BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GENERAL TEAMSTERS UNION, LOCAL 662, affiliated with the International Brotherhood of Teamsters	Case 178 No. 49263 MA-7879
and	
EAU CLAIRE COUNTY, WISCONSIN	

Appearances:

Mr. Scott D. Soldon, with Ms. Ruth E. Canan on the brief, Previant, Goldberg, Uelmen, Gratz & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of General Teamsters Union, Local 662, affiliated with the International Brotherhood of Teamsters, referred to below as the Union.

Mr. Keith R. Zehms, Corporation Counsel, Eau Claire County Courthouse, 721 Oxford Avenue, Eau Claire, Wisconsin 54703, appearing on behalf of Eau Claire County, Wisconsin, referred to below as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed as a "Class Action," on May 4, 1993. The Commission designated Lionel L. Crowley, and subsequently substituted Richard B. McLaughlin. Hearing on the matter was held on October 27, 1993, in Eau Claire, Wisconsin. The hearing was transcribed, and the parties filed briefs by January 11, 1994.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Is Section 17.06 an illegal infringement on the Sheriff's constitutional and statutory authority to appoint deputies making this grievance not arbitrable?
>
> If not, has the County violated Section 17.06 by not placing the most senior qualified employee applicant in the position of Floating Deputy?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 6
ARBITRATION PROCEDURE

. . .

6.06 The arbitrator shall neither add to, detract from, nor modify the language of the Agreement in arriving at a determination of any issue

presented that is proper for arbitration . . .

ARTICLE 17
SENIORITY

. . .

17.05 All jobs, classifications and assignments shall be subject to seniority within the Correctional Officer classification or other civilian employee classification with years of service being given equal consideration with qualifications subject to the following section:

17.06 . . . In case of a job vacancy in the Non-Supervisory protective service bargaining unit the Sheriff shall post such position . . . asking for applications from qualified employees.

a. In the case of a job opening, position vacancy or newly created positions, the senior employee bidding such position shall be awarded such position unless there is a dispute as to his job qualifications as provided for in 17.05. In case there is any question as to qualifications of any employee applicant, he shall serve a sixty (60) day qualifying period . . . Any dispute as to the qualifications of any employee applicant for the job shall be subject to the Grievance Procedure as to whether or not he should be awarded the position opening.

b. . . . If the candidate has successfully tested within the last three (3) years, another written test will not be required. The highest test score at time of interview will apply.

c. Outside applicants shall not be considered as long as there is a qualified employee applicant available.

BACKGROUND

The grievance, filed on May 4, 1993, 1/ alleges a violation of Section 17.06 because "(t)he most senior, qualified civilian corrections officer was not awarded the protective service position for which they bid in accordance with the contract."

The County's non-sworn employes, classified as Correctional Officers, are placed in a bargaining unit separate from that of employes having the power of arrest. To fill openings for positions in the bargaining unit of sworn officers, the County maintains an eligibility list. County Ordinances (the Code) state the hiring process thus:

> 3.51.030 Application and Testing Process.
>
> A. Every two (2) years or as approved by the Committee on Judiciary and Law Enforcement applications shall be solicited and received for the position of permanent Deputy Sheriff . . .
>
> B. Each qualified applicant for permanent and reserve Deputy Sheriff shall be given a comprehensive written examination . . .
>
> C. Qualified applicants passing the written examination under B above shall each be given tests to determine their physical fitness, agility and endurance . . .
>
> D. Those passing B. and C. above shall be eligible for Rating Committee examination under 3.51.040 . . .
>
> 3.51.040 Review and Rating by the Rating Committee.
>
> A. Each applicant for permanent Deputy Sheriff qualifying under 3.51.030 shall be given an oral interview . . .

1/ References to dates are to 1993, unless otherwise noted.

> D. The ten (10) highest rated applicants, and ties, shall be placed on an eligibility list by the Rating Committee according to their rating, with the highest rated applicant listed first (1st) . . .
>
> 3.51.060 Appointment of Permanent Deputies.
>
> A. In the event of a Deputy Sheriff vacancy, the Sheriff shall appoint a replacement as soon as practicable from among the top five (5) individuals on the current eligibility listing provided under Section 3.51.040 . . .

The County has hired Deputy Sheriffs from eligibility lists as described in the Code at all times relevant here. The County published eligibility lists on January 21, 1991, and April 2, 1993. The top five applicants on the January 21, 1991 list were:

1. Arthur J. Brazeau
2. Richard F. Brommerich
3. Michael P. Mayer
4. Ricky B. Olson
5. Jeffrey J. Machusak

The top five applicants on the April 2, 1993 list were:

1. Daniel Marcell
2. Kelly Dahlke
3. Harlan Reinders
4. Joseph Johnson
5. Harry Pronschinske

In October of 1992, the County conducted a written test to determine placement on the 1993 eligibility list. The list was not, however, promulgated in January due to the objections of certain applicants to the fairness of the physical agility test conducted by the County in December of 1992. The County administered a different test in response to these objections. As a result, the eligibility list which expired on January 21 was not supplanted until the issuance of the April 2 list.

From February 11 through February 18, the County posted, as Posting 93/19, two Floating Deputy positions. The posting for each position described the "JOB DUTIES & REQUIRED QUALIFICATIONS" thus:

> Performs general duty police work for the apprehension of criminals, prevention of crimes, protection of life and property, and general enforcement of all laws and ordinances on an assigned shift under general supervision. Responsible for routine patrol, accident investigation, crowd control, and preliminary investigation of all complaints. Protects life and property from criminal and traffic violators while maintaining the peace and orderly conduct of the community.

> Perform such duties that are required in the operation of a county jail, under the general direction of the Sheriff. Performs these duties in such manner as to insure that secure, safe and sanitary conditions exist at all times. Demonstrates a firm and fair attitude toward prisoners and visitors, insure and protect the personal rights and safety of prisoners, and perform duties in compliance with all state and federal laws, standards and guidelines. Works closely and cooperatively with other divisions of the Sheriff's Department and with all other agencies involved in the criminal justice system.

Seven Correctional Officers signed the postings. In order of seniority, starting with the most senior, the signers were: James Tumm; Delmond Horn; Paul Zurek; Joel Brettingen; Harry Pronschinske; Bill Slaggie; Michael Backus; Terry Nicks; and Rochelle Rasmussen.

On February 22, Sheriff Richard Hewitt, in a memo to the County's personnel department, described the status of the February posting thus:

> Please note that the undersigned are not qualified to fill the position of Floating Deputy.
>
> We will now have to fill this post from the new eligibility list.

Using the April 2 list, Hewitt, in late April, appointed Kelly Dahlke and Harry Pronschinske to fill the Floating Deputy positions. Dahlke, unlike Pronschinske, was not employed by the County as a Correctional Officer prior to her appointment. She is Hewitt's ex-wife. On or about May 13, the County determined that it did not need to fill both positions, and returned Pronschinske to the position of Correctional Officer.

The County and the Union have been parties to two collective bargaining agreements. They executed their first agreement in July of 1990. That agreement was in effect, by its terms, "from January 1, 1990 through December 31, 1991, both days inclusive." Section 17.06, a., of that agreement reads thus:

> In case of a protective service vacancy, the Sheriff shall post such new position or vacancy for a period of seven (7) calendar days asking for applications from the employees.

Section 17.06, b., of the 1990-91 agreement reads thus:

> If the position (vacancy) is Sheriff Deputy, then the appointment to fill the position (vacancy) shall be the prerogative of the Committee on Judiciary and Law Enforcement of the County Board, in consultation with the Sheriff. Such appointments shall be based solely on the basis of the following criteria:

1. Employee written test score.
2. Seniority.
3. Personnel record, including school record.
4. Recommendation(s) of appropriate staff officers.
5. Oral interview with the Committee on Judiciary and Law Enforcement.

> Each applicant shall be rated in relation to all other applicants. The top rated applicant shall be awarded the position, and if he does not want the position, the second highest rate (sic) applicant shall be awarded the position and so on. Those employees receiving a promotion under this sub-section (b) shall serve a trial period of sixty (60) days . . .

The parties, in their negotiations for the 1992-94 agreement, modified both provisions.

Richard Hendrickson was the Chief Spokesman for the Union during the collective bargaining for the 1992-94 agreement. Marvin Niese, the County's Personnel Director, served as the County's. Hewitt also participated in these negotiations. Hendrickson understood the number one priority of the Union to be the negotiation of an "escape route" from the position of Correctional Officer. At the close of the negotiations for the 1992-94 agreement, he understood the parties to have agreed to appoint "qualified" Correctional Officers to posted sworn positions on the basis of seniority. His view was that the County could use a written test to determine the qualifications of a Correctional Officer, and could refuse their placement on the eligibility list if they failed to pass the test. If, however, a Correctional Officer was placed on the eligibility list, Hendrickson believed that appointment to a sworn position would be on the basis of seniority. Niese and the Sheriff understood the changes in the 1990-91 agreement to harmonize the contract with the Code. At no point in Hewitt's experience had the Committee on Judiciary and Law Enforcement actually hired an employe. Arthur Brazeau served on the Union's negotiations team at the session at which tentative agreement on a 1992-94 agreement was reached. He understood Hewitt's position to be that Correctional Officers would be appointed to sworn positions by seniority and that outside applicants would not be considered if qualified Correctional Officers were available. The Union lost Hendrickson's notes of the bargaining for the 1992-94 agreement.

Hewitt testified that he has, throughout his roughly seven year tenure as Sheriff, used the "Rule of Five" set forth in Section 3.51.060 of the Code. He noted that where Correctional Officers appear in the top five of an eligibility list, he has appointed the senior Correctional Officer. In February of 1992, for example, he appointed Brazeau Deputy Sheriff. Brazeau was, prior to the appointment, a Correctional Officer. Hewitt affirmed this appointment in a memo to the personnel department dated February 18, 1992, which reads thus:

> Being senior member to sign posting, Arthur J. Brazeau has been appointed to the position of sworn deputy jailer.
>
> Art leaves the rank of Correctional Officer to assume his new responsibilities February 18, 1992.

On May 3, 1992, Hewitt moved Ricky Olson from the position of Correctional

Officer to that of Deputy Jailer. Olson was, at the time, the senior available employe from the top five of the then applicable eligibility list who was a Correctional Officer. Hewitt was a Deputy before being elected Sheriff, and noted that the Rule of Five has been used by the County throughout his seventeen years of employment.

In September of 1992, Hewitt considered placing Rochelle Rasmussen, then serving a probationary period as a Correctional Officer, in a Deputy Sheriff position. Michael Thoms, then serving as the Union's Business Representative, met with Hewitt and Niese to express the Union's concern that more senior officers be permitted to test for the position. Rasmussen was not appointed Deputy Sheriff.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union states the issues for decision thus:

> Whether the Eau Claire County Sheriff's Department violated the Collective Bargaining Agreement by failing to appoint the most senior qualified corrections officer to the vacant protective services position? If so, what is the appropriate remedy?

After a review of the factual background, the Union argues that "there is no constitutional issue barring the arbitrability of this dispute." Section 17.06, the Union contends, does not "infringe upon the constitutional powers of the sheriff because it implicates the sheriff's power to **appoint persons** to deputy sheriff positions . . . not the sheriff's power to **assign** . . . **duties** to deputy sheriffs, or to appoint a specific individual . . . to a certain **position**." Manitowoc County v. Local 986B, 168 Wis.2d 819 (1992), reserves the "immemorial principal and important duties" of the office of sheriff to the sheriff, according to the Union, but those duties are not implicated in this case. The Union argues that State ex rel. Milwaukee County v. Buech, 171 Wis. 474 (1920) establishes that the powers to appoint at issue here do not constitute the "immemorial principal . . . duties" of the office of sheriff governed by Manitowoc.

Seniority governs deputy appointments, according to the Union, which contends that "the clear, unambiguous language of the collective bargaining agreement, bargaining history, and actual application" underscore this conclusion. The Union asserts that contract language limits the determination of qualifications to the selection of competitors for appointment, but restricts the actual appointment to seniority. The Union concludes that Sections 17.05 and 17.06 "mandate that seniority be the determining factor." Bargaining history, according to the Union, underscores this point, since the Union "bargained for the changes in 17.06 in order to provide corrections officers with an escape route out of that position into the deputy sheriff's position." The route "bargained for and obtained was appointment by seniority." Hewitt's memo regarding Brazeau's appointment affirms this, the Union argues.

The Union asserts that neither the contract nor past practice permit the County's use of the "rule of five." That the parties deleted contract language which referred to the County Code underscores this point, according to the Union. The County's determination not to hire Rasmussen further underscores

this point, the Union contends, since that determination reflected the County's desire to avoid "an appearance of preferential hiring over those with greater seniority." Even if the Rule of Five is interpreted to be incorporated into the labor agreement, the Union argues that its sole role is to determine "who can compete for the appointment." Because employes not in the top five can be moved into the top five due to attrition of competitors over the two years of eligibility, the Union concludes a top five ranking cannot be determinative of which employe is awarded a deputy position. That the County has never made a contract proposal referring to the Rule of Five manifests that it has not secured that right in the agreement, the Union concludes.

The Union next contends that even if the labor agreement permits the application of the Rule of Five, then Pronschinske should have been preferred over Dahlke, since he was "the most senior corrections officer ranked within the top five of the eligibility list."

The County cannot, the Union asserts, ignore Section 17.06 c, due to the gap in eligibility lists. In light of Section 17.06 b, the County had, at most, a reasonable doubt concerning the qualifications of the "most senior corrections

officer on the 1991 eligibility list who was not required to take another written test." Similar doubts surround "the qualifications of the most senior applicant for the 1993 postings who had passed the October 1992 written test and other requirements for listing on the delayed 1993 eligibility list." Those doubts, under the contract, had to be addressed by a sixty day trial period, according to the Union. That the County actually used the April, 1993 list to appoint Dahlke and Pronschinske establishes, the Union asserts, that the "County is estopped" from denying the gap between eligibility lists rendered Section 17.06 inoperative.

The Union concludes that "the arbitrator (should) sustain this grievance and place the most senior qualifying corrections officer into the deputy sheriff's position posted in February 1993."

THE COUNTY'S POSITION

The County states the issues for decision thus:

1. Is Section 17.06 and (sic) illegal infringement on the Sheriff's constitutional and statutory authority to appoint deputies making this grievance not arbitrable?

2. Was any Civilian Corrections Officer qualified to fill the position of floating deputy at the time the job was posted in February, 1993?

3. Assuming arguendo that a Civilian Corrections Officer was qualified did the parties have a meeting of the minds in negotiations as to the meaning of the changes made to Section 17.06 of the 1992-1994 Collective Bargaining Agreement?

After a review of the factual background, the County argues that Section 17.06 of the labor agreement infringes on the Sheriff's constitutional and statutory authority to appoint deputies. The County contends that under Manitowoc, this necessarily means Section 17.06 is illegal, and thus that the grievance is not arbitrable. This is true whether the Union's claim for strict seniority is honored or whether the Sheriff has agreed to apply Section 17.06 in light of the Rule of Five, the County concludes. Since appointing deputies "to any of the existing classifications involves the exercise of the Sheriff's duties of law enforcement and preserving the peace," it necessarily follows, according to the County, that the grievance places an infringement on "the constitutional prerogative of the Sheriff." The County asserts that the grievance questions "not whether the Sheriff must follow the civil service process in appointing deputies" since he has consistently done so, but questions "whether the Sheriff can be bound by provisions of a Collective Bargaining Agreement to which he was

not a signatory covering only civilian employees some of whom want to become Deputy Sheriffs." The County contends that "none of the cases" relevant to this point 2/ "reach as far as the Union would like this Arbitrator to believe."

The County contends that the grievance, even if arbitrable, lacks merit. The County asserts that no certified eligibility list "existed at the time of posting and, therefore, no Correctional Officer was qualified to fill the vacancy." The County characterizes as "ludicrous" any claim that the agreement can be read "to the effect that if any time after signing a posting a person qualifies for a position he or she has a right to fill that position." Doing so would, the County asserts, fly in the face of Section 6.06. The gap in eligibility lists was due solely to fairness questions raised by competitors regarding the agility test, and thus there can be no contention that "the County intentionally delayed certifying the eligibility list so there would be a gap," the County concludes.

Because Section 17.06 "requires applicants to be 'qualified,'" it must be read in conjunction with the Rule of Five, the County contends. This is solidly supported by bargaining history, arbitral precedent and past practice, according to the County. That the Union may have wished to bargain promotion to deputy by strict seniority does not establish the County agreed to this, and, according to the County, flies in the face of any credible record evidence. At most, bargaining history establishes that the Union understood Section 17.06 to grant appointment to Deputy by seniority, while the County understood Section 17.06 to be consistent with its civil service requirements. If this is determined to manifest less than "a meeting of the minds during negotiations," the County concludes that "the status quo should be maintained." The status quo, in this case, was the Sheriff's agreement to make appointments based on the Rule of Five "and applied seniority if more than one person in the top five was a Correctional Officer."

The County concludes that the grievance must either be found not arbitrable, or if found arbitrable, must be found to lack any merit.

DISCUSSION

The County's statement of a threshold jurisdictional issue has been adopted as the first issue for decision. This issue is legal, not contractual, in nature. Resolution an issue of law is reserved to the judicial system. Because arbitration is designed to serve as an alternative to more time consuming and expensive litigation, there is no persuasive reason for an arbitrator to address legal issues unless the parties mutually submit the issues or the contract incorporates external law. Where the parties agree an arbitrator's opinion on external law may resolve the dispute, there is some assurance the opinion serves a purpose. In the absence of such agreement, an arbitration award is no more than an unneeded layer of litigation.

In this case, both parties have addressed the arbitrability issue, and, accordingly, I will address it.

Typically, an arbitrability determination is governed by Joint School District No. 10, City of Jefferson v. Jefferson Education Association, 78 Wis.2d 94 (1977), in which the Court set forth a standard composed of two

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2/ Citing State ex rel. Kennedy v. Brunst, 26 Wis. 412 (1870); Wisconsin Professional Police Ass'n v. Dane County, 106 Wis.2d 303 (1982); and Wisconsin Professional Police Ass'n v. Dane County, 149 Wis.2d 699 (Ct. App., 1989).

elements. The first is "whether there is a construction of the arbitration clause that would cover the grievance on its face." 3/ The second is "whether any other provision of the contract specifically excludes it." 4/ This standard is not suited to this dispute. Each party acknowledges the arbitration clause covers the grievance on its face. The issue is not, however, whether a contract provision bars arbitration, but whether the Sheriff's statutory or constitutional authority does.

The County's arguments focus on the relationship of Section 17.06 to the Sheriff's constitutional authority. The County's statement of the issue points to infringement on the Sheriff's statutory authority, but the County has not pointed to a specific statute affected by Section 17.06. Conflict between Section 17.06 and the Sheriff's statutory authority cannot be assumed. The Court, in Glendale Prof. Policemen's Assoc. v. Glendale, 83 Wis.2d 90 (1978), noted that "a labor contract requiring the chief to appoint the most senior qualified candidate does not contradict an express command of law . . . It does not purport to take away a power expressly conferred by law." 5/ The issue here involves a sheriff, not a police chief, but Glendale indicates that seniority based conflict between the labor agreement and the Sheriff's statutory authority cannot be presumed. Glendale establishes that "the contract and related statutes should be harmonized whenever possible." 6/ In the absence of argument establishing conflict between Section 17.06 and the Sheriff's statutory powers, there is no reason to conclude those powers preclude arbitration of the grievance.

The County's constitutional arguments focus on Manitowoc County v. Local 968B, 168 Wis.2d 819 (1992). That decision draws on State ex rel. Kennedy vs. Brunst, 26 Wis. 412 (1870), in which the Court noted that the "office of sheriff, in a certain sense, is a constitutional office," and that "the framers of the constitution had reference to the office with those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted." 7/ The Brunst Court noted that among the duties then generally recognized as belonging to the office of Sheriff "one of the most characteristic and well acknowledged was the custody of the common jail and of the prisoners therein." The Manitowoc majority noted that "maintaining law and order and preserving the peace are duties which 'gave character and distinction' to the office of sheriff," 8/ thus placing them beyond the reach of a collective bargaining agreement. Noting that the Floating Deputy positions involve both law enforcement and jailer duties, the County asserts Manitowoc and Brunst put the position beyond the reach of Section 17.06.

The County's arguments are well-rooted in the expansive rationale of Manitowoc, but extend that rationale to the point that it would overrule State

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3/ 78 Wis.2d at 111.

4/ Ibid.

5/ 83 Wis.2d at 102, citations omitted.

6/ Professional Police Ass'n v. Dane County, 106 Wis.2d 303, 316-317 (1982), citing Glendale 83 Wis.2d at 103-104.

7/ 26 Wis. at 414.

8/ 168 Wis.2d at 830, citation omitted.

ex rel. Milwaukee County v. Buech, 171 Wis. 474 (1920). The Manitowoc majority specifically addressed Buech and stopped short of overruling it. This precludes the result sought by the County here. The Buech Court limited Brunst to "those immemorial principal and important duties that characterized and distinguished the office" of Sheriff, and concluded the Sheriff's common law "power to appoint deputies . . . was not a power or authority that gave character and distinction to the office." 9/ Manitowoc overturned a Court of Appeals decision which the majority read to establish a standard "holding that only those duties 'unique' to the office at common law are constitutionally protected." 10/ The Manitowoc majority disagreed with this reading of Buech, but did not overturn Buech. Under Manitowoc, the power to appoint deputies "being rather mundane and commonplace, did not give character and distinction to the office of sheriff at common law." 11/ The power to appoint is at issue here. Short of overturning Buech, there is no reason to conclude Section 17.06 infringes the Sheriff's constitutional authority.

The dissent in Manitowoc concluded that the majority opinion "sub silentio overrules the Buech case." 12/ This has considerable persuasive force, and the County's arguments are well-founded in the majority opinion. To the extent the County urges that Manitowoc overturns, or should overturn, Buech, I disagree. That the majority declined to extend its rationale that far has been noted. Beyond this, Buech has a considerable history, and overturning that history should not be undertaken lightly. Litigation involving Buech has been limited before the courts, but it has been relevant to a series of Attorney General Opinions. 13/ An opinion issued in response to a question by this County

9/ 171 Wis. at 482.

10/ 168 Wis.2d at 826.

11/ Ibid., at 826-827.

12/ Ibid., at 832.

13/ See, for example, 39 Op. Atty. Gen. 91 (1950); 40 Op. Atty. Gen. 140, (1951); 61 Op. Atty. Gen. 80 (1972); 65 Op. Atty. Gen. 170 (1976); 68 Op. Atty. Gen. 334 (1979); 71 Op. Atty. Gen. 199 (1982); 77 Op. Atty. Gen. 94 (1988); and 78 Op. Atty. Gen. 85 (1989).

concerning the Board's authority to appoint deputies under the civil service system and to restrict the maximum number of appointments illustrates the clarity with which Buech has been interpreted:

> In . . . Buech . . . the supreme court refused to apply the rationale of the Kennedy case to the power of the sheriff to appoint deputies. 14/

The effect of Buech is, then, known and has been acted on in the continuing effort to define the relationship of legislative bodies with the office of Sheriff.

Ignoring Buech on the facts posed by the grievance would extend the Manitowoc decision far beyond its roots in Brunst and would derogate the policy issues articulated in Buech. In Brunst, "chapter 332, P. & L. Laws of 1870" permitted Milwaukee County to transfer jail supervision from the Sheriff to an Inspector, who was "an officer selected by the county board of supervisors." 15/ Custody of the jail was, in addition, "the largest share of the duties of sheriff, in point of responsibility and emolument." 16/ Thus, the act being reviewed removed the bulk of the meaningful duties from an office, made an elective office by the Constitution, and moved those duties to a legislative appointee. The separation of powers implications are apparent and significant. Manitowoc stands in stark contrast to this. Manitowoc, on its facts, involved the assignment of drug investigation duties to one deputy. Collective bargaining has a statutory basis, and thus separation of powers issue are implicated by the application of a collective bargaining agreement to the Sheriff. However, it is not immediately apparent that the infringement rises to an attempted abrogation of the "largest share of the duties of sheriff."

The Manitowoc majority judged the facts posed by determining "whether the nature of the job assigned by the . . . sheriff falls within the scope of the sheriff's constitutionally protected powers." 17/ The majority concluded that "undercover detective work is a contemporary method of the exercise of the sheriff's historical duties of maintaining law and order and preserving the peace." 18/ The County pushes this conclusion to its next logical step. Since routine jailer and patrol duties implicate law enforcement, peace preservation and the custody of the jail, it necessarily follows, according to the County, that Manitowoc precludes the interference of Section 17.06 with the appointment of a deputy who will be assigned the duties. Acceptance of this position invites review of a Sheriff's job assignment powers on a position by position, or a duty by duty basis. There is no persuasive practical or policy basis to bring the judicial system this far into day to day law enforcement administration. 19/ Buech stands in the way of this result. If the County's

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14/ 68 Op. Atty. Gen. 334, 339 (1979).

15/ 26 Wis. at 414.

16/ Ibid.

17/ 168 Wis. 2d at 829.

18/ Ibid., at 830.

19/ Cf. 168 Wis.2d at 831.

position is accepted, however, Buech falls. This introduces constitutional analysis into a Sheriff's duty assignments, and Buech speaks directly to the implications of this: "If that were true, a constitutional amendment would be necessary in order to change the duties of sheriffs in the slightest degree . . ." 20/

In sum, Buech establishes that the appointment of deputies is not part of "those immemorial principal and important duties that characterized and distinguished the office" of Sheriff. The grievance questions the applicability of Section 17.06 to the appointment of Correctional Officers to the position of Floating Deputy, as posted in February. The application of Section 17.06 on these facts does not impact the Sheriff's constitutionally protected powers, and thus cannot be considered an illegal provision. The grievance is arbitrable.

The issue on the merits has been stated broadly enough to incorporate the positions of both parties. It acknowledges that only one Floating Deputy position remains, with Dahlke as the incumbent. The elimination of the second position is not at issue. The grievance questions whether Dahlke can, under Section 17.06, be placed and retained in the position. The Union first asserts that the most senior Correctional Officer who made the eligibility list has rights superior to Dahlke. In the alternative, the Union asserts that Pronschinske, as the most senior qualified applicant under the Rule of Five, has rights superior to Dahlke.

The County urges that Dahlke's rights are superior to unit members because the posting fell within a gap between two eligibility lists. Under this view, Section 17.06 c, permitted the Sheriff to hire Dahlke, as an "(o)utside applicant" because there was no qualified unit applicant available. This view does not, however, have a solid contractual or factual basis. The County's reading of Section 17.06 c, effectively renders Subsections a, b and c meaningless. Section 17.06 creates a vehicle by which qualified Correctional Officers can become Deputies. Section 17.06 c, unambiguously establishes a preference for unit employes over outside applicants, while assuring the County that this preference will not extend to an unqualified employe. In this case, there were qualified unit applicants on the January, 1991, and on the April 2 lists. There is no reason to believe the gap in lists turned otherwise qualified unit applicants into unqualified applicants. The County's view of Section 17.06 c, unpersuasively reads the preference in Section 17.06 as a license to hire outside applicants. This is loosely rooted in the language of Subsection c, and renders the seniority rights of Subsection a, meaningless. This interpretation also ignores that Subsection b, sets the validity of a written test score at three years. At a minimum, this establishes that arguably

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20/ 171 Wis. at 482.

qualified unit applicants existed during the gap between the expiration of the January 1991, and the April 2 lists. In sum, the County's reading of Subsection c, effectively guts Subsections a, b and c.

The factual basis for the County's interpretation is tenuous. Sheriff Hewitt's February 22 memo, written during the gap the County seeks to establish as a basis for ignoring unit applicants, notes that the positions will be filled "from the new eligibility list." Hewitt testified that this is how he made the April appointments. The April 2 list, however, identified Dahlke and a number of unit members as qualified applicants. Dahlke, as all other applicants, had to submit to a series of tests and interviews to demonstrate her qualifications. There is, then, no persuasive factual basis to conclude Dahlke was hired at a time when no "qualified employee applicant" was "available" within the meaning of Section 17.06 c. Unit applicants were no less qualified than she was during the gap between eligibility lists, and arguably more qualified given the provisions of Subsections b and c of Section 17.06. In sum, the labor agreement was in force throughout the gap, and the significance the County places on that gap lacks a solid contractual or factual basis.

This focuses the parties' dispute on whether Section 17.06 creates a system based on the seniority of all qualified applicants or on the seniority of the top five applicants. Each party's reading of Section 17.06 is reasonable, thus it follows that the provision cannot be considered clear and unambiguous.

The most persuasive guides to the resolution of ambiguity are past practice and bargaining history, since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation. In this case, the line between past practice and bargaining history blurs, but the evidence on the point favors the County's interpretation.

It is undisputed that the County's use of the Code was well-known and consistently followed before and after the negotiation of both of the parties' agreements. Contrary to the Union's assertion, Section 17.06 presumes the use of the Code in the hiring process. Section 17.06 b, governs the effective period of a "written test," but the test is stated at Section 3.51.030 B, of the Code. Section 17.06 b, also refers to the "time of interview." The interview is established by Section 3.51.040 A, of the Code. Beyond this, witnesses called by each party affirmed that the County has, for years, used the Code's eligibility list.

More significantly, the County's of the Rule of Five is longstanding and well known. Hewitt has served the County as Sheriff since January of 1987, and as Deputy since 1976. He noted that the County has hired using the Rule of Five since his own hire as a Deputy. Tumm, a Union Steward and member of the Union's negotiating team for the 1992-94 contract, affirmed that he knew Hewitt consistently used the Rule of Five for appointing deputies. It is, then, apparent that the County's use of the Rule of Five was consistently applied before the formation of the Civilian unit.

The County's use of the Rule of Five succeeded the negotiation of the first agreement. Niese affirmed that the County has used the Rule of Five since the formation of the Civilian unit. Tumm stated that he was aware, at the time of bargaining for the 1992-94 agreement, that Hewitt continued to use the Rule of Five. The County's use of the Rule of Five continued, then, to be well known up to the parties' negotiation of the 1992-94 labor agreement.

Significantly, the use of the Rule of Five survived these negotiations. Brazeau and Olson were appointed Deputies during the effective duration of the 1992-94 agreement. Even if these appointments preceded the execution of that agreement, they demonstrate the use of the Rule of Five survived the formation of the Civilian unit. There is no demonstrated Union challenge to the appointment under the terms of either labor agreement. It is, then, apparent that the appointments demonstrate the County's use of the Rule of Five cannot be dismissed as unilateral County action preceding the establishment of collective bargaining for the Civilian unit.

The essence of a past practice is the agreement manifested in the parties' conduct. In this case, the Rule of Five was a known feature of the hiring process. Whether this establishes an independently enforceable past practice or not, it states the context against which the parties' bargaining must be assessed.

It is undisputed that the Union, in collective bargaining for the 1992-94 labor agreement, sought to bargain an escape route from the position of Correctional Officer into sworn law enforcement positions. Hendrickson's testimony, as well as that of Tumm and Brazeau, establish that the Union considered this a high priority item. The modified trial period of Section 17.06 a, supports the Union's assertion that the bargaining addressed this priority. The bargaining history fails, however, to establish that this priority became a mutual understanding on the use of strict seniority. The bargaining context does not support the Union's contention that it secured as broad a seniority right as the strict seniority system described by Union witnesses. The bargaining lasted only three sessions. The Union initially proposed that the Sheriff promote the most senior Correctional Officer. The County made a counter proposal substantially modifying the Union's offer. The parties ultimately agreed to add "qualified employees" to the posting requirement. The parties did not discuss the impact of any proposal on the Code. However, the Union's assertion cannot account for why the County would offer a counter proposal to its strict seniority proposal, then revert to acceptance of the offer which provoked the counter proposal.

Beyond this, that the parties did not discuss the application of the Code to the revision of Section 17.06 supports the County's interpretation of that provision, not the Union's. As noted above, the County's use of the Rule of Five was known before and at the time of this round of bargaining. The lack of discussion of the Code thus lends credence to the County's view that nothing occurred in bargaining to affect its continuing use of the Rule of Five. To conclude the Union successfully bargained a change in the known hiring process requires a more direct communication of intent than the Union has demonstrated. That the parties agreed to delete the Committee on Judiciary and Law Enforcement of the County Board from the appointing process, if anything, supports the County's view. This change did not alter the hiring process, but made the contract consistent with the County's administration of that process. The statements Union witnesses attribute to Hewitt during bargaining do not alter the conclusions stated above. Those statements are not inconsistent with the Sheriff's or Niese's view that the seniority preference was subject to the Rule of Five.

In sum, the County's consistent use of the Rule of Five preceded and

succeeded the negotiation of the two agreements covering the Civilian unit. This process was known to the County and to the Union, and nothing in the bargaining for the 1992-94 labor agreement indicates the parties agreed to change the use of the Rule of Five. It follows from this that Pronschinske is the only unit employe who can assert rights to the position retained by Dahlke.

This conclusion establishes the County's violation of Section 17.06 in retaining Dahlke over Pronschinske. While her initial appointment may not violate Section 17.06, since Pronschinske was the sole unit employe in the top five, her retention did. Hewitt acknowledged that he would have selected Pronschinske over Dahlke if an eligibility list had been in effect at the time of the February posting. As noted above, however, the gap in eligibility lists has no contractual significance. Pronschinske was, at the time of Dahlke's appointment, as qualified as she was. Each appeared on the April 2 eligibility list which Hewitt acknowledged was the source of his selection. Section 3.51.060 of the Code, read in light of Section 17.06 and consistent past practice, establishes that Pronschinske has a right to the Floating Deputy position superior to Dahlke's.

The Award entered below does not require extensive discussion. Hewitt appointed both Dahlke and Pronschinske to the position of Floating Deputy. The County returned Pronschinske to the Correctional Officer position, leaving Dahlke as the Floating Deputy. The Award requires the County to reinstate Pronschinske in the position of Floating Deputy, and to make him whole for the wages and benefits he would have earned but for his return to the Civilian unit.

Before closing, it is appropriate to touch on an argument not directly addressed above. The Union has pointed to Rasmussen's 1992 "non-hire" as evidence of weakness in the County's use of the Rule of Five. The point is troublesome. However, the impact on the Rule of Five of Hewitt's initial decision to appoint her, and the basis of his reconsideration of the decision is not sufficiently clear to warrant a meaningful conclusion. It appears Hewitt may have intended to dispense with the Rule of Five in that case, but the record is silent on what, if anything, the County did to fill the vacancy Hewitt contemplated moving her into. How, if at all, the Rule of Five affected this is speculative. The uncertainty surrounding the events of September, 1992, makes it impossible to conclude this incident manifests the County's or Hewitt's rejection of the Rule of Five.

AWARD

Section 17.06 is not an illegal infringement on the Sheriff's constitutional and statutory authority to appoint deputies making this grievance not arbitrable.

The County has violated Section 17.06 by not placing the most senior qualified employee applicant in the position of Floating Deputy.

As the remedy appropriate to the County's violation of Section 17.06, the County shall make Harry Pronschinske whole by reinstating him to the position of Floating Deputy to which he was appointed in April of 1993, and by compensating him for the difference between the wages and benefits he earned as a Correctional Officer and the wages and benefits he would have earned but for his removal from the position of Floating Deputy in May of 1993.

Dated at Madison, Wisconsin, this 19th day of April, 1994.

By Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator