

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

RICHLAND COUNTY SHERIFF'S DEPARTMENT  
EMPLOYEES UNION, LOCAL 2085, AFSCME,  
AFL-CIO

Case 93  
No. 47069  
MA-7162

and

RICHLAND COUNTY (SHERIFF'S  
DEPARTMENT)

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,  
appearing on behalf of the Union.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Jon Anderson, appearing on behalf of  
the Employer.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the County or Employer respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was transcribed, was held on June 24, 1992, in Richland Center, Wisconsin. Afterwards, the parties filed briefs and the Employer filed a reply brief, whereupon the record was closed on November 23, 1992. Based on the entire record, the undersigned issues the following Award.

ISSUES

At the commencement of the hearing each side gave its version of the issues involved here. The Union stated the issues as:

1. Did the Employer violate the agreement and/or custom and practice when it assigned both jailer/dispatcher and road officer duties to employees referred to as "Task Force Officers?"
2. If so, what is the appropriate remedy?

While the County stated the issues as:

1. Did the County violate the labor contract when it created the Task Force Officer positions?
2. If so, what is the appropriate remedy?

Since there was no stipulation on the issues to be decided, the parties asked that the undersigned frame them in the Award. From a review of the record, the opening statements at hearing and the briefs, the undersigned has framed the issues as follows:

1. Did the Employer violate the collective bargaining agreement when it created the Task Force Officer position?
2. If not, did the Employer violate the collective bargaining agreement when it assigned that position road officer and dispatcher/jailer duties? If so, what is the appropriate remedy?

#### PERTINENT CONTRACT PROVISIONS

The parties' 1991-92 collective bargaining agreement contained the following pertinent provisions:

#### ARTICLE IV - MANAGEMENT RIGHTS

4.01 The Employer shall have the sole and exclusive right to determine the number of employees to be employed, the duties of each of these employees, the nature, hours and place of their work, and all other matters pertaining to the management and operation of Richland County and Richland County Sheriff Department, including the hiring and promotion of employees. The Employer shall have the right to demote, suspend, discharge or otherwise discipline employees for just cause.

The Employer has the exclusive right to assign and direct employees, to schedule work and to pass upon the efficiency and capabilities of the employees, and the Employer may establish and enforce reasonable work rules and regulations. Further to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or employees, such rights are retained by the Employer. However, the provisions of this article shall not be used for the use of undermining the Union or discriminating against any of its members.

. . .  
ARTICLE XIV - HOURS OF WORK, WAGES AND CLASSIFICATION  
. . .

14.03 Overtime: Overtime opportunities which must be assigned to unit employees under and as limited by Section 14.10 will be split between full-time employees on the preceding and following shifts according to seniority. If said employees are unavailable or unwilling to work, then said work shall be offered to other full-time employees according to seniority. If said employees are also unavailable or unwilling to work, then the County may offer same to regular part-time employees on the same basis as was offered to full-time employees, subject to the provisions of Section 14.10. Overtime for the employees covered by this agreement shall be paid at the rate of one and one half the employee's straight time hourly rate. All compensable time shall count as time worked for computation of overtime. The sheriff must authorize all overtime, except in his absence, overtime shall be authorized by the chief deputy. Overtime will be paid for in the check following the pay period in which the overtime was earned.

. . .

14.10 The Employer and the Union agree that work normally performed by regular employees shall not be performed by casual or temporary employees, except as provided in this section.

The parties agree that there are circumstances where the use of regular part-time, casual or temporary employees is essential to provide for coverage of regular full-time and regular part-time employees in their absence, as well as to meet unusual demands on the department which cannot be handled by the regular employees alone.

BACKGROUND

The Richland County Sheriff's Department has two principal job classifications: road officer and dispatcher/jailer. The employees in these separate classifications perform different and distinct functions. The road officers principally enforce the law within the County "on the road" while dispatcher/jailers operate the dispatch center and the jail. These positions require specialized training and skills.

Historically, these job classifications have been kept separate, and employees in these separate classifications have not normally been assigned across classification lines. As a result,

there has been little switching back and forth between these two classifications, such as road officers working for a while as dispatcher/jailers or vice versa. The normal career progression in the department is for an employe to be hired as a dispatcher/jailer and then to be promoted to road officer.

The record indicates that during negotiations for the 1983 and 1984 collective bargaining agreements, the County attempted to insert language into the labor agreement which would have allowed it to fill temporary vacancies with employes regardless of their classification. In October of 1982, the County proposed to amend Sec. 14.11 of the 1982 contract by inserting the following new sentence: "The Employer may fill this temporary vacancy with any full-time employee regardless of the classification of the vacancy or the classification of the employee filling the vacancy." This proposal was designed to reduce the Employer's overtime liability by having employes fill temporary vacancies across classification lines rather than filling them within the classification on an overtime basis. This proposal was not agreed to by the Union and was not incorporated into the parties' 1983 contract. In April of 1984, the County again proposed to amend Sec. 14.11 of the 1983 contract by inserting the following new sentence: "Qualified full-time employees may be used to work in classifications other than what they are normally assigned to." This proposal was not agreed to by the Union and was not incorporated into the parties' 1984 contract. Section 14.11 of the parties' 1982 and 1983 labor agreements has been renumbered Sec. 14.10 in the parties' current contract.

On May 1, 1984, the parties executed a settlement agreement which resolved several grievances. That document stated that its intention was to "clarify the interpretation of the following provisions of the parties' collective bargaining agreement . . .", one of which was Sec. 14.03. The settlement agreement provided in pertinent part that temporary vacancies were to be filled first by full-time employes within that classification or vacancy according to seniority. This meant that if a dispatcher/jailer was absent, and the Employer decided to fill the temporary vacancy, it was to be filled with another dispatcher/jailer. Conversely, if a road officer was absent and the Employer decided to fill the temporary vacancy, it was to be filled with another road officer.

Shortly after the settlement agreement identified above was reached, the then Sheriff assigned a road officer to fill a temporary vacancy in the jail. A grievance was filed concerning same which was appealed to arbitration. An arbitration award in favor of the Union was subsequently issued by Arbitrator Daniel Bernstone. He found that the contract was silent on the question of whether the County could assign a road officer to work as a dispatcher/jailer in order to fill a temporary absence of a dispatcher/jailer, so he looked to an alleged past practice to decide the matter. He found that the County had a practice of filling temporary vacancies within the dispatcher/jailer classification on the basis of seniority within that classification, and that it had failed to follow that practice. He therefore found that the County violated the contract, via the past practice, when it transferred the employe from the road to the jail instead of assigning another

jailer to the temporary vacancy in the jail on an overtime basis.

Sometime after the arbitration award identified above was issued, the contract language in what is now Secs. 14.03 and 14.10 was changed to that language found in the current contract. One of the changes to Sec. 14.10 permitted greater use of (non-bargaining unit) casual staff to fill temporary vacancies than had previously been allowed.

As a result of this change to Sec. 14.10, the County has in recent years been filling temporary vacancies in the department caused by illness, injury and vacations with (bargaining unit) part-time employees and (non-bargaining unit) casual staff on an as needed basis. The part-time employees and casual staff who fill these temporary vacancies are cross trained to work on the road and in the jail. They work in both areas, unlike the full-time employees who work in just one area (i.e. on the road or in the jail).

This use of casual or call staff to fill temporary vacancies in the department gave the County flexibility in scheduling, but also had the following problems. First, many of the call staff were employed elsewhere and not always available to work, so the County had to have a large stable of call staff. Second, it was expensive to give all the call staff the training necessary to step in on a moments notice and work in the jail or on the road. Third, the County could not guarantee a set amount of hours of work to the call staff, so there was high turnover among them (i.e. the call staff).

Additional background information is contained in the Discussion section.

## FACTS

In September, 1991, the County decided that its staffing needs warranted creating two full-time bargaining unit positions that did not previously exist. It created these positions and entitled them Task Force Officers (hereinafter TFOs). The TFOs are used to fill in for road officers and dispatcher/jailers who are absent due to sick leave, vacations and other leaves of absence. The TFOs are assigned where they are needed in the department and perform duties in both of the two main job areas (i.e. on the road and in the jail). In November, 1991, the parties bargained over the details of the TFO position, but no agreement was reached. The County posted two TFO positions on December 19, 1991. On the following day, the Union filed a grievance challenging the creation of the TFO positions. The grievance was denied by the County and was ultimately appealed to arbitration.

## POSITIONS OF THE PARTIES

The Union's position is that the County is precluded from assigning road officer and dispatcher/jailer duties to the TFO position. According to the Union, assigning road officer and

dispatcher/jailer duties to the same person constitutes a cross assignment which is prohibited by the labor contract, the parties' practice, the parties' bargaining history, a grievance settlement agreement and a prior arbitration award. The Union asserts that for at least 20 years, the duties assigned to the road officers and those assigned to the dispatcher/jailers did not overlap, except for training purposes and emergency situations. The Union notes that the Employer was desirous of changing that practice and twice proposed specific language in contract negotiations to that effect which was twice rejected by the Union. It also notes that another grievance arbitrator rejected the Employer's efforts to unilaterally cross assign duties, and it requests this arbitrator to do so here as well. In the Union's view, the Employer's creation of the TFO classification is merely an attempt to obfuscate the real issue here of cross assignment. In order to remedy this contractual breach, the Union requests that the grievance be upheld and that the department be ordered to cease and desist from cross assigning road officer and dispatcher/jailer duties to the same person.

The Employer contends that it did not violate the labor agreement by creating the TFO position. According to the Employer, it was well within its authority under the Management Rights clause to create such a position, and it submits there is no language in the contract which limits that right. It notes in this regard that it determined that it had a staffing need that would be satisfied by creating this new position. It believes it then proceeded to do so in a reasonable and responsible manner. In its view, once it created the TFO position, the Management Rights clause permitted the County to determine the duties for that position, and it determined that the duties for this new position would be both road officer and dispatcher/jailer duties. It believes that the labor contract and arbitral authority support the County's action. Next, it notes that even before it created the TFO positions, there were already employees in the department doing the duties of both the road officers and dispatcher/jailers, namely, the part-time employees and the casual staff. It argues that the creation of a full-time bargaining unit position to do the same thing as non-unit casual staff is doing is not contractually prohibited. Finally, the Employer contends that the Union's reliance on the parties' bargaining history, a grievance settlement agreement and a prior arbitration award is misplaced. In its view, none of the foregoing is applicable or relevant here since the contract language has changed. It also contends that the facts involved here are distinguishable from those in the Bernstone arbitration award. It therefore requests that the grievance be denied.

## DISCUSSION

My analysis begins with a review of the following historical context. In recent years, the County filled temporary vacancies (i.e. those absences caused by illness or injury, vacation and the like) with (bargaining unit) part-time employees and (non-bargaining unit) casual staff on an as needed basis. These part-time employees and casual staff are cross trained to work on the road and in the jail. They can, and do, work in both of the aforementioned areas. They are assigned where needed -- either on the road or in the jail. While this arrangement of using part-time employees and casual staff to replace absent full-time employees gave the County flexibility in scheduling, the

County considered it cumbersome and expensive due to turnover and training cost for the casual staff. The County ultimately decided that its staffing needs, particularly the filling of temporary vacancies, would be satisfied by creating two full-time bargaining unit positions that did not previously exist. It proceeded to do so and entitled the position TFO. The duties of this position encompass both road officer and dispatcher/jailer responsibilities. Thus, the TFOs, like the part-time employees and casual staff, work both on the road and in the jail.

Before addressing the merits, it is noted that the parties have approached this case from different perspectives. The Employer has focused its analysis on the creation of the TFO position itself. In contrast, the Union has focused its analysis on the assignment of road officer and dispatcher/jailer duties to that position. The undersigned has incorporated both perspectives into the following discussion.

Attention is focused first on the question of whether the County violated the contract when it created the TFO position. In addressing this point, it is noted at the outset that it is an accepted arbitral principle that management has the right to create new jobs except as restricted by the contract. 1/ The contract involved here does not limit or restrict the County's ability to create new jobs and/or positions in any way, shape or form. To the contrary, it implicitly authorizes same in the Management Rights clause. In that clause the County has reserved unto itself the right to determine the number of employees, their duties, the nature, hours and place of their work and retains the exclusive right to assign and direct them. This clause is certainly broad enough to give the County the right to create new jobs and/or positions. That is exactly what the Employer did here when it created the TFO position, even though all it did was combine the duties of the road officer and the dispatcher/jailer into one position. While the Union contends the TFO position is not a "new" classification or position, I am not so persuaded. In my opinion the TFO position is a "new" position since it did not exist prior to September, 1991, on either the contractual wage appendix or in the County ordinance authorizing positions for the Sheriff's Department. 2/ Therefore, since the County has the right under the Management Rights clause to create new positions, and that is what occurred here, it is held that the County did not violate the contract by creating the TFO position.

In so finding, the undersigned believes it is also noteworthy that prior to the creation of the TFO position, the County had availed itself of this management right before. This occurred in 1984 when the County created the new position of assistant investigator. Insofar as the record

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1/ Elkouri & Elkouri, How Arbitration Works, p. 469, 3rd Ed.

2/ See Employer Exhibits 5 and 6.

shows, the Union did not challenge the creation of that position. This instance shows that the County has previously exercised its authority, albeit just once, to create new positions not listed in the contractual wage appendix.

Having so found, attention is now turned to the Union's theory that the County is precluded from assigning road officer and dispatcher/jailer duties to the TFO position. In the Union's view, assigning road officer and dispatcher/jailer duties to the same position constitutes a cross assignment which is precluded by the labor contract, the parties' practice, the parties' bargaining history, a grievance settlement agreement and a prior arbitration award. Each of these contentions is addressed below.

It is noted at the outset that there is nothing in the contract that explicitly prohibits the Employer from assigning duties to employees across classification lines. For example, there is no clause that says road officers cannot be assigned to the jail or that dispatcher/jailers cannot be assigned to the road. That being so, there is nothing in the contract that precludes the Employer from taking a road officer and putting them in the jail, or vice versa.

Historically, though, employees in the job classifications of road officer and dispatcher/jailer have not been assigned across classification lines. The record indicates that by in large, road officers have stayed on the road and dispatcher/jailers have stayed in the jail. The Sheriff made this clear at the hearing when he testified that "road patrol deputies don't go into the jail. Jailers and dispatchers don't go to the road." 3/ The Union characterizes the foregoing as a "practice" which the Employer has failed to follow here. Assuming for the sake of discussion that the foregoing constitutes a "practice", the undersigned is persuaded that the Employer has not changed this historical tradition or failed to abide by it by creating a TFO. This is because the Employer has not assigned any employee to work in a classification other than their bid classification. For example, it has not assigned road officers to the jail or dispatcher/jailers to the road. The employees in those two classifications will continue to work just as they did before the TFO position was created, namely, the road officers will be on the road and dispatcher/jailers will be in the jail.

Another pertinent historical tradition is that before the County created the TFO position, it already had a cadre of employees and staff who worked both on the road and in the jail. These people are, of course, the part-time employees and the casual on-call staff. These employees are cross trained to work both on the road and in the jail and are assigned where needed in the department. As a practical matter, the part-time employees and casual staff function as utility workers. Said another way, they are de facto TFOs. Since the Employer already uses part-time

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3/ Tr. p. 11.



employees and non-unit casual staff as de facto TFOs, it logically follows that it can also do so with full-time bargaining unit employees unless there is some contractual limitation to the contrary. There is not. That being so, it is held that the creation of a full-time TFO position to do the same work as part-time employees and casual on-call staff presently perform is not contractually prohibited.

Next, the Union relies on the bargaining history to support its case. The record indicates that during the 1983 and 1984 contract negotiations, the Employer unsuccessfully tried to change the then existing contract language to enable it to fill a temporary vacancy with a full-time employee regardless of his/her classification. According to the Union, this bargaining history proves that the department does not have the right to do what it did here. I disagree. In my view, the Union's reliance on the foregoing bargaining history is misplaced because of the following critical distinction. In the 1983 and 1984 negotiations, the Employer sought the right to fill temporary vacancies regardless of the classification involved. For example, if there was a temporary vacancy in the jail, the Employer wanted the right to involuntarily assign a road officer to the jail so that it would not have to pay another jailer overtime to fill that vacancy. Thus, under the Employer's (1983 and 1984) proposals, the County wanted to assign road officers against their will to the jail and dispatcher/jailers against their will to the road. Here, though, the circumstances are different. Specifically, by creating the TFO position the County is not assigning a road officer to the jail against their will or a dispatcher/jailer to the road against their will. In my view, this differentiates what the County tried unsuccessfully to do in 1983 and 1984, and what it did here. Given this distinction, it is held that the parties' aforementioned bargaining history does not preclude the County from creating the TFO position.

Finally, the Union relies on a 1984 grievance settlement agreement and a 1986 arbitration award to support its case. Both of these matters are subsumed into the following discussion. The grievance settlement agreement essentially provided that when an officer in one job classification is sick, on vacation, or whatever, and the department decides that the absent officer is to be replaced by a bargaining unit employee, then the department is to offer that work as overtime to the other employees in that classification. For example, if a road officer was absent and the Employer decided to fill the temporary vacancy, it would do so with a road officer on overtime. This grievance settlement agreement was relied upon in the Bernstone arbitration award. While the Union seeks to have the foregoing (i.e. the settlement agreement and the Bernstone arbitration award) applied here, the undersigned believes there are several problems with doing so. First and foremost, while the Union contends that the language involved in the Bernstone arbitration award is nearly identical with that found in the current contract, that simply is not the case. Rather, the contract language has been significantly changed. The language construed by Bernstone in his 1986 award, namely the 1984 contract language and the 1984 grievance settlement agreement, imposed a detailed procedure for overtime distribution for bargaining unit employees. However, that is not the case under the current contract language. The current contract language creates a procedure only for overtime which must be assigned to unit employees under, and as limited by,

Sec. 14.10. A review of Sec. 14.10 of the current contract reveals that there is no overtime which must be assigned to full-time bargaining unit employes. This of course means that there is no guaranteed overtime for full-time employes under the current contract, while as a practical matter there was under the contract language interpreted by Arbitrator Bernstone. Since the current contract language is different in this regard from that construed by Arbitrator Bernstone in his award, it is held that the 1984 grievance settlement agreement and the Bernstone award are inapplicable here.

Second, the facts involved in this case are distinguishable from those in the Bernstone award. As previously noted, in the Bernstone award an employe was involuntarily assigned to work a classification other than their bid classification, namely, a road officer was assigned to fill a temporary vacancy in the jail. Here, though, that is not the case because the County has not involuntarily assigned an employe to work a classification other than their bid classification.

For example, the County did not assign a road officer to the jail or vice versa. Instead, as was its contractual right, the Employer created a new and different classification (i.e. TFO). Once that position was created, the Management Rights clause permitted it to determine the duties for that newly created position. It did so and determined that the TFOs would work both on the road and in the jail. Such was their contractual right. The employees who bid on the new TFO job knew when they did so that they would be working in both areas encompassed in the road officer and dispatcher/jailer classifications (i.e. both on the road and in the jail) and they accepted the job voluntarily. That being the case, it cannot be said that the County is forcing the TFOs to work in an area or in a different classification against their will.

In summary then, it is held that the Employer had the contractual right to both create the TFO position and assign it road officer and dispatcher/jailer duties. The County's actions therefore pass muster.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That the Employer did not violate the collective bargaining agreement when it created the Task Force Officer position;
2. That the Employer did not violate the collective bargaining agreement when it assigned that position road officer and dispatcher/jailer duties. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 9th day of February, 1993.

By Raleigh Jones /s/  
Raleigh Jones, Arbitrator