disclosures to which no objections were raised. Hearing was originally scheduled for March 2, 1990 at which time the parties tentatively agreed upon a settlement of this case. However, that tentative agreement was never finalized and the parties again requested that a hearing be scheduled herein. Hearing was then held on June 11, 1990 in Kewaunee, Wisconsin. No stenographic transcript of the proceedings were taken. The parties filed their initial briefs by July 18, 1990 and they waived the right to file reply briefs herein.

STIPULATED ISSUES

The parties stipulated to the following issues:

- 1) Are bargaining unit employees entitled to the opportunity to work unfilled shifts for straight time before non-bargaining unit employees are offered the work?
- 2) If so, what is the appropriate remedy?

The parties also agreed to bifurcate this proceeding and that the undersigned should therefore retain jurisdiction for purposes of the parties' submitting further evidence or to hold a further hearing regarding the appropriate remedy, if the Union prevailed on the merits of its claim herein.

RELEVANT CONTRACT PROVISIONS:

ARTICLE 1: RECOGNITION

The Board recognizes the Union as the exclusive bargaining representative for all regular deputized employees in the County Sheriff and Traffic Departments but excluding the Sheriff, Chief Traffic Officer, supervisors, confidential and managerial employees. The terms of this Agreement shall be limited in its coverage to such employees.

ARTICLE 2: PROBATIONARY AND EMPLOYMENT STATUS

A. Probation

. . .

5. Seniority: The seniority of an employee who has satisfactorily completed probation shall date from his/her original date of employment, and he/she shall then be entitled to all benefits occurring to regular employees.

B. Regular Employee

A regular employee is hereby defined as an employee hired to fill a regular position.

. . .

#### ARTICLE 14. SENIORITY

Seniority shall mean the continuous length of service with the county from an employee's last date of hire, to a bargaining unit position.

Employees shall lose their seniority only for the following reasons: Retirement, Resignation, or Discharge for just cause, if not reversed by the grievance procedure. An employee who is promoted out of the bargaining unit shall retain all seniority accrued while a member of the unit. The promoted employee shall not accrue any additional seniority, for contract administration purposes, while he or she is outside the bargaining unit. A promoted employee who returns to the bargaining unit shall be placed in the seniority list and all rights relative to other members of the bargaining unit shall be determined based upon seniority accrued while in the bargaining unit.

#### ARTICLE 18: VESTED RIGHT OF MANAGEMENT

Except as otherwise provided in this Agreement.

The right to employ, to promote, to transfer, discipline and discharge employees, for good and sufficient causes, and the management of the property and equipment of the Sheriff and Traffic Department is reserved by and shall be vested exclusively in the Kewaunee County Board of Supervisors through its duly elected Personnel Ccmmitee and through the duly appointed or elected department head. The department head through authority vested in him by the Personnel Committee of the County Board shall have the right to determine how many men there will be employed or retained together with the right to exercise full control and discipline in the proper conduct of the Sheriff and Traffic Department operations. The Board shall have the exclusive right to determine the hours of employment and the length of the work week and to make changes in the details of employment of the various employees from time to time as it deems necessary for the efficient operation of the Sheriff and Traffic Department, and the union and the members agree to cooperate with the Board and/or its representatives in all respects to promote the efficient operation of the Sheriff and Traffic

Department.

## FACTS

The parties entered into the following stipulation herein:

In the past, bargaining unit employees picked open slots in the schedule that they could go into on a seniority basis and part-time, non-unit employees got the hours that were left over.

As of September 1, 1989 the Sheriff's Department changed its radio operator/jailer (RO/J) 1/ manning requirements policy, at the request of the Union, from a policy requiring one full-time RO/J on each shift to a policy requiring two RO/J's (one full-time and one part-time) on each shift. As a result of this change, the County hired Thomas Vanness as a full-time bargaining unit RP/J on September 18, 1989. After Vanness' hire, the County employed eight full-time RO/J's (where it had previously employed seven) and it continued to employ four part-time RO/J's (not included in the bargaining unit), as follows:

Willard Laurent  
Cole Kuehl  
Brenda Shefcheck  
Ronald Mach 2/

Currently as well as in the past, the eight full-time RO/J's have worked full-time protective employees' schedule of six days on, with three days off. This 6/3 schedule regularly creates a number of open shifts in the rotation of employees. In addition, full-time RO/J employee requests for vacation, sick leave or time off for training create further openings in the work schedule which may or may not be known in advance. Normally with a 6/3 schedule, and assuming that the Department has two RO/J's on each shift, the Chief Deputy needs 24 people in a nine day cycle to cover the RO/J work. With the current number of full-time RO/J's at eight and given the

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- 1/ Full-time RO/J's are all regular employees who are members of the bargaining unit while part-time RO/J's are not members of the unit. Henceforth, the full-time RO/J's may be referred to as unit employees or full-time employees while the part-time RO/J's maybe referred to as part-timers or non-unit employees.
  - 2/ The collective bargaining agreement does not prohibit the employment of these part-time, non-unit workers. The County has had an undisputed practice of employing non-unit part-timers in the Sheriff's Department to meet the minimum manning requirements of the Department for RO/J's. All full-time RO/J's are members of the bargaining unit and are considered "regular" employees.

possibility of sick leave, vacation leave and schooling/training time off, Chief Deputy LaCrosse testified that he has regularly used the four part-time RO/J's on 25 to 30 shifts per month; and that the majority of the time, part-timers have worked the 11:00 p.m. to 7:00 a.m. shift, although part-timers have been used on all shifts from time to time. Prior to October, 1989, regular full-time RO/J's normally worked the same shifts without a lot of changes being requested or made.

As a result of the use of non-unit part-time RO/J's, no unit employe including the Grievant has lost work hours. During the period from October 22, 1989 through February 24, 1990 full-time RO/J's worked, on the average, 650 regular hours plus 55 extra hours plus 108 overtime hours.

Sheriff Ledvina (incumbent at the time of the instant hearing) was first elected Sheriff in 1983. From 1983 until some time in 1987, Sheriff Ledvina set the schedules for all Department employes and posted these schedules. During this period, changes or trades in the schedules were allowed with the prior approval of the Sheriff upon a specific reason being given by the employe. In May, 1987, Sheriff Ledvina ceased his practice of scheduling employes and began posting a blank monthly schedule in advance of the period in question and then allowing the (then seven) full-time RO/J's to select their own shifts. The RO/J's then essentially selected their own shifts on a seniority basis. Under this procedure, the part-time RO/J's were offered the remaining shifts thereafter. Any changes in the schedule after full-time employes wrote in their selections had to be approved by the Sheriff. During this period of time, there were only two part-time RO/J's (Willard Laurent (and now full-time RO/J) Kassner), while between four and seven full-time RO/J's were employed. Again, the practice of allowing employe shift changes continued with the prior approval of the Sheriff, for specified reasons.

In January, 1990, Dale LaCrosse was promoted to Chief Deputy of the Sheriff's Department. On September 1, 1989, LaCrosse was given the responsibility of scheduling all Traffic/Sheriff's Department employes. LaCrosse asked all full-time RO/J's to select shifts by seniority and then in September, 1989, LaCrosse began scheduling all Department employes by issuing a monthly schedule showing each full-time RO/J's annually selected shift. LaCrosse then filled in with the four part-time RO/J's on all remaining shifts. 3/

There were no problems of record with LaCrosse's method of scheduling until mid-October 1989 when, after one-month's employment with the County, Vanness put in his first request for shift changes. On October 15, 1989, Vanness requested of LaCrosse, in writing, that

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3/ It should be noted that these four part-timers have personal limitations on when they can or will work as RO/J's for the County which LaCrosse tries to accommodate (such as other jobs, pension restrictions and regularly scheduled out-of-town trips). Also all part-timers except Laurent have been trained and certified as RO/J's but all part-timers meet the general standards of the County for jailers.

he be allowed fourteen changes from his regular 11:00 p.m. to 7:00 a.m. shift in the month of November: nine requests were to work the 7:00 a.m. - 3:00 p.m. shift and the remainder were to work the 3:00 p.m. - 11:00 p.m. shift. On October 19, 1989, Vanness made a second written request to LaCrosse seeking fifteen changes from his regular 11:00 p.m. - 7:00 a.m. shift. Only one of these (for 11/30) was in addition to the initial request and all of the other requested changes were the same as stated on Vanness' October 15th request. On the bottom of this October 19th request LaCrosse wrote "Negative on changes - I will talk to you about this. Dale"

On October 25, 1990, Vanness, Union Steward Gardener and LaCrosse discussed Vanness' requests in an informal meeting. LaCrosse indicated that the reason he had denied Vanness' requests was because he wanted to avoid working two part-time RO/J's together and because he wanted to have a certified intoxilizer operator scheduled on every shift if possible. 4/ On October 27, 1990, the grievance herein was filed by the seven full-time RO/J's, excluding Vanness.

It should be noted that the County has its own intoxilizer machine housed at its Safety Building in Kewaunee, Wisconsin. In addition, the County's standard operating procedure is to have its own RO/J certified intoxilizer operator 5/ assist the arresting (Traffic) officer by having the RO/J administer the intoxilizer test. Other municipal entities use the County's intoxilizer machine and/or its intoxilizer operators. The City of Kewaunee uses the County's machine when necessary but calls in its own certified intoxilizer operators to perform the test. The City of Algoma, Villages of Casco and Luxemburg and State Patrolmen normally use the County's machine and they rely on the County having a certified intoxilizer operator present to perform the intoxilizer test on their suspects.

## POSITIONS OF THE PARTIES

### Union

The Union argued that the contract language relating to seniority and shift selections is clear and unambiguous -- seniority must prevail in all shift selections. Therefore, the Union asserted that bargaining unit employe Vanness should have been allowed to select any open shifts he wished to change to off his regular shift before these open shifts were offered to non-bargaining unit part-time employes. The Union urged that both the clear contract language and the supporting past practice require the County to allow Vanness to change his shifts in the above-described

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4/ LaCrosse later confirmed his reasons for denying Vanness' October shift change request in his letter dated November 1, 1989.

5/ Twenty-four hours of training, an examination and a field test plus periodic re-certification are necessary for intoxilizer certification.

fashion whenever he wishes. The Union also pointed out that Chief Deputy LaCrosse changed the past practice on this point in the interest of efficiency and this change violated the agreement and/or the practice.

The Union asserted that the County's stated reasons for denying Vanness' requests were entirely unpersuasive and unreasonable. The Union contended that the availability of an intoxilizer operator was not a valid excuse for denying Vanness' (a certified intoxilizer operator) shift change requests, as the County could have relied upon such operators being available to it because they are normally employed by other municipalities, or the County could have called in one of its own intoxilizer operators for overtime work if necessary. Nor was it a valid excuse, in the Union's view, for the County to deny Vanness' shift change requests on the basis that the County wished to avoid having two part-time radio-operators working together, since the County is responsible to employ fully certified and qualified radio operators whether they are full or part-time. In addition, the Union asserted, the requirements that intoxilizer operators be working at all times and that regular full-time employees work on shifts with part-time employees were not policies consistently adhered to by the County in any event. The County simply denied all of Vanness' shift change requests without sufficient basis.

The Union also found fault with the fact that Chief Deputy LaCrosse denied Vanness' requests (in October 1989) without elaboration or reasons until after the instant grievance was filed (LaCrosse's written response to the grievance dated November 1, 1989). The Union pointed out that according to the documentary evidence, Vanness could have changed shifts on thirteen of the occasions he had requested changes in November and December of 1989, and in January of 1990; that only two of 20 bargaining unit employees lacked intoxilizer certification prior to the filing of the instant grievance and the last two employees were certified prior to the instant hearing; and that several other area municipal employers also employ and have available certified intoxilizer operators whose services could have been utilized by the County had there been a shortage of County operators on a particular shift.

Thus, the Union argued that the County must follow the clear language of the Agreement, as supported by the (alleged) seven-year past practice whereby the Sheriff allowed employees to sign up for their own shifts by putting their names in a posted, blank calendar. The Union noted that the Sheriff confirmed this practice in his testimony. Finally, the Union pointed to the testimony of former part-time radio-operator Kassner (now a full-time County radio-operator) who stated that before Chief LaCrosse's promotion, part-time radio-operators received the shifts left over after full-time employees had selected their shifts pursuant to the above-described employee shift signing practice.

In all of these circumstances, the Union urged that the grievance be sustained.

COUNTY

The County asserted that nothing in the labor agreement limits the management right of the Employer to employ part-time employees. The evidence demonstrated that each bargaining unit radio-operator employe has consistently worked a full-time, 6/3 schedule as well as a substantial amount of overtime, despite the County's use of the four part-time, non-unit radio-operators. Furthermore, the County argued that nothing in the contract or in the statutes requires it to give greater seniority rights to bargaining unit employes than those delineated by the contract, vis a vis non-unit employes. The County pointed out that a shift selection priority for unit employes should not be implied over non-unit employes, and the provisions of a labor agreement cannot and should not be applied to or imposed upon third parties (non-unit part-timers) who are not parties to such an agreement.

The County contended that even assuming, arguendo, that there may have existed a prior past practice whereby employes were allowed to initially select their own shifts on a seniority basis each month, no evidence was adduced to show that any shift changes of any significant number were ever requested during the continuation of the alleged practice, and no evidence was presented to show that the Sheriff had ever previously received or approved shift change requests of the type and number that Vanness put in prior to the filing of the grievance herein.

The County pointed out that Chief Deputy LaCrosse's shift selection system, allows employes to select their shifts by seniority on an annual rather than a monthly basis, which nonetheless honors the contract language. The County urged that the documentary evidence showed that part-time radio-operators have worked on all shifts over time; that the Sheriff has never allowed large-scale regular or systematic shift changes between full and part-time operators after the schedule was set; that the County's stated reasons for denying Vanness' shift change requests are reasonable and supported by the County's need to hold down overtime, and to employ and retain part-time radio-operators whose schedules need to be flexible; that it continues to be possible for employes to mutually agree to trade shifts so long as the Sheriff's staffing and manning requirements are met, and the practice of the Sheriff allowing a change for a specific reason also still exists.

In all of the circumstances of this case, the County sought dismissal and asserted that neither the contract nor any past practice requires a ruling in favor of the Union.

## DISCUSSION

The basic facts of this case are not in dispute. The question before me is whether the contract and/or past practice required the County to grant Vanness' shift change requests to shifts occupied by non-unit part-timers. The answer to this question in the circumstances here is no.

The contract (Article 2B) clearly defines a "regular employee" as one "hired to fill a regular position." The contract also includes "all regular deputized employees" of the County in the bargaining unit, it limits seniority rights to regular employes hired into the bargaining unit



(Article 14) and it goes on to state:

"The terms of this Agreement shall be limited in its coverage to such employees" (Article 1).

In these circumstances, contractual seniority rights arise only upon hire into a regular (unit) position. Also, these provisions implicitly allow the County to employ non-regular employees who cannot and need not be included in the contractual bargaining unit. 6/ These non-unit employees are therefore separated from unit employees and may be treated differently from unit employees. Thus, LaCrosse was within his rights to apply different standards/rules when scheduling part-timers. Clearly, the unit employees possess seniority rights across their unit employee group but not beyond it. As the County properly pointed out, unit employees have no seniority rights over non-unit employees who are not signatory to and have no rights under the collective bargaining agreement. Conversely, unit employees have no rights over non-unit employees other than those rights granted by the County, rights supported by practice and specific rights granted by the collective bargaining agreement. Based on this analysis, LaCrosse' refusal to grant Vanness' shift change requests to shifts occupied by non-unit part-time employees could not and did not violate Vanness' contractual seniority rights.

The contract is notably silent regarding the necessary timing of shift selections. I note that LaCrosse' method of having regular (unit) employees select their shifts annually on a seniority basis would necessarily mean that Vanness, who had the least seniority of all unit employees, would have to "select" the last regular shift left after all other unit employees selected as shift. LaCrosse' annual shift selection procedure is similar to that used between 1987 and 1989, as both systems were based upon seniority. Given the silence of the contract as to timing, LaCrosse did not violate the literal terms of the Agreement by requiring employees to select their shifts annually by seniority, rather than on a monthly basis.

Furthermore, the evidence herein failed to support the Union's assertion that there was a seven-year clear and mutually agreed-upon past practice which allowed unit employees to select any shifts they chose at any time leaving nonunit employees the left-over shifts. In this regard, I note that the evidence in this case shows that even during the period from May, 1987 until September, 1989 when Sheriff Ledvina allowed regular unit employees to sign up for their own shifts on a monthly basis, regular employees did this on the basis of seniority and without making any large-scale shift change requests after the schedule was "set". 7/ The evidence also indicated that

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6/ The County has had a long-time, clear and consistent practice of employing non-unit RO/J's on a part-time basis. This practice has not be objected to by the Union, according to this record.

7/ Although an employer may decide to relinquish some of its management rights (such as the right to schedule work) for a time, this does not mean that an employer thereby waives its

staffing levels were different in 1987-89 from those at the time of the instant hearing - there were two part-timers and between four and seven unit employes were employed during 1987-89 while four part-timers and eight unit employes were employed at the time the instant grievance arose. Also, the Department has changed its policies in regard to staffing. For example, based upon a Union request, the County adopted a policy that one unit RO/J should be employed on every shift. Also, the county acquired its own intoxilizer machine and adopted a policy of requiring a certified intoxilizer operator employed by the County to be working on each shift. All of these different circumstances not only dilute the applicability of the Union's alleged "practice" to this case but also support the conclusion that there never arose a clear past practice applicable to the point in dispute here.

The Union's evidence, proffered to show that the County did not have a real need for a full-time RO/J to be on duty on each shift, that the County did not truly need a certified intoxilizer operator on each shift and that in any event, the County did not consistently assign such employes to each shift, does not require that I find for the Union here. Rather, in regard to the last assertion, the fact that the County's system may have worked imperfectly is not material to the issue in this case. In regard to the first two assertions above, I note that the County demonstrated that it had good reason to require both a full-time RO/J and a certified intoxilizer operator on each shift. In addition, the Union failed to show that the County's asserted needs were arbitrary, capricious or discriminatory.

Because Vanness could have changed shifts with part-timers in many instances, does not mean that the County was required to grant his requests to change shifts. The Union's arguments on this point fail to take into account the possibility that the County might have lost some or all of the part-timers' services as a result of these changes. Also, I note that no unit employe, including Vanness, has lost either regular or overtime hours due to the County's employment of part-timers. Finally, it has been a consistent practice to date that unit employes are allowed to trade or change shifts with the prior approval of the Sheriff. Vanness could have availed himself of this option with one or more of the seven grievants in this case, or he could have specified a reason or reasons which might have caused the Sheriff to grant some of his requests. 8/

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right, for all time, to make management decisions in the affected area which otherwise comport with the collective bargaining agreement.

8/ However, I note that based on this record, Vanness' shift change requests, if merely to get "better" shifts for himself, might not have been acceptable to the Sheriff.

In all of the circumstances of this case and based upon my analysis of the relevant and material evidence herein, I find that the County did not violate either the Agreement or any established past practice applicable to this case by denying Vanness' shift change requests and therefore I issue the following

AWARD

Bargaining unit employees are not entitled to work unfilled shifts for straight time before non-bargaining unit employees are offered the work.

The grievance is hereby denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 2nd day of October, 1990.

By Sharon Gallagher Dobish /s/  
Sharon Gallagher Dobish, Arbitrator