

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:	
of a Dispute Between	:	
JUNEAU COUNTY PROFESSIONAL	:	Case 104
POLICE ASSOCIATION	:	No. 49411
	:	MA-7938
and	:	
JUNEAU COUNTY (SHERIFF'S DEPARTMENT)	:	

Appearances:

Labor Association of Wisconsin, Inc., by Mr. Thomas A. Bauer, appearing on behalf of the Union.
Ms. Angeline D. Miller, Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by the Labor Association of Wisconsin on behalf of the Juneau County Professional Police Association, herein the Union, and the subsequent concurrence by Juneau County, herein the County, the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission on July 7, 1993 pursuant to the procedure contained in the grievance arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on October 25, 1993 at the Juneau County Courthouse in Mauston, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on December 20, 1993.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The County and Union were unable to stipulate to a single statement of the issue(s) in dispute, and therefore, agreed to have the Arbitrator frame the issue(s) based upon the entire record. The Union framed the issues as follows:

Did the Employer violate the express and implied terms and conditions of the 1992-1993 collective bargaining agreement when the Employer filled the 7:00 AM to 3:00 PM work shift of April 6, 1993, with a non-bargaining unit employee? If so, what is the appropriate remedy?

The County framed the issues in the following manner:

When the Sheriff is in need of extra help on any shift which is not a vacant shift which requires posting under the terms and conditions of the collective bargaining agreement, can he assign a special/reserve deputy pursuant to his traditional powers and authority as Sheriff and be in conformity with the collective bargaining agreement?

The Arbitrator will frame the issues within the context of the DISCUSSION portion of this award.

BACKGROUND:

Juneau County provides police protection for its county residents through the Juneau County Sheriff's Department (Department). The Department is overseen by the Juneau County Board of Supervisors through its Sheriff's Committee, and is headed by Sheriff Richard E. McCurdy. The Department employees are organized and represented by the Juneau County Professional Police Association and there is a collective bargaining agreement in force. Police protection is provided in three shifts (7-3, 3-11, and 11-7) by one deputy patrolman and a sergeant assigned permanent shifts, augmented by the

sheriff and undersheriff during the day shift. Also "rotator" deputies can be assigned shifts when and where needed to fill in for vacancies due to sickness, vacations, etc. The Department also has followed a procedure (which is part of the labor agreement between the parties) for filling vacancies and assigning overtime through the use of a rotating seniority list. Furthermore, in cases where extra police power is needed, the Department maintains a list of qualified special and reserve deputies (not members of bargaining unit) that can be employed on a temporary basis.

In addition to the regular patrol duties, the Department also is responsible for transporting prisoners and detainees within the county, and occasionally, to other parts of the state (LaCrosse, Madison, etc.) Over the years there has been an increase in requests for the Department to conduct these secure transfers. Deputies are normally delegated these special assignments, but they also can be handled by the sheriff and undersheriff. The collective bargaining agreement between the County and the Union provides that neither reserve deputies nor the County Warden can be assigned to prisoner transfers unless they are accompanied by bargaining unit member(s), the Sheriff, or Undersheriff (or Captain and Chief Deputy when those positions are filled). The Union recently prevailed with the Sheriff's Committee on a grievance which challenged the Sheriff's assignment of a reserve officer to transfer duties without the accompaniment of a bargaining unit member. Sheriff McCurdy accepted the decision of the Sheriff's Committee.

On April 6, 1993, Deputy John Weger reported to work his regular 7:00 a.m. to 3:00 p.m. shift, performing routine patrol duties. Upon arrival for duty, Sheriff McCurdy assigned Deputy Weger to conduct an out-of-county prisoner transport which required at least his full shift to complete. There were a total of four or five transports on that day. Because of the lack of police patrols due to the high volume of transfers being conducted by regular Department personnel, the Sheriff employed a reserve deputy (non-bargaining unit employee) to patrol in the county from 7:00 a.m. to 3:00 p.m. The cost of employing a reserve deputy to perform patrol duties was much less than that of calling in a bargaining unit member to do the work.

On April 19, 1993, Deputy Steve Coronado, acting Union President, filed Grievance 93-41 alleging the County violated the terms and conditions of the collective bargaining agreement by putting a reserve deputy on duty on April 6th instead of calling in a bargaining unit deputy through the overtime/vacant shift

call-in procedure. The grievance was processed through the grievance procedure set forth in Article XIV -- Grievances, of the collective bargaining agreement, being denied by the County at each step until it reached the instant arbitration. The parties stipulated that there are no procedural issues and that the instant dispute is properly before the Arbitrator.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE II -- ASSOCIATION SECURITY

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Section 2.03 -- Employer's Rights: The County possesses the sole right to operate the County and all management rights repose in it, subject to the express terms of this Agreement. Its rights include, but are not limited to the following:

- (a) To direct all operations of the County;
- (b) To establish reasonable work rules and schedules of work;
- (c) To hire, promote, transfer, schedule and assign employees in positions within the County;
- (d) To suspend, demote, discharge and take other disciplinary action against employees for just cause;
- (e) To maintain efficiency of County operations;
- (f) To take whatever action is necessary to comply with state or federal law;
- (g) To introduce new or improved methods or facilities;
- (h) To determine the kinds and amounts of services to be performed as pertains to County operations; and the number and kind of classifications to perform such services;
- (i) To determine the methods, means and personnel by which County operations are to be conducted;
- (j) To take whatever actions are necessary to carry out the functions of the County in situations of emergency.

Notwithstanding the above listed County rights, nothing herein contained shall divest the Union of any of its rights under Wis. Stats. Chapter 111. Furthermore, any and all County rights shall be exercised consistent with this collective bargaining agreement.

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ARTICLE VII - SENIORITY

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Section 7.05 -- Overtime and Vacant Shift Assignments:

- A. The policy of the County will be to assign overtime and vacant shift assignments equitably, giving preference to seniority. The parties recognize, however, that emergency overtime and vacant shift assignments must be filled with dispatch.
- B. Overtime and vacant shift assignments will be filled according to job classification of employees at the time such need arises, e.g. overtime for a patrolman will be first assigned to those then working as patrolmen. When special skills or training, e.g. marksman or breathalyzer operator are required, overtime and vacant shift assignments will be assigned to those possessing such skills or training.
- C. Overtime and vacant shift assignments of which management has at least forty-eight (48) hours advance knowledge will be posted for not less than twenty-four (24) hours by management. Those employees who want to undertake such assignments may sign up for such assignment. The most senior employee, on a rotating basis, signing up shall be called to work such assignment, provided however, that such employee shall then go to the bottom of the rotating seniority list for such purposes. If no person signs up for overtime or vacant shift assignment, the Sheriff or his designee may order the least senior employee to work such vacancy or vacant shift assignment.
- D. When Management has less than forty-eight (48) hours advance notice of the need for overtime or a vacant shift assignment, the Sheriff or his designee may order the most accessible employee to fill such assignments, provided however, to the extent practical, the Sheriff shall offer such overtime or vacant shift assignment to employees in order of their seniority, utilizing the same rotating seniority list contemplated in (c) above.
- E. The provisions of this Section notwithstanding, the Department Head may fill vacant shifts with Rotators or Sergeants. Vacant shifts not filled in this fashion (use of Rotators or Sergeants) shall be posted and filled consistent with the terms of this Section.
- F. Neither reserve officers nor the County Warden shall be assigned to prisoner transfers unless they are accompanied by a member(s) of the bargaining unit, the Sheriff, the Captain, or the Chief Deputy.

- G. A partial exemption from the vacant shift assignment requirements of the 3rd & 4th paragraphs (c & d) of this Section is created to provide for the following:
1. In cases of vacant shifts which arise due to retirements, resignations, terminations, and deaths, such vacant shifts shall be filled in the following manner:
 - a. For the first two (2) calendar weeks, such vacancy shall be filled via the posting and rotating list provisions of the 3rd paragraph of Section 7.05. (Use of rotators or sergeants under the terms of the 5th paragraph of Section 7.05 is not permissible during this two (2) week period unless the vacancy is not bid on by appropriate bargaining unit employees.)
 - b. During the forty-five (45) calendar day period immediately following the two (2) week period defined in (1a) above, the shift vacancy may be filled with bargaining unit personnel via the posting and rotating list provisions of the 3rd paragraph of Section 7.05 or, in the alternative, may be filled with reserve/special deputies.
 - c. If the shift remains vacant at the end of the forty-five (45) day period defined above, then the process for filling said vacant shift shall revert to the posting and rotating list provisions defined in (1a) above, until such vacancy is permanently filled.
 2. In cases of vacant shifts caused by long term absences other than the type described in (1) above, exclusive of vacations, holidays, or compensatory time absences, such

vacancies shall be filled as follows:

- a. For the first two (2) calendar weeks of such vacancy, the terms of (1a) above shall apply.
 - b. During the six (6) calendar month period immediately following the two (2) week period defined in (2a) above, the shift vacancy may be filled with bargaining unit personnel via the posting and rotating list provisions of the 3rd paragraph of Section 7.05 or, in the alternative, may be filled with reserve/special deputies.
 - c. If such a shift vacancy is not permanently eliminated at the end of the six (6) month period defined in (2b) above, then the process defined in (2a) and (2b) shall repeat itself.
- H. If a particular overtime or vacant shift assignment cannot be filled under the above procedures with person(s) from the affected classifications, then the other classifications shall be afforded the work, as in the past, consistent with the rotating seniority contemplated herein for each classification, in the same order that was in effect during 1987.
- I. Regarding posted overtime under this Section, the parties agree to the following points:
1. There are to be no bumps (by more senior person) within 24 hours of a shift.

2. Employees who cancel their posted overtime shift are to call the cancellation in at least 8 hours in advance of the shift's scheduled starting time. (This assumes, of course, circumstances other than an emergency.)
3. An employee who wishes to work an 8 hour shift has priority over other employees who wish to split the same posted opportunity.

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ARTICLE XVIII -- AMENDMENTS AND SAVINGS CLAUSE

Section 18.01 -- Amendments: This Agreement may be amended in writing by mutual consent of the parties and in no other way.

. . .

Section 18.04 -- Maintenance of Standards: It is agreed that all matters relating to wages, hours or conditions of employment shall be maintained at not less than the highest standards in effect at the time of execution of this Agreement unless otherwise agreed to during the course of negotiations.

PERTINENT WISCONSIN STATUTES:

Section 59.21(2), Wis. Stats.

The sheriff may appoint as many other deputies as the sheriff may deem proper.

Section 59.21(3), Wis. Stats.

The sheriff may fill vacancies in the office of any such appointee, and may appoint a person to take the place of any undersheriff or deputy who becomes incapable of executing the duties of his office.

Section 59.21(4), Wis. Stats.

A person appointed undersheriff or deputy for a regular term or to fill a vacancy or otherwise shall hold office during the pleasure of the sheriff.

Section 59.24(1), Wis. Stats.

Sheriffs and their undersheriffs and deputies shall keep and preserve the peace in their respective counties . . . and . . . may call to their aid such persons or power of their county as they may deem necessary.

UNION'S POSITION:

The Union argues that the Arbitrator has no authority to alter the express terms of the parties' contract. The role of the arbitrator in grievance arbitrations, the Union maintains, is to interpret and apply the bargained agreement, not to re-write the parties' agreement. This role has been clearly enunciated by the Wisconsin Supreme Court in Milwaukee Board of School Directors v. Milwaukee Teacher's Education Association, 95 Wis. 2d 415 (1980). It is the Union's position that the language of the contract is clear and unequivocal and requires no "outside influences" regarding its

interpretation.

The Union argues that the specific language of Article VII, Section 7.05 clearly addresses overtime and vacant shift assignments by establishing a procedure to assign the work equitably, giving preference to seniority. Since the recognition clause of the contract does not include the classification of reserve deputy in the bargaining unit definition, the language implies that seniority is applicable only to bargaining unit employees. And since the contract states that overtime and vacant shifts will be filled according to job classification, the shift hours in the instant case should have been offered to Patrol Division deputies within the bargaining unit before being offered to non-bargaining unit employees.

The Union states that the contract provides different methods for offering overtime and filling vacancies that are based on seniority within the bargaining unit. Section 7.05 (D) allows the Sheriff to use the most accessible employee in situations with less than 48 hours notice, but where practical, to use the rotating seniority list. Section 7.05 (E) allows the County to fill overtime or vacant shifts with Rotators or Sergeants. Section 7.05 (H) states that if the Sheriff can not fill the overtime or vacant shift with an employee from the affected classification, the County can call in other classifications consistent with the rotating seniority list.

The Union points out that the record shows that it has been a long standing policy of the Sheriff's Department to use the rotating seniority list, or to call in a Rotator or Sergeant, to fill vacant shifts. The built-in flexibility in the contract allows the County a wide variety of alternatives to fill overtime and vacant shifts, as long as the County follows the provisions in consecutive order. In this case, however, the Union opines that the County did not follow the prescribed order because it was attempting to avoid having to use bargaining unit employees.

The Union notes the County would have the Arbitrator believe that there was no vacant shift, because Deputy Weger was still working, albeit on a prisoner transport. However, the Union points out that Deputy Weger was unavailable for any calls of a general nature, and was unavailable to perform routine patrol functions, or accept calls for assistance. The Union believes that the County, by assigning Deputy Weger to the prisoner transport, actually created the vacant shift. According to the Union, the Sheriff then had the option to fill the vacant shift, or leave it short-handed, but when he elected to fill the shift with a non-bargaining unit employee in order to save money, he violated the specific provision of Article VII, Section 7.05 of the contract.

