

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 DODGE COUNTY SHERIFF'S DEPARTMENT : Case 182  
 SWORN EMPLOYEES, LOCAL 1323-B, : No. 49432  
 AFSCME, AFL-CIO : MA-7952  
 and :  
 :  
 DODGE COUNTY (SHERIFF'S DEPT.) :  
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Appearances:

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

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-93 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the minimum staffing grievance of Tod Nehls.

The undersigned was appointed and held a hearing on September 16, 1993 in Juneau, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, the Employer filed a reply brief, and the record was closed on December 21, 1993.

Issues:

The Union proposes the following:

1. Did the Employer violate the collective bargaining agreement and minimum staffing policy when it unilaterally, in an arbitrary and capricious manner refused to allow employees earned time off, and in addition thereto refused to maintain minimum staffing when employees called in sick, were required to attend school, or on days when the staffing was below minimum?
2. If so, what is the appropriate remedy?

The Employer proposes the following:

1. Does the agreement require the Sheriff's Department to maintain a minimum staffing policy of three uniformed patrolmen (i.e., deputy patrolmen, traffic corporal or traffic sergeant) on the first shift, four uniformed patrolmen on the second shift and three uniformed patrolmen on the third shift?
2. If it does, what is the appropriate remedy under the agreement?

Relevant Contractual Provisions:

**ARTICLE III  
MANAGEMENT RIGHTS**

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

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**ARTICLE V  
HOURS OF WORK AND OVERTIME**

5.1 **Workday**

The regular workday shall consist of eight (8) consecutive hours.

5.2 **Work Schedule**

The regular work schedule shall consist of four (4) consecutive work days; followed by two (2) consecutive days off. This cycle shall then be repeated.

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5.3 **Time and One-Half**

Employees shall receive one and one-half (1-1/2) times their straight time hourly rate for all hours worked in excess of their normal, regular scheduled workday except for the following:

. . .

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

hours to carry into the next year.

#### 5.4 Call-In

Employees that respond to recall by the Sheriff or designated department head to work outside of the regular schedule shall receive a minimum of two (2) hours at time and one half (1-1/2).

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#### Discussion:

The facts are essentially undisputed. On March 12, 1993 Deputy Tod Nehls filed a grievance protesting the department's practice of not allowing employees to take compensatory time or vacation time if the result would be to reduce minimum staffing below three uniformed employees on the first shift, four on the second shift, and three on the third shift, while declining to fill vacancies below this level on days when these were created by other causes such as illness. Nehls referred in his grievance to an informal management policy, but it is undisputed that a "special order" governing this issue was the actual subject of the grievance and that the Union simply did not have a copy of the special order in question. That order, number 11-82, was issued on July 29, 1982, and states:

As a result of problems encountered within the Patrol Division with respect to maintaining adequate personnel on various shifts, it has been necessary to implement the following procedures. These procedures are being implemented to assure our personnel have ample opportunity to obtain time-off when requested. They have been prepared to provide for fair and impartial administration of time-off requests. In view of the above criteria, the procedures provide for adequate patrol coverage.

- I. Scheduling will be handled primarily by Sgt. Fitzgerald. The schedules will be posted weekly at approximately 4:00 pm on Wednesdays.
- II. Request for time-off must be made to Sgt. Fitzgerald prior to 4:00 pm each Wednesday, or scheduling period.
- III. Once the schedule has been posted, if it becomes necessary to request time-off, that request must be made to your platoon sergeant. If your platoon sergeant is off-duty, every attempt should be made to contact him. If that is impossible, any supervisor can grant the time-off.
- IV. The following criteria have been established as minimum scheduled employees.  
The 8:00 am - 4:00 pm shift, 10:00 am - 6:00 pm shift, and the 7:00 am - 3:00 pm shift, all require 3 officers, inclusive of the sergeant. This could be 2 deputies and 1 sergeant, or 3 deputies in the absence of the sergeant.
- V. The 4:00 pm - 12:00 midnight shift, the 7:00 pm - 3:00 am shift, and the 6:00 pm - 2:00 am

shifts, all require the scheduling of 4 officers, inclusive of the sergeant. This could consist of (2) 4:00 pm - 12:00 midnight officers, (1) 4:00 -12:00 midnight sergeant, and (1) 7:00 pm - 3:00 am deputy, or any combination thereof.

- VI. 12:00 midnight - 8:00 am requires a minimum of 3 officers, inclusive of the sergeant. This could consist of 2 patrolmen and the sergeant, if the sergeant is working. In the absence of the sergeant, it would require 3 patrolmen.
- VII. Requests for time-off, either prior to the commencement of a shift, or the conclusion of a shift, will be granted within the requirements of the minimum allowance. For example, we will allow for requests to come in two hours late or quit two hours early.
- VIII. No requests will be granted for time-off during a shift. For example, if you are scheduled to work 8:00 am - 4:00 pm, we will not grant a request for time-off from 10:00 am - 12:00 pm.
- IX. Sergeants receiving requests for time-off will have the responsibility of amending the posted schedule in the platoon room and radio room. If the request is made and approved during off-duty, the sergeant must call and authorize the change.

NOTE: The effective date of this policy is immediate, however, all previously requested and approved requests for time-off will be honored.

It is undisputed that, for the most part, management has in fact refused time off to employes when that would bring staffing below the levels specified in Order No. 1182, while refusing to bring the staffing up to that level on many

occasions if it fell below for other reasons. Nehls testified, however, that sometimes management did call in employes to bring up the staffing, at its discretion.

The County introduced a grievance filed by Deputy David Weninger in August, 1991, which alleged that the County was failing to abide by the minimum manpower policy. The County also introduced its denial at the second step dated August 27, 1991, and the Union stipulated that the grievance was not processed further. Union President Gerald Beier testified that he dropped the grievance because there were no facts or supporting data supplied with it, but that he did not feel he was waiving the issue.

It is undisputed that the Union proposed language to require that the Employer bring up minimum staffing for any shift to meet the levels specified in Special Order 11-82, in its opening proposals for the 1992-93 collective bargaining agreement. This proposal was subsequently withdrawn.

The Union argues that the County has not maintained the minimum staffing specified in Special Order 11-82, has used this policy to circumvent negotiated language in the contract, and also has discriminated against employes who have

earned and accumulated, but not yet used, holidays, vacation and compensatory time. The Union contends that different articles of the Agreement require the Employer to recognize seniority, to allow employees to use vacations one day at a time, and to receive compensatory time and accumulate it. The Union argues that the affect of management's decisions in applying Special Order 11-82 are to restrict employees' use of these contractual rights, and that this is improper given the County's simultaneous demonstration that these minimums are unnecessary. Conversely, the Union argues that the County has created an unsafe working environment by failing to maintain the minimums at its discretion. The Union contends that allowing management to expand or decrease unilaterally a condition of employment without negotiating it has an undermining effect on the Union. With respect to the prior grievance, the Union argues that by not pressing in 1991 a grievance which was poorly supported by documentation, there is no reason to suppose that the Union was waiving later and better-supported arguments concerning this issue. With respect to its contract proposal concerning this issue, the Union notes that in the cover page to its proposals it specifically reserved the right to withdraw them without creating any implication of waiver or of abandonment of arguments premised on pre-existing terms of employment. As remedy, the Union requests that the Arbitrator "order the Employer to immediately cease and desist from deviating from the minimum staffing policy, and call in replacements to maintain same, and in addition thereto allow employees off."

The County contends that Article 3.1 of the Agreement specifically provides that the Employer retains rights to determine the number of employees to be employed, to assign and direct them, and to schedule work, and that these include derivative rights to determine the total number of employees to be assigned to each shift and the number needed on duty at any given time. The County contends that Special Order 11-82 does not overrule this language, nor does it by its own terms apply to overtime situations. The County points to language within the first paragraph of Special Order 11-82 referring to the Order as being created "to assure our personnel have ample opportunity to obtain time off when requested." The County further contends that the Union is attempting to gain in grievance arbitration what it attempted to gain, but did not, in negotiations; and that the Union's withdrawal of a previous grievance establishes that the Union understands that the past practice favors the Employer. Finally, the Employer contends that even if the collective bargaining agreement contained provisions specifying minimum staffing, it could not restrict the constitutional authority of the Sheriff, which would override such language. In its reply brief the County contends that Special Order 11-82 is not a minimum staffing policy, and cannot be construed to mandate that the County have a specified minimum number of employees on duty at all times. The County further contends that this Order was never part of the collective bargaining agreement, and can be unilaterally modified or eliminated by the Sheriff. The County finally argues that management has not changed an existing condition of employment, and that there is no undermining of the Union as a result.

I adopt the County's definition of the issues in this matter, as they are clearly tied to the authority of an arbitrator to determine contractual violations, while the Union's proposed definition is somewhat broader. With respect to the merits, initially I must note that the evidence is that the County's practice is of longstanding, but that it is unnecessary to rely either on arguments of waiver or of past practice to determine this matter. Nor is the constitutional authority or lack thereof of a Sheriff to override a collective bargaining agreement relevant here. Simply, this is a matter in which the collective bargaining agreement is quite clear. Article 3.1 of the Agreement expressly reserves to management "the number of employees to be employed" as well as "the right to assign and direct employees" and "to schedule work." These rights are clearly broadly stated and clearly include the ability to determine how many employees are needed on a shift. The language of Special Order 11-82 does not demonstrate any evidence that it was in the nature of a

side agreement or mutual interpretation of Article 3.1, and there is no evidence elsewhere in the record to give it that status. The record does demonstrate that the County has applied this policy only for purposes of determining whether to allow an employe to take time off.

There is, of course, an element of inconsistency in an employer determining that employes are needed at work when it is convenient to the employe to be absent, but not needed when it is an additional expense to the employer to call the employe in when the circumstances otherwise are similar. The County, however, has simply not surrendered its Article 3.1 discretion over such decisions. Nothing else in the Agreement addresses the issue, and the Union has failed to produce any evidence indicating that the policy has been used for discriminating against any members of the Union or for the purpose of undermining the Union. Instead, the County has simply elected to apply the policy as written for the purposes for which it was written, and to make decisions on a case-by-case basis as to whether it chooses to incur the additional expense of calling in an employe on overtime if the workload appears such that short-staffing would do. This type of economically-motivated decision is exactly what the Employer reserved its rights under Article 3.1 to accomplish. 1/

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

AWARD

1. That the agreement does not require the Sheriff's Department to maintain a minimum staffing policy.
2. That the grievance is denied.

Dated at Madison, Wisconsin this 15th day of February, 1994.

By Christopher Honeyman /s/  
Christopher Honeyman, Arbitrator

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1/ I note also that the record is devoid of any example of an actual hazardous situation being created by short-staffing.