

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS'
ASSOCIATION

and

MILWAUKEE COUNTY (SHERIFF'S
DEPARTMENT)

Case 417
No. 53379
MA-9337

Appearances:

Gimbel, Reilly, Guerin & Brown, Law Offices, by Mr. Franklyn M. Gimbel, appearing on behalf of the Association.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by Milwaukee Deputy Sheriffs' Association, herein the Association, and the subsequent concurrence by Milwaukee County, herein the County, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on December 20, 1995 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on March 5, 1996 at Milwaukee, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on April 18, 1996.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The Union frames the issue as follows:

Has the County violated paragraph 3.28 of the Agreement entitled Shift Selection by not transferring the Grievant from the second shift to the first shift at a time an opening occurred on the first shift and he was the most senior deputy with a request for transfer on file?

The County frames the issues in the following manner:

1. Is the matter arbitrable?
2. Whether or not the County violated paragraph 3.28 of the Agreement when it did not move the Grievant to the day shift.

Having reviewed the entire record, the Arbitrator finds that the County's framing of the issues is appropriate to decide the instant dispute.

FACTUAL BACKGROUND:

General Background

The County first considered the idea of utilizing bilingual deputies in early 1992. The 1992 County Budget included the creation of several "Deputy Sheriff" positions to staff the new jail. In a January 25, 1992 memorandum to former Sheriff Richard Artison, then-County Board Chairman F. Thomas Ament recommended reclassifying a certain number of these newly-created positions as "Deputy Sheriff-Bilingual (Spanish)" to fill a need for bilingual deputies. Sheriff Artison agreed and in a March 19, 1992 memorandum to Thomas Taylor, Human Resources Director, recommended reclassification. Sheriff Artison noted in said memorandum that the current contract with the Association would not allow the Department to schedule and utilize existing staff in the jail based on their bilingual capabilities. However, Sheriff Artison added: "We will need to staff one of the 24-hour posts in the intake-release area with this new classification to eliminate this problem."

On April 21, 1992, Lolita Bevenue, Employment Staffing Manager, Human Resources Department sent Sheriff Artison a memorandum entitled "notification of classification review," which indicated that Human Resources had reviewed the recommendation and determined the qualifications for the position -- "same as other deputies with the addition of reading, writing and speaking Spanish." That notice also stated that no further action would be taken pending Sheriff Artison's response. Bevenue provided a copy of the notice to the Association.

Sheriff Artison responded that he concurred with the recommendation on a document filed with Human Resources on April 24, 1992. On May 15, 1992, Human Resources sent Sheriff Artison a notice confirming the reclassification. Neither Sheriff Artison's concurrence nor the May 15, 1992 memo was provided to the Association.

The 1994-1996 Memorandum of Agreement (MOA) between the County and the Association, which was negotiated after May 15, 1992, lists four classifications of deputies: Deputy Sheriff, Deputy Sheriff I, Deputy Sheriff II and Deputy Sheriff Sergeant. The MOA also

references the creation of the new title of "Deputy Sheriff" for persons to be employed in the jail. However, nowhere in the MOA is there any reference to the classification "Deputy Sheriff - Bilingual (Spanish)." Neither the County nor the Union raised or discussed any issues relating to the new classification of "Deputy Sheriff-Bilingual (Spanish)" in the aforesaid negotiations.

Jertha Ramos, head of employment and staffing for Human Resources, testified that the bilingual classification of Deputy Sheriff is separate and distinct from that of Deputy Sheriff. She added that different skills are required; and different entry exams are given to compete for these jobs.

DIAZ

Jose Diaz, hereinafter the Grievant, was hired in June 1994 as a Deputy Sheriff-Bi Lingual (Spanish) to work in the County jail. The Grievant took a different exam and competed against different candidates than Deputy Sheriff for this position. He frequently interprets as part of his job.

In 1995, the Grievant submitted a request for transfer to the first shift. Instead, several other persons classified as "Deputy Sheriff", all of whom had less seniority than the Grievant, had transfer requests approved. On December 7, 1995, the Grievant filed a grievance over his failure to go to first shift over the aforesaid Deputy Sheriffs.

Peter Misko, a Bureau Director for County Administration, testified that he explained issues pertaining to seniority to the bilingual deputies including the Grievant.

Deputy Sheriffs who are bilingual may provide translation services for various shifts in their capacity as a deputy sheriff even though they are not classified as "Deputy Sheriff-Bilingual (Spanish)." The Grievant interprets on a regular basis as an express requirement of his job duties.

PERTINENT CONTRACTUAL PROVISIONS:

PART 1

1.01 RECOGNITION. The County of Milwaukee agrees to recognize and herewith does recognize the Milwaukee Deputy Sheriffs' Association as the exclusive collective bargaining agent of all Deputy Sheriffs, Deputy Sheriffs I, Deputy Sheriffs II, and Deputy Sheriff Sergeants in the employ of the County of Milwaukee in respect to wages, hours and conditions of employment.

Wherever the term "employee" is used in this Memorandum of Agreement, it shall mean and include only those employees of the

County of Milwaukee within the certified bargaining unit represented by the Association.

1.02 MANAGEMENT RIGHTS. The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations 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 employees; the right to transfer and assign employees, subject to existing practices and the terms of this Agreement; the right, subject to civil service procedures and ss. 63.01 to 63.17, Stats., and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action; 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 for 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 employee or for the purpose of discrediting or weakening the Association.

By inclusion of the foregoing management's rights clause, the Milwaukee Deputy Sheriffs' Association does not waive any rights set forth in s. 111.70, Stats., created by Ch. 124, Laws of 1971, relating to bargaining the impact upon wages, hours or other conditions of employment of employees affected by the elimination of jobs within the Sheriff's Department by reason of the exercise of

the powers herein reserved to management. No employe covered by this Agreement shall, during the term of this Agreement, have his position within the Milwaukee County Sheriff's Department diminished on any basis except for misconduct in the performance of his duties within the department.

In the event the organizational structure of the Sheriff's Department is modified by the establishment of positions in classifications other than those currently represented by the Association, and where new employes assigned to such positions will perform duties traditionally performed by unit employes (Deputy Sheriff, Deputy Sheriff I, Deputy Sheriff II, and Deputy Sheriff Sergeant), such positions shall not be filled in the new classification except as vacancies occur through attrition in the unit classification which had traditionally performed such duties. The County reserves the right to transfer employes within classification to other duties within the department in order to create vacancies in the function to which employes in the new classification are to be appointed.

PART 3

3.01 WAGES

- (9) (a) The 1991-92 Agreement created a new title of Deputy Sheriff to be assigned to the jail. However, the parties understand that a Deputy Sheriff may be assigned to other areas as deemed appropriate by the Sheriff.
- (b) When Deputy Sheriff I positions are filled, they shall be filled via the transfer process until the residual vacancy occurs in the Jail and it will be filled with the classification Deputy Sheriff.
- (c) The classification of Deputy Sheriff is being created solely for permanent assignment to the Jail and incumbents of the classification shall not be permanently assigned to duties outside of the Jail. No vacancy which occurs outside the Jail shall be filled with a Deputy Sheriff for more than forty-five (45) working days. When Deputy Sheriffs

are assigned to perform duties of a Deputy Sheriff I outside the Jail, they shall be paid from the first hour per Section 3.01(7) when so assigned by the Sheriff or his designee.

...

3.28 SHIFT SELECTION.

Requests for assignment to a shift within a division shall be filed with the division head. Thereafter, as vacancies occur, they shall be filled by the employe in the division with the greatest seniority within classification having a request on file on the date that the vacancy occurred, provided he is qualified to perform all the duties and responsibilities of his assignment on that shift. If the most senior employe requesting such shift change is denied the request, the reason for denial shall be made known to the employe in writing.

...

PART 6

6.01 ENTIRE MEMORANDUM OF AGREEMENT

The foregoing constitutes the entire Memorandum of Agreement between the parties by which the parties intended to be bound and no verbal statement shall supersede any of its provisions.

All existing ordinances and resolutions of the Milwaukee County Board of Supervisors affecting wages, hours and conditions of employment not inconsistent with this Agreement are incorporated herein by reference as though fully set forth. To the extent that the provisions of this Agreement are in conflict with existing ordinances or resolutions, such ordinances and resolutions shall be modified to reflect the agreements herein contained.

PARTIES' POSITIONS:

The Union basically argues in its brief that because the applicable agreement between the parties does not recognize a separate classification of "Deputy Sheriff-Bilingual (Spanish)" the County has waived its right to rely on its unilateral classification and is estopped from treating bilingual officers differently from other officers in the "Deputy Sheriff" class.

The Union opines that the County should have raised the issue of "reclassification" when negotiating the 1994-1996 agreement and because it didn't the County should be ordered to honor the Grievant's shift transfer request.

The Union points out that the Grievant understood that he had the same rights and obligations as Deputy Sheriffs, and that no one ever informed him "that his seniority would be determined by comparing his date of hire with those of five other bilingual deputies rather than with the entire group of persons classified as 'Deputy Sheriffs.'"

The Union notes that various County employees, including Jose Lopez, a Deputy Sheriff and officer of the Association, provide translation services for the County even though they are not classified in a bilingual capacity.

The Union adds that the agreement does not "recognize the County's unilateral attempt to create" a bilingual deputy classification, and since it isn't in the agreement the County should be required to honor the Grievant's request to transfer to the first shift based upon his seniority over other persons in the Deputy Sheriff classification.

The Union argues in its reply brief that the general Management Rights and Entire Memorandum of Agreement provisions do not supersede the specific provisions of the contract addressing shifts and transferring shifts which support the Grievant's position.

The Union rejects the County's argument that it was inappropriate for the Union to now raise an issue that the County failed to provide a written explanation as to why the Grievant was not reassigned to the day shift because it was not included in the first step of the grievance arguing instead that the County misses the point -- according to the Union, said failure is only additional evidence of the 3.28 violation and suggests "that the County had no explanation until it was forced to create one when the Grievant filed his grievance."

The Union also argues that the County misconstrues its argument addressing the propriety of the reclassification. "To suggest that Diaz lacks standing because he is not properly a County employe is ludicrous and a blatant attempt to distract the arbitrator from the real issue. Diaz is a 'Deputy Sheriff.'" The fact that he serves as an interpreter does not differentiate him from other bilingual "Deputy Sheriffs" who also have been called as translators, and belies any claim that the classification of "Deputy Sheriff" is separate from the bilingual classification of "Deputy Sheriff-Bilingual (Spanish)."

The Union concludes by noting that the grievance is not about the County's right to establish classifications but about equal treatment of all deputies who are within the only classifications recognized by the parties' agreement. In this regard, as noted above, the Union claims the Grievant is a "Deputy Sheriff" and has a right to transfer to first shift based upon his seniority over other persons classified as "Deputy Sheriff."

The County, on the other hand, denies it violated the agreement in any respect.

The County initially argues that it is inappropriate for the Union to raise an issue for the first time at hearing that the contract was violated when the Grievant did not receive a written explanation why his day shift assignment was not affected.

The County next argues that the Grievant has no standing and no access to the contractual grievance process because the County has the contractual right to create the separate and distinct classification of Deputy Sheriff-Bilingual (Spanish) and said classification is not covered by the contract.

The County also argues that this issue has been the subject of litigation and grievance arbitration previously and that it has already been decided that the matter is not arbitrable and the Arbitrator has no jurisdiction to hear a grievance over classification citing Milwaukee District Council 48 v. Milwaukee County, 131 Wis 2d 557 (1986) in support thereof.

The County concludes by noting that it seeks no more than the benefit of its bargain:

The fact that the title of the grievant does not appear in the collective bargaining agreement is of no moment. If the grievant is not represented by the union he has no standing to claim benefits under the contract, such as grievance arbitration. If he is represented the grievant knew from day one his classification status. So did the union. The grievance should be denied.

DISCUSSION

The County initially raises several arbitrability objections to the grievance claiming that the Arbitrator lacks jurisdiction to reach the merits of the grievance.

In this regard, the County argues that the instant dispute has already been litigated and decided and therefore the Arbitrator has no jurisdiction to hear a grievance over classifications citing Milwaukee District Council 48 v. Milwaukee County in support thereof. However, that case is distinguishable from the instant dispute. In Milwaukee District Council 48 v. Milwaukee County 131 Wis. 2d 557, 563, the Court reversed the trial court and upheld the arbitrator who had concluded that because the probation officers (grievants) actually sought reclassification their grievance was not arbitrable under Sec. 4.02(1) of the collective bargaining agreement which provided: "The grievance procedure shall not be used to change existing wage schedules . . . and position classifications established by ordinances and rules . . ." (Emphasis supplied) Unlike the above case, the dispute herein is not over the reclassification of the Grievant. The parties agree that the county has the authority to create the classification of "Deputy Sheriff-Bilingual (Spanish)"

which the Grievant holds. The issue before the Arbitrator is whether said classification is covered by the parties' agreement, whether it should be treated the same or different as "Deputy Sheriff" for contract enforcement purposes, and whether the County violated paragraph 3.28 of the agreement when it did not move the Grievant to the day shift as he requested.

The County next argues that the Grievant has no standing and no access to the contractual grievance process because, as noted above, the County has the contractual right to create the separate and distinct classification of Deputy Sheriff-Bilingual (Spanish) and said classification is not covered by the agreement. For the reasons discussed below, the Arbitrator agrees.

First, the record is clear that the County has the authority under Section 1.02 of the agreement to create the classification of "Deputy Sheriff-Bilingual (Spanish)." And, contrary to the Union's assertion, the record is also clear that the County created such a classification separate and distinct from the classification of "Deputy Sheriff," and that the Grievant holds a position in said classification as an employe of the County. In this regard, the Arbitrator notes the unrefuted testimony of management witnesses about the creation of the new classification of Deputy Sheriff-Bilingual (Spanish), the reasons for its creation and assignment of job duties (with the distinguishing factor from the Deputy Sheriff classification of requiring the ability to read, write and speak Spanish and English), the Grievant's hiring process which was separate from the hiring process of Deputy Sheriff's and the Grievant's performance of his daily job duties and responsibilities which included utilization of his interpretation skill as an integral and regular part of his job function. While it is true, as pointed out by the union, that other County employes like Deputy Sheriff Jose Lopez have been called upon from time-to-time to serve as translators the Grievant's responsibility in this area is different because it is an integral part of the job duties assigned to his job classification and not incidental to the performance of his job like the occasional translation performed by Lopez and other County employes cited by the Union.

The Union argues, nevertheless, that the Grievant as a Deputy Sheriff-Bilingual (Spanish) should be treated the same as other Deputy Sheriffs for the purpose of transferring to the first shift based upon his seniority. However, the Union provided no contractual authority or other precedent in support of this position. To the contrary, Section 1.01 of the agreement entitled Recognition provides that the County recognizes the Association as the exclusive collective bargaining agent for all Deputy Sheriffs, Deputy Sheriffs I, Deputy Sheriffs II, and Deputy Sheriff Sergeants employed by the County with respect to wages, hours and conditions of employment. Deputy Sheriff-Bilingual (Spanish) is not mentioned in the Recognition Clause. Section 3.01 of the agreement references the classification of Deputy Sheriff "being created solely for permanent assignment to the Jail" but again makes no reference to the disputed classification. In fact, nowhere in the Agreement is the "Deputy Sheriff-Bilingual (Spanish)" classification mentioned. Based on same, and the language of Section 6.01 "Entire Memorandum of Agreement" which provides that "The foregoing constitutes the entire Memorandum of Agreement between the parties by which the parties intended to be bound . . .," the Arbitrator finds it reasonable to conclude that the Deputy Sheriff-Bilingual (Spanish) classification is not covered by the terms of the parties'

agreement and, therefore, the Grievant does not have access to the contractual grievance/arbitration procedure to challenge the County's refusal of his request to transfer to the first shift based upon his seniority over other persons classified as "Deputy Sheriff."

The Union argues, contrary to the above, that because the agreement does not recognize a separate classification of "Deputy Sheriff-Bilingual (Spanish)" the County has waived its right to rely on its unilateral classification and its estopped from treating said Deputies differently from other officers in the "Deputy Sheriff" classification. However, as noted above, because said classification is not covered by the parties' agreement it is the Grievant, not the County, who is prohibited from invoking its provisions in support of his position. And there is nothing in the agreement which prohibits the County from treating the Deputy Sheriff-Bilingual (Spanish) classification different from Deputy Sheriffs, for, as an example, access to the contractual grievance/arbitration process.

The Union also argues that the County should have raised the issue of "reclassification" when negotiating the 1994-1996 agreement and because it didn't it should be ordered to honor the Grievant's shift transfer request. However, the Union offered no contractual or other authority to support this claim. To the contrary, a strong argument can be made that the Union knew or should have known about the creation of this new classification, 1/ and that because this reclassification occurred before the aforesaid negotiations the Union should have brought the matter up in negotiations. The Union's failure to do so does not create a corresponding duty on the part of the County to treat the Grievant the same as a Deputy Sheriff under the agreement or to honor his request to arbitrate this dispute.

The Union claims that the Grievant understood that he had the same rights and obligations as other Deputy Sheriffs and was never told that his seniority would be determined by comparing his date of hire with those of five other bilingual deputies rather than others classified as Deputy Sheriff. However, the Union offered no persuasive evidence or testimony in support of same. To the contrary, Peter Misko who hired the Grievant testified unrefuted by the Union that he informed the Grievant at the time of his hire that he would be working with other bilingual Deputy Sheriffs, two to a shift, and that would be his assignment until his seniority in that classification got him into another shift. Jertha Ramos added that Deputy Sheriffs-Bilingual (Spanish) were treated differently than Deputy Sheriffs in their hiring and assignment and that the Grievant was informed of same.

1/ Unrefuted testimony of Gerald Rieder, current Business Agent for the Association, who testified that he regularly received notices of County Personnel Committee meetings where classification issues are handled and Jertha Romos who testified that the Association was notified of the creation of the new classification of "Deputy Sheriff-Bilingual (Spanish)."

The Union adds that the agreement does not recognize the County's unilateral attempt to create a bilingual deputy classification. It is true, as mentioned above, that the agreement neither mentions nor covers the disputed classification. However, contrary to the Union's assertion, since said classification is not recognized (covered) by the terms of the agreement the County is under no contractual obligation to the Grievant herein.

The Union argues further that the general management rights and memorandum of agreement clauses do not supersede the specific contract provisions governing shifts and transfers which in its opinion support the Union's position. However, as noted previously, the specific provisions of the Recognition Clause and the Entire Memorandum of Agreement as well as the Agreement as a whole support the County's position that the Grievant's classification is not included among those classification recognized and covered by the terms of the agreement. Therefore, the Arbitrator likewise rejects this argument of the Union.

