

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 62
 FOREST COUNTY DEPUTY SHERIFF'S : No. 47777
 ASSOCIATION : MA-7380
 :
 and :
 :
 FOREST COUNTY (SHERIFF'S DEPARTMENT) :
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Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of
 Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, WI 53222,
 appearing on behalf of the Association.
 Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street,
 P. O. Box 8050, Wausau, WI 54402-8050, by Mr. Dean R. Dietrich,

appear

ARBITRATION AWARD

Forest County Deputy Sheriff's Association, hereafter the Association,
 and Forest County (Sheriff's Department), hereafter the Employer or County, are
 parties to a collective bargaining agreement which provides for the final and
 binding arbitration of grievances arising thereunder. The Association, with
 the concurrence of the County, requested the Wisconsin Employment Relations
 Commission to appoint a staff member as a single, impartial arbitrator, to
 resolve the instant grievance. On August 20, 1992, the Commission appointed
 Coleen A. Burns, a member of its staff, as impartial arbitrator to resolve the
 instant dispute. Hearing was held on September 29, 1992, in Crandon,
 Wisconsin. The hearing was not transcribed and the record was closed on
 January 21, 1992, upon receipt of written argument.

ISSUE

The Association frames the issue as follows:

Did the County violate the collective bargaining agreement by
 having two different overtime rates in effect for the
 Grievants during 1991 and 1992?

The County frames the issue as follows:

Whether the County violated the labor agreement when it used
 the Deputy Sheriff wage rate to compute overtime
 payments for the Grievants when working certain
 overtime hours for the Department but not serving as
 Sergeant for the shift work?

The undersigned frames the issue as follows:

Did the County violate the collective bargaining
 agreement when it paid overtime to Grievants in the
 classification of Sergeant, Investigator, and Lead
 Investigator based upon the top Deputy rate, rather
 than the overtime rate of the Grievant's
 classification?

The parties stipulated that the Arbitrator has authority to fashion a remedy.

RELEVANT CONTRACT LANGUAGE

ARTICLE II

RIGHTS OF THE COUNTY

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Section 2.02: The County possesses the sole right to operate the County government and all management rights repose in it, but such rights must be exercised consistently with the rules and regulations of the County Civil Service Commission and in conjunction with the State laws regulating the operating of the Sheriff's Department under the duly elected Sheriff. These rights which are normally exercised include, but are not limited to, the following:

- A.To direct all operations of the Forest County Sheriff's Department.
- B.To hire, promote, transfer, assign and retain officers in positions with the County and to suspend, demote, discharge an (sic) take other disciplinary action, provided with just cause, against Deputies pursuant to the authority and under the rules and regulations of the Forest County Civil Service.
- C.To relieve Deputies from their duties because of lack of work or for other legitimate reasons.
- D.To maintain efficiency of County government operations entrusted to it and to introduce new or improved methods or facilities and to change existing methods or facilities.
- E.To contract out for goods or services.
- F.To determine the methods, means and number of personnel needed to carry out the operations that are conducted.
- G.To take whatever action is necessary to carry out the functions of the County in situations of emergency.
- H.To take whatever action is necessary to comply with State or Federal Law.
- I.To determine when overtime work is necessary and the composition of the force to complete such work.

The Association and the Deputies agree that they will not attempt to abridge these management rights and the

County agrees it will not use these management rights to interfere with rights established under this Agreement. Nothing in this Agreement shall be construed as imposing an obligation upon the County to consult or negotiate with the Association concerning the above areas of discretion and policy, subject, however, to the mutual obligation of the parties to bargain impact. Nothing herein contained shall divest the Association from any of its rights under Chapter 111 of the Wisconsin Statutes.

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ARTICLE IV

GRIEVANCES

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Section 4.08: Any grievance which cannot be settled through the above procedures may be submitted to an Arbitration Board. If the written decision of the Personnel Committee is not agreed to by the Association, the Association must notify the Personnel Committee in writing within ten (10) days of the date of the written decision that they intend to proceed to take the grievance to arbitration. The procedures for arbitration are as follows:

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D. Authority of Arbitrator: The decision of the Arbitration Board shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the terms of this contract.

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ARTICLE XX

SALARIES

Section 20.02: Effective January 1, 1991 the monthly salary for the classifications of work covered by this Agreement shall be listed in Schedule A. This schedule is in effect until December 31, 1992.

SCHEDULE A: Effective January 1, 1991 (3%)

<u>POSITION</u>	<u>START</u>	<u>1 YEAR</u>	<u>2 YEARS</u>
Full-time Deputies	\$1,569.06	\$1,659.14	\$1,751.31
Sergeants (2)			1,773.22
Investigator (1)			1,783.60
Lead Investigator (1)			1,795.73

SCHEDULE A:: Effective July 1, 1993 (3%)

Full-time Deputies	\$1,616.13	\$1,708.91	\$1,803.85
Sergeant			1,826.42
Investigator			1,837.11
Lead Investigator			1,849.60

SCHEDULE A; Effective December 31, 1991 - (\$10/mo.)

Full-time Deputies	\$1,626.13	\$1,718.91	\$1,813.85
Sergeants			1,836.42
Investigator			1,847.11
Lead Investigator			1,859.60

SCHEDULE A: Effective January 1, 1992 (3%)

Full-time Deputies	\$1,674.91	\$1,770.48	\$1,868.27
Sergeants			1,891.51
Investigator			1,902.52
Lead Investigator			1,915.39

SCHEDULE A: Effective July 1, 1992 (2-1/2%)

Full-time Deputies	\$1,716.78	\$1,814.74	\$1,914.98
Sergeants			1,938.80
Investigator			1,950.08
Lead Investigator			1,963.27

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Section 20.04: Hourly rate of pay to be computed in the following manner: 12 times the monthly salary divided by 2080 (hours per year) rounded off to the nearest cent.

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ARTICLE XXIII

OVERTIME

Section 23.01: Effective January 1, 1986 overtime will be compensated at the rate of time and one-half (1-1/2). Overtime is defined as any hour worked in excess of the normally required hours provided those hours are

actually worked. Any overtime worked pursuant to this ARTICLE shall be compensated by either being paid time and one-half (1-1/2), or compensatory time of time and one-half (1-1/2) at the discretion of the Deputy who works that overtime.

Any full-time Deputy working overtime as a result of the exercise of another Deputy's use of compensatory time may elect to take either time and one-half (1-1/2) pay or compensatory time equal to the hours worked.

. . .

ARTICLE XXV

ENTIRE MEMORANDUM OF AGREEMENT

This Agreement constitutes the entire Agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matters not remed (sic) by law from the areas of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and the opportunity are set forth in this Agreement. Therefore, the County and the Association for the life of this Agreement, each voluntarily, unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to in this Agreement, as well as any specific proposal which was made by either of the parties and subsequently dropped by the parties during the course of negotiations for this agreement. Waiver of any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.

BACKGROUND

In December of 1984, the Personnel Committee of the County Board approved a motion to create the classification of two Sergeants for the night shift conditioned upon receipt of the Association's agreement that the Sergeants would be paid \$17.50 per month more than a regular Deputy and that any subsequent salary increases would not exceed the increases awarded to regular Deputies. On January 25, 1985, Association President Mike Mentz responded to the County's proposal by agreeing that the Sergeant's salaries would be \$17.50 per month greater than that of a regular Deputy; that the Sergeant's salaries would not be bargained independently in the year to year negotiations; and that the Sergeant's classification would be conditional, as a pilot program, to be reviewed by the Sheriff, the Committee, and the Association at some time prior to the 1986 budget proposal.

The Sergeant's pilot program was implemented in 1985. On February 10, 1986, the County decided to discontinue the Sergeant program. On February 17, 1986, the Association filed a grievance on this decision. On March 4, 1986, the County entered into a tentative settlement with the Association. The minutes of the March 4, 1986 County Personnel Committee describe the tentative settlement as follows:

Sargeant Pilot Program thru December 31,1986

One (1) Investigator with Salary Increase of \$35.00 month

Two (2) Sargeants with Salary to stay the same as previous year of \$17.50 month

One-half additional holiday - December 24th.

Salary increase of 3 1/2% and the 3 1/2% to be paid on the \$35.00 for investigator and on the \$17.50 for the sergeants, retro-active to January 1, 1986

The county will pick up the 1% additional retirement which was an employee contribution retro-active to January 1, 1986.

Chief Deputy Huettl is responsible for providing the payroll clerk with the hours worked by each Officer in the Sheriff's Department. Since the creation of the Sergeant's position, Huettl has distinguished the Sergeant's overtime hours on the basis of whether the Sergeant was working overtime in a Sergeant slot or whether the Sergeant was working overtime in a Deputy slot. The payroll clerk paid overtime hours designated as Sergeant hours at an overtime rate based upon the Sergeant rate and paid overtime hours designated as Deputy hours at an overtime rate based upon the top Deputy rate. When Investigator positions were created in 1986, Huettl applied the same dual overtime system to the Investigators. As a result, the payroll clerk paid overtime hours designated as Investigator hours at an overtime rate based upon the Investigator rate and paid overtime hours designated as Deputy hours at an overtime rate based upon the top Deputy rate.

On January 14, 1992, Association Representative Patrick J. Coraggio sent a letter to Forest County Clerk, Dora James, which stated as follows:

Enclosed you will find a copy of the 1992 wage rates which were just provided to me. In reviewing them against the contract I have noted that Jerry Gibson, Tony Jakubiec, Mike Mentz, and Roger Wilson all have two overtime rates listed, one overtime rate pursuant to their current rank and one overtime rate as a deputy. The Collective Bargaining Agreement does not recognize this dual overtime rate structure. Therefore, I respectfully request that you immediately change this or provide me with the authority which allows this to exist.

Thank you for your immediate attention to this matter.

The rates referred to in Association Representative Coraggio's letter of January 14, 1992 were as follows:

Name	Position	Reg Hours	Current				
			Rate	Effect Bi-Wkly	Effect 12/31/91	Effect 1/1/92	Effect 7/1/92
Gibson	Lead Investigator	80.00	10.67	853.60	10.73	11.05	11.33
	Inv. Overtime			16.06		16.15	17.05
	Dep. Overtime			5.67		15.74	16.63
Jakubiec	Sergeant	80.00	10.54	843.20	10.59	10.91	11.19
	Sgt. Overtime			16.38		16.46	17.36
	Dep. Overtime			16.91		16.26	17.15
Mentz	Sergeant	80.00	10.54	843.20	10.59	10.91	11.19
	Sgt. Overtime			16.40		16.48	17.39
	Dep. Overtime			16.21		16.26	17.18
Wilson	Investigator	80.00	10.60	848.00	10.66	10.98	11.25
	Inv. Overtime			16.16		16.25	17.14
	Dep. Overtime			15.88		15.95	16.84

On January 31, 1992, County Clerk James issued the following:

TO: PERSONNEL COMMITTEE
 FROM: COUNTY CLERK'S OFFICE

When the Sergeant program was originally adopted by Forest County, to my recollection it was agreed between the Sheriff's Association and the Personnel Committee that sergeants would only receive the additional wage rate when they were performing the duties of a sergeant. If they were working as a regular deputy, they would receive the regular deputy overtime rate. We have been paying them on this basis since the program started.

When the investigator positions were established, they continued the same practice. As you can see from Mr. Coraggio's letter, this practice is now being challenged.

I have gone through the minutes of Personnel for 1985 and 1986 and I cannot find anything in writing about the pay for these positions when they were working in the regular deputy capacity.

Please advise me as to what we should do. If something in writing has to go to Mr. Coraggio, I prefer if it came from the Personnel Committee.

On February 11, 1992, Erhard E. Huettl, Chairman of the Forest County Board of Supervisors sent Association Representative Coraggio the following letter:

At the Forest County Personnel Committee meeting on February 6, 1992, a motion was made to pay Jerry Gibson, Tony Jakubiec, Mike Mentz and Roger Wilson their rate of pay as cited in the current

bargaining agreement for all duties performed effective February 1, 1992.

On February 19, 1992, Sergeants Jakubiec and Mentz sent the following letter to Sheriff Norm Knoll:

Ref. Backpay for Sgts. Jakubiec and Mentz

We request any and all backpay that was withheld from us in reference to the two overtime rates used for us since we made sargeant. We feel that this money was withheld illegally from us. We would appreciate it if you would recommend to the clerk and finance committee that this amount be paid to us as soon as possible.

On April 10, 1992, the Forest County Deputy Sheriff's Association filed a grievance with the County which alleged that the County had violated Article XXVIII - Overtime, and any other appropriate article, when it failed to appropriately compensate officers for overtime worked from the dates of appointment to their respective ranks as indicated through February 1, 1992, at the overtime rates for that classification. The affected employes were Lead Investigator Jerry Gibson, Investigator Roger Wilson, Sergeant Tony Jakubiec, and Sergeant Michael Mentz. As remedy for the grievance, the Association asked that the County immediately reimburse the four employes for all back pay denied them for overtime worked at a rate of pay less than that rate of pay based on their current rank since date of promotion, to February 1, 1992, and any appropriate interest.

On April 20, 1992, the County denied the grievance, stating, inter alia, that:

The Personnel Committee has concluded that the employes should not receive back payment of wages at the higher wage rate because they did not make proper request for or seek payment of wages at that rate in the past when working extra hours beyond their regular assigned shift. Forest County has agreed to pay these employes on the basis of the higher rate, from February 1, 1992, forward, for all hours worked whether on a regularly assigned shift or voluntary overtime hours worked.

Thereafter, the matter was submitted to arbitration.

POSITIONS OF THE PARTIES

Association

Deputy Jerry Gibson, an Investigator with the Forest County Sheriff's Department, carries the rank of Captain and was promoted to this position in April of 1989. Deputy Roger Wilson, an Investigator with the Sheriff's Department, carries the rank of Lieutenant and was appointed to this position in April of 1990. Deputy Michael Mentz, a Patrol Sergeant with the Sheriff's Department, was appointed to this rank in January of 1985. Deputy Tony Jakubiec, a Patrol Sergeant, was appointed to that rank in January of 1985.

In January of 1992, the four Grievants discovered that the County had been paying them overtime at two different rates. Further investigation revealed that, whenever the Grievants performed the duties of Captain, Lieutenant or Sergeant, they would receive overtime at their regular rate of pay, but that whenever it was determined by the Sheriff's Department that the work could be performed by officers of a lower rank, then the Grievants were paid overtime based upon the Deputy Sheriff's top Patrol Officer rate.

Section 20.04 of the collective bargaining agreement requires that the hourly rate of pay be computed by taking the monthly salary times 12 and dividing it by 2080 hours per year, rounded off to the nearest penny. Once this hourly rate has been determined, it is to be applied to all overtime.

Section 23.01 of the contract states that overtime will be compensated at the rate of time and one-half and that overtime is defined as any hours worked in excess of the normally required hours, provided that those hours are actually worked. Overtime hours are to be compensated at time and one-half the hourly rate in cash, or compensatory time off, at the discretion of the Deputy who works the overtime. This Section does not indicate that the Captain Investigator, Lieutenant Investigator, or Patrol Sergeants will receive any other form of overtime or that any other method of calculating overtime is authorized.

The clear and unequivocal language of the agreement requires that overtime be calculated by taking the officers' annual salary divided by 2080 hours. Since the language is clear and unequivocal, the language cannot be given any meaning other than that expressed. By using a lesser rate of pay to calculate the overtime of the four Grievants, the County has violated Section 20.04 and 23.01 of the collective bargaining agreement.

As Deputy Mentz testified at hearing, officers receive wages, shift differential, longevity and educational pay, none of which is itemized on the check stub. Accordingly, the Grievants had no basis to know that they were not being paid the appropriate amount of overtime until Chief Deputy Huettl advised them of this fact.

Mentz' testimony establishes that when the Sergeant positions were created in 1985, the Association agreed that the two positions of Sergeant would earn \$17.50 a month more than a top Deputy and that as the pay of Deputies increased, so would the \$17.50 spread increase. There was no discussion conducted at that time regarding Captain of Investigations or Lieutenant of Investigations. Nor was there any discussion of paying an overtime rate that differed from the rate that they were earning as Sergeant. From 1985 until January of 1992, neither of the two Sergeants had been told that overtime was being paid at differing rates.

Chief Deputy Huettl confirmed that he had never issued anything in writing to show that two wage rates were paid for overtime for the position of

Investigator or Sergeant. Huettl, who is responsible for submitting overtime to the County Clerk's Office for payment, submitted two rates based on the type of work that the Sergeants and Investigators performed. Huettl confirmed that he could not recall ever seeing anything in writing from the County Board or the Sheriff which authorized this type of overtime payment process, nor could he recall ever discussing issue this at the collective bargaining table.

Dora James, the County Clerk, testified that, to the best of her knowledge, there has never been anything put in writing that addresses a dual system for the overtime rate, nor could she ever recall having someone provide her with authorization to pay a dual overtime rate. Rather, she paid whatever was authorized by Chief Deputy Huettl.

There is nothing in writing that authorizes, or allows, the County to have a dual overtime rate pay system. There is no evidence in the record that this type of an agreement was ever reached between the parties. Consistent with the provisions of Article XXV, the County has no authority to unilaterally create a new overtime pay system.

The Employer's argument that the term "Deputy" in Section 23.01 of the collective bargaining agreement does not refer, or apply, to any persons who have the rank of Captain/Investigator, Lieutenant/Investigator or Sergeant is totally absurd. The collective bargaining agreement is replete with reference to the term "Deputy." To accept the County's argument would be to exclude four of the ten members of this bargaining unit from any contractual benefits.

Contrary to the argument of the County, the testimony of County Clerk James was refuted by Association witness Michael Mentz. Mentz clearly testified that, in 1985, they did agree to a \$17.50 per month increase over the position of top Deputy for the two Sergeants under a pilot program, but that there was never any mention of a two tier overtime pay system. Mentz further testified that, prior to February 19, 1992, there had never been any notice of the two tier overtime system.

County Clerk James corroborated that the computer system is not set up for itemizing deductions and additions to an individual officer's pay. Assuming arguendo, that Sergeants did have a two tier overtime pay system, there is nothing in the record to substantiate, or legitimize, giving the Lead Investigator (Captain) or the Investigator (Lieutenant) a two tier overtime pay system.

County

Construing the provisions of Article II (B) and (I), Article XXIII - Section 23.01 and Article XX, as a whole, leads to the conclusion that no violation of the collective bargaining agreement has occurred. Such a conclusion is further supported by the parties' collective bargaining history and past practice.

Section 23.01, which defines overtime, clearly applies to Deputies. Since the provision does not refer to Captains, Lieutenants or Sergeants, the provision can not apply to these positions. Assuming arguendo, that Section 23.01 applies to higher ranking officers, the provision is silent as to the overtime pay rate to be used to compensate these higher ranking officers when working in a lower ranking position.

Under the provisions of Article II, the County is vested with the authority to transfer or assign officers to positions. When Sergeants are called in, or scheduled to work, as Deputy, the County has exercised its rights under this contract provision to temporarily transfer or assign a Sergeant to work as a Deputy, thereby determining the composition of the work force to complete overtime work.

When the County exercises its Article II rights to assign a Sergeant to work as a Deputy, the applicable pay rate is defined in Section 20.04. In such cases, the monthly salary used for computation purposes would be that of a full-time Deputy. Such a conclusion is in accord with the terms of Section 23.01, since that provision addresses overtime pay for Deputies and is totally silent with respect to higher ranking positions.

The testimony of County Clerk James establishes that, when the pay rate for the Sergeant position was agreed to, the parties also agreed that a Sergeant would be paid at the Sergeant overtime rate when a Sergeant was working in that capacity, but if substituting for a regular full-time Deputy, then the Sergeant would be paid at the Deputy overtime pay rate. Union President Michael Mentz did not testify that the agreement testified to by Dora James did not exist, but rather, stated that he had no recollection of such an agreement. Thus, the County Clerk's testimony on this point is unrefuted.

The labor agreement does not define, in specific terms, the overtime pay rate to be used for Sergeants or other higher ranking officers when working in a lower ranking position. It is appropriate to use past practice to fill in this "gap." The past practice demonstrates that a Sergeant is to receive the higher overtime pay rate only when working in that capacity. Since the inception of the Sergeant position in 1985, Sergeants have been paid at the Sergeant overtime pay rate when working in a Sergeant capacity, but have been paid at the Deputy overtime pay rate when working as a Deputy.

The Association implies that the County paid the Sergeants and higher ranking officers at the Deputy overtime rate whenever the County determined that the work they were performing could be performed by officers of lower rank. This is a mischaracterization of the evidence. Both County Clerk James and Deputy Chief Huettl testified that the higher ranking officers were paid at the Deputy overtime pay rate only when they were working in a Deputy capacity, i.e., when they were called in to work as a Deputy due to the absence of a Deputy. In such situations, the higher ranking officers were not working in any shift supervisory capacity since either Sergeant on the night shift, or the Sheriff or Chief Deputy on the day shift, would be on duty.

Contrary to the argument of the Association, the language of

Section 20.02, 20.04 and 23.01 is not clear and unambiguous. The language is totally silent as to the overtime pay rate to be used to compensate higher ranking officers when working in a lower ranking position.

The manner in which the parties have applied the language of Section 20.02, 20.04 and 23.01 supports the conclusion that there has not been any violation of the labor agreement. Since 1985, Sergeants have been paid at the Sergeant overtime pay rate, without challenge, only when working in a Sergeant capacity, and have been paid the Deputy overtime rate when working as a Deputy.

Since the labor agreement does contain provisions which address the overtime pay rates to be utilized when overtime pay is due, the Association's reliance on Article XXV, Entire Memorandum of Agreement, is misplaced. If it should be concluded that a Sergeant, or other higher ranking officer, is entitled to the higher overtime pay rate even when working in a lower ranking position, this would constitute an amendment to the labor agreement unexecuted by either of the parties, which would be in violation of the terms of Article XXV. The grievance is without merit and should be dismissed.

DISCUSSION

The Association does not dispute the fact that, since the creation of the Sergeant and Investigator positions, the County has applied a dual system of overtime to these positions. 1/ Under this dual system, Sergeants who worked overtime in a Sergeant slot, were paid overtime based upon the Sergeant rate of pay and Investigators who worked overtime in an Investigator slot, were paid overtime based upon the Investigator rate of pay. However, when either the Investigator or Sergeant filled in for a Deputy, they were paid overtime based upon the top Deputy rate. The Association does argue that this dual system of overtime is violative of the collective bargaining agreement. In making this argument, the Association relies primarily upon the language contained in Sections 20.04 and 23.01.

Section 23.01 defines overtime as "any hour worked in excess of the normally required hours provided those hours are actually worked" and provides that "Any overtime worked pursuant to this ARTICLE shall be compensated by either being paid time and one-half (1-1/2), or compensatory time of time and one-half(1-1/2) at the discretion of the Deputy who works that overtime."

Section 20.04 states that "Hourly rate of pay to be computed in the following manner: 12 times the monthly salary divided by 2080 (hours per year) rounded off to the nearest cent." The monthly salary is set forth in Schedule A of Article XX. Schedule A contains the following classifications: Full-time Deputies, Sergeants(2), Investigator (1) and Lead Investigator (1) and sets forth a monthly salary for each classification.

The County argues that since Section 23.01 references the Deputy classification only, it is not applicable to Sergeants or Investigators. The undersigned disagrees. As the Association argues, a review of the contract reveals that many of the contract provisions that provide employee benefits and rights, e.g., Grievance Procedure, Leave of Absence, Retirement, Insurance, and Vacations, expressly references "Deputy", but does not reference Sergeants or Investigators. As the Association further argues, to accept the County's construction of the term "Deputy" would be to deprive the Sergeants and Investigators of a significant number of the rights and benefits granted to employees by the collective bargaining agreement. The undersigned agrees that

1/ For purpose of this discussion, the term Investigator includes the Lead Investigator.

such a construction is absurd. The undersigned is satisfied that, within the context of Section 23.01, the term "Deputy" is a generic term, applicable to all employes covered by the collective bargaining agreement, including Sergeants and Investigators.

Construing Section 23.01 and Sec. 20.04 as a whole, the undersigned is satisfied that the contract permits only one method of computing overtime, i.e., employes must be paid overtime based upon the hourly rate set forth in Sec. 20.04. The undersigned is further satisfied that the hourly rate set forth in Sec. 20.04 is twelve times the monthly salary of the employee's classification divided by 2080, rounded off to the nearest cent. Thus, the undersigned has concluded that the County violated the collective bargaining agreement when it paid the Sergeants and Investigators overtime which was based upon the top Deputy rate, rather than upon the Sergeant and Investigator rate, respectively.

Article II, Rights of the County, expressly recognizes that the rights of the County enumerated therein "will not be used to interfere with rights established under this Agreement". For the reasons discussed above, the undersigned is persuaded that one of the rights established under the agreement, is the right to be paid overtime based upon the rate of pay established for the employe's classification. To accept the County's arguments regarding the application of Article II, would be to interfere with rights established under the agreement. Accordingly, these arguments of the County must be rejected.

At hearing, Chief Deputy Huettl stated that he did not know how the dual overtime system came to be implemented. Dora James, the County Clerk, recalls that in 1985, she acted as the Secretary to the Personnel Committee and prepared the minutes of the Personnel Committee. While James, who maintains the minutes in her office, was unable to locate any minutes to support her testimony, she recalls that, in 1985, when the County instituted the pilot Sergeants program, the Association agreed that Sergeants would get paid the Sergeant rate only if the Sergeant served in a Sergeant capacity.

James recalls that the Sergeants were created to provide supervision at night, when the Sheriff and the Chief Deputy did not work. According to James, the Sergeants were paid at the Deputy rate, and not the Sergeant rate, when they worked at times when either the Sheriff or the Chief Deputy were on duty. James recalls that the dual pay rates were established by her office, which relied upon the Sheriff's Department to provide her office with the number of hours worked in each category. Sergeant Mike Mentz, who was Association President in 1985, does not recall such a discussion.

Assuming arguendo, that James has an accurate recollection of discussions which occurred between the Association and the County in 1985, her testimony is not dispositive of the instant dispute. The reason being that the discussions recalled by James occurred within the context of establishing a pilot program. It is not reasonable to assume that conditions of a pilot program carry over into a permanent program unless the evidence clearly establishes that the parties intended to carry over these conditions. No such evidence is contained in the present record. Moreover, under the provisions of Article XXV, oral agreements cannot supersede the provisions of the contract.

The record establishes that Chief Deputy Huettl is the Sheriff's Department employe who is responsible for certifying hours worked by Sheriff's Department employes to the County Clerk's Office. At hearing, Huettl acknowledged that he had never discussed this dual overtime system with the affected employes, but rather assumed that they were aware of the system. County Clerk James, whose office prepares the Sheriff's Department payroll, could not recall that the County had ever sent the employees any written

notification of the dual system. James assumed that, based upon the conversation that she recalled in 1985, employees were aware of the fact that the County had implemented the dual overtime system.

As discussed above, the undersigned does not consider the 1985 discussions, involving the creation of the pilot program, to be relevant to the determination of the parties' understanding at the time that they agreed to the creation of a permanent Sergeant classification. 2/ Thus, assuming arguendo, that James has an accurate recollection of the 1985 discussions, the undersigned rejects the argument that these discussions provided the Association with notice of the County's application of the dual overtime system.

Mike Mentz has been employed by the Sheriff's Department for over twenty years and was the Association President in 1985. Mentz, who was involved in the discussions which produced the pilot program, denies that there were any discussions on the payment of overtime or that the Personnel Committee ever notified the Association that there would be a dual system. Mentz claims that he did not become aware of the dual system until late December of 1991, or early January of 1992.

According to Mentz, the information attached to the employee paycheck itemizes the following deductions: Social Security, Federal Income Tax and State Income Tax, but does not itemize the source of the employee's pay, which could include regular wages, overtime wages, educational pay, and shift differential. Mentz further stated that overtime wages are not necessarily paid at the time earned, but rather, are paid out when an employee submits a voucher for the overtime.

Mentz' testimony regarding the payroll information provided to employees was not rebutted at hearing. Moreover, Huettl confirmed that the employee paychecks did not indicate that there was a dual overtime system. Crediting Mentz' testimony concerning the payroll information provided to employees by the County, the undersigned is persuaded that the Grievants did not have a reasonable basis to know of the dual overtime system prior to receiving the information which led to the instant grievance.

Upon consideration of the record evidence, the undersigned is satisfied that the County did not notify the Association of the dual overtime system at the time it was implemented. The undersigned is further satisfied that neither the Association, nor the Grievants, had a reasonable basis to suspect the existence of the dual system until they were provided with the rates referenced in Association Representative Coraggio's letter of January 14, 1992.

Given the record evidence, it is not reasonable to conclude that the Association had knowledge of the dual overtime system at the time that the parties entered into the present collective bargaining agreement, or at any time prior to the incident which gave rise to the instant grievance. Accordingly, the record does not warrant the conclusion that the dual overtime system was a practice which was accepted by the Association. Accordingly, the undersigned does not consider the evidence of the administration of the dual overtime system to demonstrate a binding past practice, or any mutual understanding with respect to the administration of the contractual overtime

2/ Since the Investigator position was not under consideration at the time that James recalls the discussion concerning the Sergeant classification, any agreement recalled by James would not be applicable to the Investigator position.

provisions.

In summary, the undersigned is satisfied that the language of Sections 20.04 and 23.01, construed as a whole, permit only one method of calculating overtime. Under this method, the County was required to pay all overtime worked by Sergeants at the Sergeants overtime rate and to pay all overtime worked by Investigators at the Investigator overtime rate. 3/ The undersigned has concluded that the County violated the collective bargaining agreement by paying overtime to the Sergeants and the Investigators which was based upon the top Deputy wage rate.

In remedy of this contract violation, the undersigned has ordered that the Grievants be made whole for all overtime pay lost due to the failure of the County to pay overtime based upon the overtime rate for the Grievant's classification. Given the lack of evidence that the Association, or the Grievants, were aware of the contract violation until the incident which gave rise to the grievance, the undersigned has made the make whole order retroactive to January 1, 1991, the effective date of the present collective bargaining agreement.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The County violated the collective bargaining agreement when it paid overtime to Grievants in the classification of Sergeant, Investigator, and Lead Investigator based upon the top Deputy rate, rather than the overtime rate of the Grievants' actual classification.

2. The County is to make each of the Grievants whole by immediately paying to each Grievant the difference between the overtime which was paid at the top Deputy rate and the overtime which they would have received if the overtime had been paid at the overtime rate of the Grievants' actual classification.

3. The make whole order is retroactive to January 1, 1991, the effective date of the parties 1991-92 collective bargaining agreement.

Dated at Madison, Wisconsin this 19th day of April, 1993.

By

Coleen A. Burns, Arbitrator

3/ Thus, the Lead Investigator would be paid at the Lead Investigator overtime rate and the Investigator would be paid at the Investigator overtime rate.

