

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration	:
of a Dispute Between	:
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LABOR ASSOCIATION OF	: Case 108
WISCONSIN, INC.	: No. 45056
	: MA-6491
and	:
	:
LINCOLN COUNTY	:
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Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54911, appearing on behalf of Labor Association of Wisconsin, Inc., referred to below as the Association.

Mr. Charles A. Rude, Personnel Coordinator, Lincoln County, Lincoln County Courthouse, 1110 East Main Street, Merrill, Wisconsin 54452, appearing on behalf of Lincoln County, Wisconsin, referred to below as the County, or as the Employer.

ARBITRATION AWARD

The Association and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in grievances filed on behalf of Peter Annis and William Voigt. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on April 10, 1991, in Merrill, Wisconsin. The hearing was not transcribed, and the parties filed briefs by June 24, 1991.

ISSUES

The parties stipulated the following issues for decision:

Did the Employer violate the provisions of Article 12, Section B, when it denied the Grievants, Deputy Peter Annis and Deputy William Voigt, available overtime hours on October 16, 1990?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 - MANAGEMENT RIGHTS

The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this contract and applicable law . . .

Any unreasonable exercise or application of the above mentioned management rights, which are mandatorily bargainable, shall be appealable through the Grievance and Arbitration process . . .

. . .

ARTICLE 11 - HOURS OF WORK

The normal scheduled work day shall be eight (8) hours. A normal scheduled work week shall be prepared by the Department Head and posted six (6) months in advance. Posted schedules may be changed by mutual agreement by the parties.

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ARTICLE 12 - OVERTIME

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B - Administration of Overtime: All overtime that becomes available to Patrol Officers, both Deputies and Sergeants, shall be filled by the following method:

1. Using a rotating system, per shift, based on seniority, the immediate preceding and succeeding shifts shall have the first opportunity to fill such overtime. Accordingly, a list shall be established, by seniority of the people on each shift (currently four (4) in number), including the Sergeant. Consequently, there shall exist a separate list for each shift.
2. When a shift is short of personnel (i.e., 2 absences), the person at the top of the list from the preceding shift shall be offered the opportunity to work the first four (4) hours and the person at the top of the list of the succeeding shift shall be offered the opportunity to work the second four (4) hours. If the person so offered accepts the offer, or refuses the offer, then that person's name moves to the bottom of the overtime list for that shift. If the overtime is not filled with the person(s) at the top of the respective lists, then such overtime shall be offered to the others on that list consistent with the above described rotation of names.

. . .

ARTICLE 26 - ENTIRE MEMORANDUM OF AGREEMENT

A - Amendments: This Agreement constitutes the entire Agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendment or agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

. . .

#### BACKGROUND

The two grievances arise from the same core of facts, and concern the events of October 16, 1990. 1/ The normal complement of officers on each shift is three deputies and one sergeant. For the 7:00 a.m. to 3:00 p.m. shift on October 16, Sergeant Proulx was scheduled to work, along with Deputies Pophal, Ratkovich and Simon. Deputy Friske was also present for that shift, but it is not clear when he was assigned to it. Friske was, at the time, serving a probationary period, and was working rotating shifts.

Proulx attended a training session on October 16, which made him unavailable to work his scheduled shift. Ratkovich attended a full day training session which took place in the County Safety Building. Simon took the day off on paid leave.

Voigt worked the 11:00 p.m. (October 15) to 7:00 a.m. (October 16) shift. Sergeant Kraft also worked that shift. The Dispatcher called Voigt during that shift to ask if he could work four hours overtime, from 7:00 a.m. until 11:00 a.m. on October 16. He responded that he would do so. Later in the shift, the Dispatcher radioed Voigt to inform him that the overtime was not available. The Dispatcher did not offer him any explanation.

Sheriff Ronald Krueger testified that he had Kraft work the four hours of overtime from 7:00 a.m. until 11:00 a.m. on October 16. Krueger testified that he did not have the overtime call-in list, but that Kraft informed him that Kraft was at the head of the list.

Annis worked the 3:00 p.m. to 11:00 p.m. shift on October 16. He testified that he was at the head of the overtime call-in list for his shift. On October 15, he signed a notice to work four hours of overtime on October 16, from 11:00 a.m. until 3:00 p.m. He stated that sometime prior to 11:00 a.m. on October 16, he was informed that he should not report to work for the four hours of overtime he had signed up for.

The parties have an established procedure for overtime call-in. A seniority roster is kept for each shift which lists the deputies who are available for overtime. This roster is updated daily regarding who has been offered overtime. An officer who is offered overtime moves to the bottom of the list, so that the next offer of overtime is made to the next most senior officer. The Dispatcher maintains the roster, and calls-in the overtime. Thus, the Dispatcher calls an officer in for overtime by contacting the first name on the list, and by then going down the list as necessary until finding an officer who will work the overtime. Where a full eight-hour shift of overtime is available, the Dispatcher will offer four hours of overtime to the shifts preceding and succeeding the shift for which there is a vacancy. Sergeants are

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1/ References to dates are to 1990, unless otherwise noted.

included on the overtime roster.

The Association filed identical grievances on behalf of Annis and Voigt on October 22. Each grievance alleged the County had "refused to follow the contractual procedure in filling overtime."

Krueger answered the grievances in a memo dated October 23, which reads thus:

I am denying both grievances, as there was a verbal agreement with the Union President before the two new positions were brought before the County Board and approved. That now has changed. However, I will keep using the two deputy positions as the County Board has authorized me to do, and that is to try and reduce overtime and better service to the people of the County.

The Association did not agree to the Sheriff's response, and the grievances were put before the County Personnel and Administration Committee, which answered the two grievances thus:

The Personnel and Administration Committee concurs with the Sheriff that the grievances should be denied, although the reasons for doing so differ from those expressed in the Sheriff's answer to the grievance.

Regular shift staffing consists of one sergeant and three deputies. Under the provisions of the collective bargaining agreement, if one employee assigned to a shift is absent (vacation, sick leave, compensatory time off), the shift "works short". If two employees assigned to a shift are absent, the absence of one of them is "covered" by provisions to staff, on an overtime basis, as outlined in Article 12 (B) of the Agreement. On October 16, 1990, the 7:00 a.m. to 3 p.m. shift was scheduled to be worked by Sgt. Proulx, and Deputies Pophal, Ratkovich and Simon; with Deputy Friske also on the shift as part of his training program. Deputy Simon took compensatory time off for October 16 (although he did attend SRT training in the Safety Building that day). Sgt. Proulx was out of the area at a training session, and Sgt. Kraft, from the preceding 11 p.m. to 7 a.m. shift, was "held over" from 7 a.m. to 11 a.m., which was in accordance with the provisions of the Agreement. Actually, with Deputies Pophal, Ratkovich and Friske on duty, had administration chosen not to "hold over" Sgt. Kraft for the first half of the 7 a.m. to 3 p.m. shift, there would still have been enough people at work to preclude "triggering" of the overtime provisions of Article 12 (B). (Deputy Ratkovich was on duty in the Safety Building at an SRT training session and could have been reassigned immediately, if necessary). While Deputy Friske is unquestionably still probationary, and has

not completed all of his training requirements, he is, nevertheless, a sworn Deputy Sheriff, with powers of arrest, in Lincoln County, and is assigned to regular duty by the Sheriff, with some duty assignments perhaps being restricted by liability concerns if Deputy Friske should be assigned where he has not yet received any mandatory training prescribed.

For the foregoing reasons, both Grievance 90-97 and Grievance 90-98 are denied. There was no violation of Article 2 or Article 12 of the Agreement.

The "verbal agreement" referred to in the Sheriff's response concerns discussions at the time of the parties' negotiation for a 1990-91 labor agreement. Krueger testified that he had been instructed by the County Board to reduce the amount of overtime. He responded by proposing the addition of three deputy positions. The County Board approved the positions, but subsequently withdrew funding for them. The Board ultimately funded two "relief" positions, one of which was awarded to Friske.

Fish stated that the Association and the County, during this period of time, disagreed on the removal of three sergeant positions from the bargaining unit. The Association and the County did reach a verbal agreement by which the sergeants would be excluded from the unit, but the new deputy positions would be placed in the unit, on a flexible schedule, not bound by the notice provisions of Article 11. This agreement was never reduced to writing.

Further facts will be set forth in the DISCUSSION section below.

#### THE ASSOCIATION'S POSITION

After a review of the facts, the Association contends that Article 12, Section B, governs each grievance. That provision is "clear," according to the Association, and provides that overtime be split between the senior available employe from the shifts preceding and succeeding the available hours. Since Annis and Voigt were the senior employes on those shifts, it follows, according to the Association, that the Grievants "should have been called in for the available overtime hours." The Association specifically rejects the County's contention that "the 7:00 AM to 3:00 PM shift was not vacant on October 16, 1990." After a review of the evidence, the Union concludes that the day shift "only had Deputy Pophal available for routine duties," thus creating a need for overtime.

The Association's next major line of argument is that the County "simply attempted to avoid the restrictions of the overtime administration language when it assigned the overtime hours to Sgt. Kraft and Deputy Friske." That Annis and Voigt were the most senior employes available for the overtime is established, the Union contends, by the fact that each was the next person on their shift to be given overtime. Beyond this, the Association notes that the Sheriff's letter denying the grievances acknowledges that he was seeking to reduce departmental overtime. The Sheriff's attempt to use two relief positions to cover overtime situations also indicates his desire to reduce overtime without regard to contractual obligations, according to the Association.

Viewing the record as a whole, the Association concludes that the grievance must be upheld, and that the Grievants must be made whole for the

County's violation of the contract.

#### THE COUNTY'S POSITION

The County states the factual background relevant to the grievances thus:

The . . . Sheriff's Department, when the normal complement is on duty, has one sergeant and three deputies on each shift. When one of the four is absent, the shift "works short" . . . It is only when at least two employees are absent from the same shift that the provisions of Article 12, Section 12.02(1), (2), (3) and (4) are operative, to provide the third person on the shift.

The County notes that there is a dispute whether Kraft was next in line for overtime, but asserts that "neither party was able to produce conclusive evidence at the hearing, or since . . . as to whether Sgt. Kraft was "in line" to work the overtime."

Beyond this, the County contends that there were three deputies on duty for the first shift of October 16, 1990, thus precluding the "'triggering' of Section 12.02." The County notes that Deputy Ratkovich, although attending a training session, was present in the Safety Building the entire shift, and thus available for duty. Beyond this, the County notes that Friske, though a probationary employe, was a sworn officer on duty for the first shift of October 16, 1990. With three deputies on duty, it follows, the County concludes that "there was . . . no reason to call in Deputy Annis four hours ahead of his scheduled . . . shift on that day."

The County concludes that because "the 7 a.m. to 3 p.m. shift . . . was staffed with sufficient personnel" the contract was not violated, and the grievances "should be denied."

#### DISCUSSION

The stipulated issue has, potentially, broad implications. A dispute on the "availability" of overtime can pose difficult interpretive issues concerning the Sheriff's discretion to assign work. Beyond this, the Association has questioned the Sheriff's use of "reserve" deputies to cover overtime.

Grievances should be resolved on the narrowest basis possible, to avoid unnecessary arbitral interference in the bargaining process codified by the labor agreement. That the Personnel and Administration Committee answer to the grievances abandoned the line of defense asserted by the Sheriff's answer puts potential issues concerning the scheduling of "reserve" deputies to cover overtime beyond the scope of the two grievances posed here.

What remains of the stipulated issue does concern the availability of overtime on October 16, but resolution of that issue is essentially factual. The initial focus must be on the first four hours of the 7:00 a.m. to 3:00 p.m. shift on October 16. It is beyond dispute that overtime was "available" within the meaning of Article 12, Section B, for these four hours, since the Sheriff held Kraft over to work them. The sole issue posed here is whether the

Sheriff's use of Kraft over Voigt violated the call-in procedures of Article 12, Section B.

The County accurately points out that the evidence on this point is less than conclusive. This is, however, inevitably the case in litigation, and the issue posed here is whether doubt remains on an essential fact, and if so, against which party that doubt should be resolved.

In cases in which doubt remains on an essential fact, burden of proof doctrines are used to determine against whom that doubt should be resolved. The burden of proof consists of two elements -- the burden of producing evidence and the ultimate burden of persuasion. The burden of producing evidence focuses on the development of an evidentiary record at hearing, while the burden of persuasion focuses on the point of view of the decision-maker in reviewing a developed evidentiary record. In arbitration, the moving party has the burden of producing sufficient evidence to stand without rebuttal. Once this has occurred, the burden to produce evidence shifts to the opposing party. This process is repeated until the evidence of both parties has been adduced.

In this case, the Association, through Voigt's testimony, established that the Dispatcher initially called Voigt in to work the overtime given to Kraft, then later cancelled the call-in, without explanation. Fish's testimony established that the Dispatcher maintains the call-in list, and is responsible for calling in the eligible employe. This evidence was sufficient to establish each point in the absence of rebuttal. The County, through Krueger, established that Kraft informed the Sheriff that he, not Voigt, was at the top of the call-in list. The Sheriff then overturned the Dispatcher's call-in of Voigt. The County did not rebut the testimony of Voigt or Fish, and the Association did not rebut the testimony of Krueger.

Each party contends that the other has failed to meet its burden. The Association notes the Sheriff's conversation with Kraft is hearsay, and asserts the County's failure to call Kraft should be considered fatal to its case on this point. The County notes the proof is inconclusive and, as a result, the doubt on the point should be resolved against the Association.

That the County's case rests on hearsay can not be considered fatal, since the Association's does also. The Dispatcher's calls to Voigt involve hearsay, and the Association failed to call the Dispatcher. That both parties have relied on hearsay is not, in itself, remarkable. Strict adherence to the hearsay rule balloons the cost of litigating cases, and arbitration is meant to be an inexpensive and informal alternative to more expensive types of litigation. In this case, neither party insisted on formal adherence to the rules of evidence. Against this background, post-hearing recourse to those rules through a conclusion that either party failed to produce sufficient evidence to meet its burden is inappropriate. The decision must turn on the record the parties developed.

That the call-in list was not produced offers no more persuasive a basis to resolve this point. Both parties sought, without success, to locate or to reconstruct the then-current call-in list. Neither can be faulted for failing to produce it.

It does not follow from this that burden of persuasion considerations are an appropriate means to resolve this aspect of the case. The proof summarized above is sufficient, in my opinion, to establish that Voigt, not Kraft, should have been called-in for the four hours of overtime at issue.

Unrebutted evidence establishes that the Dispatcher maintains the call-in list and that the Dispatcher called Voigt in. The Sheriff's use of Kraft was a deviation from this established procedure, and rests solely on Kraft's assertion that he was at the top of the list. Krueger acknowledged that he didn't have the list, and relied on Kraft. It is significant that the Dispatcher never informed Voigt why the earlier call-in had been reversed. Presumably, if a mistake had been made such an explanation would have been offered. Since it is undisputed that the Dispatcher, not Kraft, maintains the call-in list, the Dispatcher's conduct in calling Voigt in is a more reliable indication of who was on the top of the call-in list than is Kraft's unexplained and self-serving assertion that he was the eligible employee. The record affords no basis to question whether Krueger's reliance on Kraft's assertion was in good faith. That reliance was, however, in light of established call-in procedures, misplaced.

In sum, the record developed by the parties establishes that the Dispatcher maintains the overtime call-in list, and calls in available overtime from that list. The Dispatcher called Voigt in to work four hours of overtime on October 16. Krueger overturned this determination based solely on Kraft's assertion that Kraft, not Voigt, was the employee eligible for the overtime. There is no evidence to support Kraft's assertion, and thus no basis for overturning the Dispatcher's call-in of Voigt. It follows that, through the established call-in procedure, Voigt, not Kraft, should have worked the available overtime.

The final aspect of the case concerns whether overtime was "available" from 11:00 a.m. until 3:00 p.m. on October 16, and, if so, whether Annis should have worked it. There is no dispute that Annis was the eligible employee for any overtime on that shift. The issue thus posed is whether overtime was "available" within the meaning of Article 12, Section B. Although this determination could have, on other facts, posed significant interpretive issues regarding what constitutes "available" overtime or when "a shift is short of personnel," resolution of the point is, on this record, essentially factual.

The County's conduct on October 16 establishes that overtime was "available." Most significant here is that the County used the same complement of officers for the second half of the October 16 shift as it used for the first half, with the exception of Kraft. That the Sheriff chose to call Kraft in belies the assertion that the shift was fully staffed. The same officers the County seeks to count for the second half of the shift were just as present for the first half. Beyond this, the Sheriff had sought applicants for the overtime denied Annis well before the commencement of the October 16 shift. Annis had in fact signed up and prepared for the overtime before being called at home and told not to report. Against this background, it is unnecessary and unpersuasive to reach the County's contentions regarding whether officers on training or probationary officers can be counted toward a full complement of officers. The evidence unmistakably establishes that the Sheriff had anticipated a full shift of overtime on October 16. The overtime was, in short, "available" within the meaning of Article 12, Section B.

#### AWARD

The Employer did violate the provisions of Article 12, Section B, when it



denied the Grievants, Deputy Peter Annis and Deputy William Voigt, available overtime hours on October 16, 1990.

As the remedy appropriate to the Employer's violation of Article 12, Section B, the Employer shall make Deputies Voigt and Annis whole by compensating them for the wages and benefits each Deputy would have earned but for the Employer's refusal to call each of them in for four hours of overtime on October 16, 1990.

Dated at Madison, Wisconsin this 4th day of September, 1991.

By \_\_\_\_\_  
Richard B. McLaughlin, Arbitrator