

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

THE OZAUKEE DEPUTY SHERIFF'S  
ASSOCIATION

and

OZAUKEE COUNTY (SHERIFF'S DEPARTMENT)

Case 40  
No. 54341  
MA-9633

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, and Mr. Kevin W. Naylor, Labor Consultant, on behalf of the Union.

Michael, Best & Friedrich, by Mr. John J. Kalter, on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Port Washington, Wisconsin, on January 30, 1997. The hearing was transcribed and both parties filed briefs and reply briefs which were received by April 18, 1997. Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Did the County violate Sections 7.03 and 7.06 of the contract when it failed to post the new hours of work awarded to Sergeant Joseph A. Kort and, if so, what is the appropriate remedy?

BACKGROUND

The County in 1992 posted for a Sergeant's position in its jail to cover the off days of its straight shift Sergeants. The posting (Joint Exhibit 7) stated, inter alia: "Shift To Be Determined".

Thereafter, the County on December 29, 1992, awarded that job to Sergeant Joseph A. Kort and it subsequently assigned him a 5-2, 4-2 work cycle that called for him to work a five-day work week which consisted of two third shifts, two second shifts, and one first shift, as well as a four-day work week which consisted of two third shifts and two second shifts. Kort worked that cycle without incident between 1993-1996.

In order to save overtime, the County in the beginning of 1996 changed Kort's work week on an experimental basis so that he worked two second shifts and three first shifts during a five day work week, as well as two second shifts and two first shifts during a four-day work week. This eliminated two third shift slots. The County on April 1, 1996, made this change permanent. Kort did not grieve this change - one which still kept him in his original 5-2, 4-2 work cycle.

The Union, however, on April 4, 1996, did grieve on the ground that the County is required under Sections 7.03 and 7.06 of the contract to post the position with these new hours. The Union thus argues that the County is "tilting at windmills" by asserting that it has the right to change Kort's hours without a posting pursuant to Section 5.01, the management rights clause; that "a new position was created here because the County is trying to reduce overtime, which was not the initial reason for establishing this position; that the County itself has acknowledged that a "new schedule" has been created; that its grievance must be sustained to avoid absurd or nonsensical results; and that past practice supports its position. As a remedy, the Union requests that this job be posted and that it be awarded to the most senior bidder.

The County disagrees by asserting that it has the management right to alter the work schedule under Sections 5.01 and 10.01 of the contract. It therefore maintains that the Sheriff exercised his right under the contract "to determine and establish regular work schedules" and that the contract's provisions relating to job posting and assignment of shifts are inapplicable.

## DISCUSSION

This case turns on the interplay between Section 5.01 and Sections 7.03 and 7.07 of the contract.

Section 5.01 states in pertinent part:

### ARTICLE 5 - MANAGEMENT RIGHTS

**Section 5.01:** Except as otherwise provided in this Agreement, the Employer reserves and retains solely and exclusively all of its common law, statutory and inherent rights to manage its own affairs. Such rights include but are not limited to the following:

. . .

6. To determine and schedule the work to be performed by the work force;

. . .

Section 7.03, entitled "Shifts, Etc.", provides in pertinent part:

**ARTICLE 7 - SENIORITY**

. . .

**Section 7.03 - Shifts, Etc:**

a) The assignment of shifts on a permanent basis, extra work and vacation shall be made by the Sheriff to the employees insofar as possible on a seniority basis. All employees reserve the right to file a grievance if seniority is not followed.

b) With respect to the assignment of shifts referred to in subparagraph (a) above, an employee serving a trial period shall not be considered to have seniority standing and such shift assignments on a seniority basis shall only occur when a vacancy exists.

. . .

Section 7.06, entitled "Job Posting", states in pertinent part:

**Section 7.06 - Job Posting:** Whenever a new or vacant position is to be filled, it will be filled in the following manner:

a) Notice of Vacancy. A notice of all new and vacant positions in any classification included in the bargaining unit shall be posted on the department bulletin board for seven (7) calendar days.

Any employee desiring to fill any posted vacancy or new position shall sign the job posting notice.

Any employee on vacation during the full posting period will be deemed to have signed the posting and immediately upon his or her return to work from the vacation period such employee shall indicate to the Sheriff in writing whether he or she desires to be considered for the position. (The County may also attempt to contact such employee during his or her vacation period to obtain such employee's desire in writing).

All positions posted shall be filled within a reasonable time subsequent to the completion of the job posting period and any testing period.

. . .

Under the Union's theory, the County has violated Section 7.06 if one assumes that Kort's present position constitutes "a new or vacant position. . .", as the County in 1996 never posted for it. However, Kort's position is not "new" and it has never been "vacant" for one simple reason: his position today - which is still based on a 5-2, 4-2 work cycle - is the very same position he has held since 1993 with but one exception: he now works two additional day shifts and two less night shifts. That hardly converts his position into a "new one"; it merely means that he has been rescheduled within the context of his 5-2, 4-2 work week. 1/ Section 7.06 is hence inapplicable.

The County has the right to reschedule Kort because Section 5.01, paragraph 6, gives it the right "To determine and schedule the work to be performed by the work force." In addition, it was understood at the time that Kort originally posted for his position in 1992 that the hours were to be determined later since said posting stated: "Shift To Be Determined". Hence, the County retains the right to alter the hours of Kort's position pursuant to the express terms of the original 1992 posting as long as Kort remains on his 5-2, 4-2 work cycle. Thus, the record shows that Kort today is performing the same basic function that he has performed since 1993, i.e., to fill in for the other jail Sergeants on their days off.

Section 7.03 therefore does not come into play here because we are not dealing with an entirely new shift that must be posted. Rather, the situation here centers on a shift which was originally established in 1992 at the County's discretion and which, as a result, can still be altered

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1/ The Union also asserts that the position is "new" because the County has changed it in order to save overtime costs - which was not one of the reasons initially advanced by the County in 1992 when it created Kort's original work schedule. The question of overtime, however, does not affect the key inquiry here - i.e., whether Kort is performing the same relief duties he has performed since 1993. Since he is, his position is not "new" even though the County is now achieving an ancillary benefit (i.e., a reduction in overtime) that is new.

at its discretion - particularly when Kort himself has never expressed any dissatisfaction with it.

Lastly, the Union argues that a past practice supports its position and that denying its grievance "could result in the swing shift being used to either reward or punish employees." The prior past practices cited by the Union, however, all involved positions for demonstrably newly-created positions. Here, by contrast, the record shows that -- but for a few administrative details -- Kort today is performing the same basic duties he has been performing since 1993. As for possible misuse of the swing shift, it suffices to say here that my ruling is limited to the facts of this case which show that the County has not acted improperly and that Kort himself has not objected to the change in his hours. If there ever is abuse, the Union of course at that time is free to grieve.

In light of the above, it is my

AWARD

That the County did not violate Sections 7.03 and/or 7.06 of the contract when it failed to post the new hours of work awarded to Sergeant Joseph A. Kort; the grievance is therefore denied.

Dated at Madison, Wisconsin, this 21st day of July, 1997.

By Amedeo Greco /s/  
Amedeo Greco, Arbitrator