

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION : Case 350
 : No. 49373
 and : MA-7922
 :
 MILWAUKEE COUNTY :
 (SHERIFF'S DEPARTMENT) :
 :

Appearances:

Gimbel, Reilly, Guerin & Brown, Attorneys at Law, by Mr. Franklyn M. Gimbel
Mr. Timothy R. Schoewe, Deputy Corporation Counsel, on behalf of
 Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the County of Milwaukee, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on October 13, 1993, in Milwaukee, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by November 26, 1993. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there is no issue of timeliness, but could not agree on a statement of the issues and leave it to the Arbitrator to frame the issues within the confines of the statements offered by the parties.

The Association states the issue as follows:

Whether the 1991-1992 Memorandum of Agreement requires the Milwaukee County Sheriff's Department to compensate a Deputy Sheriff at Deputy Sheriff I, II or Sergeant rates when that person is assigned to perform duties outside the jail?

The County offers a more narrow statement of the issue:

Did the County violate Section 3.01(6)(e) of the Memorandum of Agreement when it refused to compensate the grievant at Deputy Sheriff I pay rates on February 4, 1993?

The Arbitrator concludes that the issue to be decided may be stated as follows:

Did the County violate Section 3.01(6)(e) of the parties' 1991-1992 Memorandum of Agreement when it refused to compensate the Grievant at Deputy Sheriff I pay rates for the hours he worked on hospital watch on February 2, 1993? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of their 1991-1992 Memorandum of Agreement are cited by the parties:

3.01 WAGES

. . . .

(6)

. . . .

(e) The classification of Deputy Sheriff is being created solely for permanent assignment to the Jail and incumbents of the classification shall not be permanently assigned to duties outside of the Jail. No vacancy which occurs outside the Jail shall be filled with a Deputy Sheriff for more than forty-five (45) working days. When Deputy Sheriffs are assigned to perform duties of a Deputy Sheriff I outside the Jail, they shall be paid from their first hour per Section 3.01(4) when so assigned by the Sheriff or his designee.

. . . .

5.02

. . . .

(4) **ARBITRATOR'S AUTHORITY**

The Arbitrator in all proceedings outlined above shall neither add to, detract from nor modify the language of any civil service rule or resolution or ordinance of the Milwaukee County Board of Supervisors, nor revise any language of this Memorandum of Agreement. The Arbitrator shall confine himself to the precise issue submitted.

. . . .

BACKGROUND

Prior to 1991, the County maintained and operated the Milwaukee County Jail and the House of Corrections (HOC). The Jail was staffed with deputies in the bargaining unit represented by the Association and the HOC was, and is, staffed by civilian corrections officers. The County was completing the new jail facility and in negotiations for their 1991-1992 Agreement the parties discussed the issue of whether the new facility would be staffed with deputies or by civilians. At the time the pay grades for the deputies were Deputy I, II or Sergeant and those rates were higher than for the civilian corrections officers. The 1991-1992 Agreement reached by the parties contained the new classification of Deputy Sheriff, below Deputy Sheriff I, and the provision in issue, Section 3.01(6)(e), of the Agreement.

The Sheriff's Department began hiring Deputy Sheriffs in the latter part of 1991. The Grievant, Craig McCann, has been employed in the Department as a Deputy Sheriff since November 4, 1991. After starting, the Grievant received two weeks of training in his jail duties and in March of 1992 he began ten weeks of training to be a law enforcement officer. The Grievant is assigned to the new Jail, which is part of the Detention Services Bureau, one of five bureaus in the Department. The new jail is staffed by Deputy Sheriffs and Deputy Sheriff I's who perform essentially the same duties in the facility. Deputy Sheriff II's and Sergeants also perform some of those same duties in the Jail. None of the staff carry a weapon in the Jail.

At times the Deputy Sheriffs in the new jail are assigned to, or volunteer for, hospital watch at the Milwaukee County Medical Complex (MCMC), prisoner transport between various facilities and prisoner escort to funerals, weddings, Huber facility, etc. The Grievant has both been assigned and volunteered for such work and has been paid at the Deputy Sheriff rate for that work. He has been paid at the Deputy Sheriff I rate when voluntarily assigned to security at the County Stadium. Deputy Sheriff I's, and at times, Deputy Sheriff II's and Sergeants also perform those duties and all carry a sidearm when performing those duties.

On February 2, 1993, the Grievant worked overtime hours on hospital watch at the MCMC for which he had volunteered. The Grievant was paid at the Deputy Sheriff rate for those hours and he subsequently submitted a Temporary Assignment to Higher Classification pay request which was denied by his Lieutenant. The Grievant subsequently filed a grievance wherein he stated as a basis for the grievance that "On Feb. 04, 1993 I worked a hospital watch and was paid at the Dep. Sheriff rate. I subsequently submitted a Temporary Assignment to Higher Classification which was denied by Lt. Tylke." The grievance alleged a violation of Sec. 3.01(6)(e) and asked as relief that he be paid "Deputy Sheriff I pay for all hours worked outside of the jail-enforcement of 3.01(6)(e) - (past, present & future)." The County subsequently became aware during the processing of the grievance that the correct date the Grievant worked was February 2nd, rather than February 4th.

The parties were unable to resolve their dispute and proceeded to arbitration of the grievance before the undersigned.

POSITIONS OF THE PARTIES

Association:

With regard to the issue to be decided, the Association asserts that regardless of how it is phrased, the sole issue in this case is the meaning and application of the term "outside the jail" in Sec. 3.01(6)(e) of the Agreement.

The Association takes the position that the term means that Deputy Sheriffs must be compensated at the higher rate whenever they perform duties outside of the confines of the Jail.

The Association contends that in negotiations resulting in Sec. 3.01(6)(e) the Association was concerned the County would staff the new Jail with civilians and that if a new Deputy Sheriff classification was created, that it be limited to the Jail assignment and not be expanded to other duties. To address that latter concern, the parties agreed to the present language in the Agreement at 3.01(6)(e). That provision provides that the position is "created only for permanent assignment to the Jail" and that Deputy Sheriffs "shall not be permanently assigned to duties outside of the Jail", and that when they do perform duties "outside the Jail", they shall be paid at the Deputy Sheriff I, II or Sergeant rates.

In response to County arguments that the terms "Jail" and "Detention Bureau" are synonymous, and that therefore Deputy Sheriffs can perform all of the duties customarily assigned to deputies assigned to that bureau, the Association asserts that those arguments ignore the plain wording of Sec. 3.01(6)(e), change the terms contained in that provision, and improperly expand the scope of the Deputy Sheriff position. The language of Sec. 3.01(6)(e) of the Agreement is clear and unambiguous and must be enforced as written. The provision limits assignment of Deputy Sheriffs "to the Jail" and does not mention the Detention Bureau. It further requires that Deputy Sheriffs be paid at the rate of the higher classification when they are assigned to duties "outside the Jail". The argument that "Jail" and "Detention Bureau" are synonymous is also not supported by any dictionary or thesaurus. The terms of the contract cannot be changed merely because the County wishes it. Per Sec. 5.02(4) of the Agreement, the Arbitrator is limited to interpreting the Agreement and may not subtract from, add to, or otherwise amend the Agreement.

The County's reliance on past practice is misplaced. Past practice is irrelevant since the wording of the Agreement is clear and unambiguous that the duties of Deputy Sheriffs are limited to those performed in the Jail and that when they perform duties outside the Jail, they must be paid at the applicable higher rate. That clear language is consistent with the Association's intent, in bargaining that wording, to preclude the Department from shifting departmental duties to the Deputy Sheriff classification so as to result in the possible elimination of positions in the higher classifications. The County's interpretation expands the scope of the Deputy Sheriff classification beyond that intended by the parties.

As to the County's reliance on the job description for the Deputy Sheriff position, the evidence shows that the description was drafted without any input from the Association. More importantly, the position description cannot be used to modify or expand the clear and unambiguous language of the Agreement.

In its reply brief, the Association disputes the County's contentions that the grievance should be dismissed because it lists the incorrect date the Grievant worked the hospital watch, because he failed to grieve earlier hospital watch assignments and because the Association failed to introduce evidence as to Deputy Sheriff I duties. The evidence indicates that the Department had notice of the actual date the Grievant worked the hospital watch and conducted the Step 2 and Step 3 hearings based on the correct date. The County was not prejudiced by the incorrect date and did not raise that as a basis for dismissing the grievance prior to this. The County's argument in this regard puts form over substance. The failure to grieve earlier instances where the Grievant was assigned to hospital watch is neither dispositive, nor a basis for dismissing the grievance. As to the duties of the Deputy Sheriff I classification, the Association asserts it is the duties of the Deputy Sheriff I at the time the parties negotiated the agreement that are relevant, and not what those duties are now. The Association presented evidence to show that Deputy Sheriff I was the lowest job classification at the time the Agreement was negotiated and that the classification was assigned various duties at the time, including hospital watches. The Association agreed to the new Deputy Sheriff classification only if it was limited to assignments "to the

Jail". The present language of Sec. 3.01(6)(e) was the result, and that language is clear and unambiguous.

The Association responds to the County's argument that the wording in Sec. 3.01(6)(e) provides for assignment to the Jail, and not in the Jail. The County argument ignores the rest of the sentence which provides that Deputy Sheriffs "shall not be permanently assigned to duties outside of the Jail." The sentence must be read in its entirety. Further, the Agreement must be read in the context of the times in which it was negotiated. When Sec. 3.01(6)(e) was negotiated, the County had begun construction of a new jail which would require increased staffing. The Deputy Sheriff classification was created solely to meet that need and the contract language reflects that understanding. The Association concedes that the Sheriff has the authority under the management rights clause to assign a Deputy Sheriff to a particular job, however the contract requires that the Deputy Sheriff be compensated at the higher rate when the job is "outside the Jail".

County:

The County first asserts that the grievance should be dismissed because the Association and/or the Grievant failed to amend the grievance to reflect the correct date the Grievant worked the hospital watch, despite having been put on notice of the inaccuracy. The County notes that this is not a group or union grievance, but a grievance about a specific assignment on a particular date.

With regard to the statement of the issue, the County asserts that the Association's proposed statement differs from the issue presented in the earlier stages of the grievance procedure and the issue presented by the Grievant. It contends that its statement of the issue is more direct and reflects the actual dispute.

As to resolution of the issue, the County first reiterates that the grievance should be dismissed since it is undisputed that the Grievant was not entitled to extra compensation for the work he performed on February 4, 1993. Secondly, the Grievant testified that since being appointed a Deputy Sheriff he has often performed such duties as hospital watch and prisoner transport outside the jail's walls and received only Deputy Sheriff pay, while receiving Deputy Sheriff I pay when performing non-jail related duties such as stadium security. He also testified that he never grieved any of those prior instances where he did not receive Deputy Sheriff I pay and the Association conceded that this is the only instance where a grievance has been filed for extra pay for the circumstances presented by the Grievant. Thus, the record does not support sustaining this grievance.

The County agrees that the wording of Sec. 3.01(6)(e) of the Agreement is the controlling language. The Deputy Sheriff classification was created for assignments to the Jail, not necessarily in the Jail. The language of the provision foresees the eventuality that Deputy Sheriffs would have duties outside the walls of the Jail, e.g., the provision speaks of Deputy Sheriffs not being assigned to permanent duties outside the Jail. More importantly, it specifically provides that Deputy Sheriffs will be paid Deputy Sheriff I rates only when they perform duties of a Deputy Sheriff I outside the Jail. The Association did not introduce evidence as to what the duties of a Deputy Sheriff I are outside the Jail area. There is nothing in the record by which a reasonable arbitrator could determine whether the duties performed by the Grievant were Deputy Sheriff I duties.

The Association's assertion that Deputy Sheriffs are entitled to a higher rate anytime they are outside the walls of the Jail, regardless of the duties they perform, is not supported by any language in the Agreement. Since the term "jail" is not defined anywhere in the Agreement, the definition of

assignments to the Jail is reserved to the County and the Sheriff under management rights. Further, the contract cannot limit the Sheriff's constitutional authority to perform his duties of keeper of the jail.

While the duties of a Deputy Sheriff have been defined, the Association has failed to meet its burden of defining the duties of a Deputy Sheriff I for the record. There is no evidence to support the Association's assertion that a duty is automatically a Sheriff's Deputy I duty merely because it occurs outside the walls of the jail. The County asserts that the "Jail" has multiple sites -- the Criminal Justice Facility, the County Safety Building, the City Police Department's headquarters in the Police Administration Building, the HOC and at times, the MCMC when prisoners are located in its prison ward. The Agreement foresees that Deputy Sheriffs will be working outside of the Jail. The Association's interpretation tortures the terms of the Agreement.

Even if the language of the Agreement is found to be ambiguous, the practice of the parties since mid-1991 has been to essentially utilize Deputy Sheriffs for duties historically performed by personnel assigned to the Detention Services Bureau, i.e., the Jail. Whether to call it a detention services bureau or a jail is up to the County and the Sheriff under the Wisconsin Constitution and the management rights clause in the Agreement. The practice has been to use Deputy Sheriffs for prisoner escort, hospital watch, and the like, for a year and half without any grievance having been filed until now. Thus, both the Association and the Grievant have acquiesced in the practice.

In its reply brief, the County reasserts that the Association has presented no evidence defining the duties of a Deputy Sheriff I outside the Jail, while the County has provided a definition of the duties of Deputy Sheriff. Those duties clearly encompass the duty performed by the Grievant. The Association's attempt to distinguish hospital watches from other duties performed by a deputy is superfluous. Since this is an individual grievance and not a group grievance, the only matter to consider is what happened with regard to the Grievant. In this case, he was assigned duties consistent with those he would be assigned when guarding a sick person inside the Jail, i.e., watch and safeguard the prisoner. The County reiterates its contentions that the Jail has multiple locations and that the Association has acquiesced in the practice known to it and its members for two years.

The County also disputes the Association's assertion that the County pays Deputy Sheriff II rates when a Deputy Sheriff performs duties outside those presently assigned to Deputy Sheriffs in the Detention Bureau. The County asserts there is no evidence it has ever paid Deputy Sheriffs at the Deputy Sheriff II rates for anything and there is nothing in the Agreement providing they should be paid at Deputy Sheriff II or Sergeant rates.

Also disputed is the Association's assertion that the position description for Deputy Sheriff the County submitted is irrelevant because the Association had no input. The contract does not require such input and the management rights provision in the Agreement reserves solely to the County the ability to define work and how it is to be performed.

DISCUSSION

As may be inferred from the undersigned's framing of the issue to be decided, the County's assertion that the grievance should be dismissed because it lists the wrong date is rejected. The evidence indicates the County was aware of the correct date on which the Grievant performed the duties from which this dispute arose. The County was not shown to have been prejudiced by the error, and the undersigned cannot come up with any good purpose to be served by applying technical rules of pleading in a grievance arbitration setting. Thus, the matter will be considered on the basis of the duties the Grievant performed on February 2, 1993.

The issue to be decided then is whether under Sec. 3.01(6)(e) of the Agreement the Grievant was entitled to Deputy Sheriff I pay for the hours he worked on hospital watch at the MCMC on February 2, 1993. 1/ The relevant language in that provision reads as follows:

. . .When Deputy Sheriffs are assigned to perform duties of a Deputy Sheriff I outside the Jail, they shall be paid from their first hour per Section 3.01(4) when so assigned by the Sheriff or his designee.

The parties agree that the above is the controlling language as to the substance of their dispute. To be entitled to Deputy Sheriff I pay under that wording, a Deputy Sheriff must (1) perform the duties of Deputy Sheriff I, and (2) perform those duties "outside the Jail", however, the two questions are intertwined.

The testimony of both Association and County witnesses who were familiar with the negotiations resulting in Sec. 3.01(6)(e) was consistent that the new classification of Deputy Sheriff would be performing the same duties in the new Jail that the Deputy Sheriff I's had been performing in the old jail facility. Both the Grievant and Coughlin, the latter a Deputy Sheriff I, testified that Deputy Sheriffs and Deputy Sheriff I's essentially perform the same duties in the Jail. Both also testified that Deputy Sheriff I's also perform hospital watch. That testimony was consistent with Bureau Director Peter Misco's recollection of the duties he performed as a Deputy Sheriff I when he worked in the Jail. Contrary to the County's contention, that testimony is sufficient to establish that hospital watch has been considered to be a duty of Deputy Sheriff I. The job description for Deputy Sheriff offered by the County is not considered controlling on the point, since there is no evidence the Association was made aware of the description. While Association input may not be required by contract, knowledge on the part of the Association that those were the duties the County intended Deputy Sheriffs to perform when they agreed to establish the classification, would be necessary to establish mutual intent or acquiescence by the Association.

The issue then, really boils down to whether the wording of Sec. 3.01(6)(e) "outside the Jail" is to be read literally, as the Association contends, or is intended to have a broader meaning, as the County asserts. For the following reasons, it is concluded that the wording "outside the Jail" was intended to mean literally outside the physical confines of the Jail facility.

Most importantly, the wording appears clear on its face. The wording

1/ The County is correct that, on its face, the grievance is not a group grievance. Further, absent a stipulation from the parties granting the arbitrator broader jurisdiction, the arbitrator is confined to deciding only the specific grievance before him on the basis of the facts upon which the grievance is based.

refers to "the Jail". At the time Sec. 3.01(6)(e) was negotiated and agreed to by the parties, the County was constructing the new jail facility. The County was concerned with the cost of staffing the new facility. The Association was concerned that if it agreed to a new, lower paid classification to perform the duties Deputy Sheriff I's had performed in the old jail, that the use of the new classification would not be expanded beyond those duties. Those concerns were met by creating the new classification, but limiting its permanent assignment to duties in the new jail facility.

In describing that limitation, the parties used the term "the Jail". The County failed to establish that the term "the Jail" is normally considered by the parties to refer to something broader than the physical jail facility itself. The words used by the parties are given their ordinary and popularly accepted meaning, absent evidence the parties intended otherwise. Even one of the County's witnesses, when pressed, conceded that if asked by someone where the Jail was, he would direct them to the street address of the Jail itself. Had the parties intended the limitation to refer instead to duties performed by a Deputy assigned to the Detention Services Bureau, or to any jail-related duties, they could easily have stated that intent.

With regard to the practice cited by the County, even if the wording was not found to be clear, there was no showing that the Association was aware of the practice. 2/ Thus, the practice is not binding. The fact that the Grievant did not grieve earlier similar assignments means he waived whatever rights he had to grieve in those instances, but it does not preclude him from asserting his contractual rights in this instance.

It therefore is concluded that in working the hospital watch on February 2, 1993, the Grievant performed the "duties of a Deputy Sheriff I outside the Jail" within the meaning of Sec. 3.01(6)(e) of the Agreement. Therefore, the County violated that provision when it refused to pay the Grievant at the Deputy Sheriff I rate for the hours he worked hospital watch on February 2, 1993.

On the basis of the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The County is directed to pay the Grievant the difference between the pay he received, and the pay he would have received had the County paid him at the Deputy Sheriff I rate, for the hours he worked on hospital watch on February 2, 1993, in accordance with Sec. 3.01(6)(e) of the Agreement.

Dated at Madison, Wisconsin this 21st day of February, 1994.

By David E. Shaw /s/
David E. Shaw, Arbitrator

2/ While the Grievant testified he was an Association "Trustee", the County did not establish what that entails or what authority that gives him as far as binding the Association. Further, the Grievant was hired as a Deputy Sheriff after the 1991-1992 Agreement was negotiated and there is no indication in the record as to when he became aware of the applicable contract language.