BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MANITOWOC COUNTY (SHERIFF'S DEPT.)

and

WISCONSIN PROFESSIONAL POLICE
ASSOCIATION/LEER DIVISION

Case 281
No. 50310
MA-8207

Appearances:

Mr. Ed VanderBloomen, Business Agent, WPPA/LEER Division, 4617 Bellevue Place, Two Rivers, Wisconsin, 54241, on behalf of the Union.

Mr. Robert J. Zeman, Corporation Counsel, Manitowoc County, 1010 South 8th Street, Manitowoc, Wisconsin, 54220-4392, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1993 collective bargaining agreement between Manitowoc County (Sheriff's Department) (hereafter County) and Manitowoc County Sheriff Department Employees, represented by Wisconsin Professional Police Association/LEER division (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as impartial arbitrator to hear and resolve a dispute between them regarding the staffing of a vacant shift. The undersigned was designated arbitrator. Hearing was held at Manitowoc, Wisconsin on March 16, 1994. A stenographic transcript of the proceedings was made and received by March 31, 1994. The parties submitted their briefs by April 25, 1994 and the record was then closed.

Issues:

The parties stipulated to the substantive issue to be decided herein, as follows:

> Did the Employer violate the terms and conditions of the agreement when it failed to make a good faith effort to obtain replacement personnel for the vacant shift created due to Road Deputy Scott Senglaub's illness?

If so, what is the appropriate remedy? 1/

Relevant Contract Language:

Article 3 - Management Rights Reserved

. . .

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of the work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of the department.

. . .

The Employer agrees that all amenities and practices in effect for a minimum period of twelve (12) months or more, but not specifically referred to in this Agreement shall continue for the duration of this Agreement.

. . .

Article 14 - Sick Leave

. . .

B. Notice of Sick Leave: In order to be eligible for sick leave pay, it is understood that on any work day when an employee is unable to perform his or her duties, he or she

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1/ The County urged that the following issue should also be determined in this case:

> Has the bargaining unit waived its right to raise the issue addressed by the grievance by failing to grieve this practice when it was implemented on prior occasions under the 1991-92 and 1993 collective bargaining agreements?

The Union objected to this and argued against it at the hearing. The undersigned hereby finds and concludes that this County defense and any evidence submitted thereon will be ruled upon herein.

> shall so advise his or her immediate supervisor or department head or department head's designee forty-five (45) minutes prior to the start of his or her work shift, if possible, so that the Employer can make a good faith effort to obtain replacement personnel.
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> . . .

Facts:

The Sheriff's Department employed 55 road deputies at the time of the instant hearing and its "minimum manning" was then set at three officers (morning shift), four officers (afternoon shift) and five officers (night shift). Prior to November 22, 1991, the Department employed approximately the same number of deputies but it had a "minimum manning" level of six officers for the night shift. The other two shifts were apparently staffed at the same levels as were in place prior to November 22, 1991.

The Union became the representative of non-supervisory law enforcement employes after the prior bargaining agent, Local 9867-B, AFSCME, AFL-CIO, ceased representing the unit and the grieving Union became its representative. The last contract between Local 986-B and the County ran from January 1, 1991 through December 31, 1992. That agreement contained the above-quoted language of Articles 3 and 14B currently contained in the effective (1993) labor agreement between the Union and the County. 2/

On November 22, 1991, Deputy Inspector Tisler issued and posted throughout the Department, a Memorandum to "Operations Division Personnel" which read in relevant part as follows:

> . . .
>
> By now most of you are aware of a severe reduction in the 1992 budget. There is no provision in the 1992 budget to account for any deficit in 1991 operating expenses. In an effort to insure that no further drain will be placed on the 1992 budget, some of the proposed changes for 1992 will become effective November 25, 1991.

2/ It is undisputed that the Union and the County did not engage in discussions regarding Article 14B before entering into the 1993 agreement.

> Overtime will be restricted to completion of duties and emergency responses. Minimum staffing will now be three for the 4:00 am - 12:00 pm shift and four for the 12:00 pm - 8:00 pm shift. Detective minimum staffing will be reduced to one for any day. On-duty detectives will be utilized to a greater degree for patrol support.
>
> On the rare occasions when any shift exceeds the minimum number of officers required under the old minimum staffing requirements and another shift is below those levels, a switch will be made to bolster the short shift. The switch will only be made if no overtime is caused by that switch.
>
> Non-emergency calls which would cause overtime will be held over to the following shift. 3/
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> . . .

This memo was issued as a result of budgetary hearings conducted by the County Board in the Fall of 1991 which resulted in the Board's directing the Sheriff's Department to cut $300,000 from its proposed 1992 budget. By the actions taken pursuant to the above-quoted memo, as well as reducing personnel (by attrition or layoff), the Department met the County Board's budgetary directive for 1992.

Deputy Inspector Ken Peterson, employed as Inspector since 1988 and otherwise employed by the Department since 1975, testified that the Department ceased replacing sick officers whenever it would create overtime liability. Peterson stated, however, that the Department had retained the option and did call-in reserve deputies or regular employes on vacation or holiday to replace sick employes when it was necessary during the relevant period. Peterson stated that Local 986-B, AFSCME, never grieved the implementation of the November 22, 1991 memo even though since November 22, 1991, the Department has made no effort to replace sick employes and it has not in fact replaced sick employes. Road Deputy Sieracki, President of the Local Union in 1993, testified that since he became a deputy in November 1991, it "happens all the time" that employes call in sick and they are not replaced. Sieracki also stated that since November, 1991, Sieracki has never been called in to replace an officer on sick leave.

Road Deputy Rick Sieracki filed the instant grievance on November 8, 1993. The grievance alleged and Sieracki testified that the County had violated Article 14B by failing and refusing to make a "good faith effort" to replace Road Deputy Scott Senglaub after Senglaub called in sick prior to the start of his 8:00 p.m. to 4:00 a.m. shift on November 4, 1993. Sieracki stated

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3/ No reference to minimum staffing levels for the night shift was made in this memo.

that he had been present when the Shift Commander stated at the 8:00 p.m. briefing that Senglaub had called in sick, that he would not be replaced and that the Union could grieve this failure to replace Senglaub if it wanted to do so. 4/ The County then denied the grievance on the ground that pursuant to Article 14B, it had retained the discretion to replace an officer on sick leave or not to do so. The grievance was then processed to arbitration.

Positions of the Parties:

Union:

The Union asserted that whenever an employe calls in sick the County should "on every occasion, call in replacement personnel" even if overtime pay liability would be incurred. The Union asserted that this position is supported by the clear language of Article 14B of the parties' 1993 labor agreement in which, the Union urged, the County waived its right to set and enforce minimum staff levels in an employe illness situation.

Because the language of Article 14B is clear and unambiguous, in the Union's view, the County's evidence of past practice should be disregarded, despite the language of Article 3, Management Rights Reserved.

On this point, the Union observed that Article 14B specifically negates the County's management rights regarding overtime and staffing whenever officers call in sick. The Union argued in addition, that the Article 14B reference to the employes' calling in 45 minutes prior to their shift does not affect the County's duty to make a good faith effort to replace sick officers at any time they call in sick.

In regard to the County's argument that past practice beginning on November 22, 1991, nullifies any obligation it may have had to replace employes on sick leave, the Union asserted that it did not represent bargaining unit employes prior to 1993. Secondly, the Union noted that

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4/ Although Deputy Senglaub did not testify, Deputy Sieracki testified that he had the above-described conversation with the Shift Commander on or about November 4th. Senglaub then filed the grievance on November 8th describing the County's action in summary fashion. The County did not call the Shift Commander to dispute Sieracki's statements. Although Sieracki testified on cross examination that he was not completely certain of the date and that he did not know the time of day that Senglaub actually called in sick, I note that the County never raised any objections/defenses on this point prior to the instant hearing. In these circumstances, there was sufficient evidence to reach the merits of this case. The County's Motion to Dismiss, made at the hearing, is therefore denied.

Article 3 of the 1993 contract provides that extra-contractual past practices of one year's duration survive only for the term of the agreement unless they are codified in the successor agreement. Third, the Union observed that the November 22, 1991 memo regarding overtime elimination was a unilateral pronouncement done without benefit of negotiations with the Union's predecessor or unit employes. In these circumstances, the Union argued, the November 22, 1991 memo and past practice evidence should be given little or no weight. The Union also urged that in the absence of any specific contradictory evidence, the testimony of Deputy Sieracki must stand and forms a proper basis for a decision on the merits here.

Regarding the remedy, the Union sought an Award compensating the Union for the shift left vacant by Senglaub on November 4, 1993 and an Order requiring the County to call in employes to fill shifts left vacant by officers who call in sick.

County:

The County argued that the evidence was insufficient to show that Article 14B could properly be applied to the alleged illness of Deputy Senglaub on November 4, 1993. In this regard, the County urged that the Union failed to prove that Senglaub actually called in sick more than 45 minutes prior to the commencement of his shift on November 4th, which is the condition precedent to the County's making a good faith effort to replace sick employes if it chooses to do so. In addition, because Article 14B uses the word "can" and not "shall" or "will," Article 14B by its terms makes replacement of sick employes entirely optional.

Furthermore, the County contended that the evidence it offered of past practice supports its case. That evidence, the County urged, showed that the November 22, 1991 memo and its implementation had never been grieved, and that the County thereafter consistently failed and refused to replace sick employes.

However, even if the Arbitrator were to reach the merits and decide to issue an Award for the Union, the remedy sought by the Union is inappropriate, the County urged, where as here, Inspector Peterson stated that overtime might not have been created in replacing Senglaub had the County decided to cancel another employe's vacation or holiday. The County therefore sought the denial and dismissal of the grievance in its entirety.

Discussion:

This case essentially involves the Union's insistence that the County replace deputies who call in sick on every occasion. However, the language of Article 14(B) does not support such a conclusion. In my view, the disputed language of Article 14(B) regarding replacing sick employes is non-mandatory.

Setting aside for the moment the County's argument that the Union failed to prove that Deputy Senglaub actually called in sick 45 minutes prior to his shift on November 4th, 5/ I note that the operative verb in the disputed clause of Article 14(B) is "can." I agree with the County that the use of this verb, rather than the verbs "shall" or "will," demonstrates that it is up to the County to decide, in its discretion, whether or not it will obtain a replacement for employes who call in sick.

5/ Under the clear language of Article 14(B), the requirement to call in 45 minutes prior to the start of the employe's shift is primarily designed to determine the employe's eligibility to receive sick leave pay.

In addition, I am convinced that the evidence of past practice offered by the County in this case not only supports the County's arguments in this case, it also bolsters the clear language of the contract. In this regard, I note that since at least November 22, 1991, the County has failed and refused to replace sick deputies whenever it would create overtime; that the County has set and changed its minimum staff levels without any apparent complaints from employes or their labor organization; and that the employes and the employes' labor organization were aware of the County's overtime policy. 6/

The fact that Article 3 provides for the extinguishment of past practices of more than 12 months' duration unless they are codified in a successor labor agreement, does not require a ruling in favor of the Union. Notably, the County's past practices existed across two labor agreements with two separate labor organizations. In addition, the Union herein did not bargain or attempt to change any part of Article 14(B) during negotiations for the 1993 labor contract. This evidence tends to support the County's assertions in this case that the Union waived its right to object to the County's failure to replace sick officers.

On the latter point, we must assume that the Union possessed full knowledge of all problems and that it negotiated a new labor agreement with the County following its certification as this unit's representative, with an awareness of these problems. Even assuming that the November 22, 1991 memo was a unilateral pronouncement of the County, this would not affect the instant grievance between the parties. Clearly, neither this Union nor its AFSCME predecessor had filed a grievance or a prohibited practice regarding the County's actions between 1991 and the filing of the instant grievance in 1993.

6/ Former Union President Sieracki admitted that he had never replaced a sick officer since becoming a deputy in November, 1991 and that the County has regularly refused to replace sick officers since November, 1991 to date. This evidence, as well as evidence of the posting of the November 22, 1991 memo, shows that the Union and the unit employes were aware of the contents of the November 22, 1991 memo.

Therefore, in these circumstances and based on the relevant evidence and argument, I issue the following

AWARD

The Employer did not violate the terms and conditions of the agreement when it failed to make a good faith effort to obtain replacement personnel for the vacant shift created due to Road Deputy Senglaub's illness.

The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 15th day of June, 1994.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator