

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 DODGE COUNTY SHERIFF'S DEPARTMENT : Case 181  
 SWORN EMPLOYEES, LOCAL 1323-B, : No. 49404  
 AFSCME, AFL-CIO : MA-7934  
 and :  
 :  
 DODGE COUNTY (SHERIFF'S DEPT.) :  
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Appearances:

Mr. James L. Koch, District Representative, Wisconsin Council 40,  
 appearing on behalf of the Union.  
 Davis & Kuelthau, S.C., by Mr. Roger E. Walsh, appearing on behalf of the  
 Employer.

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-93 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance concerning time off, filed by Rodney Kreitzman.

The undersigned was appointed and held a hearing on September 16, continuing on November 8, 1993 in Juneau, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, the Employer filed a reply brief, and the record was closed on February 10, 1994.

ISSUES:

The Union proposes the following:

1. Did the Employer violate the collective bargaining agreement when it unilaterally and arbitrarily changed a long-standing past practice of allowing rank officers off on the same date?
2. If so, what is the appropriate remedy?

The Employer proposes the following:

1. Did the County violate the collective bargaining agreement by denying Sergeant Kreitzman's request for vacation on May 23, 1993?
2. If so, what is the appropriate remedy under the contract?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE III  
MANAGEMENT RIGHTS

- 3.1 Except as hereinafter provided, the Employer shall have the sole and exclusive right to

determine the number of Employees to be employed, the duties of each of these Employees, the nature and place of their work and all other matters pertaining to the management and operation of the County, including the hiring, promoting, transferring, demoting, suspending or discharging for cause of any Employee. This shall include the right to assign and direct Employees, to schedule work and to pass upon the efficiency and capabilities of the Employees and the Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or Employees, such rights are retained by the Employer. However, the provisions of this Section shall not be used for the purpose of undermining the Union or discriminating against any of its members.

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#### ARTICLE V

#### HOURS OF WORK AND OVERTIME

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5.34 Compensatory time may be accumulated into a running account up to a maximum of four hundred eighty (480) hours each year. All hours accumulated above the maximum will be paid out on the next appropriate check. All compensatory time accounts will be paid out to the Employees on the first paycheck in December of each year but an Employee may keep up to twenty-four (24) hours to carry into the next year.

#### ARTICLE IX - HOLIDAYS

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9.3. Employees required to work on any of the holidays set forth herein shall be entitled to receive straight-time pay for the hours worked plus a compensatory day and one-half (1-1/2) off or twelve (12) hours pay at the Employee's option. The compensatory day is to be selected by the Employee, subject to the approval of the Sheriff or his/her delegated assistant.

#### ARTICLE X - VACATIONS

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10.4 The number of Employees on vacation within a given classification at one time shall be determined by the Sheriff or his/her delegated assistant.

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ARTICLE XV - GRIEVANCE PROCEDURE

15.1 Grievance. A grievance is defined as any matter involving the interpretation, application or enforcement of the terms of this Agreement.

. . .

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

DISCUSSION:

The facts are not significantly disputed. On two occasions in 1993, the Department, by action of Chief Deputy Jerold Witte, denied requests for time off filed by third shift Sergeant Rodney Kreitzman. In both cases, the reason given was that the Corporal assigned to that shift was already scheduled to take time off. There is no dispute that prior to the end of December, 1992, this was not the department's policy, and that up until that time it was possible for two "rank officers" (which included Corporals and Sergeants, but not Lieutenants who are outside the unit) to take time off at the same time, even if this left a given shift without an assigned supervisor.

In the same manner as discussed in my Award in Case 182 between the same parties, issued February 15, 1994, it is clear that the department has sometimes filled and sometimes not filled shift vacancies which fell below the minimum staffing which was considered desirable. Similarly, the department has sometimes replaced and sometimes not replaced a supervisory ranked employe when there was not one remaining. On the day shift, and on the afternoon shift, there are at least three ranking officers (including Lieutenants) on most days.

On the night shift, however, the Sergeant and Corporal are unaccompanied by any higher ranking officer. Chief Deputy Witte issued a guidance memo to the Lieutenants in December, 1992 specifying circumstances under which rank officers could be allowed time off, which tightened the requirements so that if two or more rank officers were scheduled to be on duty, one had to remain on duty, unless the reason for absence was unavoidable. Prior to that time, the only restriction had been that Corporals and Sergeants were not permitted to take a full week of vacation at the same time if they worked on the same shift.

The "full week" policy dated from approximately the time that the Corporal position was introduced, in early 1991. There is no dispute that no written policy document was produced for either the "full week" policy or the "one ranking officer must remain" policy. There is also no dispute that the Union did not file a grievance over the "full week" policy when that was introduced, and that neither party brought up the matter in the negotiations over the ensuing contract.

Grievant Rodney Kreitzman testified that neither he nor the Union in general had any argument with the general desirability of having at least one supervisory-ranked employe on duty at any one time; in his testimony, Kreitzman referred to this as a "wise decision," for the other two shifts. But Kreitzman testified that this represented an undue hardship from the point of view of the

Sergeant and Corporal on the third shift, because there were only two ranking officers on duty on that shift and they could never be given time off at the same time. Kreitzman testified that the policy was inconsistent in its effect partly because if in the regular weekly rotation either the Corporal or the Sergeant was not scheduled to be at work in the first place, the other could get time off under this policy, even though that would still result in no rank officer being assigned for the night.

Chief Deputy Witte testified that the policy's primary purpose was to "optimize" supervisory coverage on the third shift. He testified that the policy that was implemented was intended to be fair to the employees but still provide "a little more" supervision on that shift, and that the policy was that if both employees are regularly scheduled on the same date, only one of them can be off on vacation, comp time, holiday or other kinds of scheduled time off. Yet, Witte testified, if one of these officers was on a regularly scheduled day off, the second could take off on comp time, vacation or holiday. Witte testified that the policy applied to all shifts, but that the chances of it being a problem for an employee predominantly occur on the third shift.

The Union introduced a number of exhibits to demonstrate examples of this policy at work and of the prior policy at work, only a few of which were disputed by the Employer.

This matter is quite closely related to Case 182, drawing on much of the same contract language, and both the Union's and the Employer's arguments are quite similar to the arguments made there. For similar reasons, the Award also is consistent with the Award I issued on February 15, 1994 in that matter, and I therefore discuss below the arguments and analysis only to the extent that they differ from the previous Award.

Essentially, the Union is arguing here also that Special Order 11-82 became a part of the contract by its repeated use by the Employer. There is, once again, an element of inconsistency in the Employer's activities, particularly in Grievant Kreitzman's un rebutted testimony that it was more difficult now to get time off as a Sergeant than it was before the Employer created the Corporal position. Furthermore, as the Union argues, it is true that the Employer implemented the new policy unilaterally, and the policy did not provide for shift coverage by supervision on all occasions.

In the same vein, the Employer once again argues that specific contract language gives it the right to determine vacations and to approve compensatory days off chosen by the employee. The Employer argues also that the change in policy was not intended to guarantee supervisory coverage, but to "provide us a little more supervision on that shift," quoting testimony by Chief Deputy Witte. The Employer further argues that its previous decision to restrict rank officers on the same shift from taking full weeks of vacation at the same time was adopted unilaterally by the County without dissension or grievance from the Union. I adopt the County's version of the issue in this matter, which deviates slightly from the Union's preferred version, because the Union's version presumes that the County's action was arbitrary.

As noted above, for the most part the discussion contained in my Award in Case 182 is applicable also to this matter. There is some difference in the contract language involved. The difference, however, does not change the result. Article 9.3 expressly states that "the compensatory day is to be selected by the employee, subject to 1/ the approval of the Sheriff. . . ." This clearly gives the Sheriff authority to determine whether a particular selected day is acceptable within the County's needs. Also, Article 10.4 expressly states "The number of employees on vacation within a given classification at one time shall be determined by the Sheriff. . . ." This

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1/ Emphasis added.

again provides express contractual permission for the Employer's exercise of discretion. While the Employer's actions are, as noted above and as also noted in Case 182, not entirely consistent in their effect on public safety, the Employer has bargained for and obtained the contractual right to make such decisions.

While many arbitrators have found that such rights may be limited where there is evidence of arbitrary or discriminatory conduct in the exercise of them, there is no such evidence here. All of the testimony indicates that management created a rule and then applied it quite consistently, even if the rule was not itself consistent with the rule in effect up to late 1992. Furthermore, the desire of management to provide for "a little more" supervisory coverage, even if that could not be obtained to a standard of perfect coverage, was not arbitrary or discriminatory. The fact that the distribution of rank officers is not even across all shifts does result in the brunt of the rule's effect being felt by Sergeant Kreitzman and the Corporal on that shift, as the Union points out. But that is no more "discriminatory" as that term is generally used than are a number of other undesirable but inevitable features of late-night shift work.

The remaining arguments, including the Union's contention that the Union is being undermined and the Employer's contention that the constitutional authority of the Sheriff should be read so as to override all contractual provisions, are dismissed here for the same reasons as previously given in the Award in Case 182.

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

AWARD

1. That the County did not violate the collective bargaining agreement by denying Sergeant Kreitzman's request for vacation on May 23, 1993 and on July 25, 1993.
2. That the grievance is denied.

Dated at Madison, Wisconsin this 24th day of March, 1994.

By Christopher Honeyman /s/  
Christopher Honeyman, Arbitrator