BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
FEDERATION OF NURSES AND HEALTH PROFESSIONALS, LOCAL 5001, AFT, AFL-CIO	Case 393 No. 51402 MA-8593
and	
COUNTY OF MILWAUKEE	

Appearances:

Mr. Jeffrey P. Sweetland, Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO, referred to below as the Federation.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Office of Milwaukee County Corporation Counsel, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin 53233, appearing on behalf of the County of Milwaukee, referred to below as the County.

ARBITRATION AWARD

The Federation 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 Federation requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in Grievance Number 30627, filed by Liz Glisper as a group grievance. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on August 31, 1994, in Milwaukee, Wisconsin. The hearing was not transcribed, and the parties filed briefs and a reply brief or a waiver of a reply brief by November 2, 1994.

ISSUES

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

Is grievance 30627 arbitrable?

RELEVANT CONTRACT PROVISIONS

This Memorandum of Agreement made and entered into by and between the County of Milwaukee, a municipal body corporate, as municipal employer . . . and the Federation of Nurses and Health Professionals . . .

PART 1

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1.05 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, resolutions and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions, the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employes; the right to transfer and assign employes, subject to existing practices and the terms of this Agreement; the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary actions and the right to release employes from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means, and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employe or for the purpose of discrediting or weakening the Federation . . .

1.06 WORK OF THE BARGAINING UNIT

. . .

(3) The County agrees that employes shall normally be assigned job duties consistent with their

classification. The general term "all other duties as may be assigned" which appears on the civil service examination announcement is intended to mean duties consistent with the classification and subject to the provisions of sec. 2.09 of this Agreement.

PART TWO

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2.37 EMPLOYE'S SAFETY

(1) The Federation and the County mutually agree that employes' and public safety is a primary concern and that every effort shall be made to promote safe equipment, safe work habits and safe working conditions. To that end, the Federation shall have one advisory representative from Nursing and one advisory representative from the laboratories on the Employe Safety Committee of the Medical Complex, and one advisory representative on the Employe Safety Committee of the Mental Health Complex. When minutes of the Committee meetings are kept, a copy thereof shall be forwarded to the Federation of Nurses and Health Professionals.

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PART 3

3.01 ROLE OF THE REGISTERED NURSE

(1) The County recognizes that the registered nurse is responsible for the direct and/or indirect total nursing care of patients and that the proper utilization of nursing skills requires that various supportive personnel and services are provided to assist the nurse in giving nursing care.

(2) The nurses must and shall have authority commensurate with their responsibility for directing the work of the various auxiliary and nursing personnel who are assigned to nursing units to perform various tasks which are a part of total nursing care.

(3) The County will make every reasonable effort to implement the principle of relieving the registered nurse of such tasks as cleaning units following patients' discharge, delivering drugs from pharmacy to the wards and correctional institutions, transporting stable patients and their records, transporting specimens and performing clerical duties.

(4) The County agrees that relief from nonprofessional tasks is desirable in allowing nurses to perform the duties for which they were educated and will make every effort to implement the transfer of such nonprofessional duties to other services or auxiliary personnel.

(5) The parties further agree that it is the County's responsibility to attempt to provide adequate numbers of registered nurses and auxiliary nursing personnel on all shifts as necessary, consistent with sound practices, and to fill approved vacancies as soon as possible in order to provide safe and adequate nursing care and to make maximum utilization of the training and competencies of all nursing personnel.

PART 4

4.02 GRIEVANCE PROCEDURE

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(1) APPLICATION

Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.

A grievance shall mean a controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute by an employe or group of employes concerning the application of wage schedules or provisions relating to hours of work and working conditions contained in or referenced to in this Agreement. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinances and rules which are matters processed under other existing procedures. Grievances filed under this grievance procedure shall not be resolved in a manner which conflicts with this Memorandum of Agreement, Civil Service Rules, Milwaukee County Government Ordinances and Resolutions, or binding past practices established by the parties unless such resolution is agreed upon by the Director of Labor Relations and the President of the Federation.

. . .

(4) ARBITRATOR'S AUTHORITY

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

BACKGROUND

Grievance 30627 was filed on February 28, 1994, as a "Group" grievance. The grievance form states the following under the heading "What happened to cause your grievance?":

> Milwaukee County violated the MOA when it announced a deputy would no longer be assigned to accompany nurses into the prisoner pods to give medications.

The form lists the following as the "Rule, Regulation . . . Contract Provision, etc." violated:

> 1.05 Management Rights, 1.06(3) Work of Bargaining Unit, 3.01 Role of the Registered Nurse, 2.37 Employe's Safety, past practice, and any other applicable section of the MOA, Civil Service Ordinances, or law.

The grievance seeks the following "specific relief": "Deputy continue to be assigned to assist the nurse during medication passes as in the past."

In a memo to the Federation dated March 18, 1994, Peter Misko, the Bureau Director-Administration of the Sheriff's Department, stated "the deputy assigned to escort the nursing staff during medical rounds will continue to do so until I have an answer to Grievance No. 30627." Misko had served as a hearing officer at a Step 2 hearing on the grievance on March 16. On August 4, Misko issued a decision which stated the following:

. . .

BACKGROUND

When the Milwaukee County Jail was located in the Safety Building a Deputy Sheriff was assigned to accompany the nurse on medication rounds. A new jail was built with the direct supervision philosophy. A position to accompany the nurse on medication rounds was not proposed or created in the staffing plan.

POSITIONS OF THE PARTIES

The Union Argument:

The Union argues that because of incidents in the past there is always a deputy sheriff with the nurse. The Union points to various sections of the Memorandum of Agreement (MOA).
2.37 Employe's Safety This is a safety issue. A deputy sheriff should make rounds with the nurse to insure safety.
1.05 Management Rights The Union agrees that the County has the rights but they have a responsibility to make them reasonable.
1.06(3) Work of the Bargaining Unit It's not in the nurses role to insure their own safety. A deputy has a gun. A deputy is trained.
3.01 Role of the Registered Nurse Insuring the safety of the nurses is not within the role of a nurse.
Milwaukee County Administrative Manual (MCAM), Chapter 8 speaks to safety and health. Nurses have not received any training in safety.
OSHA general duty clause.
DILHR, Chapter 32 reinforces chapter 8 of MCAM. DILHR has adopted OSHA regulations.

The County Argument:

The County by Director Willie McFarland stated that in the old facility, which was an indirect linear type jail, there were (sic) no fixed post on the tiers. A deputy was assigned to assist the nurse in getting through the various doors that were generally locked. Keys were only assigned to sworn personnel.
In the new facility, which is a direct supervision jail, there are (sic) fixed post on the pods. An unarmed deputy is assigned within the pod and has no barriers separating them from the inmates. Throughout the day other civilian staff interact with the inmates on the pods with out an escort.

Since Director McFarland has been assigned to the Criminal Justice Facility there has been no serious injuries to any of the staff members assigned.

DISCUSSION

The Union contents (sic) that this is an issue of safety. No documentation was submitted by the union to establish this contention. The Sheriff's Department is assigning nurses to job duties (medication rounds) consistent with their classification. The Union has not demonstrated any lack of responsibility on managements (sic) part in exercising their rights in an unreasonable manner.

RULING

The Union has not drawn any essence, in this matter, from the collective bargaining agreement. The Department on the other hand, has in essence, provided the relief sought by the grievant(s) in this matter.

Accordingly, the grievance of Liz Glisper (Group), is denied.

. . .

THE PARTIES' POSITIONS

The County's Initial Brief

Noting that the grievance was "initiated in early 1994 after the Sheriff announced that he was considering returning to a policy of assigning deputy sheriffs to certain positions and functions within the County jail," and that no reassignments had taken place when the grievance was filed, the County concludes that "no grievable event had occurred as that term has meaning under the collective bargaining agreement." Beyond this, the County notes that the "entirety of the grievance claim is based upon the staffing and assignment of members of other bargaining units." The assignments at issue affect, the County contends, employes represented either by "the Milwaukee County Deputy Sheriff's Association or the Milwaukee County Deputy Sheriff's Supervisor's Association."

The County then contends that even if the grievance raises an issue assertable by Federation-represented employes, "the relief requested is beyond the arbitrator's authority to grant." This is, the County asserts, grounded in Sections 4.03(4) and 4.02(1) of the labor agreement because the grievance seeks either the assignment of non-unit personnel or the creation of a new benefit.

Beyond these contractual restrictions, the County contends that the relief sought in the grievance "is further restricted by the constitutional authority of the Sheriff." A review of relevant case law establishes, according to the County, that the "Sheriff's obligation as 'keeper of the jail' was such an immemorial duty which may not be diminished and whose powers may not be restricted by collective bargaining agreements."

The County concludes by requesting "a determination that the arbitrator find that he has no authority to deal with this matter, declare the grievance moot and dismiss this from further consideration."

The Federation's Reply Brief

After an extensive review of the factual background to the grievance, the Federation notes the County has, over its objection, posed the following threshold issues:

1. Whether a grievable event had occurred prior to the filing of the grievance which is the subject of this arbitration;

2. Whether a dispute involving staffing in another bargaining unit is arbitrable under the Agreement;

3. Whether Local 5001 is attempting to create new language and a new benefit not now in the Agreement such that the relief requested is beyond the arbitrator's authority;

4. Whether an award granting the relief requested would be violative of the Sheriff's constitutional authority as keeper of the County jail.

Starting with the fourth issue, the Federation asserts that a review of the governing case law establishes that "(a)n award requiring that a Med Deputy continue to escort nurses doing med passes in the pods would not impermissibly intrude on the Sheriff's Constitutionally protected powers." More specifically, the Federation argues that the contractual obligation here arises under Section 2.37. That provision obligates the County to "provide the nurses . . . with safe working conditions." That obligation, the Union contends, "is not one of those 'immemorial principal and important duties that characterized and distinguished the office' of sheriff." Acknowledging that the Federation's position is that "providing safe employment to nurses assigned to med passes at CJF means assigning deputies to accompany them," the Federation asserts that this position is not "a material intrusion upon the Sheriff's constitutional authority." That the legislature has imposed numerous burdens of this type on Sheriffs underscores, according to the Federation, the validity of its position. That it seeks to add, not take from, the Sheriff's responsibilities distinguishes its position from other unions who have attempted to assert collective bargaining rights against sheriffs.

Beyond this, the Federation argues that the County, not specifically the Sheriff, "has bound itself by the Agreement to make every effort to promote safe working conditions for all bargaining unit members." It follows from this, according to the Federation, that the "County cannot hide behind the Sheriff's constitutional prerogatives to relieve itself of this contractual burden." Evidence which could be brought forth at hearing would show, the Federation contends, that the staffing decision made by the Sheriff reflects budgetary, not jail-management based policy, and that the County must be made to answer under its labor agreement with the Federation. The Federation summarizes thus:

> The merits of the grievance may be determined and appropriate relief fashioned as between Local 5001 and the County without any impact on that authority. Consequently, the Arbitrator has jurisdiction under MERA and the terms of the Agreement to arbitrate the grievance.

The Federation stresses, however, that even if the relief it requests involves non-unit personnel, the grievance remains arbitrable. If additional deputies must be assigned to assure the safe work place required under Section 2.37, then the assignment of such personnel, according to the Federation, falls within an arbitrator's remedial discretion. Nor would any remedy flowing from Section 2.37 create a new benefit. The Federation argues that any such remedy fits well within established legal and arbitral authority.

The Federation then contends that the grievance is both timely and proper. The Sheriff's announcement "that the med deputies would definitely be eliminated and that the process of eliminating them would begin as early as March 7, 1994" constituted an appropriate basis for a grievance, according to the Federation. That the actual elimination of the assignment of med deputies did not occur until August cannot, the Federation asserts, obscure that "when the grievance was filed, there was already an existing controversy" satisfying the requirements of Section 4.02(1). This conclusion, according to the Association, is "consistent with the general contract principle of anticipatory repudiation."

The Federation concludes that "the Arbitrator has jurisdiction to arbitrate the grievance."

The County's Reply Brief

The County asserts that the Union's reading of the case law governing the Sheriff's authority is mistaken, and that the authority cited by the Union "specifically delineates the very cases which prove up the county's point." The purported safety concerns cannot, the County contends, mask that "the union seeks to impose its will through the grievance arbitration mechanism to dictate to the sheriff who, how, when, where, and why to staff the jail." These purported concerns ignore that "(n)owhere does there exist data which speaks to provide a foundation for the assertion that the jail operation is unsafe or safe only if the union's staffing and operational demands are satisfied."

The County argues that established precedent makes the "immemorial principal and important duties of the sheriff at common law . . . constitutionally protected regardless of their uniqueness." Noting that the sheriff "is not a party to the contract" and that there is "no dispute that running the jail" falls into the constitutionally protected powers of the Sheriff, the County concludes that "to the extent the contract's terms impinge upon the sheriff's functions they are illegal."

Reasserting that "no contract terms exist to require the sought after relief," and that even if they did they would be "void," the County contends that the grievance cannot be considered arbitrable. That "the union did not controvert the county's assertions that the matter was not grievable in the first instance since no grievable event occurred" only underscores this conclusion, according to the County. The County concludes the only appropriate answer to the grievance is "an order dismissing the grievance as not arbitrable."

DISCUSSION

The parties have not stipulated the issues for decision. The Federation has addressed the threshold issue of arbitrability, but has not agreed that the objections raised by the County are posed by Grievance 30627.

The issue for decision I have adopted treats all of the County's objections as a single issue of arbitrability. This reflects that the objections are so intertwined that they cannot be meaningfully separated. The County's objection that "no grievable event" had occurred at the time of the grievance's filing illustrates this point. The grievance was filed after the Sheriff's February announcement. Whatever the announcement lacked as a "grievable event" was arguably addressed in August when the change was implemented. The objection is, however, more than technical because at the time the grievance was filed, there were no facts to give substance to its allegations. Grievance 30627 was, from its filing, a policy dispute. That policy dispute is more than technical because it poses the County's objection that the grievance questions a policy within the Sheriff's constitutional discretion. Thus, the County's objection that the grievance is not rooted in a grievable event becomes inextricably intertwined with its objection concerning the scope of the Sheriff's discretion even though the policy announced in February became a staffing reality in August.

The fundamental issue is whether the policy challenged by Grievance 30627 is arbitrable. The standards governing the enforcement of an agreement to arbitrate date back to the Steelworkers' Trilogy. 1/ The Wisconsin Supreme Court incorporated, from the Trilogy, the teaching of the limited function served by a reviewing authority in addressing arbitrability issues. 2/ The Court, in Jt. School Dist. No. 10 v. Jefferson Ed. Asso., stated this "limited function" thus:

> The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 3/

1/ United Steelworkers v. American Mfg. Co., 363 US 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 US 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 US 593 (1960).

2/ Dehnart v. Waukesha Brewing Co., Inc., 17 Wis.2d 44 (1962).

3/ 78 Wis.2d 94, 111 (1977). This decision is referred to above as Jefferson.

The Jefferson Court held that unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" the grievance must be considered arbitrable. 4/

The second element of the Jefferson analysis can be treated summarily. Neither party has cited any "provision of the contract" which "specifically excludes" arbitration of the policy cited in Grievance 30627. The parties' dispute thus focuses on the first element of the Jefferson analysis.

The first and second sentences of Section 4.02(1) state the interpretive dilemma posed by the first element of the Jefferson analysis. The second sentence of that provision defines "grievance" broadly enough to pose the policy concerns highlighted by the grievance. The first sentence, however, restricts arbitration to "the terms of this Agreement," thus placing legal issues outside of the arbitrator's jurisdiction. The dilemma posed by Grievance 30627 is whether it states an issue within the "terms of this Agreement." If it does not, there is "no construction of the arbitration clause that would cover the grievance on its face."

Whether the grievance "on its face" raises issues falling within the contract raises a troublesome issue, but the record establishes that Grievance 30627 directly challenges a policy decision involving the Sheriff's operation of the jail. That issue does not fall within the contract.

The grievance, "on its face," makes three assertions relevant here. The first is that "Milwaukee County" violated the labor agreement by announcing that "a deputy would no longer be assigned" to accompany Federation-represented nurses on their med passes in the "prisoner pods." The second is the allegation of a series of contractual and legal foundations for the alleged violation. The third is that the violation should be remedied by continuing the assignment of a deputy on the med passes. Although the reference to the "County" in the first assertion gives the appearance that County agents undertook the disputed action, the balance of that assertion, and the two which follow it, belie that appearance. It is apparent that the first allegation addresses the action of the Sheriff in assigning deputies within the jail. Although the alleged contractual and legal bases for the assertion of a violation point to provisions governing general safety concerns, the remedial request clarifies that Grievance 30627 challenges a policy decision made by the Sheriff and seeks to have that policy decision set aside.

Any doubt on this point is resolved in the supporting evidence submitted by the parties. The parties submitted the arbitrability issue as a legal point, resting on exhibits submitted at hearing, as supplemented by their briefs. Neither party anticipated disputes on the underlying facts, and argued the legal point on the assumption the exhibits and briefs could be treated as establishing any relevant factual background. That background underscores that Grievance 30627 poses an issue of fundamental jail policy.

The Union's brief acknowledges that "the Sheriff . . . announced to Local 5001 that the med deputies would definitely be eliminated . . ." The Federation responded by making "its views known to the Sheriff and other County representatives that the continuation of the med deputies was necessary to the safety of the nurses on med passes." This basic policy dispute is underscored in Misko's summary of the second step hearing. The "Background" section notes the med deputy was based on the staffing of a facility supplanted by "(a) new

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4/ Ibid., at 113.

jail." That jail "was built with the direct supervision philosophy," and did not include any provision for a med deputy in the proposal or creation of "the staffing plan." The elimination of the med deputy thus reflects a fundamental issue of the "direct supervision philosophy" built into the creation of the new facility. Misko's summary of the "Positions of the Parties" further underscores the point. He summarized the Federation's position to include an armed deputy, while the County's position included an "unarmed deputy." The County's position also turned on the difference in the architecture of the two facilities. The "old facility" did not include a "fixed post," but "linear" cells, secured with, and separated by, a series of locked doors operable only by "sworn personnel" who served as escorts. The "new facility" has a fixed post overseeing the "pod," and does not include locked doors between the supervising deputy, the inmates, and "other civilian staff."

Whether this background represents proven fact is less significant here than that it establishes that Grievance 30627 was processed as a fundamental policy dispute between the Federation and the Sheriff. The difficulties thus raised are that the Sheriff is not a party to the agreement enforced through Section 4.02, and that the Sheriff has constitutional authority superseding the labor agreement.

The labor agreement states the parties to it in a prefatory paragraph set forth above. The listed parties are "the County of Milwaukee . . . as a municipal employer" and the Federation. The Sheriff is not included. Whatever may be said of the current state of Wisconsin law on the authority of a Sheriff, it is apparent that a sheriff is not the agent of County authority that another department head would be. Rather, the "office of sheriff, in a certain sense, is a constitutional office." 5/ The reference to "Milwaukee County" in the grievance, standing alone, is not sufficient to obscure that acts of the Sheriff cannot be presumed to be acts of the County or vice versa. 6/

More significantly here, the Wisconsin Supreme Court has staked out a type of duty traceable to the "immemorial principal and important duties that characterized and distinguished the office" of Sheriff. 7/ Duties of this type give "character and distinction to the office," 8/ are constitutionally protected, and beyond the reach of a labor agreement. 9/

In Professional Police Association v. Dane County, 10/ the Court addressed the selection of a "court officer," and noted that:

> "Attendance on the Court" is in the same category of powers inherent in the sheriff as is running the jail.

5/ State ex rel. Kennedy v. Brunst, 26 Wis. 412, 414 (1870).

6/ See Professional Police Association v. Dane County, 149 Wis.2d 699 (CtApp, 1989).

7/ State ex rel. Milwaukee County v. Buech, 171 Wis. 474, 482 (1920).

8/ Ibid.

9/ See Manitowoc County v. Local 968B, 168 Wis.2d 819 (1992).

10/ 106 Wis.2d 303 (1982).

> Just as this court held in . . . Brunst . . . that the legislature cannot deprive the sheriff of control of the jail, neither can the legislature through a statute authorizing collective bargaining by the county board and a union deprive the sheriff of his (constitutional) authority . . . 11/

The identification of "running the jail" with a "category of powers inherent in the sheriff" is significant to this grievance. The policy dispute posed by Grievance 30627 is fundamentally related to "running the jail." As such, it falls outside of the scope of the labor agreement enforced through Section 4.02. It can be noted that Manitowoc included a forceful dissent on the scope of the authority exercised in that case. 12/ On "running the jail," however, no dissent is apparent:

11/ Ibid., at 313.

12/ See 168 Wis.2d at 831-833.

> While the duties performed by a court officer may be part of the constitutional duties of the Office of Sheriff (as is the operation of a jail), the assignment of the deputy to act as court officer may be regulated by the legislature (as is the assignment of a deputy to work in the jail). 13/

By focusing on a fundamental policy dispute central to the "running of the jail," Grievance 30627 falls in an area not directly reachable through the collective bargaining process.

In sum, the collective bargaining agreement is a document reflecting legislative action through the authorization, in the Municipal Employment Relations Act, of collective bargaining agreements between municipal employers and the majority representative of their employes. The agreement enforceable here binds the County and the Federation, but does not include the Sheriff as a party. Beyond this, Grievance 30627 reflects a fundamental policy dispute involving the Sheriff's implementation of "direct supervision philosophy." That policy is tied to the Sheriff's "running the jail," and thus falls outside of the labor agreement. No construction of Grievance 30627 covers the grievance on its face. Grievance 30627 is, therefore, not arbitrable.

This conclusion should not be interpreted to read the Federation's forcefully argued safety concerns out of existence. Those concerns have a basis in Section 2.37 of the agreement. Section 4.02 contains language sufficiently broad to yield an interpretation making a grievance questioning the safety of the jail work environment arbitrable.

Grievance 30627 is not, however, such a grievance. As submitted to the County, Grievance 30627 directly challenges a policy decision of the Sheriff, and seeks to have that policy decision undone.

To come within the scope of Section 4.02, a grievance based on Section 2.37 would have to focus on specific action of the County or its agents in failing to "promote . . . safe working conditions." The Federation's brief attempts to do this, but the determination of the arbitrability of Grievance 30627 must focus on the grievance itself. The distinction between the grievance as filed and as argued is apparent. The Federation's brief includes a memo indicating the jail may be overcrowded, thus posing a safety issue. This is, however, less an amendment to Grievance 30627 than the submission of a different grievance. Grievance 30627, as noted in Misko's decision, provoked a basic policy debate on the "direct supervision philosophy." This bears little resemblance to a dispute on whether the County has promoted safe working conditions in staffing an overcrowded jail, whatever the underlying philosophy of that staffing may be.

13/ 106 Wis.2d at 320, dissenting opinion of Justice Abrahamson.

This raises more than a technical point. The preliminary steps of the grievance procedure afford the opportunity to resolve disputes informally. In this case, those steps were occupied less with overcrowding issues or staffing issues within the County's authority than with a policy debate on the Sheriff's philosophy in staffing a new institution. Safety issues may well be grievable, but in light of case law concerning the Sheriff's constitutional authority, such issues must be the focus of the grievance, not an arguable implication.

The tension between a non-arbitrable policy grievance and an arbitrable safety grievance is manifested by the Federation's assertion that maintaining the med deputy is the only means to assure nurse safety. This presumes conflict between the safety concerns of Federation-represented employes and the Sheriff's staffing philosophy. Such a conflict, under current Wisconsin law, cannot be presumed without infringing on the Sheriff's Constitutional authority. A grievance, unlike Grievance 30627, which isolates specific unsafe working conditions within the County's control both assures that the preliminary steps of the grievance procedure address resolvable issues and that alternative measures not infringing on the Sheriff's authority are explored. If, as the Federation asserts, there is a fundamental conflict between the Sheriff's staffing philosophy and Federation concerns on safety, that conflict can be meaningfully litigated only after it is demonstrated that the conditions cannot be ameliorated without action by the Sheriff. The litigation, at that point, is not whether the Sheriff can constitutionally operate a jail, but whether he may do so in a manner compromising the safety interests of County employes.

In sum, Grievance 30627 is not arbitrable. It seeks to reverse a policy decision of the Sheriff. The Sheriff is not party to the labor agreement and the policy decision is within the scope of his Constitutional authority. That Grievance 30627 is not arbitrable does not mean the Federation cannot grieve working conditions in the jail under Section 2.37. Such a grievance must be directed to the County, and focus on action within the County's control which does not unnecessarily infringe upon the Sheriff's constitutional authority.

AWARD

Grievance 30627 is not arbitrable.

Dated at Madison, Wisconsin, this 5th day of December, 1994.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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