

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	:
OCONTO COUNTY SHERIFF'S DEPUTY	: Case 93
LABOR ASSOCIATION	: No. 44386
	: MA-6280
and	:
	:
OCONTO COUNTY	:
(SHERIFF'S DEPARTMENT)	:
	:

Appearances:

Mr. Michael G. Perry, Attorney at Law, on behalf of the Oconto County Sheriff
Godfrey and Kahn, S.C., Attorneys at Law, by Mr. Dennis W. Rader, on
behalf of Oconto County.

Sherif

ARBITRATION AWARD

Oconto County Sheriff's Deputy Labor Association, hereinafter the Union, requested the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Oconto County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The County subsequently concurred in the request and David E. Shaw was designated to arbitrate in the dispute. A hearing was held before the undersigned on November 14, 1990 in Oconto, Wisconsin. There was a stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by January 30, 1991. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not agree on a statement of the issue to be decided. The Union would frame the issue as follows:

Can the County hire more than two (2) "Floater" relief persons that have flexible schedules without negotiating the hiring, if filling those positions affect the longevity of the guaranteed fixed schedules of the permanent full-time deputies?

The County would state the issue as being:

Is the County restricted by contract to hiring only two floater relief deputies?

The Arbitrator concludes that the Union's statement of the issue more accurately states the issue to be decided.

CONTRACT PROVISIONS

The parties cite the following provisions of their 1989-1990 Agreement:

. . . .

ARTICLE II

1/ The parties agreed to waive the three-member Arbitration Board.

PURPOSES OF AGREEMENT

. . .

The County retains all rights, power and authority that it had prior to this Agreement.

. . .

ARTICLE IV

HOURS

The work week of the Investigators shall consist of forty-two (42) hours. Work schedules for Radio Operators and Jailers shall be prepared and posted at least two (2) weeks prior to when such is to be worked. Radio and Jailers' schedules and shifts shall remain as presently in effect unless changed by negotiations between the County and the Union.

The work week for Patrolmen shall consist of forty-two (42) hours. The work schedule shall be a 5-3 schedule of five (5) nine and one-half (9-1/2) hour shifts;

6:00 a.m. - 3:30 p.m.
8:00 a.m. - 5:30 p.m.
3:00 p.m. - 12:30 a.m.
5:30 p.m. - 3:00 a.m.
8:30 p.m. - 6:00 a.m.

Work schedules for the Patrolmen shall be prepared and posted at least two (2) weeks prior to when such is to be worked and shifts may be changed up to one (1) week prior to when such is to be worked.

. . .

ARTICLE XIX

MANAGEMENT RIGHTS

The County possesses the sole right to operate County government and all management rights repose to it, subject only to the provision of this Contract and applicable law. These rights include, but are not limited to the following:

- A.To direct all operations of the County;
- B.To establish reasonable work rules and schedules of work with the Sheriff, Sheriff's and Traffic Committee. Approval of schedule and shift changes must be obtained from the Personnel and Wages Committee, who shall negotiate such changes with the Union;
- C.To hire, promote, transfer, schedule and assign employees to positions within the County;
- D.To suspend, demote, discharge and take other disciplinary action against the employees;
- E.To relieve employees from their duties because of lack of work or any other legitimate reasons;
- F.To maintain efficiency of County government operations;
- G.To take whatever action is necessary to comply with State or Federal law;
- H.To introduce new or improved methods or facilities;
- I.To change existing methods or facilities;
- J.To determine the kinds and amounts of services to be performed as pertains to County government operation, and the number and kinds of classifications to perform such services;
- K.To determine the methods, means and personnel by which the County operations are to be conducted;
- L.To take whatever action is necessary to carry out the functions of the County in situations of emergency.

. . .

MEMORANDUM OF UNDERSTANDING

- 1. Effective January 1, 1987. . .

. . .

- 2. The County shall have the right to hire part-

time "floater" personnel on an as-needed flexible schedule to fill in for Road Deputies, Jailers and Dispatcher shifts for the purpose of alleviating overtime. The County shall negotiate the impact of such positions such as wages, hours, benefits, and impact on vacations and/or other compensatory time available for other bargaining unit personnel as a result of such change.

. . .

MEMORANDUM OF UNDERSTANDING

The "Floater" Relief Deputy position shall be paid at the deputy rate and shall accumulate holidays, vacations and sick leave as a deputy. The Floater Relief person shall also be under the protective service category of the Wisconsin Retirement Fund. Any benefits specific to radio operators and jailers shall not apply to the Floater Relief position. Posting rights shall be in accordance with rights offered to deputies under the Collective Bargaining Agreement. Benefits under the uniform allowance provisions of the contract shall be pursuant to those received by deputies.

A tentative work schedule for the Floater Relief person shall be established at the same time as schedules for other employees, but such schedule may be changed at the discretion of the Chief Deputy or Sheriff to cover in the event of another bargaining unit member's choice to take vacation days, compensatory time or sick days or to ensure the most economical use of personnel in the department.

Full-time Floater Relief person shall be offered hours in the amount equivalent to a deputy under the contract. Part-time Floater Relief persons shall not be guaranteed a maximum number of hours on a daily, weekly, monthly or annual basis, but shall be called in to work on an as-needed basis. Benefits for the part-time Floater Relief persons shall be provided on the same basis as benefits received by part-time radio operators under the Collective Bargaining Agreement.

BACKGROUND

Oconto County maintains and operates the Oconto County Sheriff's Department and the Oconto County Sheriff's Department Labor Association is the voluntarily-recognized bargaining agent for all full-time and regular part-time personnel of the Sheriff's Department. In 1986, during negotiations for the parties' 1987-1988 Agreement, the County proposed to create "floater" relief personnel positions in the Department for the purpose of alleviating overtime. As a result of the negotiations, the parties agreed to incorporate the following Memorandum of Understanding in their 1987-1988 Agreement:

2. The County shall have the right to hire part-time "floater" personnel on an as-needed flexible schedule to fill in for Road Deputies, Jailers and Dispatcher shifts for the purpose of alleviating overtime. The

County shall negotiate the impact of such positions such as wages, hours, benefits, and impact on other bargaining unit personnel as a result of such change.

In 1987, the County created full-time and part-time "floater" positions in the Department. One position was a full-time position guaranteed 40 hours per week, but with no fixed schedule, and the other position was part-time without any guarantee of hours or scheduling. The County hired two individuals in mid-1987 to fill the Floater Relief positions in the Department. Upon a request from the Union to negotiate the impact of hiring the full-time floater person, the parties subsequently agreed in September of 1987 to the second Memorandum of Understanding which was incorporated into their 1989-1990 Agreement.

In March of 1989, in settling a pending grievance, the parties agreed that the person in the part-time Floater Relief Deputy position would be guaranteed at least 40 hours of work per week, but not on a fixed schedule as long as he remained in that position. Another individual was given the full-time Floater Relief Deputy position that was already guaranteed 40 hours of work per week without a fixed schedule.

In December of 1989 the County posted the position of Relief Deputy - Court Security which was subsequently changed and posted as full-time Floater Relief Deputy with the agreement of the Union and the individual who had signed the posting. The latter being an individual who until then had held a management position.

On June 22, 1990 the County posted another full-time Floater Relief Deputy position and hired an individual on that date to fill the position. At that time there was a vacancy in a road patrol Deputy Sergeant position which was not filled. Prior to posting the position, the County had asked the Union's President and Vice-President to meet and at that meeting informed them of the County's intention to hire another full-time Floater Relief Deputy. The Union's representatives asked the County to first fill the Sergeant position and were informed that was not the County's intention. On June 28, 1990, the Union filed the instant grievance. The parties were unable to resolve their dispute and the grievance proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the County violated the parties' 1989-1990 Agreement by failing to negotiate for an additional "Floater" Relief position that replaced a permanent full-time road deputy position. In support of its contention, the Union asserts that the County's hiring of any additional floater relief personnel to replace full-time road deputy positions is the County's "backdoor" approach to eliminating Article IV of the Agreement without negotiating. Article IV guarantees existing road patrol deputies a fixed work schedule of five days on and three days off working nine and one-half hour shifts. That provision eliminates some of the Sheriff's discretion and flexibility to schedule his road patrol deputies whenever and wherever he sees fit. The Union asserts that guaranteed work schedule is a "contract benefit" that the parties negotiated in 1983. The Sheriff obtained additional flexibility with regard to scheduling in the 1987-88 Agreement when it was agreed that the Union would allow the County to hire two "Floater" Relief persons that would not be assigned to any fixed or guaranteed schedules. In exchange, the County agreed to provide parity in wages between the Radio Dispatchers and Jailers. That agreement was memorialized by the Memorandum of Understanding incorporated into the 1987-88 Agreement. The Union had agreed to

the Sheriff's right to hire part-time help with a flexible schedule to fill any positions needed to eliminate overtime.

In September of 1987 that part-time help provision was modified when the parties agreed to allow the Sheriff to hire two Floater Relief deputies, with one to be a full-time position and the other to be part-time with no guarantee of any certain number of hours per month, and neither position was to have a fixed, guaranteed schedule. Those positions were memorialized by the Memorandum of Understanding incorporated into the parties' 1989-90 Agreement.

The Union notes that both Memorandums of Understanding were prepared by the County's legal counsel and asserts that the testimony of the County's person in charge of personnel, Gene Dolata, established that his notes of the negotiations regarding the second Memorandum spoke of "person", i.e., in the singular, as opposed to the use of persons or personnel in the Memorandum. The Union cites the testimony of Sergeant Noack, who was on the Union's negotiations team, and Kadlec, who recalls the negotiations team reporting back to the membership, as establishing that it was the belief of the Union's bargaining team that it had agreed to only two positions; one being full-time and one being a part-time "Floater" Relief person. Kadlec testified that when the then-president of the Union, Sczepaniac, reported back to the membership regarding the agreement, he advised them that the Union was agreeing to allow the Sheriff to hire two additional people.

The Union cites the testimony of the County's legal counsel, Rader, as establishing that if the County's position is accepted, then the Union gave away more than it got in return. Rader also testified that at no time during the negotiations did he ever tell the Union that the County intended to have the flexibility to hire more than one person for each of the two positions. That testimony is cited as establishing that the point was never clarified and, therefore, there was never a meeting of the minds in that regard. According to the Union, there was never an agreement on its part to allow the County to eliminate Article IV of the Agreement through the unlimited power to hire as many part-time or full-time Floater Relief personnel as the County desired, regardless of its effect on eliminating Article IV. The Union contends that the evidence indicates that for the last two years the County similarly believed that it only contracted to add one part-time and one full-time person for each of the Floater Relief positions. This is evidenced by the County's conduct in negotiating the Egge/Franks grievance in March of 1989 and the Court Security Officer position, as well as their attempt to negotiate with regard to the current position in dispute. In resolving the grievances in March of 1989 and in dealing with the Court Security Officer position in December of 1989, the County acknowledged its duty to bargain over the creation of additional full-time Floater Relief personnel. With regard to the Court Security Officer position that was retitled to a Floater Relief Deputy position, the Union notes that the change was initialled by all parties and asserts that this was negotiations and an agreement was reached. That it was not memorialized with an additional Memorandum of Understanding is explained by the absence of the County's legal counsel. The absence of the parties' attorneys does not mean that they could not effectively negotiate a contract change between themselves and Rader conceded this point in his testimony.

In June of 1990 when the County unilaterally decided it wanted to create another full-time Floater Relief Deputy position without a fixed schedule, the County first invited the Union to the negotiations table, but when the Union demanded that the County replace the permanent full-time road deputy position before they would consider allowing the County the opportunity to hire additional Floater Relief personnel, the County decided it no longer needed to negotiate the issue and instead posted and hired the position that is now in dispute. The Union characterizes this as a "haphazard attempt" to negotiate

the additional Floater position. The Union concludes that if the County has the right to continue hiring additional Floater Relief personnel with flexible schedules, it will be able to unilaterally eliminate Article IV of the Agreement without good faith bargaining between the parties. The Union questions why if the County had that right, would it want to fill vacated permanent road patrol positions that have guaranteed hours and fixed schedules.

The only guarantee there would be left to the Union is the County's claim that they would never do this. Dolata's testimony is cited for the proposition that the County believes that it would have the right to do as much, even though it does not believe it to be feasible. The Union concludes that it has recognized the importance of a fixed guaranteed work schedule for the road patrol deputies. It would be absurd to believe that the Union would give that protection away for the little or nothing it received in return for agreeing to the Floater Relief persons, and that is why the Union agreed only to allow the County to hire two Floater Relief persons and not unlimited additional people that could eliminate the full-time road deputy positions.

County

The County takes the position that the Agreement does not restrict the number of either full-time or part-time Floater Relief Deputy positions the County may establish. The County cites the first Memorandum of Understanding that was placed in the 1987-88 Agreement and notes that it continued verbatim in the parties' 1989-90 Agreement. It asserts that the language of that Memorandum of Understanding does not restrict the number of Floater Relief Deputy positions, either full-time or part-time, that the County may establish.

If the language did restrict the number of such positions, it would so state the number of positions the County was limited to. Lacking any such limiting language, the presumption is that there is no limit on the number of personnel that can be hired into those positions. It is asserted that the language is clear that the County "shall have the right to hire part-time 'floater' personnel. . . ." The County further notes that Article II, Purpose of Agreement, provides as follows:

The County retains all rights, power and authority that it had prior to this Agreement.

Having retained all rights and powers to hire as many personnel as necessary to do the job, that right can only be taken away by specific language that clearly limits that right. Since it is clear the language does not limit that right, the Union has the burden to prove otherwise.

The County contends that the language of the Agreement refers only to the term "personnel", but does not restrict or expressly define the number of persons that may hold a position and that, therefore, the County has the ability to place as many persons in a position as are needed. It is asserted that the evidence showed that the need of the County to establish the "floater" positions in the Department arose due to the fact that it had been established that the Department was incurring an excessive amount of overtime. The County's legal counsel testified that as a result of the concern over the excessive overtime, the County proposed during negotiations for the 1987-88 Agreement that it have the right to establish the floater positions, and that the parties agreed to the equalization of wages for the Jailers with the Dispatchers in exchange for the County receiving the Floater Relief positions.

Reviewing the entire factual background for creating the floater positions, it is clear that the language of the agreement was intended to create two distinct positions: full-time floater and part-time floater, which could be filled by any number of people, as opposed to the Union's position that the County agreed to only two persons. The County notes that the auditors identified 5,432 overtime hours in the Department through September of 1986. In response the

County proposed the creation of the floater positions to alleviate the overtime. The deputies work a 42 hour week and multiplying that by 50 weeks in a year, an average of 2,184 total hours worked by a single deputy may be presumed. It would therefore be illogical for anyone to argue that an agreement was reached that only two people could be hired as "floaters" to help alleviate the overtime, since two people could not accomplish that task.

Citing the first Memorandum of Understanding, the County contends that the plain meaning of the language in the Agreement deals with "personnel" and does not refer to one single person. That Memorandum is the document that created the position that is at issue in the grievance. There is no clear and unambiguous language in that first Memorandum of Understanding that limits the County's right to place employes in the positions created. Rather, the language is clear and unambiguous that there is no limit and it must be given its full effect. The County asserts that the second Memorandum of Understanding, agreed to in 1987 after the parties bargained the impact of the position created by the first Memorandum, does not carry as much weight in resolving the issue in this case since the controlling language should be the first Memorandum which created the position. The language in the second Memorandum refers to "person" and "persons" in the sense that the language does not qualify or limit the language to any one person. A fair reading of the words results in the conclusion that the language calls for more than one person in the positions of full-time and part-time Floater Relief Deputy at any time. The language states "the 'Floater' Relief Deputy position shall be paid at the Deputy rate and shall accumulate holidays, vacations and sick leave as a deputy." (Emphasis added.) According to the County, that simply states that the County can hire personnel as needed. Further, the County agreed to bargain the impact of the positions, in the plural, on other members. A rule of contract construction is that if the words are plain and clear, there is no reason to resort to technical rules of interpretation. Another rule is that if the language is clear and unambiguous, there is no reason to give it another meaning. The usual and ordinary definition of a term can be defined by resort to a reliable dictionary. The County quotes the following definition from Webster's Ninth New Collegiate Dictionary:

Personnel: a body of persons usually employed (as in a factory, office, or organization). . ." (p. 878)

Also, the plain meaning of the word "personnel" and its application in the labor context, refers to more than one person. Another general rule of contract interpretation is that words must be given their ordinary meaning, even if that may not have been the meaning truly intended by the parties. Citing, Mohawk Rubber Co., 83 LA 814, 816. The County asserts it has always maintained that the language of the Agreement does not restrict the number of people that can be placed in the positions, and the Union has now come forth advocating a different interpretation three years after the language was agreed to by the parties.

The County next asserts that the evidence concerning the bargaining history of the applicable Agreement proves that a specific number of persons to be placed in the position at issue was never discussed between the parties. The County cites the testimony of Dolata, and the Sheriff that there were never any discussions of a specific number of persons to fill the Floater Relief positions. Dolata's testimony with regard to the second Memorandum of Understanding established that a draft of the language of that Memorandum was conveyed to the Union and also to its legal representative at the time, and that the latter returned a letter to the County's representative stating that the language of the Memorandum accurately reflected the agreement of the parties. There was no indication from the Union that the Memorandum was inaccurate or failed to specifically list the number of persons that could fill

the Floater positions. Dolata also testified that it was never his understanding that the parties were talking about a person for each of the Floater Relief positions. The Sheriff also testified that he would prefer an increase in the number of deputies in the Department. Given that desire, it would be unlikely that the Sheriff would have overlooked the fact that he or the County had specifically agreed to limit the number of persons he could place in the Floater positions when the positions were negotiated. The Sheriff also testified that in settling the grievance in 1989 which resulted in personnel being jockeyed into different positions, there never was a discussion or agreement concerning the number of persons that could be hired into the floater positions.

The County also asserts that the testimony of Noack on behalf of the Union cannot be used as the basis for finding that the County agreed to only one person each serving in the full-time Floater and part-time Floater positions. His recollection is directly refuted by the words of the first Memorandum. Noack testified that the parties negotiated for a person, rather than a position; however, the plain wording of the Memorandum states "personnel" would be hired. The context in which the term "personnel" was used in the first Memorandum also indicates that the County was not limited to one person in each position. The County notes that the first Memorandum gives the County the right to hire part-time Floater personnel on an as-needed flexible schedule to fill in for Road Deputies, Jailers and Dispatchers. It asserts it would be illogical for the language to mean only one person could be hired to fill in for all of those different positions. The County asserts that Noack testified as to what his opinion or assumptions were, but that they did not materialize in the language of the first Memorandum agreed to by the Union. It is also asserted that Noack's testimony indicates that there was never a specific discussion on the number of persons, but only that he continued to "assume" only one person would be in each position.

Next, the County asserts that it retains the right to hire and that it has the broad discretion in determining the number of persons needed to feasibly complete the required work pursuant to Article XIX, Management Rights, Sections J and K, of the Agreement. The County again cites the testimony of Dolata that the County has reserved its right to determine how many personnel are needed to provide services pursuant to those provisions. The County asserts that "Because of the well-known importance of a Management Rights clause to an employer, it would be unjust to infer that the language in the first or second Memorandum of Understanding limits the County to hiring only one person for each position, unless it is clearly and expressly set forth." The County cites Elkouri and Elkouri, How Arbitration Works, 4th Ed., for the general rule that unless specifically restricted by a statute or the collective bargaining agreement, management retains the unqualified right to hire or not to hire. (p. 507) That rule applies in this case and results in the conclusion that the County has retained its right to hire and has the broad discretion to determine the number of persons needed to fill the Floater positions as required by the work. The County concedes that it will bargain the impact of that hiring on other people in the Department and asserts that is the method by which the Union can obtain relief in this matter, rather than by arbitrating the meaning of the language.

The County contends that the issue of "minimum manning" or restricting the number of persons that may be hired or placed in a specific position is a permissive subject of bargaining under Wisconsin law and, therefore, there can be no presumption that a specific provision limiting the number of persons to be placed in a position is to be inferred from the existing contract language. The County takes issue with what it characterizes as the Union position that even though minimum manning is a permissive subject of bargaining, the County bargained away its right to select the number of persons needed by having

negotiated and agreed to a specific, fixed work schedule. The County asserts that the two concepts are dissimilar. Minimum manning means the number of persons needed to complete the work, while fixed scheduling means the number of hours to be worked by the number of people needed. If no one is needed, the number of hours pursuant to a fixed schedule is moot. The County also contends that the Union's position that the County will attempt to eliminate the patrol deputy positions through attrition and replace them with Floaters is purely speculative and not supported by the history of the matter. The County notes that the Sheriff testified that the first Floater hired moved into a permanent patrol deputy position. Dolata also testified that it is the County's intent to readjust the personnel in the Department so as to have the effect of reducing the number of Floater positions.

Lastly, the County contends that the Union has improperly brought this issue to arbitration in that it should be bargaining the impact of the additional personnel, as required by the first Memorandum of Understanding which allows the County to establish the schedule on an "as-needed" basis. The County reviews the history of the negotiations and notes that the first Memorandum of Understanding was entered into for the purpose of alleviating overtime. It asserts that presumably the existing members of the Department would obtain less overtime and, hence, less total wages. Against that background, it makes perfect sense that the bargaining of the impact of additional Floater personnel is consistent with the needs of the parties and a fair way to resolve issues such as this one. In September of 1987, the parties in fact negotiated the impact of the Floater position being filled. The first Memorandum of Understanding created the positions as expressed in Section 2 of that Memorandum. The next step was for the parties to negotiate the impact of the employee starting in the position in September of 1987, and that agreement was reduced to writing, resulting in the second Memorandum of Understanding. The County asserts that it is a general rule of labor law that the employer retains the right to hire personnel as needed, however, it concedes that it is required to bargain the impact of hiring or reducing personnel. Hence, this matter should not have been brought to arbitration. The Arbitrator lacks jurisdiction to even review the contract language, since the first Memorandum of Understanding clearly states that the parties will bargain the impact of any personnel placed in the Floater positions. The County has been unable to bargain the impact of the latest hiring because the Union has refused to do so after the first attempt. Therefore, the parties should be sent back to the bargaining table to negotiate the impact.

DISCUSSION

In essence, the Union is asserting that the County is attempting in this instance to avoid the fixed work schedule set forth in Article IV by replacing a full-time Road Sergeant Deputy position by adding another full-time Floater Relief Deputy position, and contends that the Memorandums of Understanding relied upon by the County only authorized the hiring of one person each in the full-time and part-time Floater Relief Deputy positions. The County contends that the first Memorandum of Understanding is clear that the County is not limited in the number of persons it may hire for each position and requires only that the County bargain the impact of such hirings, and that determining the number of persons in each position is a reserved right of management.

It is initially noted that the first Memorandum of Understanding references "part-time 'floater' personnel" and makes no reference to full-time floater personnel. However, the evidence indicates that in September of 1987 the parties agreed to expand the first Memorandum to include a full-time Floater Relief position in its coverage. The Union asserts that it was the understanding of the members of its bargaining team that the County was only authorized to hire one person each in the full-time and part-time Floater

Relief positions. However, as the County contends, the first Memorandum uses the plural term "personnel" in the language authorizing the County to hire for the Floater Relief positions. The Union relies on the reference in the second Memorandum to the singular term "person" as supporting its contention that the County is only authorized by the Memorandum to hire one person in each position, and must therefore bargain with the Union before hiring additional persons in the Floater Relief positions. It is noted that at the time the second Memorandum was agreed to there was only one person in the full-time position. It seems more likely that the reference to "person" refers to the fact that only one person was in the position at that time, rather than to an intent to limit the County to only placing one person in the position. Moreover, had the parties intended to limit the persons in the floater positions to a set number, it would have been a simple matter to set forth that intention. It is noted they did not do so and such a limit will not be inferred.

The Union has cited several instances that it alleges constitute acknowledgement by the County that it must negotiate with the Union over adding further relief persons beyond the two it asserted were authorized by the first Memorandum. Those instances have been reviewed and it is concluded that they do not fully support the Union's allegation in that regard. The settlement negotiations in the Egge/Franks grievances appear to have involved more who was to be placed in what position, rather than whether there would be another full-time floater. The instance involving Byrum was a unique situation of a management person desiring to be put back into the bargaining unit and the discussions surrounded into what position he would be placed. The last instance involving the position being grieved is more troublesome, as that appears to be more of an attempt by the County to obtain the Union's agreement to the additional Floater Relief position, as the Union claims. That is perhaps explained by the discussion below.

Although neither the first, nor the second Memorandum of Understanding is deemed to express a set limit on the number of persons the County may place in the Floater Relief Deputy positions, the first Memorandum does expressly state that such personnel are to be hired "to fill in for Road Deputies, Jailers and Dispatcher shifts for the purpose of alleviating overtime." (Emphasis added) The record also establishes that the purpose of authorizing such positions was to alleviate the substantial amount of overtime in the Department at the time.

The County's argument that it needed more than just two Floater Relief persons to adequately meet the overtime in the Department is persuasive to that extent; however, it is not persuasive in explaining the hiring of the additional Floater Relief deputy in June of 1990. At the time the position in question was posted and filled, i.e., June 22, 1990, there were, in effect, already three full-time Floater Relief deputies: Judy Egge Kadlec, Chail Franks (in the part-time floater position, but guaranteed full-time hours as long as he is in the position) and Robert Byrum. Ostensibly, that would be sufficient to meet the needs of alleviating excessive overtime in the Department, noting that there are circumstances in a police operation where some overtime is unavoidable. One then questions the purpose for which the additional full-time Floater Relief Deputy, Mason, was hired in June of 1990. That question appears to be answered by Dolata's testimony that filling that position was necessitated by the Road Sergeant, McMahan, being promoted to a management position:

QSo that position -- and there again as road sergeant they are guaranteed the five-three permanent schedule pursuant to the 1989-90 contract that's now in existence?

AYes. We schedule them the same.

QOkay. This Mike Mason position that has been filled has --
was necessitated by McMahon being moved up; is
that correct?

AYes.

QBut the county has the flexibility of scheduling Mason
whenever and wherever they want to?

AYes.

(Tr. 32)

Thus, contrary to the County's assertion that it would not do so, the County essentially replaced a regular full-time person on a fixed schedule with a full-time Floater Relief Deputy position, thus avoiding the fixed work schedule. As noted above, the stated purpose of authorizing the hiring of Floater Relief Deputies is to alleviate overtime, and not to permit the County to replace personnel that work a fixed schedule with those who do not. Relying on the first Memorandum, the County asserts its only duty is to negotiate the impact of adding persons to the floater position. The wording on which the County relies, however, speaks to negotiating the wages, hours and conditions for the floater positions and only in a very narrow area of compensatory time and vacations with regard to negotiating the impact on the rest of the bargaining unit personnel.

Given the above, and the restriction in the first Memorandum of Understanding authorizing the hiring of floater relief personnel for the purpose of alleviating overtime, it is concluded that the County's posting and filling the additional Floater Relief Deputy position in June of 1990 while leaving the regular Sergeant Deputy position vacant, violated the letter and intent of that provision of the Agreement.

With regard to remedy, it is generally management's right to decide whether to fill a vacancy absent contract language limiting that right. In this case there was a vacancy created among the Road Deputies when Deputy Sergeant McMahon was promoted and the County chose to fill that vacancy by adding another full-time Floater Relief Deputy, rather than filling it with a regular Sheriff's Deputy or Deputy Sergeant on a fixed schedule. The County having decided to fill that vacancy, and it having been concluded it could not do so under the circumstances by adding another full-time Floater Relief Deputy, the County has been ordered to post and fill the vacancy as a regular position on a fixed schedule, rather than as a floater.

Based upon the foregoing, the record and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. Therefore, the County is directed to immediately repost the position and fill it as a regular full-time position if it has not already done so, and to negotiate with the Union before posting and hiring Floater Relief personnel without a fixed work schedule for purposes other than alleviating overtime in the Sheriff's Department.

Dated at Madison, Wisconsin this 19th day of August, 1991.

By David E. Shaw /s/
David E. Shaw, Arbitrator