BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
BROWN COUNTY SHERIFF'S DEPARTMENT NON-SUPERVISORY EMPLOYEES	:	Case 444 No. 44902 MA-6450
and	:	
BROWN COUNTY	:	

Appearances:
Mr. Fredrick J. Mohr, Attorney at Law, appearing on behalf of the Union.
Mr. John C. Jacques, Assistant Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above are parties to a 1989-1991 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Ron Smith. The undersigned was appointed and held a hearing on February 28, 1991, in Green Bay, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. The parties' briefs were exchanged on March 26, 1991.

ISSUE:

The parties ask the Arbitrator to resolve the following question:

Was Ron Smith injured in the line of duty?

The parties agree that if the Arbitrator finds that Smith's injury was duty-incurred, he would be entitled to sick leave under Article 39 of the collective bargaining agreement, which states:

> An employee injured in the line of duty shall receive full pay while disabled for a period of one hundred eight (180) calendar days which may be extended by the Employer. Any compensation checks received for the County's insurance company shall be turned over to the County while the employee is on full pay status. The employee shall obtain a medical certificate to certify his disability and shall obtain medical permission to return to duty. Sick leave shall not be charged during the one hundred eighty (180) calendar days or extended period.

BACKGROUND:

The Grievant, Ron Smith, is a police officer with the Brown County Sheriff's Department. In September of 1990, 1/ he was working during off-duty hours at a part-time job as a door checker and bouncer at a night club called Lothario's in the Village of Ashwaubenon, which is in the County's limits.

The General Rules and Regulations of the Department, specifically Rule 18, provide that department members may not accept off-duty employment in taverns, dance halls or night clubs as dispensers of alcoholic beverages. The inter-pretation of this rule, according to Captain Gary Pieschek, is that employees cannot be bartenders, but that door checker jobs or bouncer jobs are allowable under the Rules. The Department was aware of the Grievant's off-duty job and was aware that other officers also worked at Lothario's.

On September 7th, the Grievant worked his regular shift between 1:00 p.m. and 9:00 p.m. for the Department, and then started his part-time job at the night club at 9:30 p.m. About 10:00 p.m., four people came into the club, and the Grievant asked them for identification. The first man, John Novak, showed the Grievant his driver's license. A woman had no identification, and the Grievant told her she could not come in without any ID. She stated that she was John Novak's wife, and the Grievant told her she had to have an ID or not come in. She became disorderly, swearing and complaining, and the Grievant pointed to his badge and let the Novak's know that he was a police officer.

1/ All dates are for 1990 unless otherwise stated.

Mrs. Novak made a profane statement to the Grievant, and he pinched her on her elbow and told her she was "out of here." John Novak lunged at the Grievant, who fell on his back with Novak on top of him. The Grievant was in pain, and asked a civilian bouncer to handcuff and arrest Novak. The Grievant was transported to a hospital and later filed a criminal complaint of battery to a police officer against Novak. Novak was convicted of a reduced charge of battery misdemeanor.

The Grievant filed a claim for worker's compensation with the County, which was denied by the County's carrier. An October 12th letter from Dwight Helke, Compensation Claim Supervisor, states in part:

> It is our opinion, based on our investigation, that Mr. Smith's back injury of September 7, 1990 would not fall under the Workers Compensation Policy for the Board of Supervisors of Brown County, as he was not an employee of the County at the time this happened. It is our feeling that Mr. Smith's back injury would, however, fall under Workers Compensation Policy for Lothario's Night Club as that is where he was employed at the time as well as where the injury occurred.

After the County's carrier denied the claim, the Grievant filed a claim with Heritage Insurance, Lothario's carrier. He received permanent partial disability payments and benefits for lost wages from Heritage.

Rule 45 of the Rules and Regulations states in part: "When off duty, members will still be subject to call from civilians. The fact that they are off duty will not relieve them from the responsibility of taking proper action in any matter coming to their attention, at any time requiring such action." It is the Grievant's opinion that he was acting as a police officer when he was injured, because he had identified himself twice as a police officer, and that as an officer, he had the discretion to either escort Mrs. Novak out of the night club or arrest her. His interpretation of Rule 45's language regarding the phrase ". . . responsibility of taking proper action . . ." is that he was taking proper action as a police officer in escorting Mrs. Novak out of the club and to have someone handcuff John Novak and effectuate his arrest.

THE PARTIES' POSITIONS:

The Union:

The Union argues that the facts show that the Grievant was acting in his capacity of a police officer at the time of his injury. The Sheriff's Department was aware of the duties of its employees at Lothario's, and those employees have made arrests on previous occasions at the night club. Officers will be pressed into official duties when a disturbance arises, and the Grievant's actions were within the realm of required activity while off duty. If an officer did not respond when off duty, he could be subject to disciplinary action.

The Department could revise its rules and prohibit off-duty employees from exercising their police powers, the Union notes. Or it could prohibit individuals from working as door checks at local drinking establishments. But the Department has not restricted its employees when off duty. Therefore, there is the potential for employees to be injured while off duty and effecting arrests.

The Union asserts that the Grievant was acting in the line of duty when he identified himself as a police officer before he was injured. The Union points out that "in the line of duty" generally means the same thing as the test of compensability under the Worker Compensation Acts, which are entitled to a liberal construction to achieve their purpose. The courts have developed the "positional risk" doctrine, which makes an injury compensable if it would not have happened but for the fact that the conditions of employment placed the employee in the position he or she was in when the injury occurred. The Union contends that the County placed certain "obligations of employment" on officers under Rule 45, and it was the duty of the Grievant to react to the disorderly activities of Mrs. Novak, or he would have breached his duty under Rule 45. Further, the Union argues that the Grievant's obligation to react to the disturbance is statutorily based in Section 59.24(1), Wis. Stats., which requires deputies to keep and preserve the peace and suppress all affrays, routs, riots, unlawful assemblies and insurrections.

The Union states that the Grievant not only had the legal authority to perform in the manner in which he did, but was obligated to do so in the course of his employment by the terms of Rule 45. Thus, the Union concludes that the Grievant was injured while in the line of duty and entitled to the compensation prayed for.

The County:

The County raises an argument as to the arbitrability of this grievance, contending that coverage under the state's worker's compensation law, Chapter 102, Stats., determines whether or not an injury occurred during the line of duty. The County asserts that the proper forum to determine whether there is a duty incurred disability or injury in the line of duty is within the exclusive jurisdiction of the Wisconsin Workers Compensation division of the Department of Industry, Labor and Human Relations. Section 102.03(2), Stats., indicates that the exclusive remedy against an employer for work injuries are set forth in Ch. 102, Stats. The County notes that the workers compensation carrier for the County has denied coverage, and the Grievant can assert his exclusive remedy against the County for two years to challenge the denial, and that because the two year period has not elapsed, the arbitrator has no authority to determine whether the employee was injured in the line of duty. The Grievant has accepted workers compensation benefits from a different employer, Lothario's, thereby conceding that he was injured in the line of duty as a bouncer for Lothario's.

The County asserts that the Grievant's injury was not duty incurred, as the record is clear that he was working as a bouncer at Lothario's when he was injured. The Grievant's written statement to Lothario's' worker's compensation insurer, Heritage Insurance, indicates that he was working as a bouncer for Lothario's when he was injured.

The County points out that the Wisconsin Supreme Court has held that an off-duty deputy sheriff cannot be considered performing duties as a law enforcement officer while working as a door keeper in Rainbow Gardens v. Industrial Commission, 186 Wis. 223 (1925). Rainbow Gardens was held to be applicable in a more recent case, Berry v. LIRC & Walworth County (unpublished Ct.App., Dist. II, Decision No. 89-0997). The County notes that as in Walworth County, no County interests were served when the Grievant was injured at Lothario's. Prior case law delineates responsibility for off-duty employment to the private sector employer.

There was no law enforcement function involved in removing a patron from the private premises, and the Grievant was not injured while attempting to quell a disturbance, the County states. Acting as a bouncer has no relationship to acting as a police officer, and checking identification is not police work. The County concludes that the evidence shows that the Grievant was not acting as a police officer when attacked by John Novak, and if the Arbitrator issues an award on the merits, the grievance should be denied.

DISCUSSION:

First, addressing the County's concern regarding arbitrability, I find nothing in the Worker's Compensation law that would exclude a determination of rights under a collective bargaining agreement. Section 102.03(2), Stats., states in part: "Where such conditions exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employe of the same employer and the worker's compensation insurance carrier." The phrase "exclusive remedy" does not apply to the interpretation of the parties' collective bargaining agreement. Rather, the term "exclusive remedy" is intended to bar common law recovery of damages, or personal injury claims. See Oliver v. Travelers Insurance Co., Ct.App., 103 Wis.2d 644, and Franke v. Durkee, Ct.App., 141 Wis.2d 172. Further, there is no indication that any agency or court has determined the issue of the Grievant's employment status; the record only indicates that one insurance carrier denied a claim and another one paid it. The issue before the Arbitrator is not one of compensation, because the Grievant has already been compensated by Lothario's for his injury. The effect of a finding in favor of the Grievant would be to reinstate the Grievant's sick leave used while recovering from the injury incurred, as the Grievant sought in his grievance (see Joint Ex. #2). If the Grievant were injured in the line of duty, pursuant to Article 39, sick leave could not be charged up the time lines specified in that article.

However, I find that the Grievant was not injured in the line of duty pursuant to Article 39 when he was injured by John Novak. The Grievant was working at a night club while off duty, and it was his off-duty employment obligations that gave rise to the injury. The Union relies heavily on Rule 45, which states in part: "When off duty, members will still be subject to call from civilians. The fact that they are off duty will not relieve them from the responsibility of taking proper action in any matter coming to their attention, at any time requiring such action." The Union states that it was the Grievant's duty to react to the disorderly activities of Mrs. Novak. However, it was the Grievant's off-duty employment responsibilities which led to Mrs. Novak's conduct and his injury.

Escorting people out of taverns or night clubs is the ordinary work of a bouncer, and it was part of the expectation of employment connected with the Grievant's job as a bouncer. While there were occasions in the past in which the Grievant's status changed from that of a bouncer to that of a police officer, such as making arrests at the night club, there was no disturbance or breach of the peace or any matter that arguably put the Grievant in the line of duty as a police officer. It was only after he was injured that he acted in the line of duty to arrest John Novak, or have a civilian bouncer make the arrest on his behalf. The fact that the Grievant identified himself as a police officer did not change his status into acting in the line of duty. The "duty" being required of the Grievant at the time was the duty of a bouncer or door checker -- to require ID or keep those without ID out of the night club.

The Union points out that the courts have developed the "positional risk" doctrine. The courts look to whether the employment creates a "zone of special danger" which resulted in injury to the employee (see Franke, noted above). The Grievant's injury would not have happened but for the conditions or obligations of employment placed upon him through his employment with Lothario's, not the County. It was the off-duty job with Lothario's that created the zone of special danger in this case, not the job with the County. If the Grievant had been a patron in the night club, another patron entering the club without proper identification would not have created a disturbance to which the Grievant would have been obligated to respond as a police officer. Instead, the Grievant was responding -- as an obligation of employment with the night club -- to a patron entering without ID. The injury the Grievant suffered was not suffered because the Grievant was acting in the line of duty as a police officer -- it was because he was acting in accordance with his duties as a door checker or bouncer. A patron entering a night club without identification is not a matter that would have come to the attention of a police officer or required him to take proper action under Rule 45.

Based on the record as a whole, I conclude that the grievance should be denied, because there is no evidence that the Grievant was acting in the line of duty on behalf of the County when he was injured.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 11th day of April, 1991.

By _____
Karen J. Mawhinney, Arbitrator