

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**MANITOWOC COUNTY (SHERIFF'S DEPARTMENT)**  
and  
**WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

Case 327  
No. 55787  
MA-10093

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Appearances:

**Mr. Stephen J. Rollins**, Corporation Counsel, Manitowoc County, 1010 South Eighth Street, Manitowoc, Wisconsin 54220, on behalf of the County.

**Mr. Gerald Ugland**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54220-0370, on behalf of the Union.

**ARBITRATION AWARD**

According to the terms of the 1996-97 collective bargaining agreement between the County Personnel Committee of Manitowoc County Board of Supervisors (hereafter County) and Manitowoc County Sheriff's Department Employees Local 986-B, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding when, if ever, Nancy Saueressig should have been granted regular employe status by the Sheriff's Department. The Commission designated Sharon A. Gallagher to hear and resolve the dispute between the parties. Hearing was held at Manitowoc, Wisconsin on January 27, 1998. A stenographic transcript of the proceedings was made and received by February 5, 1998. The parties agreed that their initial briefs would be postmarked to the arbitrator by March 18, 1998 and that the Arbitrator would thereafter exchange them; the parties reserved the right to file a reply brief within ten (10) working days after their receipt of the other party's initial brief. All documents in this case were received by April 13, 1998, whereupon the record was closed.

**ISSUES**

The parties stipulated to the substantive issue in this case, as follows:

Did the Employer violate the collective bargaining agreement by denying the Grievant, Nancy Saueressig regular employe status, wages and benefits? If so, what is the appropriate remedy?

However, the County argued that a procedural issue should properly be determined before the undersigned could reach the substantive issue. That procedural issue is as follows:

Was the grievance timely filed?

The parties agreed that the Arbitrator should determine the procedural issue first and that if she found the grievance timely, the Arbitrator should then proceed to determine the stipulated substantive issue herein. As I have found the grievance timely filed, I will reach the stipulated substantive issue herein.

### **RELEVANT CONTRACT PROVISIONS**

#### **ARTICLE I - RECOGNITION AND BARGAINING UNIT**

The Employer recognizes the Union as the exclusive bargaining agent for the employes of the Manitowoc County Sheriff's Department, excluding the positions of Sheriff, Inspector, Deputy Inspectors, Jail Administrator, Chief Investigator, Narcotics Unit Supervisor, Clerical Coordinator, Food Service Manager, PSJS Administrator, Lieutenants, Sergeants, Sworn Employees with the power of arrest, and temporary employees.

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#### **ARTICLE VIII - GRIEVANCE PROCEDURE**

- A. **Definition of Grievance:** Should any differences arise between the Employer and the Union as to the meaning and the application of this Agreement, or as to any question relating to wages, hours and working conditions, they shall be settled under the provisions of this Article.
- B. **Time Limitations:** The failure of a party to appeal a grievance in a timely fashion will be treated as a settlement to that particular grievance, without prejudice. However, it is not possible to comply with the time limitation specified in the grievance procedure because of work schedules, illness, vacations, holidays, any approved leave or time off, these time limitations may be extended by mutual agreement.

The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure.

C. Steps in Procedure:

Step 1 The employe and one (1) Union steward shall orally state grievances to the Department Head (Sheriff) or the Sheriff's designee within a reasonable period of time, but in no event more than thirty (30) calendar days after the Union knew or should have known of the occurrence of such grievance. . .

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ARTICLE X - DEFINITIONS OF EMPLOYEES

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B. Regular Part-Time: A regular part-time employe is a person hired to fill a regular part-time position. Regular part-time employees shall not be used to replace, reduce or displace regular full-time employment.

...

D. Temporary: A temporary employee is hired for a specified period of time (not to exceed six months) and who will be separated from the payroll at the end of such period. Temporary employees receive none of the benefits contained in this Agreement. Temporary employees shall not be used to replace, reduce or displace regular employment.

**BACKGROUND**

The County's Policy Manual indicates that in order to be considered for a regular bargaining unit opening, individuals must appear on the current eligibility list prior to their selection for such an opening. However, it is not a requirement for a person being considered for a temporary job to be on the current clerical eligibility list, although the County has used this list as a resource to find employes for non-regular jobs, including temporary jobs. The County has hired temporary employes off the street without testing in the past. The record shows that the Grievant, Nancy Saueressig, was on the clerical eligibility list at the time she was hired as a non-sworn reserve deputy in 1995 but that she did not re-take the test in November of 1995, and therefore she did not appear

on the current eligibility list dated in November, 1995. 1/ Once an employe has passed the County eligibility tests and has been hired into a regular

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bargaining unit position, the collective bargaining agreement applicable to that employe is applied and the employe then has contractual posting rights which generally override the need for the employe to remain on the County's current eligibility list. 1/

There are approximately five Secretary/Clerical employes and one Secretary/Bookkeeper employe who occupy bargaining unit positions in the Sheriff's Department. Although the Secretary/Bookkeeper has her own office, all other unit clerical employes work in the same area, are aware of the work that the other employes do, and can see each other during their workday as they are seated at desks, and in the same area.

Nancy Saueressig was originally hired as a non-sworn reserve deputy in the Sheriff's Department on or about May 30, 1995 at a rate of \$6.49 per hour. From the end of May, 1995 through December 31, 1995, the Grievant worked a total of 382.5 hours. During this period of time, the Sheriff's Department clerical work calendars indicate that the Grievant regularly worked two or three days per week, between 2.5 and 8 hours per day. From January 1, 1996 through December 31, 1996, the Grievant worked a total of 349.25 hours for the Sheriff's Department, again regularly working approximately 2 or 3 days per week, between 3.25 and 6.5 hours per day. Beginning on January 1, 1997 through March 5, 1997, the Grievant worked 132.5 hours, between 3 hours and 8.75 hours per day.

It should be noted that in 1996, the Grievant worked sporadically. For example in January, 1996, the Grievant did not work two weeks, and then for the next three weeks she worked only 5 days; in February, she did not work two weeks, and then in the last two weeks of February, 1996 she worked four days; the Grievant worked three days in March, 1996, two days in April, 1996 and did not work at all in May and June and the first two and half weeks of July, 1996. Beginning in the fourth week of July, 1996, the Grievant began working more days - between 2 and 3 days per week and sometimes every day in a week. In January, 1997 the Grievant began working 3 or 4 days per week and sometimes 5 days per week.

Prior to March 5, 1997, the Grievant worked flexible hours on an as-needed basis for the Sheriff's Department. Once a month, Clerical Coordinator Kathy Leist would check the vacation schedule among her regular bargaining unit employes to see when she would need the Grievant to help with the workload. Thereafter, Leist would check with the Grievant, and then schedule the Grievant on a separate calendar posted in the Secretary Bookkeeper's office in the Department. (No bargaining unit employes were scheduled in this manner.) Leist stated that during the period prior to March 5, 1997, the Grievant had no definite hours or days of work as a result of this approach.

Union Steward Kathy Shoulak was aware that the Grievant had worked at the Sheriff's

Department performing clerical duties since 1995. Shoulak stated that she had been told by management that the Grievant was a non-sworn reserve deputy and therefore Shoulak did not

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believe that the Grievant was part of the bargaining unit. Shoulak also stated that she was told by Clerical Coordinator Leist that the Grievant's position did not qualify for bargaining unit status and that the Grievant's work hours were limited.

### FACTS

On or about March 6, 1997, Clerical Coordinator Leist announced to bargaining unit employees that the Grievant was a temporary employe as of that time and that she would receive a higher pay rate as a result. At this point, the Grievant began essentially replacing Dawn Madsen who was then on a six-month trial period in the Secretary/Bookkeeper job in the Department. Thus, the Grievant essentially worked Madsen's prior regular part-time clerical schedule and she was no longer scheduled on the separate calendar maintained in the Secretary/Bookkeeper's office.

At this time, the County sent through an employe status report for the Grievant which listed her present salary as \$6.94 per hour and showed that it would increase to \$10.39 per hour upon this status change, and classified her a "temporary secretary/clerk" as of March 6, 1997. This form also showed that the Grievant would be replacing Dawn Madsen as a Secretary/Clerk. As the replacement for Dawn Madsen, the Grievant typed incident reports, assisted customers at the counter, issued subpoenas, and assisted unit clerical employes with a variety of clerical duties. The Grievant also did the work of unit employes who were absent or on leave during this period of time.

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From March 6, 1997 through September 25, 1997, the Grievant worked a total of 990 hours. The Grievant worked from 8:00 a.m. to 2:00 p.m. five days per week beginning in the third week of March, the same schedule Madsen had worked. 3/ Prior to March 6, 1997, Leist told the Grievant that her new position would be a temporary one, for not more than six months, to replace Dawn Madsen while Madsen was on her trial period in the Secretary/Bookkeeper job.

However, in approximately early June, 1997, Madsen told Leist that she enjoyed her new position and intended to stay in it. At this point, Leist knew that another bargaining unit employe, Patty Shimek, was due to go on maternity leave in early August, 1997. Leist decided to check with her supervisor and the Personnel Director whether she could retain the Grievant to replace Shimek during her pregnancy leave. Management told Leist that if the Sheriff's Department could "show a separation" of the Grievant's employment from the County, the Department could retain the Grievant as a temporary to perform Shimek's duties during her maternity leave.

At this point, Leist spoke with the Grievant, explained to her that the County had to show a separation in her employment in order for her to continue working for the County as a temporary employe to replace Shimek. The Grievant indicated that she wished to go on a vacation in the middle of June, and the Grievant then agreed to take 10 days of unpaid vacation, from June 19 through June 30, 1997, to show the separation from payroll required by the County. The Grievant stated that she understood that she would have continued regular employment upon her return to the County on July 1, 1997 through the end of Shimek's maternity leave. Leist stated that she expected the Grievant to return on July 1, 1997 to begin training on Shimek's job and she had made her plans for the office with that expectation in mind.

It is undisputed that the County failed to notify the Union regarding the arrangements Leist made with the Grievant for her "separation" from payroll. It is also undisputed that the County never offered to pay for the Grievant's June, 1997 vacation. Finally, it should be noted that although the County has employe status report forms for the other relevant actions it took regarding the Grievant's employment from her date of hire through her termination on October 24, 1997, the County produced no form indicating that the Grievant had been "separated" from the payroll in June, 1997.

The Grievant stated that she took the eligibility test for consideration for County employment in or about November, 1994. At this time, the Grievant stated that she believed that she would be on the eligibility list forever, having taken the necessary tests. However, in April or May, 1997, the Grievant stated that management told her that eligibility tests must be taken every two years to remain effective, or the employe must request that their prior scores be carried over onto a new list. The Grievant stated that none of this was made clear to her at any time during her employment until Dawn Madsen's part-time position became open (when Madsen took the Secretary/Bookkeeper position) and it was determined that the Grievant was not on the eligibility list and apparently could not be considered for that opening. 4/

No evidence was submitted to show that anyone had ever been selected for a bargaining unit clerical opening unless they had been on the current eligibility list prior to their application therefor. Indeed, County managers stated and County policy demonstrates that individuals cannot be selected for unit clerical openings unless their names are on the current eligibility list. On October 25, 1997, the Grievant's "temporary" position replacing Shimek terminated and an employe status report issued indicating that the reason for her separation was that her "temporary position ended".

The grievance in this case was filed on August 29, 1997, prior to the termination of the Grievant's "temporary" position and just prior to the expiration of the six-month period following her employment as a "temporary" employe. On September 26, 1997, the County answered the Union's grievance in relevant part as follows:

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This serves as the Employer's step three response to the referenced grievance.

This grievance states that it is filed on behalf of Nancy Saueressig, a non-represented temporary employee of the Sheriff's Department. Since Ms. Saueressig is non-represented, a grievance cannot be filed upon her behalf.

As explained at the step three meeting, Ms. Saueressig was hired as a non-sworn reserve deputy on May 24, 1995 and worked in that capacity until March 5, 1997. Ms. Saueressig's status as a reserve deputy is not unique to Ms. Saueressig. In fact, there is a long standing practice within the Sheriff's Department of the use of non-sworn reserve deputies, dating back to 1984. If a grievance were to be filed on the basis of Ms. Saueressig's reserve deputy status, it would not be timely as more than thirty days (in fact, over five months) had elapsed between the time Ms. Saueressig was a reserve deputy and the date of this grievance.

Ms. Saueressig had a change of status effective March 6, 1997 to a temporary secretary clerk. At that time she began temporarily filling the position vacated by Dawn Madsen. She continued in this temporary status until she was separated from the payroll on June 19, 1997, and went on an unpaid leave of absence. Ms. Saueressig was activated on the payroll on June 30, 1997, and began training to fill a new temporary assignment as a temporary replacement for Patty Shimek who began a twelve week Family and Medical Leave on August 4, 1997. The collective bargaining agreement allows the use of temporary employees, but states "A temporary employee is one hired for a specified period of time (not to exceed six months) and who will be separated from the payroll at the end of such period. Temporary employees receive none of the benefits contained in this Agreement. Temporary employees shall not be used to replace, reduce or displace regular employment." Ms. Saueressig was separated from the payroll on June 19, 1997, less than six months after she began in her temporary status. When she was placed on the payroll again, it was for a totally different position and function. She has received none of the benefits contained in this Agreement, and her temporary status has not caused the displacement or reduction of regular employees.

It is anticipated that Ms. Shimek will be returning from leave on October 27, 1997. At the time of her return Ms. Saueressig will be removed from her temporary position, and her employment relationship with the Manitowoc County Sheriff's Department will be terminated.

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## **POSITIONS OF THE PARTIES**

### **Union**

In regard to the question of arbitrability, the Union asserted that the County's denial of benefits to the Grievant should constitute a continuing basis for a grievance and that the County's deceptive statements to Union representatives and employes should not preclude the Grievant from proceeding in this case and receiving an award on the merits. In regard to the merits of the case, the Union asserted that because the Grievant had an expectation of continued employment and because that employment lasted more than six months she was, under Article X, to be considered a regular employe, not a temporary employe. In this regard, the Union noted that the Grievant began performing Dawn Madsen's duties before March 6, 1997 and that while the Grievant was training to substitute for Shimek, she performed other duties as well. The Union pointed out that there was no evidence that the Grievant suffered any reduction in her work hours in 1997 due to a lack of work at the Sheriff's Department. The Union finds it significant in that the employe status report dated May 24, 1995, regarding the Grievant, the Grievant was listed as a "reserve deputy" and her status was then listed as temporary, part-time. Again, on March 6, 1997, the County issued another employe status report for the Grievant which listed her as having a status change from Reserve Deputy to Secretary/Clerk - Temporary and indicated that her wage would change from \$6.94 to \$10.39 per hour and that she would replace Dawn Madsen on a part-time, regular basis. These facts, in the Union's view, show the obviously contradictory manner in which the County depicted the Grievant's status while assigning her essentially the same duties she had performed since 1995.

The Union contended that the vacation which the Grievant took from June 19, 1997 through June 30, 1997 was not a leave of absence nor a break in service because both the County and the Grievant expected that the Grievant's work would continue to be regular after her vacation and for an extended period of time. Thus, the Union asserted, the County merely changed the Grievant's status on paper and that this technical change should not be persuasive of her actual duties and employment status for the County.

The Union noted that the Grievant worked regularly and consistently from May, 1995 until her termination in October, 1997. The fact that the County did not, in fact, separate the Grievant from employment prior to her six month service as a temporary employe having expired, demonstrated to the Union that the grievance must be sustained. The County's policy that because the Grievant was not on the current clerical eligibility list she could not be considered for vacancies should not apply to the Grievant as she was already a regular clerical employe at the time she could have posted into Madsen's position. The Union noted that the Grievant was unaware that she had to qualify more than once for the eligibility list. Furthermore, the Union pointed out that the Employer's witnesses stated that the Grievant was a competent worker, that she could have passed the clerical eligibility list test and that she could have performed all of the duties of the open position in the Department.



In all of the circumstances, the Union urged that the Employer, by hiring the Grievant and treating her as a regular employe, had waived the requirement that she be on the current clerical eligibility list before she could be considered for any regular employment posting. The Union contended, therefore, that the Grievant is entitled to all of the benefits of the regular position that she occupied pursuant to the collective bargaining agreement. In fact, the Union urged, upon her termination in October of 1997, the Grievant was entitled to use the layoff clause to either have Christensen laid off or to post for or bump into other unit jobs. Thus, the Union sought that the grievance be sustained and that an Order be issued requiring the County to recognize that the Grievant was entitled to all benefits of the collective bargaining agreement applicable to a part-time Secretary/Clerk and to order that the County make the Grievant whole.

### County

The County initially observed that the time limit for bringing a grievance is no later than thirty (30) calendar days after the Union knew, or should have known, of the occurrence which gave rise to the grievance. On this point, the County noted that the Grievant was initially hired and utilized as a reserve deputy from May 24, 1995 through March 5, 1997. Thereafter, the Grievant was hired as a temporary replacement for Dawn Madsen beginning on March 6, 1997 and that following a separation in employment, the Grievant was hired as a temporary replacement for Patty Shimek in late June, 1997. The County noted that with regard to the Grievant's taking temporary employment to replace Madsen and Shimek, neither of these positions was more than six months in length, and that in any event, the Grievant was told that she would not be permitted to continue as a permanent employe after these temporary jobs were completed.

Given this factual background, the County argued that any grievance which attempted to complain regarding the Grievant's employment as a reserve deputy from May 24, 1995 through March 6, 1997 would be more than three years untimely. The County noted that Union officials admitted that they were aware of the Grievant's status as a reserve deputy during this period of time; that the Grievant was not a member of the bargaining unit; and that the contract did not apply to her.

With regard to the Grievant's employment as a temporary replacement for Dawn Madsen, the County urged that the Union knew in March, 1997 that the County was treating the Grievant as a temporary employe, not to be considered for permanent employment and that her employment would be terminated within six months. Yet, the County noted, the Union failed to grieve the County's treatment of the Grievant until months after it knew of the County's position regarding her employment. With regard to the Grievant's employment as a temporary replacement for Patty Shimek, the County noted that the Union knew in June, 1997, that the Grievant would be replacing Ms. Shimek and that that employment would be terminated after less than a six-month period. Thus, in the County's view, the grievance regarding this position

was filed three months late. Therefore, the County urged that the grievance should be dismissed without consideration of the substantive issue in this case.

In the alternative, assuming that the Arbitrator found the case timely, the County urged that the contract permits the Employer to hire temporary employees pursuant to Article X. Because the Grievant's first assignment as a temporary employee lasted for only four months, the County urged, no violation of Article X occurred in that instance. Thereafter, following a period of separation from employment, the County noted that the Grievant's assignment to replace Ms. Shimek again lasted only four months, not in excess of the six-month period mentioned in Article X, Section D. The County asserted that the Grievant was employed to cover two different positions which were each temporarily vacant for periods of less than six months and that therefore, her employment in these positions could not violate Article X, Section D. The County noted that the Grievant was fully aware that she was covering two different positions and that her time in each position was to be limited and would not evolve into a permanent job.

The County took exception to the Union's request that the Grievant be awarded the position that was ultimately filled by Brenda Christensen. In this regard, the County noted that the Grievant was not eligible to be hired into that position because she was not on the then-current clerical eligibility list. In addition, the County noted, the Union had had an opportunity to obtain the relief it is seeking in this case by proposing a formal written agreement to the County thereon. The Union failed to do this. The Union's failure to act essentially cost the Grievant the opportunity to be hired as a permanent employee of the Sheriff's Department and, the County urged, the County should not be made to pay for the Union's mistake in failing to pursue a settlement with the County previously. In all of the circumstances, the County sought denial and dismissal of the grievance in its entirety.

## **REPLY BRIEFS**

### **Union**

If the County's arguments regarding the timing of the filing of the instant grievance were accepted, the Union argued that it would have had three separate 30-day periods in which to appropriately file the grievance. In the alternative, the Union asserted that the County had deceived employees in the Department regarding the Grievant's status and that therefore it should not profit from such deception. In any event, the Union reiterated that this case involves a continuing grievance, and that the Union could have waited at least a six-month period before it could have determined whether the County was indeed treating the Grievant as a temporary or a regular employee. Thus, the Union urged that the grievance be found timely filed in these circumstances.

The Union argued that the Employer should not be allowed to essentially assert that an employe is temporary but to then retain the employe and assign regular duties to the employe. This showed that the County had in essence hired and maintained that employe in a regular position from the beginning. The Union noted that the County has no authority to make individual contracts with employes; that the Grievant was used as a substitute for regular employes who were on leave beginning in early 1997; that she worked regularly while no employe was on leave during January and February, 1997; and that she worked on her usual work tasks or was assigned work by the clerical supervisor consistently throughout her employment. The Union observed that the contract does not allow the Employer to unilaterally extend a temporary employe's status for any reason. Because the Employer essentially waived the applicability of the clerical eligibility test to the Grievant by treating her as a regular clerical employe, she had rights to the position which she occupied at the time she filed the grievance and she should have been given job-bidding rights as well as the proper pay and benefits back to at least the beginning of 1997.

The fact that the Employer stated that it would have agreed to a settlement whereby the Grievant would have been placed in a regular position in the Department had the Union body entered into such an agreement, the Union observed, constituted an explicit waiver of the standard that all new employes must be on the clerical eligibility list prior to hire. This fact is another reason why the Union should prevail in this case and why the Grievant's pay and benefits should be awarded back to the beginning of her employment with the Department. In the alternative, the Union urged that the remedy herein should reach back seven months, including the 30-day deadline for filing the grievance.

### County

The County argued that the Union knew or should have known that the Grievant had worked in the Department since 1995 and that indeed the Union's witnesses admitted as much at hearing in this case. The County therefore urged that the Union's claim that a continuing basis for its grievance existed is unpersuasive as it blurs the distinction between the Grievant's employment initially as a Reserve Deputy and her subsequent employment in two temporary assignments. In addition, the Union's argument on this point was inconsistent with the record facts. In this regard, the County noted that the Grievant admitted she was told in March and in May, 1997 that she was a temporary employe and that she would be terminated after performing those duties for less than six months. Furthermore, the County argued that the Union's claim that it did not understand the Grievant was a part of the bargaining unit constituted no true misunderstanding, as the Union's witnesses readily admitted that all Reserve Deputies in the Department are excluded from the bargaining unit.

The County asserted that even if this case had been filed as a unit clarification under Section 111.70(d)(5), Stats., it "would be timely only if brought while the employe was actually employed in the position the Union was seeking to have recognized" and that in any event, the grievance filed was untimely because the Grievant's status changed in early March, 1997 from Reserve Deputy to temporary employe. The County pointed out, contrary to the Union's assertions, that the duties that were assigned to the Grievant during her period of employment and not relevant to this case. In these circumstances, the County urged that the grievance had been filed three years too late, and that it should be dismissed on that basis.

After March 6, 1997, the County contended that the Grievant had no expectation of continued employment beyond the period of her two temporary assignments. The County resisted the Union's contention that the two separate assignments given to the Grievant, each of which was less than six months, should be treated as a single assignment lasting more than six months and that the Grievant's unpaid vacation did not constitute a break in her employment with the County. The County asserted that the Union's claims that the County had waived the requirement that the Grievant be on the eligibility list and that the employer had in fact originally hired the Grievant off the eligibility list were both false and unsupported by the record herein. In regard to the latter point, the County observed that when the Grievant was hired as a Reserve Deputy there was no requirement that she be on the eligibility list to be hired and that the fact that she was then on that clerical eligibility list does not necessarily require a conclusion that she was hired from it.

The County also argued that the Union misrepresented the record evidence in its initial brief as follows. The County noted that the fact that the Grievant was acting as a temporary replacement for a regular part-time employe would not therefore make the Grievant a regular part-time employe in her own right. In addition, the County pointed out that there was no actual record evidence to show that the Grievant could be regarded as a transferred employe after she left her position as a Reserve Deputy, despite the Union's assertions in this area.

In all of the circumstances, the County urged that the grievance was not timely with respect to the Grievant's employment as a Reserve Deputy or with respect to her temporary assignments replacing Dawn Madsen and Patty Shimek. Even if the grievance were found timely with respect to the Grievant's employment as a Reserve Deputy, the County argued that the remedy the Union is seeking is actually one which should be provided through a unit clarification and that therefore the grievance should be denied "because it is in the wrong forum". 5/ Alternatively, if the grievance is found timely with respect to the temporary assignments, the County urged that it did not violate the collective bargaining agreement by hiring the Grievant for two separate and distinct temporary work assignments which were each less than six months in duration during which the Grievant was separated from the County's employment for a two-week period of time.

## DISCUSSION

### Arbitrability

The labor agreement specifically provides that any grievance may be processed under Article VIII of the contract regarding "the meaning and application" of the agreement as well as "questions relating to wages, hours and working conditions." The instant grievance is therefore arbitrable on its face. Step 1 of the procedure states that a grievance must be filed "within a reasonable period of time, but in no event later than thirty (30) calendar days after the Union knew or should have known, of the occurrence of such grievance." Based upon the record evidence in this case, it is my view that the grievance herein was timely filed pursuant to the terms of Article VIII.

The record demonstrated that the Grievant was originally hired as a non-sworn Reserve Deputy in 1995, not for a specified period of time. It is apparent, that the Grievant accepted this employment without having any assurance that it would continue into the future and without having a regular schedule that she could depend upon. Rather, the Grievant and Clerical Coordinator Leist negotiated the Grievant's work schedule and posted this schedule on a separate calendar not applicable to bargaining unit employees from 1995 until March 5, 1997. Based upon the record evidence in this case, the position the Grievant held from 1995 to 1997 was casual, not "temporary" under the labor agreement. It also appears from the record that Department employees were aware of the fact that the Grievant was employed on an intermittent basis essentially to assist them in completing their work when employees went on vacation or the workload varied.

The County has argued that because Department employees, members of the bargaining unit, were aware that the Grievant was employed on a casual basis beginning in 1995, the grievance (filed in late August, 1997) essentially came three years too late. I note that Article I states that the Union is "the exclusive bargaining agent for the employees of the Manitowoc County Sheriff's Department. . ." Article I does not exclude casual employees or Reserve Deputies and it makes no distinction between part-time employees or regular employees for purposes of coverage. Because the Local Union knew for years about the Grievant's employment as a Reserve Deputy and never made further inquiries regarding her employment status or attempted to claim the position or file a grievance thereon, the grievance herein was clearly filed more than 30 days beyond the time at which the Union should have known a grievance arguably existed regarding the Grievant's employment as a Reserve Deputy. 6/

The question arises whether the instant grievance was timely filed regarding the Grievant's employment as a temporary employee. On March 6, 1997, the Grievant was hired as a "temporary" employee by the County. The Union filed the instant grievance on August 29, 1997, approximately six months after the Grievant began work for the County as a temporary

employee. The fact that the County assigned the Grievant at first to replace Dawn Madsen and later to replace Patty Shimek does not require a conclusion that she should be excluded from coverage by the collective bargaining agreement as a temporary employee. Thus, I find that the Union was well within the timelines of Article VIII in filing the grievance regarding the temporary status of the Grievant and that the fact that the Union waited until the Grievant had worked almost six months as a temporary employee was logical and appropriate. In particular, I note that it was not until August 4, 1997 that the Grievant was told that she would not be considered for the vacant position which Dawn Madsen had previously held and that there was no evidence proffered to show that the Union was officially notified by the County of the Grievant's employment status after early March, 1997. In all of the circumstances of this case, I find that the Union filed the instant grievance no later than thirty (30) days after the Union should have known of the occurrence of the grievance.

### **Substantive Issues**

Having found the grievance timely filed, I turn now to the substantive issues in this case. The County has argued that the Grievant could not possibly have become a regular employee as of March 6, 1997, because it gave her two temporary assignments, each of less than 6 months' duration with a period of separation from County employment between these assignments due to the Grievant's request for vacation. Article X, Section D makes no reference to temporary employees filling in for regular part-time employees as does Article X, Section B. As such, it is clear that the parties intended that Article X, Section D should apply not to positions, but to the employment of temporary employees for a specific period of time. Thus, in my view, the County cannot avoid its obligations to treat an employee as non-temporary where it hires and employs that person in various jobs for a period in excess of six months as it did here.

The record in this case clearly demonstrates that the County used the Grievant's request for a two-week vacation in the middle of June, 1997 to try to show the "separation from the payroll" required by Article X but that this action was simply a paper transaction for the convenience of the County. Thus, the County failed to demonstrate evidence to show that it had, in fact, separated the Grievant from the payroll. I note that Clerical Supervisor Leist and the Grievant discussed the fact that the Grievant would have to take an unpaid vacation beginning on June 19th, to show a separation from employment, but that the Grievant was expected to return to work on June 30, 1997 to continue her employment in the Department. Also, I note that the County proffered no employee status report form to document an actual separation from employment. These facts show that there was no genuine separation from the payroll in this case.

The Union has argued that the Grievant should be placed in Dawn Madsen's part-time position and be granted full back pay and benefits in that position. The contract does not support such a far-reaching remedy. Indeed, the contract is silent regarding what, if any, remedy should be granted where, as here, the County has employed a temporary employee beyond the six-month contractual time limit. Given the silence of the agreement on this point, I am loath to order the County to offer employment to the Grievant, as such an extreme remedy should be clearly provided for in the contract before it can be awarded by an arbitrator. However, given my conclusion that the County violated the contract by its actions toward the Grievant, I believe it is fair and reasonable to order the County to make her whole by paying her the contract rate for the hours she worked from March 6 through October 24, 1997 and by paying her for the vacation she took from June 19 through June 30, 1997.

Based upon the relevant evidence and argument in this case, I therefore issue the following

**AWARD**

The grievance was timely filed.

The Employer violated the collective bargaining agreement by denying the Grievant, Nancy Saueressig regular employee wages and benefits as of March 6, 1997. The County shall cease and desist from employing temporary employees for more than six (6) months and it shall pay the Grievant vacation pay for the period June 19 through June 30, 1997 as well as the appropriate contractual wage rate applicable to regular bargaining unit employees effective March 6, 1997, through her termination on October 24, 1997 (if it has not already done so).

As stated above, the County has no obligation to offer the Grievant any regular employment as a result of this Award.

Dated at Oshkosh, Wisconsin this 29th day of April, 1998.

Sharon A. Gallagher /s/  
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Sharon A. Gallagher, Arbitrator

**ENDNOTES**

1/ The current clerical eligibility list dates back to November, 1995. Personnel Director Cornils stated that from 1994 to November, 1995 the County had a number of openings, and used the 1994 list but that the Personnel Committee did not decide to retest and set up a new list until November, 1995. Due to downsizing by attrition, the 1995 clerical eligibility list was not exhausted in May, 1997 when Dawn Madsen's part-time position became vacant.

2/ During January and February, 1997, the Grievant was scheduled even when no other employes were off work, she began working more regular hours at that time and she did regular unit work. These facts, however, do not mean that the Grievant's position became a regular unit position at this time.

3/ During the first two weeks of March, the Grievant worked three days per week, 8:00 a.m. to 1:00 or 2:00 p.m.

4/ Sometime in May, 1997, departmental bargaining unit employes came to Clerical Coordinator Leist and asked her if the Grievant could stay on to take Dawn Madsen's former part-time job. Both Madsen and Shulak were then Union stewards and they put together a written agreement signed by all unit employes in the Department, which they proposed to the County, essentially waiving the fact that the Grievant was not then on the clerical eligibility list but placing the Grievant into the part-time Secretary/Clerical position Dawn Madsen vacated when she became the Secretary/Bookkeeper in the Department on a non-precedent setting basis.

Leist took the suggestion up with Personnel Director Cornils who stated that it might be possible for the County to enter into such an agreement but it was necessary for the employes to have the Union body formally adopt a written agreement on the subject and then propose it to the County. Although the employes put together such a written agreement and gave it to the Union president on May 29, 1997, the Union never formally proposed any such agreement to the County and the County hired Brenda Christianson off its 1995 clerical eligibility list, to fill the part-time vacancy after no internal applicants posted for the position. The fact that the Union failed to pursue a settlement regarding the Grievant, however, is not relevant to this case.

5/ Contrary to the County's assertions, the Union is not in the wrong forum here: Article X of the contract addresses the allegations made in this grievance. In addition, the unit clarification portions of the Wisconsin Statutes are separate and distinct provisions to which timeliness arguments do not pertain.

6/ Yet, whether the Union could have won a grievance regarding the Grievant's employment status while she was a Reserve Deputy is not an issue properly before me. In any event, the Grievant, as a casual employe from 1995 to March, 1997, could not have been legally included in the unit.