

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/  
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION LOCAL 225**

and

**WASHBURN COUNTY**

Case 37  
No. 55544  
MA-10045

*(Jody Benson Grievance)*

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Appearances:

**Mr. Gary Gravesen**, Bargaining Consultant, Wisconsin Professional Police Association/LEER Division.

**Mr. Michael D. Miller**, Administrative Coordinator/Personnel Director, on behalf of the County.

**ARBITRATION AWARD**

The above-captioned parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Shell Lake, Wisconsin, on January 14, 1998. The hearing was not transcribed and the parties thereafter filed briefs and reply briefs that were received by March 23, 1998. Based upon the entire record and the 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:

Whether the County violated Article 6, paragraph B, of the contract when it failed to offer the Jail Sergeant position to grievant Jodi Benson and, if so, what is the appropriate remedy?

### **BACKGROUND**

The County in June, 1997, posted for a newly-created Jail Sergeant position in its jail. Grievant Benson, a Dispatcher/Jailor since 1991, bid on that position, along with fellow employe Marcy Baumgart and others.

The County passed over Benson - even though she had about 8 months more seniority than Baumgart and even though the County concedes that Benson is otherwise qualified - and awarded the Jail Sergeant position to Baumgart. The County by letter dated June 25, 1997, informed Benson that it passed over her because:

...

Under the terms of the current labor agreement, Article 6, paragraph B, Sheriff Dryden has awarded the Jail Sergeant position to Marcy Baumgart who he feels is the senior most qualified candidate. This decision is based on your potentially conflicting personal relationship with an [sic] other employee of the department whom you would be likely to supervise.

Thank you again for your interest.

...

The "personal relationship" alluded to in said letter referred to Benson's admitted live-in relationship since 1992 with Jailor McLain, who at that time worked the 12:00 A.M. - 7:00 A.M. shift and who now works a staggered shift. The Jail Sergeants' hours are from 2:30 p.m. - 11:00 p.m., thereby requiring the Jail Sergeant to have overlapping shifts with McLain on several afternoons a week. Benson's relationship with McLain is well-known in the Sheriff's Department, as Benson has never tried to hide it.

The County defends its decision to pass over Benson in part on the grounds that her supervision of McLain would create a conflict of interest and violate its Nepotism Policy (Joint Exhibit 8), which was never bargained with the Union and which was adopted before 1988 without ever being challenged by the Union up to the time of the instant grievance. Said Policy states in pertinent part:

- A) All applicants for County positions will be required to list on their application form whether they have any relative employed by Washburn County and what the relationship is a member of the immediate family and is in a direct administrative and/or supervisory capacity in the Department with the vacancy, the applicant will not be considered in that position.\*

- B) No person employed by or elected to serve Washburn County may have any part in the screening or hiring of job applicants who are members of their immediate family. Neither may such an employee or elected official have any part in the evaluation, promotion, demotion, termination, negotiation of wages and benefits or supervision of any member of their immediate family.

\*Immediate family means wife, husband, son, daughter, mother, father, brother, sister, brother-in-law, sister-in-law, daughter-in-law, mother-in-law, father-in-law, step-parent or step-child. (Emphasis added).

- C) If two (2) persons in the employ of the County marry, the Personnel Committee shall investigate any potential areas of conflict of interest and take whatever steps are necessary to eliminate such conflict of interest.
- D) Any committee or department head action which results in the hiring or promotion of any relative of a County employee or elected official shall be subject to approval of the Personnel Committee.
- E) All situations involving employment of relatives shall be evaluated and, if deemed necessary, acted upon by the Personnel Committee.
- F) Decisions of the Personnel Committee in the above matters may be appealed to the County Board.

There is no evidence that either Benson or McLain in the past ever engaged in any inappropriate conduct on the job.

The Sheriff's Department in the past has hired the relatives of employes without any difficulties ever arising because of those family relationships. It hired Baumgart's daughter Martha as a limited-term employe during the summer and weekends, during which time Baumgart sometimes supervised her daughter. The County also hired Mark Dennis as a limited-term Jailor/Dispatcher when Sergeant Dave Dennis, his brother, worked as a Road Deputy. The two worked together on about 45 occasions. At the time of his hire, Mark Dennis was told he could not post into any Road Deputy position. And, it hired Debbie Riecter as a Law Enforcement Assistant, thereby requiring her to sometimes work under Mark Riecter.

Sheriff Terrence C. Dryden testified that he has never hired any employes in violation of the

County's nepotism policy and that employees in the past have supervised their relatives only on a very limited basis.

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Jail Administrator Mary Olson, who is in the bargaining unit, testified that the newly-created Jail Sergeant position was created to help her keep the jail clean; to supervise the quality and quantity of bargaining unit work; to schedule employees; and to approve overtime. Olson added that the Jail Sergeant does "not really" mete out formal discipline, but only "corrective discipline".

Benson on July 8, 1997, grieved the County's failure to award her the Jail Sergeant position, hence leading to the instant proceeding.

Thereafter, the County's Board of Supervisors on August 19, 1997, adopted a resolution which stated in pertinent part:

**BE IT FURTHER RESOLVED** that under the paragraph entitled "Coverage" of the County Ethics Policy, Ordinance No. 6-92, which paragraph currently excludes certain positions is hereby deleted and replaced with the following: "This Code governs all County officials, whether elected or appointed, paid or unpaid, and all County employees."

Prior thereto, the County's Ethics Policy did not cover any bargaining unit employees.

#### **POSITIONS OF THE PARTIES**

The Union asserts that the County violated Article 6, paragraph B, of the contract and the contractual just cause proviso when it failed to award the Jail Sergeant position to grievant Benson only because of her live-in relationship with fellow Jailor McLain. The Union thus states that the County's Nepotism Policy and Ethics Policy were unilaterally promulgated and were never bargained with the Union and that, as a result, they cannot be used to deny Benson the posted position in the face of her excellent qualifications. It also points out that the County in the past has hired relatives of employees; that the County's own Nepotism Policy does not on its face cover live-in relationships; that a legal opinion on this issue by Edwin v. Fischer, the County's Corporation Counsel, cannot be given any weight; and that the County's revised Ethics Policy should not be considered because it was adopted after the grievance was filed. As a remedy, the Union seeks a traditional make-whole remedy which includes awarding back pay and the Jail Sergeant position to Benson.

The County, in turn, maintains that the Union - because of its past inaction - has waived its

right to bargain over its nepotism and ethics policies; that said policies constitute "reasonable work rules" which are authorized under the contract; and that since the Jail Sergeant exercises direct supervision over jail employees, the "operational and morale problems arising from being supervised by one's spouse are too numerous to mention here". While agreeing that its Nepotism Policy "does not specifically address those living in a 'spouse like' relationship", the

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County asserts that such relationships can be viewed as other "spousal" relationships because they "will cause problems with office efficiency, jail and public safety. . ." The County also maintains that no binding past practice exists relating to the hiring of an employees' relatives.

### **DISCUSSION**

This case turns on the interplay between Article 2 of the contract, entitled "Management Rights", and Article 6, entitled "Job Posting, Transfer and Promotions."

Article 2 states in pertinent part that the County retains the right "To establish reasonable work rules" and "To hire, promote, transfer, reschedule and assign employees in positions within the County."

Article 6, Section B, states:

- B. Posting Procedure: Whenever a vacancy occurs or a new job is created, it shall be posted on a bulletin board for a period of ten (10) calendar days. Each employee interested in applying for the job shall sign the notice in the space provided or shall authorize his or her designate to sign the posting. At the end of ten (10) calendar days, the notice shall be removed and the applicant shall be selected within ten (10) calendar days. The notice shall state the prerequisites for the position to be filled and said prerequisites shall be consistent with the requirements of the job classification. The employee with the greatest seniority who is able and qualified shall be given the job. If there is any difference of opinion as to the qualifications of an employee, the employee may seek adjustment under the grievance procedure. The Employer may administer valid and appropriate tests and exams to determine ability and qualifications. The parties agree that vacancies shall be offered to all interested and qualified employees covered by the terms and conditions of this agreement before other applicants are considered for the vacancy. Internal applicants must meet all criteria for the posting before they shall be considered for the position. Unsuccessful internal candidates shall receive a written notice stating the reasons they were not considered for the position.

(Emphasis added).

Here, because Benson had the "greatest seniority" and was otherwise "able and qualified" for the Jail Sergeant position, she was entitled to said position under Article 6, Section B.

The question then becomes whether the County's nepotism and ethics policies constitute "reasonable work rules" under Article 2 and whether the County could deny Benson the job on the ground that her live-in relationship with fellow jailor McLain disqualified her from said position even though Benson had more seniority than Baumgart.

The County's Nepotism Policy (Joint Exhibit 8), on its face does not cover said live-in relationships because it only covers:

"wife, husband, son, daughter, mother, father, brother, sister, brother-in-law, sister-in-law, daughter-in-law, mother-in-law, father-in-law, step-parent or step-child."

Since McLain does not fall under any of these listed categories, his relationship with Benson is not covered under this language.

The County nevertheless argues that McLain and Benson are in a "spousal relationship" and that they therefore are covered. I disagree. If the County wants to encompass live-in relationships under its policy, it should clearly amend its policy to reflect that fact. Until it does, only the categories listed therein are covered.

However, even if we assume *arguendo* that the policy covers live-in relationships, it still is not a "reasonable work rule" because the County in the past has hired relatives of employes, thereby showing that it has applied its policy in a disparate manner. For while Sheriff Dryden tried to downplay such other hires, the record reveals that one set of relatives worked on the same shift in about 45 separate instances without incident. In addition, application of said policy here is unfair because Benson and McLain in the past have worked together without incident and because the record shows that Benson is an excellent employe who has always displayed the highest level of professionalism, a point conceded by Sheriff Dryden and Jail Administrator Olson. The County's claim here that they cannot work together thus rests entirely on conjecture which is not supported by one iota of objective evidence.

The County's revised Ethics Policy also suffers from a fundamental defect: it was revised in August, 1997, to cover Benson and other bargaining unit employes only after Benson had filed her grievance and only after the County decided in June, 1997 to not award her the Jail Sergeant position. Since the revised Ethics Policy was not in effect in June, 1997, the County cannot now rely on a policy that was not even in existence at the time Benson was denied the Jail Sergeant position.

But again, even if we were to assume *arguendo* that the Ethics Policy does apply, the County still has failed to offer any concrete evidence to prove that Benson's live-in relationship with McLain and her promotion to the Jail Sergeant position would violate this policy.

There similarly is no merit to the County's claim that the Union has waived its right to object to its Nepotism Policy because it did not raise any earlier objection to its policy which has been in effect since at least 1988. For in this connection, it is well-established that an employer's unilaterally promulgated work rules cannot supersede a contract and that, moreover, a union can grieve *either* when a policy is promulgated *or* when it is being implemented to a given set of facts. See How Arbitration Works, Elkouri and Elkouri, pp. 511; 280. (BNA, 5th Edition, 1997). Here, the Union has taken the latter course - which it has every right to do.

Lastly, the record does not support the County's claim that the Jail Sergeant operates as a supervisor. Jail Administrator Olson - who oversees the Jail Sergeant and who herself is in the bargaining unit - testified in substance that the Jail Sergeant only performs routine bargaining unit work devoid of real supervisory duties.

In light of the above, it is my

**AWARD**

1. That the County violated Article 6, paragraph B, of the contract when it failed to award the Jail Sergeant position to grievant Jodi Benson.

2. That to rectify said contractual violation, the County shall make Jodi Benson whole by immediately offering her the Jail Sergeant position and by paying to her a sum of money, including all benefits, that she would have earned had she been awarded said position in June, 1997.

3. That to resolve any questions that may arise over application of this Award, I shall retain my jurisdiction indefinitely. The parties thus are to advise me within thirty (30) days whether any questions have so arisen.

Dated at Madison, Wisconsin, this 15th day of May, 1998.

Amedeo Greco /s/  
Amedeo Greco, Arbitrator

AAG/gjc



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