

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration	:
of a Dispute Between	:
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DOOR COUNTY DEPUTY SHERIFF'S	: Case 86
ASSOCIATION	: No. 49855
	: MA-8078
and	:
	:
DOOR COUNTY	:
	:

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Appearances:

Mr. Edward VanderBloomen, Business Agent, Wisconsin Professional Police Association/LEER Division, appearing on behalf of the Association.  
Mr. Dennis Costello, Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and the County or Employer, respectively, are parties 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. Hearing was held in Sturgeon Bay, Wisconsin, on November 9, 1993. The hearing was not transcribed and the parties did not file briefs. Based on the entire record, the undersigned issues the following Award.

ISSUE

The undersigned has framed the issue as follows:

Did the County violate the collective bargaining agreement when it filled the Juvenile Officer/Investigator position? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The parties' 1993-94 collective bargaining agreement contains the following pertinent provisions:

ARTICLE VI - SENIORITY

Section 6.01 - Definition of Seniority:

It shall be the policy of the department to recognize the seniority principle. On any particular question or decision, when all other factors involved are equal, seniority will be recognized. Seniority time shall consist of the total calendar time elapsed since the date of original employment with the Employer provided, however, that no time prior to a discharge for cause or a quit shall be included, and provided, that seniority shall not be diminished by temporary lay-offs or leaves of absence or contingencies beyond the control of the parties of this Agreement.

. . .

Section 6.05 - Job Posting:

Whenever any vacancy occurs due to a retirement, quit, new position, or for whatever reasons, the job vacancy shall be posted. The vacancy shall be posted on the Squad Room bulletin boards for a minimum of three (3) working days. The job requirements, qualifications, and wage rate shall be a part of the posting, and sufficient space shall be provided for permanent Employees to sign said posting.

Section 6.06 - Trial Period:

All else being equal, the applicant with the longest service record shall be given the first opportunity to qualify for the vacancy. . . .

. . .

**LETTER OF UNDERSTANDING**

The Juvenile Investigator position shall be recognized in the contract. However, since this position is not tested for, the employee serving in this position is chosen and replaced at the discretion of the Sheriff.

. . .

**APPENDIX A**

Door County Sheriff's Department 01/02/93 - 12/31/94  
Salary Schedule

. . .

LEVEL E:	Investigator (1947 hrs.)	
	Juvenile Officer/Investigator	(2080 hrs.)
LEVEL F:	Road Deputy	(1947 hrs.)
	Communications/Security Deputy	(1947 hrs.)

FACTS

There is no dispute about the facts giving rise to the grievance. In March, 1993, the position of Juvenile Officer/Investigator in the Sheriff's Department became vacant when the person filling it assumed employment elsewhere. The County decided to refill the position. The posting notice provided as follows:

**NOTICE OF VACANCY**

March 9, 1993

Position: Juvenile, Liaison Deputy for Door County Sheriff's Department

The Sheriff will be accepting written applications to fill the position of Juvenile, Liaison Deputy. The deadline for submitting the application to the Sheriff will be March 20, 1993.

To be included in the written application the Deputy should list, any specialized training you have had, outside of recruit class. Your interest in the program, how you perceive the Juvenile, Liaison position, and why you should be selected to fill this position.

Each applicant will be invited in for a personal interview. The Sheriff will make the selection to fill the position.

I have included for your review, the Duties and Responsibilities that go along with this position.

Deadline for filing written resume with Sheriff is March 20, 1993.

Four deputies signed the posting: Jeff Farley, Connie Schuster, William Roche, and Mark Winkel. Schuster was the most senior applicant, Farley was second most senior, Winkel was third most senior, and Roche was the least senior. Each applicant filled out a short application for the position and then had an interview with Sheriff Charles Brann. During the interview, all the applicants were asked the same set of questions. Following the interviews, Brann selected Winkel for the position and so informed him. Brann then verbally informed the other three applicants that the position had been given to Winkel. When Farley asked Brann why Winkel had gotten the job, Brann replied that the reason was that all the applicants were qualified for the position, but that Winkel had done better in the interview than the others. A grievance was filed over the filling of the Juvenile Officer position which is the subject of the instant arbitration.

Vacant positions in the Sheriff's Department are normally filled after the applicants are tested. In this case, the applicants for the Juvenile Officer position were not tested.

This was the fourth time the Employer filled the Juvenile Officer position. In each previous instance, there were numerous internal applicants for the position and the Sheriff did not select the senior applicant. None of these selections were grieved.

The record indicates that under the parties' 1990-92 labor agreement, the Juvenile Officer was paid the same wage rate as Road Deputies. In the fall of 1992, the Juvenile Officer position was reclassified to a higher pay rate, namely, the rate paid Investigators.

The record further indicates that the contractual language contained in the Letter of Understanding was first included in the parties' 1990-92 contract. This language was not changed when the parties negotiated their subsequent (i.e., current) contract.

#### POSITIONS OF THE PARTIES

The Association contends the Employer violated the contract when the Sheriff awarded the Juvenile Officer position to Winkel. In the Association's view, the vacancy should have been awarded to the senior applicant. The Association's case is premised on its belief that the seniority clause applies to the filling of the Juvenile Officer position. The Association asserts that all four applicants were qualified for the Juvenile Officer position, and it cites the Sheriff's testimony to support this claim. It contends that since "all the factors (were) equal" among the four competing candidates, seniority should have been controlling. Since that did not happen, the Association argues that the Employer violated the seniority clause. With regard to the applicability of the contractual Letter of Understanding, the Association makes the following argument. It submits that the 1992 reclass of the Juvenile Officer to a higher rate of pay (than it was before the reclass) turned that position into a promotion opportunity for deputies. According to the Association this pay raise implicitly changed the Letter of Understanding so that the Juvenile Office position can no longer be filled at the discretion of the Sheriff (as it previously was), but instead must be filled pursuant to the seniority clause. The Association therefore requests that the grievance be sustained and the Juvenile Officer position awarded to the most senior applicant.

The Employer contends it did not violate the contract when it awarded the Juvenile Officer position to Winkel. According to the Employer, the contractual section applicable to this grievance is the Letter of Understanding. It reads that clause as explicitly giving the Sheriff the right to select whomever he wants to fill the Juvenile Officer position. It notes that this section says nothing whatsoever about the application of seniority. It submits that given the foregoing, the Letter of Understanding should be interpreted exactly as written and the arbitrator should not add seniority to that provision. The County contends that if the arbitrator accepts the Association's argument that the Juvenile Officer reclass somehow altered the Letter of Understanding, he would be doing just that (i.e., adding seniority to that provision). Finally, the Employer argues in the alternative that if the seniority clause is found applicable to the filling of the Juvenile Officer position, there still was no contractual violation because the four applicants were not equal within the meaning of the seniority clause. In support thereof, it cites the Sheriff's testimony that one of the applicants, namely Winkel, was above the others based on his performance at the interview. It therefore

contends that the grievance should be denied.

#### DISCUSSION

What happened here is that the County filled the Juvenile Officer position with someone other than the senior applicant. At issue is whether the County violated the contract by doing so.

In deciding this contractual dispute, the undersigned will look at the two provisions relied upon by the parties, namely, the seniority clause (Section 6.01) and the Letter of Understanding. The Association contends the seniority clause controls while the County relies on the Letter of Understanding. Inasmuch as the parties dispute which section is applicable here, it is apparent that this is the critical question. In the analysis which follows, I will review both contractual provisions and decide which one controls here.

As just noted, the Union relies on the seniority clause to support its case. That section sets forth the following general principle:

It shall be the policy of the department to recognize the seniority principle. On any particular question or decision, when all other factors are equal, seniority will be recognized.

The second sentence cited above mandates that seniority "'be recognized' when all other factors involved are equal." On its face, this section does not contain any limitations or exceptions. Here, as previously noted, the Juvenile Officer position was filled. It is undisputed that in filling that vacancy the Sheriff did not rely on the seniority of the applicants. It is also undisputed that the person who the Sheriff selected for the position was not the most senior applicant. If the language cited above is looked at standing alone, that section precludes the County from making the selection it made here unless it is established that the "other factors" involved were not equal.

Having said that, a particular contract provision cannot be read in isolation from the rest of the agreement. To do so would not be in accordance with accepted principles of contract interpretation. It is a well-established arbitral principle that the meaning of each contract provision must be determined in relation to the contract as a whole. 1/ Here, the Employer points

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1/ Elkouri & Elkouri, How Arbitration Works, Third Edition, p. 308.

to a completely different section of the contract, namely, the Letter of Understanding, and contends it is dispositive. Accordingly, a review of that provision follows.

The Letter of Understanding contains two paragraphs: the first deals with the Juvenile Officer position and the second deals with the Court/Records Liaison Clerk position. Only the first paragraph is applicable here. The first sentence of that paragraph provides that "the Juvenile Officer position shall be recognized in the contract." The second sentence then goes on to provide:

However, since this position is not tested for, the employe serving in this position is chosen and replaced at the discretion of the Sheriff.

By its express terms, the latter part of this sentence mandates that the person selected as Juvenile Officer "is chosen and replaced at the discretion of the Sheriff." The provision is silent though on how the Sheriff makes his decision. No criteria is specified. In the absence of any specified criteria, the Sheriff is free to give whatever weight he desires to seniority. Practically speaking, this language gives the Sheriff the right to select whomever he wants as the Juvenile Officer.

As the existence of this grievance shows, it is possible to read the seniority clause as conflicting with the first paragraph of the Letter of Understanding. As noted above, the seniority clause provides that seniority will be recognized in filling vacancies when all other factors are equal. Since there are no stated exceptions or limitations to this general principle in that section (i.e., Section 6.01), the inference is that seniority is a factor in filling all vacancies, including the Juvenile Officer position. However, while no limitation on this principle is found in the seniority clause, one is found elsewhere in the contract, namely, the first paragraph of the Letter of Understanding. There it establishes that the general principle found in the seniority clause does not apply to every position in the bargaining unit; it has one exception and that is that the person who fills the Juvenile Officer position can be "chosen and replaced" at the Sheriff's discretion. Given the foregoing, I read the first paragraph of the Letter of Understanding to implicitly override the seniority clause to the extent that while the seniority clause grants employes certain job rights based on their seniority, the first paragraph of the Letter of Understanding withdraws that right from a certain position, namely, the Juvenile Officer. Application of the first paragraph of the Letter of Understanding here means that the senior applicant for the Juvenile Officer position is not contractually entitled to assert seniority under Section 6.01 to get that position because the Sheriff has the right to select whomever he wants to fill that job without regard to seniority. Were the undersigned to hold otherwise and find that the senior applicant was entitled to get the Juvenile Officer position, this would make the first paragraph of the Letter of Understanding meaningless and ineffective.

It is an accepted rule of

contract construction that interpretations which nullify a contract provision are to be avoided because the presumption is that the parties intended the provision to have some meaning. 2/

While it is not necessary to rely on the parties' past practice to resolve this contractual dispute, that practice is nevertheless noteworthy because it supports the interpretation reached above. The record shows that the Letter of Understanding was first included in the parties' 1990-92 labor agreement. After this provision was added, the Employer filled the Juvenile Officer position several times. Each time it did so, there was more than one applicant and the Sheriff did not select the senior applicant; instead, he made his selection without regard to seniority. None of these selections were grieved. In and of itself, the Association's failure to grieve these prior selections does not mean it agreed with the Employer's (contractual) interpretation because a union may elect not to grieve something for reasons that have nothing to do with the merits. Here, though, it is clear from the record, specifically the Association's opening and closing statements, that the Association knew that the Letter of Understanding gave the Sheriff the right to select whomever he wanted as the Juvenile Officer without regard to seniority. Given this acknowledgment, the Association had previously accepted the contractual interpretation noted above.

The Association contends the accepted interpretation of the Letter of Understanding changed as a result of the 1992 reclass of the Juvenile Officer position to a higher rate of pay. I disagree. As noted above, when the parties inserted the Letter of Understanding in the 1990-92 contract, they mutually understood that it gave the Sheriff the discretion to choose whomever he wanted for the Juvenile Officer position without regard to seniority. This mutually accepted meaning was not altered in subsequent negotiations. If the Association intended that the Letter of Understanding was henceforth to be interpreted following the 1992 reclass as it proposes (i.e., that the Sheriff had lost his discretion to fill the Juvenile Officer position as he wished) it never advised the County of same during the negotiations which culminated in the parties' current 1993-94 contract. Since it did not, it can be said with absolute certainty that the parties did not mutually contemplate that the 1992 reclass of the Juvenile Officer position to a higher rate of pay meant that the Sheriff had lost his discretion to pick whomever he wanted as the Juvenile Officer, but instead had to fill the position pursuant to the seniority clause. Thus, under the circumstances, it would be a circumvention of the bargaining process to read the language as proposed by the Association and allow the seniority clause to override the Letter of Understanding. In so finding, the undersigned is simply trying to give effect to the parties' intent as evidenced by their bargaining history. Accordingly, it is held that the parties' mutually accepted meaning controls here; not the meaning now proposed by the Association. Therefore, the County's actions did not violate the contract.

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

AWARD

That the County did not violate the collective bargaining agreement when it filled the Juvenile Officer/Investigator position. Therefore, the grievance is denied.

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2/ Ibid.

Dated at Madison, Wisconsin, this 3rd day of February, 1994.

By Raleigh Jones /s/  
Raleigh Jones, Arbitrator