The Union further maintains that the general management rights of the County are limited by the provisions of the collective bargaining agreement which specifically deal with the assignment of overtime and the filling of vacancies within the Department. The Union adds that the County cannot unilaterally change any of the provisions of the agreement that directly relate to, or impact upon, wages, hours or conditions of employment, and is bound by the specific language of the contract. The Union argues that if the parties had originally intended for the County to be able to use non-bargaining unit employees to fill overtime and vacant shift assignments, they would have stated so in the contract. The Union concludes that the County is seeking to achieve through the grievance procedure that which it could not obtain at the bargaining table.

The Union also rejects the County's reliance on the "traditional power and authority" of the sheriff as permitting his actions herein. The Union believes that said authority, and the case law relied upon by the County in support thereof, must give way to the wages, hours, and conditions of employment covered by the parties' collective bargaining agreement and more specifically, the provisions of Article VII, Section 7.05.

For these reasons, the Union urges the Arbitrator find that the County violated the specific provisions of the contract, to order the County to cease and desist any further violations of this nature, and to compensate the two affected employees at their overtime rate of pay for eight hours for the work they missed on April 6, 1993.

COUNTY'S POSITION:

The County argues that the Sheriff's authority and power of appointment is clearly fixed in Wisconsin Statutes (Sections 59.21 (2) through (4)). These statutes set forth that the sheriff may appoint as many deputies as he may deem proper, and may fill any position of undersheriff or deputy if one becomes incapable of executing the duties of his office. The County points out that Wisconsin Statutes do provide legislative guidelines allowing counties to fix by ordinance a minimum number of deputies to be appointed by the sheriff, but that Juneau County has no such ordinance. The County maintains that state law gives the Juneau County Sheriff the power and authority to appoint deputies in any manner he sees fit.

The County also argues that the assignment of reserve officers to temporary patrol duty within the county falls within the scope of the Sheriff's constitutionally protected powers. As such, the County believes that these assignments are outside the scope of control of the collective bargaining agreement. The County cites Manitowoc County v. Local 986B, 168 Wis. 2d 819 (1992) in which the Wisconsin Supreme Court held that the posting requirement of the (Manitowoc County) collective bargaining agreement as applied to the sheriff's assignment of a deputy to a temporary undercover position to be illegal and barred the enforcement of that provision. The County also points to Wisconsin Professional Police Association v. County of Dane, 106 Wis. 2d 303 (1982) (WPPA I), where the Court found that the duties performed by a court officer may be among the principle and important duties which characterize the office of sheriff so that the sheriff may not be restricted as to whom he appoints to perform those functions. In the instant case the County maintains that the procedural requirements for filling overtime and vacant positions is illegal because it forces the Sheriff to relinquish his constitutionally protected powers to assign qualified personnel in order to maintain law and order and preserve the peace.

The County further supports its argument that the Sheriff's power to assign personnel cannot be abrogated or interfered with by referring to Iowa County v. Iowa County Courthouse, 166 Wis. 2d 614 (1992) where the Supreme Court determined that a circuit judge's power and authority to fill vacancies in the office of register in probate is outside of collective bargaining agreement procedures and by referring to Crawford County v. WERC, 177 Wis. 2d 66 (1993), where the Court upheld the authority of the clerk of court and register of deeds to appoint deputies outside the purview of the collective bargaining agreement. The County points out that the Juneau County sheriff is an elected official, not an appointed official, and therefore not an agent of the County, but rather represents the local presence of the state, and, as such, is not a party to and cannot be bound by a provision in a collective bargaining agreement which regulates or abrogates his constitutional authority and power.

The County argues that, whether or not the posting requirement is legal or illegal, the overtime and vacant shift provision does not apply in this case because there was not a vacant shift or overtime situation. In essence, when the regular patrolman had to leave the county the sheriff opted to create a temporary extra patrolman's position, and fill it with a reserve officer, for as long as the regular patrolman was involved with the transport. Further, the County argues, there is nothing in the agreement language which serves to limit the sheriff assigning a reserve deputy to a temporary position such that

seniority or overtime provisions of the agreement would be activated regarding bargaining unit members.

The County further points out that there is no language in the contract which defines "overtime" or "vacant shift". Because of this, these terms are open to interpretation. The County suggests that the record supports a definition of a "vacant shift" as being any shift in which someone would be absent due to vacation, holiday, funeral leave, leave of absence, personal day, sickness, training assignment, and so forth. Based upon this definition, in the instant case the shift was not vacant because the patrolman was in fact still on duty and working. And, as the County purports, because "overtime" has always been associated with the filling of vacant shifts, this incident was not a case for overtime either.

The County concludes by indicating that this case boils down to some practical management issues as well as statutory mandates which are complimentary. There are times when a sheriff needs to be able to manage his duties of insuring peace and order by appointing and assigning extra deputies to stand in his stead. The County maintains that is exactly what Sheriff McCurdy did on April 6, 1993 -- call in extra help in the form of a reserve deputy where there is no language in the collective bargaining agreement to prevent him from so doing. It was efficient, economical and reasonable. But mostly, the County argues, there were no violations of the existing agreement language.

For all of the above reasons, the County maintains that the grievance is without merit and should be denied.

DISCUSSION:

The parties in this case, through stipulation, have given the Arbitrator the authority to determine, from the record as a whole, the precise issue(s) that will be the subject of this arbitration.

There is no dispute in this case as to the basic facts of what happened and what the County did in its job assignments on April 6, 1993. The sheriff assigned Deputy Weger, the regular deputy scheduled for the 7-3 shift for routine patrol duties, to transport a prisoner out of the county. Then the sheriff called in (employed) a reserve deputy to perform routine patrol duties in the county until Deputy Weger returned. Because Deputy Weger was out of the county on the transport for the entire 7-3 shift, the reserve deputy also worked the entire shift that day. The dispute is over whether or not the sheriff had the authority and discretion to employ a reserve deputy (a non-bargaining unit employee) to perform routine patrol duties on that day.

The Union chooses a fairly narrow issue statement that would confine the Arbitrator to determining whether or not there was a violation of the contract by the County in the specific job assignment on April 6, 1993. The Union's issue statement follows a traditional and conservative view of the authority of an arbitrator in grievance arbitrations. The Union makes a good point that this is a grievance arbitration, and the job of the arbitrator is to settle a grievance, not to re-write the parties' collective bargaining agreement. According to the Union, the issue has to do with a particular case, a specific grievance, and the job of this Arbitrator is to determine if there has been a violation of the contract by the County. But the Union leaves out an important issue relating to the defense the County is raising regarding its actions in this case. So, from this standpoint, the Union's issue statement is incomplete.

The County, on the other hand, seeks to have the Arbitrator take a look at the broader and more generalized issue of the traditional powers and authority of the sheriff -- to determine whether or not the sheriff has the

discretion to make duty assignments as he sees fit whenever he is need of extra help on any shift which is not a "vacant" shift. The County would like the Arbitrator to answer questions relating to the scope and authority of the sheriff, and to rule on the legality of specific contract clauses that may act to restrict or abrogate the sheriff's constitutional powers. The County would like not only this particular dispute resolved, but also potentially others that might surface if the sheriff again chooses to exercise his constitutionally protected authority and powers of appointment.

While it might be in the County's best interest to want to seek not only resolution to this particular grievance, but also other potential disputes, the County's approach is much too broad, and could take this Arbitrator into areas that are far beyond the scope of this grievance (ruling on all duty assignments of the sheriff) and, perhaps even beyond the jurisdiction of the grievance arbitration process (determining the legality of certain contract clauses). Courts, and the parties themselves, take a dim view of arbitrators that exceed their authority and jurisdiction.

And yet, because of Manitowoc County, the County's defense that the sheriff's authority cannot be abrogated or limited by a collective bargaining agreement, raises the question of the authority of the Arbitrator in this case. For if the contract clauses in question, the ones relating to overtime and vacant shift assignments, are in fact illegal, it would be beyond the authority of the Arbitrator to order the County to conform to the contract.

Thus, this Arbitrator finds the Union's issue statement incomplete, the County's much too broad, and neither addressing the issue of the authority of the arbitrator. Therefore, the Arbitrator frames the issues as follows:

1. Did the County violate the 1992-1993 collective bargaining agreement between the parties by employing a reserve deputy (a non-bargaining unit employee) to perform routine police patrol duties on April 6, 1993?
2. If so, are the relevant provisions of the collective bargaining agreement enforceable?
3. If 1. and 2. are answered in the affirmative, what is the appropriate remedy?

Did The County Violate The Contract?

The Union maintains that the contract language of Article VII - Seniority, Section 7.05 - Overtime and Vacant Shift Assignments is very clear: the County (sheriff) is to offer the work to current bargaining unit employees first through the established rotating seniority list. The County argues that this duty assignment was neither an "overtime" nor "vacant shift" situation and so the sheriff had full discretion to assign whomever he thought best for the job. For the reasons stated below, the Arbitrator agrees with the Union.

The County first argues that the shift was not vacant. According to the County, Deputy Weger was on duty, filling his shift, receiving his pay -- thus, no vacant shift. The Union counters that there was a vacant shift, otherwise why would the sheriff need to call someone in? The Arbitrator finds some merit in both positions.

The operative word here is "shift." Perhaps because of their standard operating practices derived over the years and supported by the labor agreement, the parties seem to use the terms "shift" and "position" and "classification" interchangeably. For example, during the hearing (Transcript, p. 29) Mr. Bauer questioned Mr. Oleson, the Union President, regarding this:

- Q Okay. Now, how are duties and responsibilities assigned to deputies within the Sheriff's Department?

