

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 LAW ENFORCEMENT EMPLOYEE RELATIONS :  
 DIVISION OF THE WISCONSIN PROFESSIONAL :  
 POLICE ASSOCIATION (DOOR COUNTY : Case 70  
 DEPUTY SHERIFF'S ASSOCIATION) : No. 45091  
 : MA-6497  
 and :  
 :  
 DOOR COUNTY (SHERIFF'S DEPARTMENT) :  
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Appearances:

Mr. Edward Vander Bloomen, Representative, Wisconsin Professional Police Association/LEER Division, 4617 Bellevue Place, Two Rivers, Wisconsin 54241, appearing on behalf of the Association.  
Mr. Dennis D. Costello, Door County Corporation Counsel, 138 South 4th Avenue, Sturgeon Bay, Wisconsin 54235, appearing on behalf of the County.

ARBITRATION AWARD

Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association (Door County Deputy Sheriff's Association), hereinafter referred to as the Association, and Door County (Sheriff's Department), hereinafter referred to as the County or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder.

The Association, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On January 28, 1991, the Commission designated Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held on March 4, 1991 in Sturgeon Bay, Wisconsin. The hearing was not transcribed and the record was closed on March 4, 1991, upon receipt of oral argument.

ISSUE:

The parties presented the following issue:

Did the Employer violate the terms and conditions of the collective bargaining agreement by refusing to compensate senior shift employes an additional 60 cents per hour for a block of four hours or more in the absence of the Shift Sergeant or the employe so designated by the Sheriff or Chief Deputy while serving as Shift Sergeant?

RELEVANT CONTRACT PROVISION:

ARTICLE XXVI - MANAGEMENT RIGHTS

Section 26.01: The County possesses the sole right to operate County government and all management rights reposed in it. The business and the direction of the County Sheriff's Department and its working forces is vested exclusively in the County of Door, and the Sheriff, and includes but is not limited to the following: to hire, expand, direct and control all operations of the Door County Sheriff's Department; to direct and supervise the work of the Employees of the Door County Sheriff's Department; to determine by whom work shall be performed and the location where such work shall be performed; to determine to what extent any service shall be added, modified or eliminated; to schedule the hours of work and assignment of duties in a manner not inconsistent with the provisions of this Agreement; to make and enforce reasonable rules; and to take whatever action may be necessary to carry out the functions of the County in situations of an emergency nature.

Section 26.02: The Employer's exercise of the foregoing functions shall be limited by the other provisions of this contract. However, the County has all the rights which it has at law except those expressly bargained away in this Agreement.

Section 26.03: The Association does not waive

any of its rights as stated in Chapter 111 of the Wisconsin Statutes.

ARTICLE XXVII - WAGES

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Section 27.03 - Acting Pay: Whenever an employee is designated by the Sheriff or the Chief Deputy to serve as a Shift Sergeant for a block of four (4) hours or more, that employee will receive a step up in pay of .60 cents per hour. This step up provision is agreed upon separate from any other similar type provision in the contract.

BACKGROUND

On February 27, 1990, Chief Deputy Garey D. Bies issued the following:

The practice of the Senior Deputy of a shift receiving "acting pay", will not continue after February 16, 1990. There is no provision in the contract for that practice.

Starting on February 17, 1990 only a designated Deputy will receive the "acting pay." There will be only one designated person per shift on the road and only one person in the jail section that will be designated. The person will be designated either by the Sheriff or the Chief Deputy in accordance with the Contract, Section 27.03.

On March 23, 1990, the Union filed a grievance alleging that the County violated Section 27.03 and any other applicable articles and/or sections of the existing collective bargaining agreement by refusing to compensate senior shift employes an additional 60 cents per hour for a block of four hours or more in the absence of the Shift Sergeant or the employe so designated by the Sheriff or Deputy. In remedy of this violation, the Association requested that the County refrain from similar violations in the future and compensate all affected senior shift employes. The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

The language of Section 27.03 should be construed in a manner consistent with the parties' longstanding practice, i.e., that the most senior individual on the shift be designated Acting Shift Sergeant. With two exceptions, which were due to unusual circumstances, this practice has existed since well before 1976. The grievance should be sustained and all affected employes should be made whole.

County

During the 1986-87 contract negotiations, the parties adopted Section 27.03, which section specifically reserved to the Sheriff or the Deputy Sheriff the right to designate the individual to serve as a Shift Sergeant. While this language has changed over the years, it has never required the Employer to designate the most senior person to act as Shift Sergeant. The policy enunciated in Chief Deputy Bies letter of February 27, 1990, is a reasonable policy, consistent with the County's contractual management rights and the language of Section 27.03. Accordingly, the grievance must be denied.

DISCUSSION

For at least twenty years prior to February 27, 1990, when the Shift Sergeant was absent from duty, the most senior Deputy on each shift automatically assumed the position of Acting Shift Sergeant. 1/ As Acting Shift Sergeant, the senior Deputy was in charge of the shift.

During the negotiation of the parties' 1986-87 agreement, the parties incorporated the following Section 27.03 - Active Pay, into their Agreement:

Section 27.03 - Acting Pay: Whenever an employee is designated by the Sheriff or the Deputy Sheriff to serve as Shift Sergeant for an entire shift, that employee shall be paid at the six (6) month Shift Sergeant rate of pay for the hours worked.

Prior to the adoption of this provision, Deputies who assumed the duties of the Shift Sergeant had not been paid for the assumption of these duties. The evidence concerning the negotiation of Section 27.03 demonstrates that the County's agreement to provide "Acting Pay" was premised upon the Employer retaining the right to designate the Acting Shift Sergeant. Indeed, the language adopted by the parties provides the Sheriff or the Deputy Sheriff with the exclusive right to designate Acting Shift Sergeants.

The language of Section 27.03 remained unchanged until the parties negotiated their 1988-89 agreement. At that time, the provision was modified to read as follows:

Section 27.03 - Acting Pay: Whenever an employee is designated by the Sheriff or the Chief Deputy to serve as a Shift Sergeant for a block of four (4) hours or more, that employee shall be paid at the six (6) month Shift Sergeant rate of pay for the hours so worked.

During the negotiation of the parties' 1990-1993 agreement, Section 27.03 was modified to read as follows:

Section 27.03 - Acting Pay: Whenever an employee is designated by the Sheriff or the Chief Deputy to serve as a Shift Sergeant for a block of four (4) hours or more, that employee will receive a step up in pay of .60 per hour. This step up provision is agreed upon separate from any other similar type provision in the contract.

From the time that Section 27.03 was placed into the parties' 1986-87 agreement until February of 1990, the most senior Deputy assumed the position of Acting Shift Sergeant when the Shift Sergeant was absent.

Chalres Brann assumed the position of Sheriff in January of 1989. In February of 1990, the Sheriff determined that he would no longer permit the senior Deputy to automatically assume the Acting Shift Sergeant position. According to Brann, he decided to implement this change because he was not confident that the most senior Deputy invariably had sufficient experience to take charge of the shift. The Sheriff was particularly concerned that, on the second and third shifts, it was possible for an employe with less than one year of experience to assume the Acting Shift Sergeant position and make command decisions.

Under the new policy, the Sheriff assigned the position of Acting Shift Sergeant to one Deputy on each shift. Prior to making this assignment, the Sheriff asked each Shift Sergeant to recommend an Acting Shift Sergeant. The Sheriff reviewed the recommendations and then designated an Acting Shift Sergeant for each shift. Each person so designated was the senior Deputy on that shift. The Union is not grieving this conduct of the Sheriff.

The Sheriff also made the determination that, in the absence of the Shift

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1/ On two occasions, the Sheriff designated someone other than the senior deputy to act as the Shift Sergeant. This action was not grieved.

Sergeant and the designated Acting Shift Sergeant, that no other Deputy would have charge of the shift. Rather, Deputies would be expected to contact the Sheriff, the Chief Deputy, or an off-duty Shift Sergeant to make command decisions which normally would be made by the Shift Sergeant or Acting Shift Sergeant. The question to be determined herein is whether, in the absence of the Shift Sergeant and the designated Acting Shift Sergeant, the most senior Deputy is entitled to automatically assume the position of Acting Shift Sergeant and receive the pay set forth in Section 27.03.

At hearing, Deputy Sheriff Paul Mickelson, who is also President of the Union, confirmed that the Sheriff has taken the position that, in the absence of the Shift Sergeant or Acting Shift Sergeant, no one is in charge of the shift. According to Mickelson, to the extent that senior Deputies continue to make command decisions, they do so on their own initiative. The record does not demonstrate otherwise.

As discussed above, when the parties first adopted Section 27.03, they reserved to the Sheriff or the Deputy Sheriff the right to designate Acting Shift Sergeants. The language reserving this right was not changed in subsequent negotiations. 2/ To be sure, after the adoption of Section 27.03, the most senior Deputy automatically assumed the position of Acting Shift Sergeant. However, given the language of Section 27.03, it must be concluded that the continuation of the prior practice was at the sufferance of the Sheriff. In other words, with the adoption of Section 27.03, the Sheriff was not contractually required to continue the practice, but did so at his sole discretion.

The memo advising the Union of the change in the procedure for designating Acting Shift Sergeant was issued on February 27, 1990. At that time, the parties had completed their 1990-1993 contract negotiations, but had not yet executed the agreement. Upon receipt of the memo, the Union's bargaining representative, Business Agent Edward Vander Bloomen, contacted County Corporation Counsel Dennis Costello to discuss the change in policy. Costello advised Vander Bloomen that he thought that they could resolve the matter without reopening the contract. Costello also indicated that he did not think that there would be a problem with continuing to have an employee serve as Acting Shift Sergeant and receiving the step up pay. However, when Costello discussed the matter with the Sheriff, he was advised that the Sheriff intended to implement the policy change.

Given the language of Section 27.03, which provides the Sheriff or the Chief Deputy with the exclusive right to designate Acting Shift Sergeants, Costello did not have authority to obligate the Sheriff to continue the prior practice of permitting the most senior Deputy to assume the Acting Shift Sergeant position. For the same reason, the Union did not have a reasonable basis to conclude that Costello's statements to Vander Bloomen provided the Union with a right to continue the prior practice.

In summary, to be entitled to receive the acting pay provided in Section 27.03, the employee must be designated by the Sheriff or Chief Deputy to serve as Shift Sergeant. The employees who are the subject of the instant grievance have not been designated by the Sheriff or Chief Deputy to serve as Shift Sergeant and, therefore, are not entitled to receive the acting pay provided in Section 27.03.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not violate the terms and conditions of the collective bargaining agreement by refusing to compensate senior shift employees an additional .60 cents per hour for a block of four hours or more in the absence of the Shift Sergeant or the employee so designated by the Sheriff or Chief Deputy.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 16th day of April, 1991.

By \_\_\_\_\_  
Coleen A. Burns, Arbitrator

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2/ For purposes of this discussion, the Deputy Sheriff and Chief Deputy are one and the same.

