

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
 : Case 174  
DODGE COUNTY NON-SWORN EMPLOYEES, : No. 47972  
LOCAL 1323E, AFSCME, AFL-CIO : MA-7454  
 :  
and :  
 :  
DODGE COUNTY (SHERIFF'S DEPARTMENT) :  
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Appearances:

Mr. Michael J. Wilson, Representative at Large, Wisconsin Council 40,  
Mr. Ralph E. Sharp, Jr., Corporation Counsel, appearing on behalf of the

AFSCME  
Employ

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-93 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance concerning step up pay for Corporals serving as Acting Sergeant in the jail.

The undersigned was appointed, but no hearing was held, as the parties stipulated the relevant facts. Briefs were filed by both parties, and the record was closed on March 24, 1993.

STIPULATED ISSUES:

1. Is the grievance arbitrable?
2. When the Corporal serves as Acting Sergeant, should the pay rate be at the hourly rate of Sergeant on the basis of a 37.5 hour week or a 40 hour week?

RELEVANT CONTRACTUAL PROVISIONS:

1992-93 CONTRACT

ARTICLE V  
HOURS OF WORK AND OVERTIME

5.1 Workday

The regular work schedule shall consist of four (4) consecutive workdays; followed by two (2) consecutive off days. This cycle shall be then repeated.

5.2 Work Schedule

5.21 Jailers shall work a four (4) day on, two (2) day off work schedule. Relief Jailers shall average 37.5 hours per week in a six (6) week period on a flexible schedule.

- 5.22 Secretaries shall work Monday through Friday, 8:00 a.m. to 4:00 p.m. with varied shift upon mutual agreement of management and the Employee.
- 5.23 Communications Technician shall work Monday through Friday.
- 5.24 Deputy Secretaries shall receive an additional one dollar (\$1.00) per hour when used for court security and prisoner transportation in increments no less than one-half (1/2) hour. Management will determine which Employee will be used for the listed duties.
- 5.25 Swat Team members shall be paid three (\$300.00) dollars for their services on this special squad.
- 5.26 All present shift schedules will be maintained. Any changes will be by negotiated agreement between management and the Union. If agreement cannot be reached, changes will not be implemented.

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#### ARTICLE XV GRIEVANCE PROCEDURE

- 15.1 Grievance. A grievance is denied as any matter involving the interpretation, application or enforcement of the terms of this Agreement.
- 15.2 Procedure. Grievances shall be presented in the following manner: (Time limits set forth shall be exclusive of Saturday, Sunday or holidays).
  - 15.21 The Employer and/or the Grievance Committee representative shall take the grievance up orally with the Employee's immediate supervisor within twenty (20) days after the Employee knew or should have known of the event giving rise to the grievance. The Supervisor shall attempt to make a mutually satisfactory adjustment of the matter and in any event shall be required to give an answer within seventy-two (72) hours.
  - 15.22 The grievance shall be considered settled in 15.21 unless within five (5) days from the date of the supervisor's answer the grievance is presented in writing to the Chief Deputy. The Chief Deputy shall attempt to make a mutually satisfactory adjustment of the matter and in any event shall be required to give an answer within seventy-two (72) hours.

15.23 The grievance shall be considered settled in 15.22 unless within five (5) days from the date of the Chief Deputy's written answer the grievance is presented in writing to the Personnel and Labor Negotiations Committee. The Personnel and Labor Negotiations Committee shall meet within two (2) weeks after receipt of the grievance and shall submit a written answer to the Grievance Committee, the Employee or his representative within five (5) days.

15.3 Arbitration. If a satisfactory settlement is not reached as outlined above, the Union may, within ten (10) days after the written answer is received or due from the County Personnel and Labor Negotiations Committee, request the Wisconsin Employment Relations Commission to appoint an arbitrator from its staff to hear the grievance, whose decision shall be final and binding on both parties. In rendering his/her decision, the arbitrator shall neither add to, detract from nor modify any of the provisions of the Agreement.

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#### APPENDIX "A"

January 1, 1992  
Dodge County Sheriffs Department Non-Sworn Employees  
Local 1323-E

	Hours per Week	Start	6 Mos.	18 Mos.	30 Mos.
Sergeant	40				13.726
	37.5				14.399
Corporal	37.5	12.766	12.976	13.186	13.396

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#### 1990-91 Contract

#### ARTICLE V HOURS OF WORK AND OVERTIME

- 5.1 The regular workday shall consist of eight (8) consecutive hours, excluding Cooks.
- 5.2 The regular work schedule shall consist of four (4) consecutive workdays; followed by two (2) consecutive off days. This cycle shall be then repeated.
- 5.21 Jailors shall work a four (4) day on, two (2) day off (4-2) work schedule. Deputy Secretaries shall work Monday through Friday, 8:00 a.m. to 4:00 p.m. with varied shifts upon mutual agreement of Management and the Employees.
- 5.23 Communications Technician, Civil Process Server, Jail Sergeant and Detective Institutional Investigator shall work Monday through Friday.
- 5.24 All present shift schedules will be maintained. Any changes will be by negotiated agreement between Management and the Union. If agreement cannot be reached, changes will not be implemented.

#### APPENDIX "B"

#### WAGE SCHEDULE EFFECTIVE JANUARY 1, 1991

	Hours per Week	Start	6 Mos.	18 Mos.	30 Mos.
Sergeant	40				13.198 hourly 1055.84 bi- weekly
	37.5				13.845 1038.38

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#### STIPULATED FACTS:

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1. Prior to January 1, 1992, the non-sworn employees of the Dodge County Sheriff's Department were included in an overall bargaining unit of Dodge County Sheriff's Department Employees, which included both sworn and non-sworn employees (local 1323B).
2. Prior to January 1, 1992, the non-sworn employees of the Dodge County Sheriff's Department were covered under the terms of the collective bargaining agreement between the Employer and Local 1323B, joint exhibit 2.
3. Effective January 1, 1992, the local 1323B bargaining unit was split up into two (2) separate bargaining units. Sworn employees remained in local 1323B. Non-sworn employees of the Dodge County Sheriff's Department were recognized as local 1323E.
4. Joint exhibit no. 1. is the first collective bargaining agreement between the Employer and local 1323E.
5. There is no bargaining history relevant to the issue to be determined by the Arbitrator from the negotiations which resulted in Joint exhibit no. 1.
6. Corporals work a repeating four-two (4-2) work cycle, that is four (4) consecutive work days followed by two consecutive days off.
7. The Corporals average 37.5 hours per calendar week.
8. The Jail Sergeant position in the Dodge County Sheriff's Department has been unfilled since prior to the effective date of joint exhibit no. 1.
9. Corporals and only Corporals in the Dodge County Sheriff's Department have been "stepped-up" to Sergeants pay when a ranking officer, i.e. Lieutenant, was not on duty at the Dodge County Jail.
  - a. The "step-up pay" is attributed to the "command" of the jail.
  - b. No two (2) corporals receive "step-up pay" simultaneously.
10. The Employer has at all times material to the instant dispute paid the Corporals the 40 hour and not the 37.5 hour Sergeant rate for any "step-up" to Sergeant referred to in 9. above.
11. The "step-up" referred to in 9. above occurs

when either the lieutenant takes time off or is not scheduled to work:

- a. 1st Shift. 7:00 a.m. to 3:00 p.m., the Lieutenant works Monday through Friday, 8:00 a.m. to 4:00 p.m., the Corporal, Gerth was replaced by Harmsen sometime during 1992, is "stepped-up" when the Lieutenant is off on vacation and on weekends.
- b. 2nd Shift. 3:00 p.m. to 11:00 p.m., Corporal Tony Brugger receives "step-up" pay for seven (7) hours 4:00 p.m. through 11:00 p.m., Monday through Friday when the Lieutenant works until 4:00 p.m. On weekends at other times when the Lieutenant is off Corporal Tony Brugger receives eight (8) hours "step-up".
- c. 3rd Shift. 10:00 p.m. to 6:00 a.m., Corporal Dawn Smack receives eight (8) "step-up" pay for each shift she works (no Lieutenant on duty).

12. There is no Sergeant or any other bargaining unit employee scheduled for forty (40) hours per week or paid at the forty (40) hour rate.

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#### ADDITIONAL FACTS:

Certain exhibits were stipulated to by parties in addition to the stipulated facts noted above. Among these, one that is relevant is the original posting for the Corporal positions, created on January 29, 1991 when the parties' 1990-91 collective bargaining agreement was already in effect. This posting specified, among other terms, that:

"The position of Corporal will receive, in addition to the rank, a .25 per hour pay increase. In the event that a superior officer, higher in rank, is not on duty the Corporal for that respective shift will receive pay equal to that of the divisional Sergeant. The additional pay will only apply when the Corporal is acting as the officer in charge within the respective division."

The grievance was filed by Corporal Dawn Smack and was also signed by two other Corporals, on May 22, 1992. It identified as the date of the alleged infraction May 7, 1992, and contended that the violation was that the Corporals, when working as a 37.5 hour per week Sergeant, received the 40 hour per week rate. The initial denial of the grievance dated May 26, 1992 by Chief Deputy Jerry Witte argued that the grievance was untimely, but also that "since the creation of the jail corporal position, the rate of pay has been set at the 40 hour sergeant rate when the corporal is eligible for that rate".

#### The Union's Position:

The Union argues that since the previously combined sworn and non-sworn employees of the Department were split into two collective bargaining units, the

first collective bargaining agreement between the parties presenting this case was executed on April 10, 1992. The Union argues that the date of violation of May 7, 1992 is appropriate because there could be no contract violation until there was a contract, and the May 7 date appears to reflect the first pay check received that incorporated the newly negotiated rates. In the alternative, the Union argues that a remedy would still be appropriate for this case even if the grievance should have been filed earlier, because of the "continuing" nature of the grievance.

With respect to the merits, the Union contends that the 1992-93 agreement is missing a reference in Article 5.23 of the predecessor agreement of the combined local, which specified that the "jail sergeant . . . shall work Monday through Friday." The Union argues, thus, that the 40 hour Jail Sergeant position was eliminated as of the new collective bargaining agreement and therefore that stipulation of fact no. 12, specifying that there is no 40 hour Sergeant or any other 40 hour employee in the unit, bears particular significance here. The Union argues that since a Sergeant working a 37.5 hour working week would earn \$14.39 per hour or \$558.71 per week, the Corporal serving in place of the Sergeant should be paid the identical amount. The Union requests back wages to equal the differential between the hourly 37.5 hour and 40 hour rates retroactive to January 1, 1992, which was the effective date of the parties' current agreement.

#### The Employer's Position:

The Employer argues with respect to timeliness that this grievance was not filed until May, 1992, some 33 or 34 paychecks since the Corporals involved were hired and started to receive earnings equal to the 40 hour Sergeant rate for "step-up" hours. The Employer argues that it is clear that the grievance was of a type known to the employees as soon as they were paid, and that it was grossly untimely because the contractual standard under both contracts allowed 20 days for initial filing, not the 472 days actually taken.

As to the merits, the County argues that "actions speak louder than words" and that the fact that the employees involved had a very long history of being paid at the Sergeant 40 hour rate without complaint indicates how the contract was actually understood by the parties. The County argues that the sequence of events shows that everyone involved clearly understood that the 40 hour Sergeant pay rate was to be used, and that the grievance therefore lacks merit as well as timeliness.

#### DISCUSSION:

As to the timeliness of this grievance, I find that the grievance fits within the well-known exception to standard calculations of timeliness known as a "continuing" violation. For reasons adequately explained in the cases cited in the Union's brief, as well as in many other arbitral decisions, a grievance alleging that the wrong pay rate is being received creates a new period of timeliness for every paycheck received. To find otherwise would be to create the undesirable situation where a past error cannot be corrected prospectively, which would hardly aid in labor relations stability. The limitation inherent in the "continuing" line of cases, of course, is that a retroactive remedy is generally inappropriate, for that would commonly violate timeliness requirements. In this case, so long a period lapsed since the practice in question started that I find no retroactivity to be appropriate.

The merits of this matter are more complex, despite the relatively brief stipulated facts. Initially, I note that the change in bargaining units here did not represent the kind of loss of continuity that occurs when one union is "raided" by another. Instead, the parties appear to have made by consent an

administrative change in the bargaining unit structure, but there is nothing in the facts before me to indicate that contract terms which first came into existence in the 1991 collective bargaining agreement did not continue with a common understanding as to their meaning, where the language was not changed in the successor agreement.

Based on the record before me, I can only conclude that the inferences to be drawn from such continuity and such changes as exist here do not all favor either party. First, as the Union points out, the fact that Article 5.23's reference to the Jail Sergeant working Monday through Friday disappeared in the change from Joint Exhibit 2 to Joint Exhibit 1 suggests that such Jail Sergeants as there might be in the future would work 37.5 hours. Yet against this stands the continuing existence in the new collective bargaining agreement of a 40 hour rate for Jail Sergeant in Appendix A. If this were not intended to apply to a future Jail Sergeant, only one other function for this wage line could exist, and that would be the continuing "step-up" wage rate for the Corporals.

Similarly, the stipulation of fact that there is no 40 hour employee in this bargaining unit suggests that a general shift to 37.5 has taken place, which should logically be extended to the Corporals when working in place of the Sergeant, because they continue to work 37.5 hours. Against that, however, is the fact that there was no 40 hour Jail Sergeant prior to January, 1992 either, yet for the entire period of the inception of the Jail Corporal job till May, 1992, no grievance was filed. It appears from this record that there was no Jail Sergeant as of when the Jail Corporal's position was created in the first place, though the evidence in the record is not conclusive on this point.

Furthermore, I note that no term of the collective bargaining agreement itself explicitly entitles the Corporals to any higher rate when working out of classification. Instead, this right is a holdover from the terms under which the position was unilaterally created by the County. Thus, those terms must be considered to be controlling. This remains true even though the hourly rate payable for step up pay was pegged to "the divisional sergeant", because that classification is not now filled and apparently was not filled even on the date of the job's creation. Under these circumstances, it is very difficult to say why the Employer should be found to have violated terms it unilaterally created, without some clear expression in the contract to that effect. In particular, the continued existence of the 40 hour Sergeant rate in a collective bargaining agreement which no longer includes Patrol Officers implies that that rate must have a purpose.

For the reasons already noted, I conclude that there is some evidence favoring the Union's view of this case. But there is at least as much evidence favoring the Employer's view. And the payment at the 40 hour rate to these employees for over a year before a grievance was filed can hardly have escaped unnoticed for so long a period of time by multiple employees. But in particular, it is well-understood that in cases of contract interpretation, it is, in marginal situations, incumbent upon the union to show that the employer's interpretation of the Agreement was incorrect. The balance of evidence in this case fails to meet the Union's burden of persuasion.

For the foregoing reasons, and based on the record as a whole, it is my decision and

#### AWARD

1. That the pay rate for the Corporal serving as Acting Sergeant should be at the 40 hour week hourly rate of Sergeant.



2. That the grievance is denied.

Dated at Madison, Wisconsin this 13th day of May, 1993.

By \_\_\_\_\_  
Christopher Honeyman, Arbitrator