A I guess when you pick your shifts you more or less pick your duties. If you pick patrolman, you are going to [do] patrolman duties. Thus, when a deputy, at the beginning of the year, would pick a "shift," he/she would actually pick a position (e.g. Patrolman, Jailer) on a particular shift (e.g. 7:00 a.m. - 3:00 p.m., 3:00 p.m. - 11:00 p.m.). It is important to make this distinction when attempting to analyze whether or not there was a "vacant shift."

The Arbitrator agrees with the County when it says the shift was not vacant, not in the sense that there was no one on duty. The 7:00 a.m. to 3:00 p.m. shift consists of more positions than just patrolman. The contract lists "Patrolman, Matron, Dispatcher, Jailer, Court/Process Officer, Sergeant, Investigator, and Juvenile Officer/Investigator." It would be normal that any given shift would be made up of different combinations of these positions depending on the needs of the Department. For instance, each shift presumably would have at least one each patrolman, sergeant, jailer, and dispatcher. Indeed, Sheriff McCurdy testified (Transcript, p. 51) that, in normal situations, there is a sergeant and a patrolman on duty. When Deputy Weger was reassigned to the prisoner transfer duty, his position of patrolman became vacant. The shift was not vacant, but the position of patrolman (someone to perform routine patrol duties on that shift) became vacant. It is reasonable to interpret Article VII - Seniority, Section 7.05 - Overtime and Vacant Shift Assignments to mean: "vacant [positions or classifications on a] shift."

There is contractual support for this interpretation that work assignments should apply to positions on shifts. Section 7.05 (B) states in part ". . . e.g. overtime for a patrolman will be first assigned to those then working as patrolman." And Section 7.05 (H) states in part: "If a particular overtime or vacant shift assignment cannot be filled under the above procedures with person(s) from the affected classifications, then the other classifications shall be afforded work. . . ." These statements indicate to the Arbitrator that the parties were actually thinking of "vacant shift" in terms of a "vacant [position or classification on a] shift."

The County next argues that the sheriff, when faced with a prisoner transport order, actually created a temporary patrolman position and filled it with a Reserve Deputy, something allowed under the labor agreement. The Union counters that, in fact, the County created a vacant shift when the sheriff assigned Deputy Weger to the prisoner transport.

The Arbitrator agrees with the Union on this point. When the need for a prisoner transport arose, the sheriff did not create a temporary "patrolman" position, but rather, assigned Deputy Weger to temporary "transporter" duty. Assigning Deputy Weger to that duty, resulted in a vacancy in the existing, regular "patrolman" position on the first shift.

The contract is very explicit and clear: whenever there is a need to assign overtime or to fill vacant [positions on] shifts, "The policy of the Employer will be to assign overtime and vacant shifts assignments equitably, giving preference to seniority." [Section 7.05(A)] And further, "The most senior employee, on a rotating basis, signing up shall be called to work such assignment, provided however, that such employee shall then go to the bottom of the rotating seniority list for overtime and vacant shift purposes." [Section 7.05(C)].

The record is very clear that the Department has been using the rotating seniority list for filling overtime and position vacancies. The Union President testified uncontested that the rotating seniority list is always available to the Department through the dispatcher (Transcript, pp. 8 and 30) and that the use of the list has ". . . always been the practice that's been

done that way." (Transcript, p. 13)

The County also argues, however, that it acted properly herein pursuant to its management authority under Section 2.03 of the agreement. In particular, the County cites Section 2.03(a), (c), (e) and (i) in support thereof. That section, in the opinion of the Arbitrator, being more general in nature regarding the overall authority of the County to manage its affairs, must give way to the specific requirements of Section 7.05 governing overtime and vacant shift assignments. In fact, Section 2.03 itself states in the introductory paragraph that the management rights described therein are "subject to the express terms of this Agreement."

The County finally argues that its action made sense from an economical point of view. (Transcript, pp. 54 and 71) The County's attempt to save money is praise worthy. However, the County still has an obligation to act in conformance with the terms of the parties' collective bargaining agreement, something which it did not do in the instant case. Based upon the above, I find that the County violated Section 7.05 of the agreement by not using the rotating seniority list and first offering the work to a bargaining unit employee as it had done in the past.

Is the Contract Enforceable?

In Manitowoc County, the Court stated that an arbitrator exceeds his authority in enforcing an illegal contract. The Court reasoned this way in Manitowoc County:

1. a sheriff's historical duties of maintaining law and order and preserving the peace are duties which "gave character and distinction" (WPPA I) to the office of sheriff.
2. the undercover assignment of a deputy involved those duties.
3. the assignment of an undercover deputy falls within the constitutionally protected powers of a sheriff and cannot be limited by a collective bargaining agreement.
4. the posting requirement of the assignment of an undercover deputy is illegal because it impinges upon and limits the constitutional powers of appointment of the sheriff.
5. the arbitrator exceeded his authority by enforcing an illegal contract provision.

It is not the role of a grievance arbitrator to make law, or even to determine whether or not an existing contract, and/or its parts, are legal -- these functions being under the jurisdiction of the legislature, courts, and appropriate administrative agencies. Yet clearly, where a contract has been determined to be illegal, or where a contractual agreement will force a party to perform an illegal act, an arbitrator does exceed his authority in ordering a party to comply or perform. A determination of the enforceability of the contract provisions applicable herein will require a close look at the statutes and case law cited by the parties in the record of this case.

Regarding the issue of whether or not an arbitrator's order to comply with the contract will force the sheriff to perform an illegal act, there is no evidence in the record to suggest that the act of appointing a bargaining unit employee for overtime or to fill a vacant position is, in any way, illegal. The County argues that the contract clause requiring the appointment of a

bargaining unit employee abrogates and limits the constitutionally protected powers of the sheriff, but it does not argue, nor does it provide any evidence at all, that the act of appointing a bargaining unit member itself is illegal.

Based on this, the Arbitrator has no reason to believe that the sheriff would be performing an illegal act if required to assign a deputy from a rotating seniority list of bargaining unit members.

The question of whether or not the pertinent contract clause itself, specifically Article VII - Seniority, Section 7.05 - Overtime and Vacant Shift Assignments, is illegal has several parts to it. First, has this specific clause been adjudged to be illegal by a court or agency of jurisdiction? Or, has an identical or very similar clause in another sheriff's deputies' contract in Wisconsin been adjudged to be illegal by a court or agency of jurisdiction? Or finally, is there enough case law to support the claim that this clause is illegal?

In response to the above, the Arbitrator first points out that the County has cited no case in which the clause in question has been found to be unlawful.

Likewise, the County has not cited any case for the proposition that an identical or very similar clause in another deputy contract in Wisconsin has been adjudged to be illegal. While it is true that the County provided evidence that a "posting requirement" related to an undercover assignment was found to be illegal (Manitowoc County), and that assignment of only "non supervisory bargaining unit" members to the position of "court officer" may be illegal (WPPA I), the disputed clause in the instant case concerns "Overtime and Vacant Shift Assignments" and regular, routine patrol duties that make up the bulk of day-to-day law enforcement functions. On this basis, the instant contract clause is distinguishable from the aforesaid cited cases.

Lastly, case law needs to be reviewed to determine if there is enough support for the claim that the clause is illegal. The Court in Manitowoc County found that the assignment of an undercover drug investigation officer gave "character and distinction" to the office of sheriff. In WPPA I, the Court concluded that the duties performed by a court officer may be among those preserved to the sheriff by the Wisconsin constitution. In neither case did the Court clearly determine that a job assignment like the regular patrol duties that are at issue in this case are such that said duties give "character and distinction to the office of sheriff" and therefore, fall within the constitutionally protected powers of the sheriff. The Court stated in Manitowoc County, supra, p. 831, "where the courts eventually decide to draw the line regarding which activities of a sheriff involve law enforcement and preserving the peace such that they are constitutionally protected is not at issue here." It is clear from this statement that the courts should, and probably will, decide the legal and constitutional issues relating to defining the sheriff's power and authority. And that, for now anyway, the issue of whether normal, mundane patrol duties on a regular shift fall into those protected powers remains undetermined.

Based on the foregoing, and in particular because one, the instant contract clause differs from the clauses considered in Manitowoc County and WPPA I, and two, the nature of the job assignment herein is substantially different from the job assignments in the two aforesaid cases -- instead of an undercover drug investigation assignment or the appointment of a special court officer the police duties involved herein are the normal, regular, mundane patrol duties performed daily in Juneau County, the Arbitrator is not convinced that the disputed clause is unlawful especially absent an expressed adjudication or clear direction from a court of law supporting that conclusion.

Likewise, the Arbitrator rejects the County's reliance on various statutory provisions regarding the Sheriff's authority to appoint deputies. Based on the record evidence, the Arbitrator is not convinced that the sheriff's authority described therein to appoint deputies applies to the

instant dispute where the sheriff temporarily filled a shift position with a non-bargaining unit employee in violation of the parties' collective bargaining agreement.

While the courts have not specifically addressed the legality of the relevant contract clauses in this case, the Supreme Court has held that powers that are derived constitutionally cannot be limited by legislation or a collective bargaining agreement (WPPA I). But can a sheriff voluntarily limit or delegate those powers of his own accord? In Glendale Professional Policeman's Association v. City of Glendale, 83 Wis. 2d 90 (1978) the Court hinted the principle of waiver may allow an official (like police chief or sheriff) to delegate to others, or even willingly accept a limitation on, some or all of the powers derived by law.

In this case, it is clear that Sheriff McCurdy voluntarily relinquished and/or delegated his constitutionally derived powers of appointment, and other significant labor relations functions, to others. The record shows three clear areas where the sheriff did this.

First, and perhaps most critically, relates to the acceptance by the sheriff of a limitation on his power of appointment. In Juneau County labor-management disputes involving the sheriff and the deputies are resolved through a grievance procedure in the collective bargaining agreement. The second step in that procedure calls for a dispute to be submitted to the Sheriff's Committee of the County Board of Supervisors. A recent grievance (County Exhibits 1 & 2) involving the assignment of a reserve officer to a prisoner transport by the sheriff was resolved by the Committee in favor of the Union. That is, the Committee found that the sheriff had violated the collective bargaining agreement. McCurdy acknowledged (Transcript pp. 44-46) that he accepted the decision of the Committee -- a decision which placed the assignment provisions of the collective bargaining agreement above his power of appointment. By accepting the Committee's decision, the Sheriff accepted a limitation of his power of appointment as it relates to the collective bargaining agreement. By not objecting to or fighting this limitation, the Sheriff accepts a limitation on his power to make unrestricted assignments.

Next, it is the testimony of the Chairman of the Sheriff's Committee that, when it comes to assignments of reserve or special officers, the sheriff shares this function with the Chairman. Mr. Brunner stated (Transcript, p. 69): "It's our interpretation has been that if each shift, and we formally have, you know, up to three shifts, if each shift is filled by the Association members and the Sheriff decides that he would like to have extra help to go out to search or do patrolling, whatever he would like to have them do, as long as it's not a full time regular job, I feel the Sheriff, even myself, has the right to bring in a reserve officer, reserve officer as well as whoever additionally he needs." (emphasis added). This is an indication that the sheriff delegates some of his constitutional powers of appointment to the Chair of the Sheriff's Committee. And further, it seems that appointments are limited to only part-time or temporary positions, which is consistent with the collective bargaining agreement (even though it is not clear from the record if the sheriff accepts this limitation).

And lastly, and perhaps most to the point here, the record is quit clear that the Sheriff, through dispatch procedures, has always used the rotating seniority list to call in deputies when needed (Transcript, pp. 13 and 50). Apparently, this incident was the first time a non-bargaining unit member was called in prior to bargaining unit members first having the opportunity to work. Again, by adopting and consistently using over the years, a procedure that assigns deputies for routine overtime or the filling of vacant positions on shifts, the Sheriff accepts a limitation on his power to make unrestricted assignments.

Based on all of the above, and, in particular because the applicable contract clauses have not been shown to be illegal, and because the sheriff has

acted to voluntarily limit or subordinate his assignment power to the collective bargaining agreement, I find that the relevant provision(s) of the collective bargaining agreement are enforceable. So, with the first two questions answered in the affirmative, a question remains as to the appropriate remedy.

What is the Remedy?

At the time of the hearing, the Union had not identified who had been adversely affected by the County's actions in this case. The County raises the question as to whether Deputy Mark Strompolis and Sergeant Scott Peak, later identified by the Union in its brief, actually would have been available to work and receive overtime pay on April 6th.

The Union failed to show that the named bargaining unit employees had actually been damaged. Still, it is clear that the County should have used the rotating seniority list as it had in the past, and that in so doing, a bargaining unit employee would have had the opportunity to work and receive overtime. On the other hand, it is possible that no one from the bargaining unit would have either been available or would have chosen to work that patrolman position. After all, in the past the Sheriff indicated (Transcript, pp. 50 and 57-58) he did have trouble either reaching people in a timely fashion, or finding someone who was willing/able to work, when he used the rotating seniority list.

Since no damages were shown by the Union, and yet because the County did not provide an overtime opportunity to bargaining unit employees on April 6th, the County should provide that lost opportunity to those identified by the Union as having been affected.

In view of all of the foregoing, it is my

AWARD

That the grievance is sustained, and the County is ordered to use the established rotating seniority list when assigning overtime or when filling vacant (positions on) shifts, and to offer (first right of refusal) the next two overtime opportunities of at least four hours each to Deputy Mark Strompolis first, and Sergeant Scott Peak second, without any changes to the rotating seniority list. (Strompolis and Peak will work or not, their choices, without losing their current places on the rotating list.)

Dated at Madison, Wisconsin this 10th day of March, 1994.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator