

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**LINCOLN COUNTY PROFESSIONAL DEPUTIES'
ASSOCIATION, LOCAL 101, of the
LABOR ASSOCIATION OF WISCONSIN, INC.**

and

LINCOLN COUNTY (SHERIFF'S DEPARTMENT)

Case 176
No. 56629
MA-10356

(David Pophal Grievance)

Appearances:

Mr. Thomas Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., appeared on behalf of the Association.

Mr. John Mulder, Administrative Coordinator, Lincoln County, appeared on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and the County, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on September 30, 1998, in Merrill, Wisconsin. After the hearing the parties filed briefs, whereupon the record was closed on November 9, 1998. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate the collective bargaining agreement when it assigned investigator duties to the grievant, but failed to compensate the grievant at the existing sergeant investigator rate of pay? If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

The parties' 1997-1998 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 2 – MANAGEMENT RIGHTS

2.1 The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this Contract and applicable law. These rights include, but are not limited to the following:

...

2.1.3 To hire, promote, transfer, schedule, and assign employees to positions within the County;

2.1.10 To determine the kinds and amounts of services to be performed as pertains to County government operation; and the number and kinds of classifications to perform such services;

...

APPENDIX "A"

SALARY SCHEDULE

DEPUTY SHERIFF		Rates as of 12/31/96	January 1, 1997 (3.25% atb)	January 1, 1998 (3.25% atb)
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<i>48 months</i>	ANNUAL	30,675.00	31,672.00	32,701.00
	MONTHLY	2,556.00	2,639.00	2,725.00
	HOURLY	14.74	15.23	15.72

...

Sergeant Investigator		Rates as of 12/31/96	January 1, 1997 (3.25% atb)	January 1, 1998 (3.25% atb)
	ANNUAL	32,386.00	33,446.00	34,528.00
	MONTHLY	2,698.00	2,787.00	2,877.00
	HOURLY	15.57	16.08	16.60

FACTS

The wage schedule in the parties' collective bargaining agreement (Appendix "A") contains the wages for three classifications: deputy sheriff, juvenile officer and sergeant investigator. The sergeant investigator classification is the highest-paid classification in the bargaining unit. This classification has been in the bargaining unit since 1989 and its wage rate has been listed on Appendix "A" since then. The record indicates the basic duties of that position have not changed since it was created -- the employee in that position primarily investigates assaults. The record further indicates that over the years, several employees have filled the sergeant investigator position and been paid at the negotiated wage rate. The sergeant investigator classification is also known as the detective classification. The parties use the terms sergeant investigator and detective interchangeably.

In 1996, the County posted a vacancy for a detective. Eight employees bid for the position. The bidders were subsequently given a written civil service exam and four bidders were given oral interviews. Afterwards, a panel of three finalists was submitted to the Sheriff, who then selected one of them. The Sheriff selected David Pophal who has been with the

Department for 21 years. The Sheriff's written notification to Pophal concerning same was worded as follows: "This letter is to notify you that you have been appointed to the Detective Bureau, effective January 1, 1997. Congratulations."

Pophal assumed from this notification that he had been promoted from a deputy sheriff to a detective/sergeant investigator and that his pay rate would change accordingly. Pophal testified he was verbally advised that he had to complete a six-month probationary period for his new detective position.

Pophal began working in the Detective Bureau on January 1, 1997. After doing so, he performed the same investigator duties as were performed by the employees who preceded him in the Detective Bureau. With one exception which will be noted later, the employees who preceded Pophal in the Detective Bureau were paid at the sergeant investigator pay rate. The County did not pay Pophal at the sergeant investigator rate; instead, it continued to pay him at the top deputy rate (i.e. the 48-month rate) which he was at when he was "appointed" to the Detective Bureau. Thus, his pay rate did not change after his "appointment" to the Detective Bureau.

On August 4, 1997, Pophal made a written request to Chief Deputy Soucy that he and Jeffrey Simon "be given the title of Sergeant Investigator". Pophal testified that the reason he waited until August, 1997, to make this request was to get off probation. On August 6, 1997, Chief Deputy Soucy responded to Pophal with the following memo: "I appreciate your request for promotion to Sergeant Investigator. Your request will not be acted upon at this time."

On September 24, 1997, Pophal grieved the County's failure to pay him at the sergeant investigator rate. The County denied the grievance and it was appealed to arbitration.

The record indicates that bargaining unit member Jeff Simon has been assigned to the Detective Bureau since July, 1993. Simon, like Pophal, is a detective. Simon has been paid at the top deputy rate (i.e. the 48-month rate) since July, 1993; he has never been paid at the sergeant investigator pay rate. The matter of Simon's pay has never been grieved or addressed in negotiations. When Pophal's grievance was filed, Simon told Association representatives he did not want to be part of that grievance or have a separate grievance filed on his behalf concerning his pay.

POSITIONS OF THE PARTIES

Association

The Association contends the County violated the labor agreement when it assigned the grievant investigator duties but did not pay him at the sergeant investigator rate of pay. It makes the following arguments to support this contention.

First, the Association notes at the outset that the labor agreement contains a wage rate for sergeant investigator and has since 1989. It also notes that several employes have filled that position and been paid at the negotiated wage rate. As the Association sees it, these uncontroverted facts estop the County from arguing that the classification of sergeant investigator does not exist.

Second, the Association avers that in this case the County decided to fill a sergeant investigator position in the Detective Bureau. The Association submits that was their contractual right. Having made the decision to fill that position, the Association believes it is self-evident that the position which Pophal filled was a sergeant investigator position and not a deputy sheriff position. Building on the premise that the County promoted Pophal to sergeant investigator, the Association contends the County then became obligated to pay Pophal at the sergeant investigator pay rate specified in the labor agreement. To support this position, the Association notes that it is uncontroverted that Pophal is performing investigator duties and that, with one exception (i.e. Simon), the employes who preceded him in the Detective Bureau were paid at the sergeant investigator pay rate. The Association also notes that the parties use the term sergeant investigator and detective interchangeably. The Association argues that given the foregoing, it is a contract violation for the County to continue to pay the grievant at the pay rate of his former position (i.e. the deputy sheriff); instead, the Association believes he should be paid at the sergeant investigator pay rate.

With regard to the detective just noted who is not receiving sergeant investigator pay (i.e. Simon), the Association contends that the fact that he never grieved not being paid at the sergeant investigator pay rate is not germane to this case and therefore should be disregarded by the arbitrator. In making this contention, the Association calls the arbitrator's attention to the uncontroverted fact that it inquired of Simon whether he wanted to file a grievance over his pay and he expressly declined to do so. According to the Association, the fact that he does not want to pursue the County's contractual violation does not preclude Pophal from doing so.

Finally, responding to the County's argument that the Association should have negotiated the matter, the Association argues that it was unnecessary for it to do so because it was satisfied with the sergeant investigator pay rate specified in the contract. According to the Association, it was the County, not the Association, that wanted to change the wage rate for the sergeant investigator position. As a result, the Association believes it is the County that is obligated to bring the matter to the bargaining table.

In order to remedy this contractual breach, the Association requests that Pophal be paid prospectively at the sergeant investigator pay rate, and that he also receive sergeant investigator pay retroactive to January 1, 1997 (i.e. the date he started working in the Detective Bureau). With regard to the latter (i.e. the backpay), the Association seeks to have Pophal receive the difference between the top deputy pay rate (which he has already received), and the sergeant investigator pay rate.

County

The County contends it did not violate the labor agreement when it assigned the grievant investigator duties but did not pay him at the sergeant investigator rate of pay. It makes the following arguments to support this contention.

First, the County notes at the outset that Section 2.1.3 of the Management Rights clause gives it the right to “assign employees to positions”. It contends that what happened here is that the County simply “assigned” the grievant to the Detective Bureau to perform investigative duties.

Second, the County sees this case as a past practice case. In support of this premise, it notes that in 1993 it “assigned” Jeff Simon to the Detective Bureau. It points out that after it did so, Simon continued to receive deputy sheriff pay for this assignment (not sergeant investigator pay) and that this has continued to the present. The County stresses that the matter of Simon’s pay was never grieved by the Association or raised by it in negotiations. According to the County, the Association’s failure to grieve the matter or negotiate a different rate of pay for Simon has established a binding past practice that when someone is assigned to the Detective Bureau, they are paid at the top deputy rate – not the sergeant investigator rate. In the County’s view, if the Association now wants to change this practice after accepting it for four years, it should do so at the bargaining table.

Next, building on the premise that Simon’s existing deputy sheriff pay has created a past practice, the County asks the arbitrator to apply that practice here. It submits that it has treated Pophal exactly the same as Simon because both are being paid at the top deputy rate (rather than the sergeant investigator pay rate). Since both employees are similarly situated, the County asks rhetorically why a grievance was filed for Pophal but not Simon. According to the County, the Association’s attempt to dismiss this as Simon’s personal preference is unpersuasive. The County avers that if the arbitrator finds in favor of Pophal and awards him a remedy, this will result in a situation where two similarly situated employees are being treated differently. The County asserts that should not be allowed to happen.

Finally, the County calls attention to the exact words which were used in the Sheriff’s letter to Pophal. It specifically notes that the letter does not use the words “promotion”, “additional compensation”, or “sergeant investigator”. The County implies that since these words were not used in the letter, the Sheriff did not “promote” Pophal to sergeant investigator; rather, he was simply appointed to another assignment (i.e. detective) in his existing deputy sheriff classification. The County contends that while Pophal may have thought he was being promoted or would be receiving additional compensation as a result of working in the Detective Bureau, the letter does not say that. The County therefore avers that Pophal’s assumption that he was being promoted to sergeant investigator does not have a

factual basis. The County also submits that nothing in the labor agreement says that someone assigned to the Detective Bureau is automatically paid at the sergeant investigator pay rate. The County contends that since that is what the Association is proposing here, the Association's contention does not have a contractual basis either. The County therefore requests that the grievance be denied.

DISCUSSION

My analysis begins with an overview of the factual context of this matter. The County decided to post a detective position. The employees who bid on this position then went through an examination process which consisted of a written exam and an oral interview. Afterwards, a panel of three finalists was submitted to the Sheriff, who then selected one of them. The Sheriff selected Pophal and subsequently sent him the following letter: "This letter is to notify you that you have been appointed to the Detective Bureau effective January 1, 1997. Congratulations."

When Pophal received the letter from the Sheriff just noted, he assumed he had been promoted to sergeant investigator. I find that assumption was justified for the following reasons. First, as was just noted, it is uncontroverted that the position which was posted, and that Pophal applied for, was detective. The wage schedule of the labor agreement does not contain a classification known as detective; instead, it only contains the three classifications of deputy sheriff, juvenile officer and sergeant investigator. The parties stipulated at the hearing that the terms detective and sergeant investigator are interchangeable. Since those terms are used interchangeably by the parties, they are one and the same (i.e. synonymous). It therefore follows that when Pophal posted for the detective position, he was also posting for the position of sergeant investigator. Second, after the Sheriff selected Pophal off a panel of finalists, the Sheriff sent him a letter which said he was being "appointed to the Detective Bureau". This appointment to the Detective Bureau was not simply a lateral transfer from one assignment to another within Pophal's existing deputy sheriff classification. Instead, it was a promotion from one classification to another. Were it otherwise, why would the detective job bidders go through a written exam and an oral interview for simply a lateral transfer wherein they would still be paid the same rate (in Pophal's case, the deputy sheriff 48-month rate)? In my view, that makes no sense. I believe the more reasonable expectation is that the employees who bid on the detective job and went through the testing process did so because they viewed the detective job as a promotion from deputy sheriff. That certainly was Pophal's expectation and the County did not establish otherwise. Moreover, it is also noteworthy that after Pophal received the Sheriff's letter, he (Pophal) was told that he had to complete a six-month probationary period for his new detective position. Generally speaking, employees who are promoted have to complete a probationary period while those who are transferred or reassigned within their existing classification do not. The fact that Pophal was told he had to complete a probationary period buttresses the conclusion that he received a promotion rather

than a transfer or a job reassignment. Third, I find that the County's reliance on Sec. 5.08(2) of the County's Civil Service Ordinance is misplaced. The section in question requires the Sheriff to test for appointments to positions of equal compensation. That section has no applicability here for one simple reason: the positions of deputy sheriff and detective/sergeant investigator do not have "equal compensation". In point of fact, the latter position (i.e. sergeant investigator) pays more than the former (i.e. deputy sheriff, even at the 48-month rate). Given the foregoing, I find that Pophal's "appointment to the Detective Bureau" was not merely a new assignment within his existing deputy sheriff classification; rather, it was a promotion to sergeant investigator. The fact that the Sheriff's letter to Pophal informing him of his selection and appointment did not use the terms "promotion", "additional compensation", or "sergeant investigator" is not controlling. What is controlling is this – after he went to work in the Detective Bureau, Pophal began performing the same investigator duties as the detectives who preceded him had performed. With one exception (i.e., Jeff Simon), the detectives who preceded him were paid at the sergeant investigator pay rate – not the deputy sheriff pay rate.

Not surprisingly, it is the one exception just noted which the County relies on. The record indicates in that regard that Simon, who has been a detective in the Detective Bureau since 1993, has always been paid at the top deputy rate (i.e., the 48-month rate); he has never been paid at the sergeant investigator pay rate. The County contends that Simon's existing deputy sheriff pay has created a binding past practice that when someone is appointed to the Detective Bureau, they are to be paid at the deputy sheriff rate – not the sergeant investigator rate listed in the contract. The County asks the arbitrator to apply that practice here so as to foreclose Pophal (who is similarly situated to Simon) from being paid at the sergeant investigator pay rate.

Based on the following rationale, I decline to do so. The County's underlying premise that this is a past practice case overlooks the fact that not all conduct establishes a binding past practice. That is the situation here because the conduct which the County relies on (and wants to have enforced) involves the conduct of a single bargaining unit employe (i.e. Simon). As has previously been noted, Simon declined to grieve his pay. That is his right; he does not have to file a grievance. Similarly, the Association does not have to file an individual grievance if it lacks a willing grievant (as was the case in Simon's situation) or a group grievance when just one employe is affected by the Employer's action (as was also the case in Simon's situation). That being so, Simon's failure to grieve his pay does not foreclose other bargaining unit employes or the Association from doing so. Consequently, I find that just because Simon has been paid at the top deputy sheriff pay rate since 1993, that does not make it a binding past practice which is entitled to contractual enforcement. Moreover, aside from that, it is a generally accepted arbitral principle that a single instance is insufficient to create a past practice which supplements the labor agreement. This means that the fact that Simon chose not to grieve his pay does not foreclose the Association from seeking to enforce the

contract. Since Simon's situation does not establish a binding past practice, the County does not have a valid defense for not paying Pophal at the sergeant investigator pay rate.

Given the above, it is concluded that employees who are promoted to detective are contractually entitled, pursuant to Appendix "A", to be paid at the sergeant investigator pay rate. That did not happen to Pophal, so the County violated the labor agreement. In order to remedy this contractual violation, the County shall henceforth pay Pophal at the sergeant investigator rate.

The final question is how far back Pophal's backpay should go. The Association asks that it (i.e. Pophal's backpay) be retroactive to the date he was appointed to the Detective Bureau (January 1, 1997) as opposed to the date the grievance was filed (September 24, 1997). When faced with backpay retroactivity questions, arbitrators usually hold that backpay runs from the date the grievance was filed. In accordance with that generally accepted view, the undersigned finds that Pophal's backpay is retroactive to September 24, 1997.

Based on the foregoing and the record as a whole, the undersigned makes the following

AWARD

That the Employer violated the collective bargaining agreement when it assigned investigator duties to the grievant, but failed to compensate the grievant at the existing sergeant investigator rate of pay. In order to remedy this contractual violation, the Employer shall henceforth pay the grievant at the sergeant investigator pay rate. Additionally, the Employer shall also pay the grievant the difference between the top deputy pay rate (which he has already received), and the sergeant investigator pay rate retroactive to September 24, 1997.

Dated at Madison, Wisconsin this 7th day of January, 1999.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

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