

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 SHEBOYGAN COUNTY LAW ENFORCEMENT : Case 173
 EMPLOYEES LOCAL 2481, AFSCME, AFL-CIO : No. 48089
 : MA-7504
 and :
 :
 COUNTY OF SHEBOYGAN :
 :

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Street, Sheboygan, Wisconsin 53083, for the Union.
Ms. Louella Conway, Personnel Director, Sheboygan County, Sheboygan County Courthouse, 615 North Sixth Street, Sheboygan, Wisconsin 53081, for the County.

ARBITRATION AWARD

The Sheboygan County Law Enforcement Employees Local 2481, AFSCME, FL-CIO ("the Union") and the County of Sheboygan ("the County") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a grievance relating to shift selection and seniority. The Commission designated Stuart Levitan as the impartial arbitrator. Hearing in the matter was held on December 14, 1992, in Sheboygan, Wisconsin. It was not transcribed. The parties submitted written arguments by March 16, 1993. The record was held open until April 19, 1993, for the parties to submit reply briefs, which right they waived.

ISSUE

The parties stipulated to the following issue:

"Did the employer violate the collective bargaining agreement, Article 24, Section A.2., when it posted the schedule of August, 1991, and denied shift selection by seniority?

If so, what is the remedy?"

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 5

MANAGEMENT RIGHTS

Except as otherwise provided in this Agreement, the Employer shall have the right to:

1. Carry out the statutory mandate and goals assigned to

the County utilizing personnel, methods and means in the most appropriate and efficient manner possible. It is understood and agreed, however, that should new classifications, reclassifications, reallocation or substantial changes in job duties occur, the parties agree to meet and negotiate wages, hours and working conditions for any such positions.

. . .

3.To determine the specific hours of employment, the length of the work week and make such changes in the various details of the employment as it from time to time deems necessary for the effective and efficient operation of the Sheriff's Department. It is understood and agreed that shift rotation during the term of this Agreement shall remain the same as scheduled prior to the effective term of this Agreement.

4.To adopt reasonable rules and policies and amend the same from time to time.

. . .

ARTICLE 24

SENIORITY

A.Sheboygan County, shall, during the life of the herein contract for the employees covered by the same, recognize seniority as herein provided.

. . .

2. In determining shift preference where the same classifications are involved the shift preference shall be given to the employee with the longer period of seniority in that classification.

BACKGROUND

This grievance concerns the Union's objection to the County's August, 1991 action setting minimum staffing levels of two male and two female correctional officers for the second shift weekdays. It is one in a series of actions/responses which the parties have taken on this issue over a number of years.

On September 27, 1988, the Sheboygan County Board of Supervisors adopted an ordinance amending the Sheriff's table of organization. By its terms, the ordinance, zeroed out the position of Correctional Officer, and created 12 "Correctional Officer (Male)" positions and six "Correctional Officer (Female)" positions. The ordinance also zeroed out the number of Cook/Matrons, Assistant Cook/Matrons and Part-time Matrons.

To establish the procedure to implement the elimination of the matron and cook positions, the parties on April 18, 1989 entered into a Memorandum of Understanding which provided as follows:

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is entered into to establish an orderly procedure in eliminating the position of matron in the Sheriff's Department, and the shared duties of matron in the position of cook and assistant cooks. Set forth below is the method by which this will be accomplished.

1. Where possible, attrition will be used in the phase out of the matron positions.
2. These positions will eventually be replaced by four (4) full time entry level female correctional officer positions.
3. Upon posting of any of the newly established female correctional officer positions, the present matrons and assistant cook will be given the opportunity to take the entrance examination for the aforementioned openings before the positions are announced for filled from outside the unit.
4. If the matrons or assistant cook do not pass the entrance examination, or decide against taking the test, they will become part-time assistant cooks.
5. Should the matrons or assistant cooks successfully pass the test, are accepted as and are subsequently employed as Correctional Officers, they individually must complete the twelve (12) month required probationary period. If individually they are incapable of completing the probationary period, based on the decision of

the sheriff, they will be permitted to displace a less senior part-time assistant cook.

6. The less senior part-time assistant cook employed as a replacement will then be affected in a layoff.
7. All benefits and conditions outlined in the 1987/88 labor agreement, which are applicable to matrons will remain in effect until the position of matron is eliminated.

This agreement will remain in effect for the period of time required as outlined.

This Memorandum of Understanding is entered into this 18th day of April, 1989.

SHEBOYGAN COUNTY
BY ITS PERSONNEL DIRECTOR

LOCAL 2481, LAW ENFORCEMENT
EMPLOYEES, AFSCME, AFL-CIO

John E. Bowen /s/
JOHN E. BOWEN

Thomas V. Lepping /s/
THOMAS V. LEPPING, PRESIDENT

On January 24, 1989, the County posted a shift sign-up with separate listings for male and female correctional officers. The posting provided for five males (one a relief) and no females on the 0700-1500 shift; four males (one a relief) and one female on the 1500-2300 shift, and four males (one a relief) and one female on the 2300-0700 shift. On November 28, 1989, the Union grieved this posting, asserting it constituted a violation of Article 24, Section 2, and requesting as adjustment a "single seniority list with a longer period of seniority in the same classification, not a list by gender." On December 7, 1989 Jail Administrator Ronald J. Joosse declined to process the grievance, contending it was untimely in light of the April 18, 1989 Memorandum of Understanding. That same day, the Union advanced the grievance to Step 2, where, on December 11, 1989, Sheriff John W. Webb declined to process it on the grounds of untimeliness. On March 8, 1990, Personnel Director John E. Bowen provided the County's Step 3 response, denying the grievance on the grounds that "the County has shown on numerous occasions that sex is a bona fide occupational qualification." On March 26, 1990, the County's Law Committee provided the Step 4 denial.

Meanwhile, another shift preference grievance was also being processed. On May 24, 1989, the Union challenged the first shift selection being given to a female correctional officer who was returning to the bargaining unit, contending that the County had improperly counted non-bargaining unit seniority in allowing her the shift selection. On June 20, 1989, Jail Administrator Joosse denied the grievance, contending that the position was an entry-level one which the County did not have to post. Joosse also asserted that, based on the contractual definition of seniority as being based on date of hire, the returning officer did in fact have the ranking seniority to select this shift had it been subject to posting. After a series of further appeals/denials, the grievance was advanced for arbitration before a WERC arbitrator. On April 25, 1990, through the good offices of Arbitrator Edmond Bielarczyk, Jr., the parties reached a settlement of their dispute, reduced to writing as follows:

1. Seven Slots for term of contract - five male and two female on first shift for term of contract. Fifth male will be moved to second to meet scheduling, work load needs.
2. Carve out management time for shift preferences, assume seniority accumulated in classification, for

term of contract.

3. Union recognizes management will have female and male correctional officers, for term of contract.
4. Subject to ratification by both sides.
5. If either party fails to ratify this document, becomes null and void.

Both parties subsequently ratified the agreement.

On November 17, 1989, the County posted shift sign-up sheets, which provided for four males (one afternoon relief) and two females (one afternoon relief) for the 0700-1500 shift; five males (one day and one night relief) and one female for the 1500-2300 shift, and three males (one afternoon relief) and two females (one afternoon relief) on the 2300-0700 shift.

On December 4, 1990, the County published a statement of minimum staffing levels for the coming year, under which there would be four corrections officers, "one of each gender," on the first and second shifts Monday through Friday; three corrections officers, "one of each gender," on those shifts on Saturday, Sunday and holidays, and three corrections officers, "one of each gender," on third shift Sunday, Saturday and holidays. In December, 1990, the County posted a shift sign-up sheet which provided for five males (one an afternoon relief) and two females (one an afternoon relief) for the 0700-1500 shift; three males (one a relief) and three females (one a relief) for the 1500-2300 shift; and three males (one an afternoon relief) and two females (one an afternoon relief) for the 2300-0700 shift.

In August, 1991, the County placed in the schedule book a revised minimum staffing level, which corresponded to the provisions of the December 4, 1990 statement, except that the second shift, Monday-Friday was now revised to be "two of each gender."

On August 20, 1991, Correctional Officer Thomas A. Abrams, the fourth most senior male C.O., grieved, asserting a violation of Article 24, Section A(2). As supplemented on August 26, Abrams stated that, "at present, a practice is in effect requiring two officers of either sex as minimum staffing. This results in less senior officers being assigned to preferred shifts." As remedy, he sought the discontinuance of this practice. Abrams' grievances was co-signed by four male and three female officers. On August 27, 1991, Jail Administrator Joosse responded to the Union President as follows:

Dear Mr. Nelson:

I received your amended grievance dated 08/26/91 alleging a violation of Article 24 A (2) of the labor contract.

Management has always determined the staffing levels needed for the effective and efficient operation of the Sheriff's Department. This right is guaranteed in Article 5 (1)(3)(4), Management Rights, of the current labor contract.

Your grievant is apparently overlooking the fact that he is attempting to lump two classifications together for seniority purposes, when the contract, i.e. Article 24 A (2) clearly separates seniority for shift preference by classification.

Male and female correctional officers as separate and

distinct classifications have existed since the adoption of County Ordinance #19 (1988-89) on September 27th, 1988, and subsequent discussion and negotiation with the Personnel Director and the Personnel Committee, resulting in the Memorandum of Understanding attached to the contract and dated April 18, 1989.

Since this is the second time in the past several months that a grievance has been filed on this issue, and since this very issue was negotiated for you by Union representatives, I would ask that the Union better inform it's (sic) membership of the facts so that it's (sic) membership does not continue filing on the same issue.

I must therefore remind you that since the thirty day contractual time limit has long ago expired, the County is not required to process your grievance.

Sincerely,

Ronald J. Joosse
Jail Administrator

The grievance was pursued through further steps, being denied on the asserted grounds of management rights and the agreement of April 25, 1990.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

The Union never negotiated two classifications of male and female correctional officers. It did, however, make some exceptions to the seniority clause to allow one of each gender on each shift. The effect of mandating two females and two males changes the seniority choices for shift selection beyond the negotiated exception to seniority, and could stop second shift slots from being filled by three females using their seniority. This is a reach by the employer of more than was negotiated and more than what was agreed to in the settlement of the prior grievance.

The parties' intent was to accommodate the need for one female on each shift; which female got the shift was a matter of seniority, after which the slots were filled according to combined-gender seniority. There is only one classification of correction officers. The County Board ordinance of August 16, 1988 is meaningless. The language of the contract has never recognized separate male and female classifications.

The 1991 staffing levels were to be "one of each gender" on each shift. If the employer is now saying that there are separate male and female classifications, why were those terms not used rather than gender? Again, this is a reach to negate the seniority system.

The agreement on the prior grievance does not dictate nor condone the Employer's action or going beyond the agreement of one female per shift exclusion from the seniority language. The agreement says nothing about second shift gender make-up -- it addresses first shift make up, how many females and how many males and who moves from first shift to second shift to meet scheduling and work load needs.

This grievance is timely. The December 4, 1990 staffing requirements stated "one each gender" on each shift. The staffing level which prompted this grievance asks for two of each gender. It is a different grievance and it is timely.

The April 25, 1990 settlement does not establish separate classifications of correctional officers, which would trigger shift preferences. The testimony of the Union grievance representative established that the Union never expanded the perimeters beyond one female on duty.

Further, the powers of the Sheriff are not in question in this matter. The Sheriff never invoked any of his statutory powers, be they applicable or not in this situation, but denied the grievance based on the contract. It is a contractual dispute which is before the arbitrator.

The grievance should be sustained, and the employer required to repost shift slots to be awarded on the basis of seniority within the confines of "one each gender" per shift.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The labor agreement provides it is management's right and responsibility to utilize personnel in the most appropriate and efficient manner possible, and to agree to negotiate for any new classifications which might occur. The County is in compliance with these provisions.

Union exhibit three establishes that the parties met and reached agreement on recognition and utilization of male and female correctional officers and that sufficient staff, of both genders, would be utilized to meet scheduling and work load needs. It is a management right to determine specific hours of employment, and a management responsibility to provide adequate staff. There is a greater need to staff more male correctional officers on the second shift, based on the number of returning Huber inmates.

Union exhibit six, the 1991 minimum staffing levels, reinforces the County's right to establish the gender composition of each shift. This is also in accord with the statutory requirement establishing gender as a bone fide occupational qualification.

Further, the County has established the classifications of

male and female correctional officers, as required by statute. Employees in each classification have the right to sign for shift preference based on their seniority in that classification.

Further, this case had already been judged on its merits in a prior suit under the doctrine of res judicata and was decided in the agreement between the parties on April 25, 1990. This particular issue was discussed and agreement was reached establishing separate classifications of male and female correctional officers and also provided utilization of various numbers of male and female staff on the first shift based on the staffing needs of the department.

Finally, the authority to staff the jail is within the constitutional and statutory authority of the Sheriff.

Accordingly, the grievance should be denied.

DISCUSSION

This grievance is one of a continuing series of disputes between the parties.

The County argues that consideration of the merits of this matter is foreclosed by Manitowoc County v. Local 986B, AFSCME, AFL-CIO, 168 Wis. 2d 819, 829 (1992) in which the Wisconsin Supreme Court held that Sheriffs are constitutionally "empower(ed) ... to perform certain traditional functions free of other interference." Certainly, the duty of keeping the jail is one of the "immemorial principal and important duties that characterized and distinguished the office of sheriff," such that one reading of Manitowoc County might well support the County's analysis. However, the Court also reaffirmed that, where one is in place, the collective bargaining agreement "will still control wages, hours and conditions of employment." Id, at 831. Thus, the guidance to be gleaned from Manitowoc County is not completely clear. In any event, my role as arbitrator is to interpret and apply the collective bargaining agreement, not to perform as a jurist parsing precise points of constitutional law. Accordingly, I conclude that Manitowoc County is no bar to consideration of this matter on its merits.

The Union asserts that the County violated Article 24, Section A.2 in August, 1991, when it posted a sign-up sheet for correctional officers (C.O.) which provided for "two of each gender" for the second shift, Monday through Friday. The contractual clause in questions provides that in determining shift preference "where the same classifications are involved the shift preference shall be given to the employe with the longer period of seniority in that classification."

The County contends that this clause does not apply, because female C.O.'s and male C.O.'s are not members of the same classification. In support, the County notes the 1988 action by the Board of Supervisors, designating distinct gender-defined C.O. positions. The Union is correct, however, in denying the validity, for purpose of this arbitration, of that County Board action. Moreover, the Union is correct in noting that the collective bargaining agreement speaks exclusively of the position of correctional officer (e.g., see Article 10/I/A; 10/IV/6). The classification is that of correctional officer; there is no separation of correctional officers based on gender.

To say that there is only one classification of correctional officer is not to say, however, that the County has violated Article 24, Section A.2.

Notwithstanding that there is only one classification of correctional officer, the record shows that the County has posted shift sign-ups with separate listings for each gender since at least January 24, 1989. The County denied a Union grievance on this posting on the grounds that "sex is a bona fide occupational qualification." Similar gender-based shift signings were posted in November, 1989 and December 1990.

Pursuant to Article 5, Section 1, the County has the right to "carry out the statutory mandate ... assigned to the County utilizing personnel, methods and means in the most appropriate and efficient manner possible." One of the County's statutory mandates is to provide "at least one person of the same sex on duty who is wholly responsible ... for the custody, cleanliness, food and care" of jail inmates. Sec. 302.41, Wis. Stats. Pursuant to Article 5, Section 3., the County has the right to "determine specific hours of employment, the length of the work week and make such changes in the various details of the employment as it from time to time deems necessary for the effective and efficient operation" of the Sheriff's Department. On its face, this would seem to encompass the authority to set minimum staffing levels, and to take other actions concerning scheduling. I note that this section also states that it is understood and agreed "that shift rotation during the term of this Agreement shall remain the same" as that scheduled prior to the agreement. I assume that if this restriction of shift rotation amendments were applicable to this situation, though, the Union would have brought it to my attention.

The County's primary argument is that the particular operations of the jail (including the timing of returning Huber Law inmates) requires the two-gender scheduling on the second shift. Generally, given the physical and visual contact between correctional officers and inmates --- correctional officers must perform strip searches and other highly intrusive procedures --- gender is considered a bona fide occupational qualification (BFOQ) in this regard. The Federal Equal Employment Opportunities Commission compliance manual recognizes an employer's ability to claim a same-sex BFOQ in such a contact position in an institutional setting. State statutes mandate at least one same-sex employe in this regard. I find that gender is a BFOQ in this case, and that the County was not prevented by Article 24, Section A.2. from scheduling "two of each gender" for the second shift, Monday - Friday.

I am aware that there is a companion grievance, again concerning gender-based sign-ups. The parties have informed me that they intend to rely on this award in resolving that grievance. They may of course do so if they so choose. However, they should be aware, and I must make clear, that my conclusion in this grievance is based primarily on the same-gender BFOQ as relates to correctional officers; such a BFOQ does not apply equally to such positions as detective, deputy or dispatcher.

Accordingly, on the basis of the collective bargaining agreement, the record evidence, and the arguments of the parties, it is my

AWARD

That this grievance is denied.

Dated at Madison, Wisconsin this 18th day of June, 1993.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator