BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
LOCAL 2430, AFSCME, AFL-CIO	:	Case 13 No. 40546 MA-5098
and	:	
KENOSHA CITY AND COUNTY JOINT SERVICES BOARD	:	

Appearances:

Mr. John P. Maglio, Business Representative, P.O. Box 624, Racine, Wisconsin 53401-0624, appeared on behalf of the Union.

Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-3101, by Mr. Mark L. Olson, appeared on behalf of the Joint Services Board.

ARBITRATION AWARD

On May 6, 1988, Local 2430, Wisconsin Council 40, AFSCME, AFL-CIO and the Kenosha City and County Joint Services Board jointly requested the Wisconsin Employment Relations Commission to appoint William C. Houlihan, a member of its staff, as arbitrator to hear and issue a final and binding award on a pending grievance. The parties subsequently requested the arbitrator to attempt mediation of the grievance, and following a mediation attempt, the Commission formally appointed me as arbitrator on February 14, 1989. A hearing was conducted on July 6 and September 20, 1989 in Kenosha, Wisconsin. Briefs were submitted and exchanged by March 12, 1990. Reply briefs were waived on June 21, 1990. This case addresses the reasonableness of a work rule barring the employment of spouses of sheriffs' deputies and Kenosha City police officers in the classification of dispatcher.

BACKGROUND AND FACTS

This case has had a fairly complex history. In 1982 a number of law enforcement authorities within Kenosha County joined with the City of Kenosha Fire Department to form a combined dispatching operation for all of the services. The Joint Services Board was established to administer and control this function, and since approximately 1982 Local 2430 has represented the dispatchers employed by the Joint Services Board.

In its initial hiring of dispatchers the Board confronted the question of whether to place any restrictions on persons who were related to employes of the departments it served. The Board opted to restrict the positions of dispatcher, dispatch supervisor and manager of the dispatch center from spouses of Kenosha County Sheriff's Department deputies and City of Kenosha Police Department officers. No such restriction was placed on spouses of City of Kenosha Fire Department officers or officers of several other law enforcement departments using the dispatch center's services. Pursuant to the policy the Board discharged Beverly Sebetic, a dispatcher, when she married a Kenosha County deputy sheriff. The Board also refused to hire Debra Heyden for a position as dispatcher, because she was married to a County deputy sheriff. Heyden sued the Board in Federal District Court, and the Board prevailed in the subsequent litigation through the Supreme Court's denial of certiorari on October 13, 1987.

The original grievance in this matter was the one filed by Beverly Sebetic on December 18, 1984, protesting her discharge. The grievance was held in abeyance by the parties pending the Federal District Court civil rights action, and following the final conclusion of that action, was processed under the terms of the collective bargaining agreement. In the meantime, Sebetic (who was discharged as of December 30, 1983) was reemployed by the Board as of August 27, 1984 as a records clerk, a position not subject to the rule.

In the Dispatch Center, 21 dispatchers are employed, four of whom are normally on duty at any given moment. They are assigned to four separate consoles in the center, one each for dispatching City police, sheriff's deputies, City fire calls and County fire and rescue services. Each dispatcher is responsible for a particular agency, though a number of smaller municipalities within Kenosha County use the dispatch center's services and are consolidated there. The same dispatcher, however, is not constantly assigned to the same console. A rotation schedule is prepared and distributed by management at periodic intervals, and all dispatchers are cross-trained to dispatch for any agency. Dispatchers work on three shifts, and have the right to shift selection by seniority, but not to console selection by seniority. Other jobs in the bargaining unit include records clerks, fleet maintenance, evidence and identification positions.

The mechanics of the dispatching operation are complex, and were the subject of extensive testimony, some of which conflicted. In essence, a distinction is made between law enforcement and fire calls, with the City fire calls in particular being made based on computer-designated appropriate

equipment to respond, by district, based on prior mapping and programming by management. The dispatcher dispatches the fire company tagged by the computer, with relatively rare exceptions, and does not dispatch individual fire department officers. Testimony conflicted as to whether there was any degree of discretion or even knowledge among the dispatchers as to which fire officer was assigned to what piece of equipment, and I conclude from all of the testimony that while it is likely that a dispatcher who was the spouse of a fire officer would know to what equipment the officer was assigned, under normal circumstances few occasions would arise in which the dispatcher could exercise any discretion as to what equipment to send to a particular fire call.

Despite differences among the witnesses as to the degree of discretion enjoyed by law enforcement dispatchers, it is clear that the discretion is far greater than with fire calls. The Sheriff's Department maintains four to eight squads, or one- or two-person patrol cars, per shift on the road, and these cover an area which is thirty miles in length. Dispatchers have the aid of a computer to initially select the nearest squad to a call, but as discussed below overrides to the computer's selection are frequent, in excess of 50% of the dispatches. In the Kenosha Police Department, from 10 to 35 squads are on the road at any given time, and again the dispatchers are frequently expected to override the computer's suggested squad assignment. In both of these departments, and in fact in the dispatch center's operations generally, the time taken to respond to calls is a major factor in the quality of service provided, and the foremost guideline for assignments is that the public should receive that assignment which will cause the call to be responded to most promptly. Other considerations, however, come into play, and these will be discussed below.

Testimony varied as to the percentage of law enforcement calls which are for the City Police Department and the Sheriff's Department as opposed to other units using the Center. Neither party's witnesses offered documentary evidence of the calls' frequency, and whether the Union's estimate or Communications Manager Debra Taran's is accepted (Taran's was that 98% of the law enforcement calls are for one of the two units subject to the no-spouse rule), it is clear that the overwhelming majority of the law enforcement calls are for one of the two units subject to the no-spouse rule. It is undisputed that prior to the inception of the Joint Services Board, police officers and sheriff's deputies were dispatched by sworn officers of both departments independently. The Police Department has never had any rule prohibiting employment of spouses, including the assignment of one spouse to dispatch the other, and there have been instances in which such assignments have been made. The Sheriff's Department, by contrast, has a "no-spouse" rule which is broader than the Joint Services Board's; in the Sheriff's Department not only husband and wife relationships are covered, but also parent and sibling relationships.

ISSUES

The parties stipulated to the following:

1. Is the rule reasonable that the Kenosha City/County Joint Services Board not employ or continue to employ spouses of Kenosha Police Officers or Kenosha County Deputy Sheriff's as Dispatchers?

2. What action may the Kenosha City/County Joint Services Board take to enforce the no spouse rule?

3. Does the Kenosha City/County Joint Services Board have just cause to discharge a dispatcher who marries a Kenosha police officer or a Kenosha County deputy sheriff?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I - RECOGNITION

Section 1.1. Bargaining Unit. The Employer hereby recognizes the Union as the exclusive bargaining agent for all regular full-time and regular part-time clerical and related and technical employees of Kenosha City and County Joint Services Board excluding managerial, supervisory, confidential and journeyman mechanic employees, for the purpose of bargaining on all matters pertaining to wages, hours and all other conditions of employment, as certified by the Wisconsin Employment Relations Commission on June 2, 1983 (Case I, No. 31285, ME-2193, Decision 20609).

Section 1.2. Management Rights. Except as otherwise provided in this Agreement, the Employer retains all the normal rights and functions of management and those that it has by law. Without

limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for just cause; the right to decide the work to be done and location of work; to contract for work; services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for various job classifications. The Employer shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The Employer will not contract out for bargaining unit work where such contracting out will result in the layoff of employees or the reduction of regular, straight time hours worked by bargaining unit employees.

ARTICLE III - GRIEVANCE PROCEDURE

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Section 3.5. Work Rules and Discipline. Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. When any employee is being disciplined or discharged, there shall be a Union representative present and a copy of the reprimand sent to the Union.

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NO-SPOUSE RULE (added 6/87)

Policy

The Kenosha City/County Joint Services Board will not employ, or continue to employ, spouses of the City of Kenosha police officers or Kenosha County deputy sheriffs in the following Board positions: Dispatcher; dispatch supervisor; manager.

Rule

> Spouses of City of Kenosha police officers or Kenosha County deputy sheriffs will not be hired for the above enumerated positions in the Dispatch Center. Dispatchers, dispatch supervisors, or managers who enter into a marriage relationship, after their employment, with City of Kenosha police officers or Kenosha County deputy sheriffs will be dismissed from their positions pursuant to this policy. This policy is premised upon the clear and present potential for conflict between the discretionary duties and functions of persons employed as dispatchers, dispatch supervisors, or managers and the marriage relationship where such relationship is entered into with City of Kenosha police officers or Kenosha County deputy sheriffs who are dispatched by dispatchers, dispatch supervisors, or manager(s).

. . .

POSITIONS OF THE PARTIES

The Union contends that the Employer is unnecessarily worrying about a spouse dispatching a spouse in a life threatening situation, because all of the dispatchers are highly trained and experienced. The Employer concern is characterized as mere speculation, lacking any basis in fact. Prior to the creation of the Joint Services Board, such spousal dispatching was permitted, and in fact occurred without adverse incident. A member of the bargaining unit testified that she was living with a Police Officer, that she had dispatched him into a situation involving a gun, and had received a commendation for her performance.

The Union argues that there is a discriminatory aspect to this rule with respect to the Sheriff's Department and Police Department, for several reasons. The County fire and rescue units, Silver Lake Police Department, Wheatland constables, Department of Natural Resources officers, and a number of towns are not covered by the rule, even though they also engage in law enforcement activities dispatched by dispatchers of the Joint Board. Similarly, the rule does not apply to spouses of fire fighters. In addition, the rule does not apply to other kinds of relationships such as father-son, mother-daughter, uncle, sibling, platonic or homosexual relationships. The Union contends that the Board has arbitrarily drawn a line between spousal relationships affecting two of the Joint Board's served agencies and all other agencies and kinds of relationships, and that no reasonable line can be drawn.

The Union further contends that arbitrators have been reluctant to uphold restrictions on spouses working in the same work environment in recent years, citing Southern Airways 1/ and Braniff Airways 2/ for this view.

The Union argues in particular that this rule violates Article 1, Section 1.1, on the ground that it is policy affecting a condition of employment and was not secured in the course of negotiations. The Union contends that discharge pursuant to the rule would violate both Article 1, Section 1.2 (requiring just cause for discharge) as well as Article 3, Section 3.5 (allowing discipline only in a fair and impartial manner). The Union contends that a number of checks and balances exist which provide opportunity for the employer both to control the actions of dispatchers and to evaluate whether any infraction has occurred. The Union points to the existence of both a computer printout and a minute-by-minute recorded tape of radio calls to support its assertion that the employer here is well equipped with the means to control any abuse by employes. Supervisors monitor transmissions and there are complaint channels to uncover improper performance.

1/ 47LA 1135, 1141 (Walland, 1966).

2/ 48LA 769, 770 (Gray, 1965).

In the event that the rule is found both reasonable and enforceable, the Union contends that termination of a dispatcher who married a sworn officer in one of the departments covered by the rule would be unjustifiable. The Union contends that it would be possible for the Board to temporarily assign a newly married dispatcher to a different console, shift or work assignment where no conflict would arise until such time that the individual could exercise his or her contractual right to post for a permanent position that did not conflict with the policy.

The Board argues initially that the Arbitrator should defer to the results of the parallel court action, contending that similar principles apply. Considerable authority is cited in support of this contention. The court found that the rule bears a rational relationship to a legitimate Employer interest. With respect to the contractual arguments specifically, the Board contends that the fact that it decided to limit the rule to spousal relationships does not make the policy discriminatory or unreasonable, because sound policy reasons underlie that decision. The Board contends that the decision not to extend the rule to other kinds of familial or platonic relationships is justifiable because of the unique closeness of the spousal relationship, and that the decision not to extend the rule to unmarried couples reflects problems in enforcement as well as a customarily recognized difference between the intensity of the two kinds of relationships. The event giving rise to the rule was the Employer's observation that law enforcement officer's spouses were applying for dispatcher jobs. The Board contends that in practice, the vast majority of the difficult law-enforcement dispatches are made from one of the two departments to which the rule applies, and that this justifies not extending the rule to the small towns and villages of Kenosha County which generate only a small part of the dispatch work load. Similarly, the Board contends that lack of discretion given dispatchers in dispatching fire fighting units justifies a distinction between the Kenosha Police Department and Fire Department with respect to this rule. Should the rule be found discriminatory either in terms of its limited jurisdictional application or the fact that non-spousal relationships are unregulated, the Board has indicated that it would be willing to expand application of the rule to remedy that defect.

The Board argues that the record overwhelmingly shows that there is great discretion exercised in the dispatching of police officers and deputies, and that dispatchers are encouraged to override the computer-aided dispatch system on numerous occasions, because of the inability of that system to recognize all of the relevant factors which enter into making a decision as to which unit to send. The Board argues also that the computer-aided system is frequently out of service for scheduled maintenance or because of breakdowns.

The Board contends that the discretion which dispatchers exercise is such that it is not possible fully to track the propriety of their actions after the event, because certain kinds of manipulation of the system leave no records even on the continuous recording tape. The Board argues, also, that after-the-fact analysis of the propriety of a dispatcher's actions is considerably less desirable than advance encouragement of dispatchers to act properly by removal of conflicting relationships from the dispatch decisions. Furthermore, there exists a continuing duty to monitor a dispatch and the Employer does not want a dispatcher pre-occupied with a spouse in danger.

The Board argues that it must be permitted to discharge dispatchers who marry officers of the affected departments, because other constraints on the Board make any lesser solution unworkable. The Board contends that both Sheriff's and Police Department officers have the right to shift selection by seniority, as do dispatchers, thus making it impossible for the Board to switch shifts of a dispatcher involved in such a relationship. Furthermore, overtime complicates the picture, and work assignments cannot be used for this purpose because dispatchers rotate consoles. The Board argues that the rotation serves the essential function of keeping all dispatchers cross-trained, which is important in an environment in which calls for any one function may exceed the capacity of that console and be re-routed to other personnel within the Center. Thus, the Board contends that the safety of both the public and the law enforcement officers is affected by this rule, and it would be improper for the Arbitrator to downgrade the safety of either group by overturning the rule or making it unworkable.

DISCUSSION

Initially, I must note that this matter is not subject to any doctrine of deference to the parallel court proceeding, because even though some of the arguments and principles involved are related, the court proceeding concerned a civil rights claim, while this one involves an interpretation of contract. However, the Court's finding that the rule is rationally related to a legitimate governmental interest is adopted by this Award.

The first question which must be resolved is whether there is in fact discretion in dispatchers' work which could at least in some circumstances result in favoritism in assignments. I conclude that the Board has made its case in this part of the dispute, and that such discretion does exist. While the record does not establish that dispatchers have authority to change squad numbers, it is apparent that the flow of work is such that a number of opportunities for manipulation of the system do arise. Indeed, such opportunities, in the sense of overrides of the computer system, are mandated in many instances. In such circumstances as the assignment of a lower-numbered squad to the first incoming call within a district which has more than one squad available to it, it would be difficult or impossible for management later to track down the fact that a particular officer with a higher squad number had been saved from a particular assignment. Also, the ability of dispatchers to enter records as to breaks and various other significant assignments is sufficiently discretionary that it would require substantial effort on management's part to find out whether any misconduct had occurred or not. The likelihood that concealment of such an act could be successful warrants consideration in evaluating the rule.

The next element in determining reasonableness is the breadth of the rule. As a practical matter, the rule originated as a reaction to the receipt of employment applications from spouses of law enforcement officers. The Board further contends that the spousal relationship is closer and more vulnerable to abuse than the other kinds of relationships noted in the record. In light of the rule's origin, I think the Board enacted a rule it could enforce and which was narrowly focused at the problem confronted. By doing so, the Board attempted to minimize intrusion into the lives of its employes. However, it also made a conscious decision to leave unregulated other relationships which could potentially give rise to future concern. The prospect of a woman dispatching her father or son into a potentially lethal situation must be of concern to this Board.

I regard this rule as narrow, practical, but philosophically impure. It does not purport to be comprehensive and the administration reflects that fact. The Board is aware of the fact that female dispatcher(s) and male law enforcement officer(s) have lived and acquired households together without benefit of marriage. At least one dispatcher was given a commendation for her handling of a situation where she sent her lover into a gunfire situation. On the other hand, a management witness testified to what she perceived to be an unsatisfactory situation involving a dispatcher and law enforcement officer who were co-habitating and spending too much time lunching together. Nothing was done about this arrangement. Neither of these situations fell within the "no-spouse" rule. The two events represent the two broad types of behavior giving rise to the "no-spouse" rule.

Notwithstanding its imperfections, I think the rule has been drawn reasonably, given the practicalities facing this Employer. The Board has indicated that it debated internally whether to broaden the rule to other kinds of relationships, and decided not to. It would serve the parties little if I were to strike down this rule because some of the relationships not covered by it may, in certain factual circumstances, be as powerful as the spousal relationships management is concerned about, and thus perhaps trigger Board enactment of a broader rule desired neither by it nor by the Union.

I do not find the rule unreasonable in its coverage only of the Kenosha County Sheriff's Department and City Police Department officers. The testimony demonstrates that all of the remaining law enforcement work dispatched by the Center, put together, amounts to only a tiny fraction of the work dispatched to these two departments, and I find this a significant distinction. Furthermore, the record demonstrates that any discretion which a dispatcher may have in

choosing fire units to dispatch is extremely limited and rare in comparison to that exercised with law enforcement units. Thus the exclusion of the Fire Department from the rule is also reasonable.

I do not, however, find the Board's presumed method of enforcement of the rule to be reasonable. Discharge is an inappropriate enforcement of this particular rule for a number of reasons. First, the employe involved has engaged in no misconduct whatsoever, while the Board proposes to treat that employe with extraordinary severity. Indeed, there is evidence in the record that one dispatcher may have avoided marriage to a police officer she was living with precisely because legitimizing their relationship in the eyes of society generally would constitute its damnation in the eyes of the employer. Such a result is, to say the least, perverse.

The employe has a contractual right to his/her job absent cause for termination. I am not willing to conclude that marrying a law enforcement officer from the City or County of Kenosha constitutes cause for termination. This is particularly true in a work environment where the Employer has made a conscious decision to tolerate the fallout arising from a host of other existing and potential relationships.

Second, I am persuaded by the record evidence that it is in fact possible, though perhaps inconvenient, for the Board to accommodate its policy with a newly married dispatcher for at least the period of time likely to be required for the dispatcher to post for another position in the department. While it is true that dispatchers' seniority rights under the Agreement prevent the Board from unilaterally assigning a dispatcher to a different shift from his or her spouses, the Board does have unilateral rights of assignment, and the rotation of consoles within a given shift is entirely within its control. There is nothing to prevent the Board from assigning a dispatcher married to a police officer or sheriff's deputy to one of the other consoles, and this would take care of the bulk of the conflict.

The Board has argued that it cannot insulate such a dispatcher from dispatching his or her spouse entirely unless it is free to remove the dispatcher from the dispatch center completely. At times of overload within the dispatch center, this may be true. However, in light of the relief directed below, I regard this as a transitional problem, akin to those otherwise tolerated.

All kinds of relationships between human beings, as the Union points out, can be of such intensity that they might tempt a dispatcher engaged in such a relationship into favoritism toward (or against) the other party. The Board has chosen to treat the spousal relationship as the most powerful form, and I have declined to overturn that decision. But if nothing else, it is clear that at most, the distinction between the spousal relationship and the familial, platonic and other relationships noted in the record are a matter of degree. The Board has, in enacting this rule, recognized in effect that a number of potentially conflicting relationships will have to be ignored, either because the relationship is generally perceived to be less close or because it causes a difficulty less frequently, as with the fire department and outlying town law enforcement departments. The Board thus impliedly accepts the concept that all it can or should do to attempt to guard against conflicts affecting dispatchers' judgement is to attempt to control the most obvious and pervasive relationships which could cloud someone's judgement.

But having accepted the limitations of the chosen rule the Board cannot maintain that it is necessary to <u>discharge</u> a dispatcher in order to keep a perfect separation between spouses involved in the two affected departments, because such perfection of control is well beyond the scope of the rule. A rule's reasonableness is a coin with two sides: On the one is the need which the employer experiences for the rule, but on the other is the hardship which the rule imposes on the employe. A disproportionate impact on either side can overwhelm what would otherwise be a strong case. This Board has opted against an attempt to root out every last instance of any kind of relationship between any two human beings, one of whom is a dispatcher, that could possibly affect the dispatcher's judgement. Under these circumstances, to go further than to allow the Board to reassign the dispatcher involved in such a way as to reduce the occasion for him or her to encounter the spouse would be a disproportionate

impact upon the employe. I therefore find it reasonable that the Board has enacted the rule, and unreasonable that the rule be applied to require the discharge of any dispatcher.

The Board has argued that numerous spousal relationships could easily complicate its task of accomodation. I agree. However, the record is silent as to how many of these relationships exist, or may develop.

As the parties have requested me specifically to address what actions the Board might justifiably take to enforce the no spouse rule, I will add that I consider it reasonable that the Board might take some action to limit the length of time for which a dispatcher subject to the rule might remain in the dispatch center. While I do not, as noted above, accept management's argument that it is impossible to reassign dispatchers within the Center so as to eliminate at least the bulk of the potential contacts between spouse-dispatcher and spouse-officer, there is likely to be enough inconvenience as a result of the reassignment of such a dispatcher and his or her removal from the normal rotation to justify a requirement that the dispatcher post at the earliest opportunity for another position within the department as and when a position for which the dispatcher is qualified becomes available. Thus I find that the Board may require such a dispatcher to bid for the first such available position. Since, however, the dispatcher has not engaged in any misconduct, failure to obtain the position should not be held against the dispatcher, and in that event the dispatcher should simply bid for the next such position.

I regard this disposition as the most balanced construction of the parties' collective bargaining agreement as otherwise administered. The decision addresses what is in dispute without undoing that which is not. Should this ultimately prove to be an unworkable disposition of this matter, either due to a high marriage rate and/or low turnover rate in non-dispatching positions, the parties may seek to address their problem by altering the terms of their collective bargaining agreement.

AWARD

The rule is reasonable that the Kenosha City/County Joint Services Board need not employ or continue to employ as dispatchers spouses of Kenosha police officers or Kenosha County Deputy Sheriff's. Enforcement of the rule, however, may not extend beyond a requirement that the dispatcher be reassigned pending an opportunity to post for another position not affected by the rule.

Dated at Madison, Wisconsin this 1st day of February, 1991.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator