

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 MANITOWOC COUNTY SHERIFF'S DEPARTMENT : Case 232  
 EMPLOYEES LOCAL 986-B, AFSCME, AFL-CIO : No. 43869  
 : MA-6092  
 and :  
 :  
 MANITOWOC COUNTY :  
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Appearances:

Mr. Michael J. Wilson, Representative, Wisconsin Council 40, AFSCME,  
Mr. Mark Hazelbaker, Attorney at Law, Corporation Counsel, Manitowoc

AFL-CI  
 County

ARBITRATION AWARD

On April 3, 1990, the Manitowoc County Sheriff's Department Employees Local 986-B, AFSCME, AFL-CIO filed an arbitration request with the Wisconsin Employment Relations Commission. Following jurisdictional concurrence from the Employer, Manitowoc County, the Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on September 17, 1990 in Manitowoc, Wisconsin. A transcript of the proceedings was taken and distributed by October 10, 1990. Post-hearing briefs were filed and exchanged by January 23, 1991.

This Award addresses the bargaining unit status of Reserve Deputies employed by the Sheriff's Department.

During the processing of this grievance, the parties were also involved in a unit clarification proceeding before the Wisconsin Employment Relations Commission. That proceeding, initiated March 6, 1990 led to an Order, dated March 5, 1991 including certain Reserve Deputy positions within the bargaining unit and excluding other petitioned-for positions. At hearing, the parties stipulated that the unit clarification decision would be made a part of this record, and it was submitted on March 13, 1991.

BACKGROUND AND FACTS

For years, the Manitowoc County Sheriff's Department has employed Reserve Deputies. These are non-bargaining unit employees who have supplemented the regular bargaining unit work force. The Reserve Deputies are sworn law enforcement officers. In 1983, the Union filed a unit clarification petition with the Wisconsin Employment Relations Commission seeking inclusion of the Reserve Deputies. The Commission found the work of the Reserve Deputies to be so irregular that the Reserve Deputies were held to be casual, not regular part-time employees.

Since 1983 both the number of Reserve Deputies and their hours worked has increased substantially. The full-time authorized staff has remained constant in the face of a growing workload.

The duties performed by the Reserve Deputies are summarized in the unit clarification Findings of Fact, excerpted and set forth below:

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11. The existing Manitowoc County jail was built in 1960; it has inmate maximums of 46 (under ideal circumstances) or 25 (under a worst-case

circumstance). In 1990, the average daily inmate population has been 72. The Manitowoc County Board has approved bonding for a new jail, with a capacity of 160 adults and 12 juveniles; its projected opening is sometime late 1992-early 1993, assuming no unexpected delays. When the inmate population is too large to be housed in the County Jail, prisoners are transferred to other facilities, under the control of Manitowoc County Deputies, both full-time and reserve. Such transport duty is never performed by a single officer. Transport duty also occurs when there is a need for emergency medical services. For both full-time and Reserve Deputies assigned to transport duty, call-in assignments can provide advance notice of anywhere from one hour to three weeks. When assigned to transport duty, full-time and Reserve Deputies operate essentially interchangeably.

12. At their time of hire, Reserve Deputies go through a process of application/testing/interview; while they thereafter have annual evaluations, they do not repeat the hiring process, unless they wish to apply for a change in classifications. At their time of hire, Reserve Deputies are neither told they have permanent employment with the County, nor told of any termination date. Reserve Deputies are not offered any set schedule nor pattern of hours, nor promise of work beyond their current assignment. Depending on the particular assignment, Reserve Deputies may learn of an assignment anywhere from one hour to a few weeks to several months in advance. Full-time Deputies who work as jailers can choose their vacation by April 15; individual shift commanders may fill anticipated vacation-vacancies throughout the year at that time, or they may wait until close to the time the personnel is actually needed. In filling such vacancies, first offer is made to other full-time Deputies; if further personnel is needed, the openings are offered to Reserve Deputies, in an unofficial rotating manner designed to spread the work. In 1989, three full Jailer shifts were filled the entire year by Reserve Deputies. Openings for transport and patrol duty can be known from a few hours to a few weeks in advance, and are filled in the same manner. Reserve Deputies work the same hours as the Deputy they are substituting for, and, in an extended substitution, even work the same weekly schedule. Reserve Deputies supervisors vary depending on the particular assignment.

13. On patrol, Reserve Deputies generally function as assistants or trainees to full-time deputies; they never patrol alone, or only with another Reserve Deputy. The individual shift commanders make assignments on whether a Reserve Deputy will ride with a regular deputy; there are no squad cars exclusively designated for either classification. Both Reserve Deputies and full-time Deputies work in the same locations, and are under the same chain of command. Reserve Deputies and full-time Deputies track their hours in similar manners, but use differently-colored

cards for reporting. While Reserve Deputies do have the power of arrest, the full-time Deputy present with the Reserve Deputy, Zimmer, has issued traffic citations with a deputy present; Zimmer has never written an accident report. Only a few persons within the department are trained and certified on the intoxilyzer, none of them Reserve Deputies. Reserve Deputies are never put in charge of the response to a domestic violence call and are not trained in high-speed pursuit policies and practices. Neither Reserve Deputies nor full-time Deputies transport prisoners alone. Although the primary responsibility for testifying in court falls on the arresting officer, Reserve Deputies have testified at arraignments and trials. Only full-time Deputies have been given advanced training in accident investigation. On transport duty and jail duty, the Reserve Deputies and full-time Deputies perform essentially similar functions, except that Reserve Deputies are generally not assigned to work in the jail by themselves. A full-time Deputy who became a Reserve Deputy would not thereafter exercise the level of responsibility of a full-time Deputy. Training in the use of squad car computer/communications system is not routinely offered to Reserve Deputies, although many have learned how to use it. On balance, the need for and work assignments of Reserve Deputies is generally routine and predictable, with their duties and responsibilities more limited than those of full-time Deputies.

14. Unlike full-time Deputies, the Reserve Deputies cannot file grievances, nor receive any of the following fringe benefits: paid holidays, sick leave, vacation, funeral leave, overtime, paid holidays, compensatory time, paid leave; shift premium, or education incentive compensation. For discipline and discharge, Reserve Deputies are subject to a policy of progressive discipline and requirement of cause, which appeal rights are distinct from the just cause provision which the collective bargaining agreement provides for full-time Deputies. For accident investigations, Reserve Deputies are subject to the same procedure as full-time Deputies, except they do not have union representation. Full-time Deputies and Reserve Deputies receive the same meals provisions, and both are required to be residents of the County of Manitowoc. Both groups are to purchase their uniforms from a vendor designated by the County, although only the full-time Deputies are reimbursed for their cost, and the two groups wear different colored uniforms. Both groups receive yearly performance evaluation. Both groups participate in the Wisconsin Retirement System. Reserve Deputies are paid \$6.14 per hour.

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ISSUES

The parties stipulated the following:

Is the employment of any or all of the Reserve Deputies violating the terms of the collective bargaining agreement in any fashion?

If yes, what is the appropriate remedy?

The Union contends the following issue is also presented:

Are any of the Reserve Deputies employed on a regular basis?

The County does not regard the latter issue to be before the Arbitrator.

PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 1 - RECOGNITION AND BARGAINING UNIT

The Employer recognizes the Union as the exclusive bargaining agent for the employees of the County Sheriff Department, excluding the positions of Sheriff, Inspector, Deputy Inspector, Training/Jail Administrator, Court/Process Administrator, Communications Administrator, Food Service Manager/Matron, Lieutenant, Sergeant, and temporary employees.

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ARTICLE 3 - MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

Manitowoc County shall have the sole right to contract for any work it chooses and to direct its employees to perform such work wherever located subject only to the restrictions imposed by this Agreement and the Wisconsin Statutes. In the event the Employer desires to subcontract any work which will result in the layoff of County employees, said matter shall first be reviewed with the Union.

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of its department. The Employer may adopt reasonable work rules except as otherwise provided in this Agreement.

The Employer agrees that all amenities and

practices in effect for a minimum period of twelve (12) months or more, but not specifically referred to in this Agreement shall continue for the duration of this Agreement. The parties recognize the County's right to implement an Employee Assistance Program. Practices and policies established pursuant to the Employee Assistance Program shall not be considered a past practice, regardless of how long they exist. The County reserves the right to modify or discontinue any portion of the program. The decision of the County to modify or discontinue any portion or all of the program shall not be subject to the grievance procedure.

The term "Employee Assistance Program" refers to a system of employee referral and counseling which helps employees with emotional, mental, chemical dependence and other personal problems. Referrals and counseling shall be confidential and shall not be disclosed or considered except as expressly authorized by the employee in writing.

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#### ARTICLE 10 - DEFINITIONS OF EMPLOYEES

- A. Regular Full-Time: A regular full-time employee is a person hired to fill a regular full-time position. Full-time employees are eligible to receive all benefits in this Agreement. Outside Employment: It is agreed that an employee of the Department, in accepting employment with the County, has chosen a career which shall take priority over any outside employment. It is further agreed that this shall not be construed as prohibition of other employment so long as the outside job does not interfere with his or her ability to perform his or her job within the department.
- B. Regular Part-Time: A regular part-time employee is a person hired to fill a regular part-time position. Regular part-time employees shall not be used to replace, reduce or displace regular full-time employment.

Regular full-time employees hired prior to January 1, 1984, and working on a continuous basis through December 31, 1983, who subsequently became regular part-time employees and regular part-time employees hired prior to January 1, 1984, shall be entitled to all fringe benefits under this Agreement. (Holiday, vacation and sick leave benefits shall be pro-rated.)

Regular part-time employees hired on or after January 1, 1984, shall be eligible for all fringe benefits under this Agreement prorated according to the percentage of full-time worked by the employee, which percentage shall be determined as follows:

1. The percentage shall be determined four (4) times per year:

January 1st  
April 1st  
July 1st  
October 1st

2. The percentage of the ensuing quarter shall be determined by dividing the number of hours paid by four hundred and eighty six and six-tenths (486.6) hours.

3. Certain benefits such as pension contributions and longevity are paid per hour and shall not be further prorated.

4. Worker's Compensation leave, layoff and other leave shall not diminish the employee's proration factor.

C. Seasonal: A seasonal employee is a person on the active payroll only during the season in which his or her services are required. Seasonal employees are not entitled to any of the fringe benefits under this Agreement. Seasonal employees shall not be used to replace, reduce or displace regular employment.

D. Temporary: A temporary employee is one hired for a specified period of time (not to exceed six (6) months) and who will be separated from the payroll at the end of such period. Temporary employees receive none of the benefits contained in this Agreement. Temporary employees shall not be used to replace, reduce or displace regular employment.

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ARTICLE 22 - JOB POSTING

A. Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs on the bulletin board in the department as well as the bulletin board in the office of the County Clerk for five (5) working days. Any employee desiring to fill any such posted vacancy or new position shall make application in writing and submit it to the Personnel Office. After the conclusion of the posting period, the envelope shall be opened at the Personnel Office in the presence of a representative of the Union and a representative of the County Personnel Committee, or its designee, at a time to be mutually agreed upon.

B. Whenever any vacancy occurs it shall be given to the employee with the greatest seniority, provided the applicant for such position is qualified and eligible for the position. The awarding of the position shall occur within seven (7) work days after the completion of the

posting period.

- C. When objections are made by the Sheriff's Department regarding the qualifications of an employee to fill the position, such objections shall be presented to the employee and the Union in writing by the Sheriff or the Sheriff's designee.
- D. If there is any difference of opinion as to the qualifications of an employee, the County Personnel Committee and the Union Committee shall take the matter up for adjustment through the grievance procedure.

#### POSITIONS OF THE PARTIES

The Union contends that temporary employees are subject to all of the restrictions found in Article 10. The contract defines and includes both regular full-time and regular part-time employees. Bargaining unit employees enjoy broad protection against work erosion due to the broad terms of Article 10(D).

It is the claim of the Union that the County has hired a second work force to use in place of bargaining unit employees. The Reserve Deputies are not temporary employees. Some work more than regular bargaining unit employees. The Reserve Deputies have been hired to meet a growing workload. These employees are being used to circumvent the negotiated contractual hours of work provision.

In the Union's view the Employer has unilaterally altered the Recognition Clause and scope of the bargaining unit.

The Union argues that the Reserve Deputies are a part of the bargaining unit by operation of the Recognition Clause and should be entitled to and subject to all provisions of the Agreement.

It is the view of the County that this grievance seeks to outlaw a decade-long practice of employing casual deputies in the Sheriff's Department. The relief sought would be unconstitutional. It is beyond the authority of this Arbitrator to tell the Sheriff who he is to deputize.

The County points to the record in the unit clarification proceeding and advances a number of arguments based upon that record and the additional evidence submitted in this proceeding. Essentially, those arguments are that the Reserve Deputies work irregularly, have diminished responsibility, are really helpers and have no expectation of continued employment. The County claims that this matter has been previously litigated, in the 1983 unit clarification, with no substantial change of facts since that time.

The contract contains no provision requiring that only bargaining unit members perform bargaining unit work. No one has been reduced, replaced or displaced. All work is first offered to unit members and only if it is rejected is a Reserve called. The Article 10(D) restrictions speak to supplanting existing positions, not to eliminating potential growth.

It is the view of the County that there is a clear and unequivocal past practice of calling in Reserve Deputies which is contractualized by Article 3. The Union has accepted this practice for years because it eased working conditions. The remedy sought by the Union is argued to be inappropriate in

that the contract does not apply automatically to newly-accreted employees. In the view of the County, the Arbitrator cannot decide when any particular employee's status changed from temporary to regular. If any relief is granted, it should be to direct the parties to bargain.

The County argues that this Award may not abridge the constitutional authority of the Sheriff, as outlined in Wisconsin Professional Police Association v. Dane County, 106 Wis. 2d 619. Specifically, the County claims that this Arbitrator lacks the authority to tell the Sheriff who to deputize and/or assign work.

#### DISCUSSION

The Commission placed five Reserve Deputies in the bargaining unit, having found them to be regular part-time employees. Two others were found to be casual. Three Reserve Deputies testified at the arbitration hearing. All three, Zimmer, Reimer and Kunz, were found by the Commission to be regular part-time employees and therefore included in the unit.

The unit clarification decision either answers, or obviates the need to answer, a number of arguments advanced in this proceeding. Both parties' claims with respect to bargaining unit status have been disposed of by the unit clarification. By clarifying the unit, the Commission has rejected the County claim that there has been no substantial change of facts since the 1983 unit clarification proceeding. My own review of the record confirms that fact as the utilization of Reserve Deputies has increased substantially.

Article 1 extends recognition to ". . .the Union as the exclusive bargaining agent for the employees of the County Sheriff Department, excluding . . .temporary employees." On its face, the Recognition Clause is expansive. Article 10 provides a more specific "Definition( ) of Employees". The Article provides that "A regular full-time employee is a person hired to fill a regular full-time position" and that "A regular part-time employee is a person hired to fill a regular part-time position." The two Articles must be read together in order to understand the scope of the Recognition Clause. Common to the two definitions is the provision that the person hired be "hired to fill a regular. . .position." The County refused to authorize creation of these regular positions and so Reserve Officers were hired into "casual" positions. Casual employees are not mentioned in Article 1 nor are they defined in Article 10. Since the contract nowhere defines casual, I would apply the legal definition which is whether or not the individual regularly works something more than a de minimis number of hours. 1/ Zimmer worked 1894 hours between January 1 and September 17, 1990. During the same period, Reimer worked 1387.65 and Kunz 1380.5 hours. The Commission concluded that these employees are not casual and there is no contractual basis to distinguish that finding. The County's characterization of them as "casual" is not supported by the facts, the contract, or the law.

The Reserve Deputies are not hired for a "season" within the meaning of Article 10(C) nor are they separated from service after six months as set forth in Article 10(D).

The County argues that the Union seeks to outlaw a decade-old practice of employing casual employees to provide relief to bargaining unit members. The County has a valid point. It possesses and has exercised the right to use non-unit people to handle work that would otherwise be of a kind performed by

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1/ City of Phillips, Dec. No. 26151 (WERC, 9/89).



bargaining unit employees. The County has resisted and/or avoided Union objection to this practice for a long period of time. There was a certain acquiescence. However, the practice was substantially expanded. In 1983, the work of the Reserve Deputies was so irregular that they were regarded as casual. By 1990, they were not only regular employees but at or near full-time status. What the County has done is to employ a second work force outside the parameters of the labor agreement.

I believe the Union finally objected to the practice. That objection came in two obvious ways. On January 20, 1990, the Union filed this grievance. On March 6, 1990, the Union filed the Petition for Unit Clarification. The County was clearly on notice that the Union was objecting to the utilization of Reserve Deputies. The Unit Clarification order has already altered that practice. This Award addresses the contractual status of the practice.

As the practice existed as of the date of hearing it was predicated upon the County's use of "casual" Reserve Officers. However, as noted, the Reserve Officers were anything but casual. The Commission, in the Unit Clarification proceeding, found them to be regular part-time. I accept that conclusion for purposes of this Award. As of January 20, and certainly no later than March 6, 1990, the County was on actual notice that its use of these employees was subject to attack. It was also on actual notice that its use of these employees was so regular and ongoing that they could hardly be regarded as casual. Notwithstanding this, the County persisted in its use of these employees in Reserve Officer status.

If the practice was predicated upon the use of casual employees, the underlying premise had changed. To wit, the employees were no longer casual. As the factual underpinning of the practice changed, the nature and significance of the practice changed, too. The casual positions grew into regular part-time positions.

As regular part-time employees, the Reserve Officers are contractually defined and regulated. If their employment was to be temporary, they are similarly defined and regulated by the Labor Agreement. They can be hired for a period not to exceed 6 months and are thereafter separated. They are not to be used to replace, reduce or displace regular employment. These constraints are violated by the Employer's use of the Reserve Officers. The employees were not terminated after 6 months. They were used to replace regular employment.

The County argues that no existing employe was laid off, terminated, or denied overtime. That may well be true, but ignores the words of the contract. The contract does not permit temporary employees so long as regular employees are not replaced, reduced or displaced. It permits temporary employees, so long as regular employment is not so affected. It is the overall employment and not the individual status that is contractually protected. The difference here is key. While no bargaining unit member has suffered a loss of hours there are many hours of employment that would have been available to bargaining unit members 2/ but for the use of temporary employees.

I believe that on January 20, 1990 the County was on notice that the practice was subject to challenge. As of that date, given the changed nature of hours worked, the practice was no defense to the clear contract language. The employees had evolved into regular part-time employees whose conditions of employment were contractually regulated. The County maintained these employees on the payroll beyond the 6-month period.

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2/ This would include members who might have been, but never were, hired.

The question remains as to the consequence of that action. I believe the answer in this dispute is that a regular position was created. The work being performed is permanent work. There is no indication it will dissipate. The County made a conscious decision to retain these employees to handle what all testimony describes as a permanent increase in law enforcement work. The collective bargaining agreement anticipates the expansion of the law enforcement work force. Article 1 recognizes the Union as representing employees within the Department. Article 10 defines the categories of employees and the conditions of their hire. I believe that by failing to separate the Reserve Officers by July 20, 1990 the County converted those positions to regular part-time positions, covered by the terms of the Agreement.

The County has argued that this Arbitrator cannot decide when any employee's status changes from casual to regular. I disagree. It is precisely that task that I am required to perform. The Commission hearing was conducted May 8, 1990 and the Arbitration hearing on September 17, 1990. By those dates the employees in question had worked substantial hours, as already noted. While it may be that I will never know the precise moment the Reserve Officers went from casual to regular status, this record demonstrates that they were regular employees during all of 1990, which is sufficient to support this remedy.

To find to the contrary would do the process an enormous disservice. The County simply disregarded its responsibilities under the labor agreement. The Reserve Officers were working close to full-time schedules, for a protracted period of time. They were hardly casual. Under the collective bargaining agreement, regular employees are entitled to a certain level of pay and benefits. If I find that the contract does not anticipate the hiring of new employees, I emasculate it of a good deal of meaning. If I find that I lack the authority to remedy substantial breaches of the agreement I encourage the County to refuse to honor its contractual obligations, comfortable in the knowledge that it is free and profitable to do so.

The County further cautions me not to intrude into the constitutional prerogatives of the Sheriff. Specifically, the County alleges that the Sheriff's authority to deputize and assign work are elements of this dispute. This Award does not comment on either of those rights. I do not purport to tell the Sheriff who to deputize and/or who to assign. The Sheriff is not even a signatory to the labor agreement. It is my intent to tell the County Personnel Committee and County Board that if regular positions are created, even if done de facto, they are entitled to the wages and benefits set forth contractually.

#### AWARD

The grievance is sustained.

#### RELIEF

Those employees occupying positions found to be regular in the unit clarification proceeding are to be treated as regular employees as of July 20, 1990. As of that date, they were entitled to all wages and other contractual rights and benefits provided, which are to be provided retroactively.

#### JURISDICTION

I will retain jurisdiction over this matter to resolve disputes relative to the relief granted. If I am not contacted within 60 days of the date of this Award, I will relinquish jurisdiction.

Dated at Madison, Wisconsin this 23rd day of September, 1991.

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