

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**ST. CROIX COUNTY SHERIFF'S DEPARTMENT EMPLOYEES' ASSOCIATION**

and

**ST. CROIX COUNTY**

Case 166  
No. 56943  
MA-10469

Case 167  
No. 56944  
MA-10470

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Appearances:

**Mr. Thomas A. Bauer**, Labor Consultant, Labor Association of Wisconsin, Inc., appearing on behalf of the Association.

**Mr. Stephen L. Weld**, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, appearing on behalf of the County.

**ARBITRATION AWARD**

The Association and the County named above are parties to a 1997-99 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned arbitrator to hear the grievances of Robert Widiker. The undersigned was appointed and held a hearing on February 9, 1998, in Hudson, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by April 8, 1999.

**ISSUES**

The parties stipulated that the issue in grievance numbers 98-54 and 98-73 is the following:

Did the Employer violate Appendix B when it selected someone other than the Grievant for the vacant Court Officer position? If so, what is the remedy?

The parties further stipulated that the issue in grievance numbers 98-64, 98-81 and 98-7 is the following:

Did the Employer violate the provisions of the collective bargaining agreement when it paid the Grievant at Court Officer level for performing the job on an interim basis but not for filling in as Court Officer?

### CONTRACT LANGUAGE

#### **EXHIBIT "B"**

**Re: Filling of Primary Service Deputy, Court Officer, Recreation Officer, or Process Server Position(s)**

Whenever the County determines that a vacancy or new position is to be filled, said vacancy or new position shall be posted for seven (7) calendar days in overlapping weeks on the bulletin board provided by the County for Association use. The posting shall set forth the job duties and responsibilities, required qualifications, and rate of pay. Interested bargaining unit employees shall make application to the personnel office.

#### **Qualifications Necessary to Apply:**

Applicant must be a Certified Law Enforcement Officer in the State of Wisconsin, must be currently employed in a qualifying position in St. Croix County, and must have three (3) continuous years of service as an officer in the St. Croix County's Sheriff's Department. Qualifying positions include: Corrections Officer II, Security Officer II, Primary Services Deputy, Court Officer, Investigator, Process Server, and Recreation Officer. Time spent in the positions of Corrections Officer I and/or Security Officer I will be counted toward the three (3) years of continuous service provided that the applicant currently meets the other two requirements, i.e. certified officer and qualifying position. Continuous years of service does not include time spent in the reserves or auxiliary services, or time spent in a temporary (non-benefit) position.

**The Selection Process:**

The selection process will consist of three-phase procedure to develop a composite score.

*Phase I – Written Test*

The test is not a pass-fail test; rather it is used as an indicator of success in the chosen field.

The test counts as one-third (1/3) of the total score.

Applicants can test only once every twelve (12) months. If additional vacancies are posted within the 12-month period of time, the applicant must use his/her original test.

*Phase 2 – Oral Interview*

The oral interview consists of a series of questions relating to the applicant's experience, technical knowledge, education, and skills. All applicants will be asked essentially the same questions. The Interview Panel will consist of five (5) members as follow:

1 representative from the Personnel Department

1 representative from the Public Protection Committee

1 representative from management in the Sheriff's Department

2 representatives from surrounding Sheriff's Departments

The interview counts as one-third (1/3) of the total score.

*Phase 3 – Department Evaluation*

The department evaluation is completed by management in the Sheriff's Department, with input from the Sheriff's Department staff and other related managers. This will vary depending upon the position to be filled.

The evaluation will consider such items as:

- work history
- self-motivation
- report-writing ability

The departmental evaluation counts as one-third (1/3) of the total score. Composite scores are developed by the Personnel Department using the three-phase procedure. When candidates are determined to be substantially equal, seniority shall be the determining factor. The Personnel Department provides the Sheriff with a list of top three candidates. If more than one vacancy exists, the Sheriff makes the final appointment from the list with an additional name being added so that the Sheriff always has three candidates from which to make his/her selection (assuming there are than many applicants). The eligibility list is valid for twelve (12) months from the date it was established.

## **BACKGROUND**

The Grievant, Robert Widiker, has been employed by the St. Croix County Sheriff's Department for six years. He is a Security Officer II (which the parties sometimes call court/security officer). He sought a promotion through the posting process to be a Court Officer, a position that is paid much higher than the Security Officer. Another person was chosen for that position, and all these grievances relate to the selection of the other candidate and Widiker's level of pay during certain periods of time.

The job description for the Security Officer has a special note that at least one Security Officer will be assigned to work in the court system. The job description further states that the officer assigned to the court system will have many of the duties described for the position, and that half of the work time will be spent in providing courtroom security, with the other half working as an assistant to and under the direction of the Court officer. Widiker is the Security officer assigned to work in the court system. He provides security for the courtrooms, the government center, brings prisoners into court for appearances, and performs some of the same duties as the Court Officer.

The Court Officer is supposed to handle all first appearances in court, meet with the District Attorney's office to prepare and sign questions for summons or complaints or warrants, log court dispositions, make reports to other County agencies, provide for secure transportation of prisoners for court appearances, and assist in the jail operation as necessary. Widiker testified that he performed all of the duties of the Court Officer and filled in for the Court Officer when he or she was busy.

The Court Officer was Jane Jensen until the summer of 1998 when she announced her retirement. The County used a promotional procedure that is at issue in this case to fill the position of Court Officer. Widiker was among those seeking the job. Melissa Zopp was chosen by the Sheriff for the position from an eligibility list established by the County.

### **Promotion Grievance**

The County admits that it made some mistakes in the procedure for establishing an eligibility list to fill the position of Court Officer. It believes it corrected those mistakes. All dates noted below refer to the year 1998 unless otherwise stated.

A written exam was prepared for the candidates by Chief Deputy Ronald Volkert and Jensen. The exam had a total of 85 points. It was taken on July 20<sup>th</sup> by Widiker, Barbara Schrank, Melissa Zopp, Jill Germain, Mark Mikla and Mary Lischewski. Widiker scored 77 and Schrank scored 67. Both of those were considered passing marks (over 75 percent of the points) and Zopp, Germain, Mikla and Lischewski (who withdrew later in the process) fell below what was considered to be a passing score.

Then the oral interviews took place. In several phases. First on July 29<sup>th</sup>, Volkert, Julie Speer from the Public Protection Committee, and Personnel Director Debra Kathan interviewed only Widiker and Schrank, based on the mistaken belief that the exam was a pass-fail test (not to mention the further mistake regarding the composition of the interview panel). Kathan notified that Sheriff that the interviewing panel found Schrank to be their first choice and Widiker their second choice, and that he could select from the top two after conducting a performance review.

Volkert testified that after a couple days he sat in on the first set of interviews with Kathan and Speer, he was sitting in his office and started reading the contract. He realized that they had used a pass-fail test which was incorrect. Volkert stated that he called Kathan and told her that they had a problem and had to correct it, and that Kathan said they would have a second interview. Kathan testified that she was following the promotional procedure for the Investigator position until Volkert brought it to her attention. However, the procedure for the Investigator promotion also calls for a test that is not pass-fail.

Volkert, Kathan and Speer then interviewed the additional candidates – Germain, Mikla and Zopp on August 10<sup>th</sup>. Volkert said that he and Speer asked follow-up questions to the candidates' answers.

Once again, a couple of days later, Volkert was sitting in his office, again reading the contract, and realized that they should have had two representatives from surrounding sheriffs' departments included on the interview panel. So he called Kathan again, who said she would have all five candidates be interviewed by the two representatives from the other departments. On cross-examination, Volkert testified that Kathan said they should just wait and see if the Union filed a grievance. A grievance was filed on August 11<sup>th</sup>.

In the third set of oral interviews held on August 17<sup>th</sup>, two outside law enforcement people – Chief Deputy Neil Gulbranson from Pierce County and Al Lentz from Barron County – and Kathan were present. Kathan asked all the same questions in the same format for all three sets of interviews. Lentz and Gulbranson asked follow-up questions in Widiker's interview.

Kathan testified that all the interviewers made their ratings independently, and once the ratings were completed, there was some talk among them.

Everyone ranked Zopp as the top candidate in the oral interviews.

Volkert completed a performance evaluation for Widiker and gave him a total score of 47.5 points out of 55 possible. Volkert became Widiker's direct supervisor on February 16<sup>th</sup> when he became the Chief Deputy. In making his evaluation of Widiker, Volkert spoke with Jensen. Volkert had been Widiker's supervisor for about six months when he had to make an evaluation. He based some of his rankings in the performance evaluation on things that Jensen

told him. He had no personal knowledge of Widiker's job performance. Volkert did not check Widiker's personnel file, and he did not check with his predecessor, Chief Deputy Max Irke. Although Volkert testified that Jensen told him that work was piled up on her desk when she came back from vacation, he gave Widiker a top rating in the category of productivity. Volkert admitted that it was possible that Jensen gave him wrong information regarding the quality of Widiker's work, but he added that he talked to other people, including some in the Clerk of Court's office and Kathan. Despite the fact that Widiker scored the highest on the written exam, Volkert rated him as only a three or four (out of five) in the category of knowledge of the job.

During Widiker's six years on the job, he has not received an evaluation. The Jail Captain has done performance evaluations on employees working there on a regular basis, but the Sheriff's Department has not done any regular performance evaluations on patrol deputies or investigators. The only time Volkert prepared an evaluation for Widiker was in this promotional process.

Zopp was a Corrections Officer II with the County before getting the promotion to Court Officer. The Captain of the Jail, Karen Humphrey, prepared the evaluation for Zopp, as well as for all of the other candidates, since they were all Correction Officers under her supervision. Of 55 maximum points available in the evaluation, Zopp received a perfect score of 55. Kathan asked Humphrey why she rated Zopp so highly, and was told that Zopp is a superb employee.

Widiker found out from Zopp that she was offered the position of Court Officer and had accepted it in early September. Widiker testified that the Sheriff called him in and told him that he had placed first in the written test, that he was over confident in the oral interview, but failed on the evaluation portion. Widiker and the Sheriff, who died in November, did not get along well together, according to Widiker.

Widiker has four more months of seniority than Zopp.

Kathan took the scores of the applicants from the written test, the oral interviews, and the performance evaluations and came up with a final result. She established a score of first place in each category as a set number of points, second place as a set number, etc., in order to not skew the system. On August 17<sup>th</sup>, Kathan gave Sheriff Paul Burch the eligibility list for Court Officer, with the listings showing the ranking as follows:

1. Melissa Zopp
2. Robert Widiker
3. Barbara Schrank
4. Jill Germain
5. Mark Mikla

Kathan's letter notes that the Sheriff has the right to select from the top three candidates to fill the vacancy for the Court Officer positions.

David Hake is an Investigator with the Sheriff's Department and the President of the local Association for two years. He has been in contract negotiations for three contracts. The procedure for filling the Court Officer position was negotiated for the first time into the 1997-99 labor contract. A similar procedure was in existence in the contract for the Investigator position.

Hake noted that the promotion process was incorrect in a couple of respects, because the County initially treated the written exam as a pass-fail test, and it went ahead with only three people on the panel for oral interviews. Hake spoke with Kathan and told her that the County was in violation of the contract because it did not have a five-member interview board, as the contract required. Hake believed that Kathan's plan to re-do the interviews with just the two outside law enforcement people and herself still violated the contract because all five people should be sitting in on the interview at one time. Hake was concerned that the members of the panel have a chance to ask independent questions of the applicants, and one panel would not know what the other asked. Hake thought applicants could not be graded fairly that way.

Hake filed a grievance before anyone was selected from the eligibility list before he knew of their rankings on the list. The grievance #98-54 was filed on August 11<sup>th</sup>. Widiker filed grievance #98-73 on September 21<sup>st</sup>, grieving the selection of Zopp.

Both parties agree that the new procedure allows the Sheriff to select any one of the final top three candidates, without regard to any other criteria.

The County has used the promotion procedure for promotions of Primary Service Deputies (or road deputies) without any problems before the promotional procedure at issue here.

### **Compensation Grievance**

Widiker filed a grievance (#98-64) for compensation for performing Court Officer duties between June 26<sup>th</sup> and August 2<sup>nd</sup>. Widiker testified Chief Deputy Volkert told him that as of June 26<sup>th</sup>, he was to assume the duties of the Court Officer – signing complaints, bringing prisoners to court, etc. The Court Officer, Jane Jensen, was retiring, but she was still present. The record is not clear about what she was doing during this period of time. Widiker stated that she was not performing the duties of the Court Officer, that he was doing those duties, but that he was also still acting as a Security Officer.

Volkert agreed that he had a hallway conversation with Widiker, but he did not believe he had ordered Widiker to assume the Court Officer's duties while Jensen was still there.

Volkert recalled that he asked Widiker to assume the Court Officer's duties after Jensen

left, while they were in the process of hiring a Court Officer, and Widiker did assume the duties when Jensen actually retired. On August 27, 1998, Widiker sent the following letter to Kathan:

On June 26, 1998 Chief Deputy Ronald Volkert told me that as of that day (June 26, 1998) I was to assume the duties of Court Officer. The reason given was Jane Jensen was retiring July 31, 1998 and a replacement would not be by that date. Another reason was that Jane would be taking time off during the month.

As of June 26, 1998 I began assuming the duties of Court Officer. I continued the duties even when Jane was present.

I am requesting the wages and benefits of the Court Officer from June 26, 1998 until the new Court Officers starts their duties.

Thank you for your time and consideration in this matter.

On August 28<sup>th</sup>, Kathan responded to Widiker's letter with the following letter:

I am in receipt of your letter dated August 27, 1998 regarding your work as a Court Officer in Jane Jensen's absence.

I have reviewed your work history with Chief Deputy Ron Volkert and he informs me that you took over the duties of the Court Officer position on August 3. Prior to that date, Jane Jensen had been our Court Office and, as such, had ultimate responsibility for the tasks to be completed.

As you know, a portion of the job of Security Officer is assisting the Court Officer in daily activities and serving in that capacity during his/her absence. PTO time that she may have used in June and July did not eliminate Jane's responsibility for the Court Officer position. It was similar to other times when she would be off for a vacation or illness and you would fill-in for her court work.

However, upon Jane's effective resignation date from the County, full responsibility for the duties of the Court Officer have fallen to you, until such time as a new Court Officer assumes the position. As such, the County will compensate you on an interim basis for your court officer duties.

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As is the practice under the contract, you will be placed at the next highest pay level within the Court Officer classification that affords you a wage



increase. I will instruct Ron to change your hourly rate, on a temporary basis effective August 3, to \$16.12 per hour. Please let me know if you have any questions.

Widiker filed another grievance (#98-81) for compensation for training the new Court Officer for the period from September 8<sup>th</sup> through September 28<sup>th</sup>. He explained that when Zopp became the Court Officer on September 8<sup>th</sup>, he sat down every day and explained to her what had to be done and how to do it. On September 28<sup>th</sup>, he asked Volkert how long he would be getting Court Officer pay, and Volkert told him that he probably was not going to get it. Widiker said that in that case, the training was over – “school was over.” Volkert asked him if he was refusing to assist the Court Officer, and he replied that he would have to assist her but he did not have to train her. Widiker said something to the effect that since he had not gotten the job, he was not qualified to train the Court Officer.

Grievance #98-7 was filed by Widiker for pay for doing the Court Officer’s job on November 30<sup>th</sup>, December 1, 7, 8, 9, 10 and 11 while Zopp was off duty on personal time. Widiker wrote a note to Personnel stating that he had assumed Court Officer duties on those dates. Kathan replied with the following:

I am in receipt of your letter dated December 17 in which you request court officer pay for one date in November and six dates in December. You indicate that on these dates, the County’s court officer, Melissa Zopp, was on personal time off and it was necessary for you to perform some of the functions of the court officer.

You began working as a security officer with St. Croix County on February 16, 1993. At that time, your job description was that of security officer. The job description you received in 1993 has not changed in the last five-plus years. It indicates that a portion of the work time of the Security Officer is performing court officer tasks – logging court dispositions, assisting with first appearances in court, securing jailed persons for court appearances, etc. Whether serving with the former court officer, Jane Jensen, or the current officer, Melissa Zopp, your duties have remained constant.

From February 16 through the end of 1993, Jane Jensen was absent for 160 work hours. During those absences, it was your responsibility as security officer to complete basic court officer tasks. At no time in 1993 did you request to be paid court officer wages during the absences of Jane Jensen. In 1994, Jane Jensen was absent for 136 work hours. At no time in 1994 did you request to be paid court officer wages during those absences. In 1995, Jane Jensen was absent for 168 work hours. At no time in 1995 did you request to be paid

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court officer wages during those absences. In 1996, Jane Jensen was absent for 232 work hours. At no time in 1996 did you request to be paid court officer

wages during those absences. In 1997, Jane Jensen was absent for 124 work hours. At no time in 1997 did you request to be paid court officer wages during those absences.

Since Jane's retirement in July, you have filed a series of grievances regarding the court officer position. You have not been compensated as a court officer for any time in which the County maintained a full-time court officer. Your compensation as a court officer was limited to those days in which there was no functioning court officer in the County. In the absence of a designated court officer, the County paid you as an "acting" or "interim" court officer. With the selection of Melissa Zopp to the court officer position, your compensation returned to that of a security officer. Referring to a letter to you from my office, dated September 22, 1998, you will note that we also visited the question of your security officer job description, and the fact that it requires you to assist with court officer duties on an as-needed basis.

When Melissa Zopp was on personal time off November 30 and December 1, 7, 8, 9, 10 and 11, you functioned as a security officer, responsible for completing some of the court officer tasks in the same manner as you did during Jane Jensen's absences in 1993, 1994, 1995, 1996, 1997, and 1998.

There are no provisions in the contract or the job description that would demand payment outside of your classification for these fill-in duties. Certainly if there had been, you would have petitioned for additional pay in all the previous years back to your start date in 1993.

Your request is denied.

Widiker testified that he took over Court Officer's duties on Mondays by getting all the reports from different agencies throughout the County and taking them to the District Attorney's office, where criminal complaints were typed. He would then read and sign the complaints and bring people up to court. On Tuesday, they prepared for traffic and handled traffic on Wednesday. On Thursday and Friday, they handled paperwork and anyone that had to go to jail. He also performed those functions when assisting Jensen, the former Court Officer.

Widiker estimated that he usually spent about 50 percent of his time assisting the Court Officer or filling in for the Court Officer. The job description notes that the Security Officer assigned to work in the court system will spend about half of the time providing for courtroom security and the other half assisting the Court Officer.

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Widiker makes a distinction between assisting the Court Officer when she is present and filling in for the Court Officer when she is absent. He said he did not ask for compensation in the past when Jensen was absent because the Chief Deputy at the time told him it was part of his position.

## THE PARTIES' POSITIONS

### The Association

The Association first asserts that the County violated Appendix B of the collective bargaining agreement by selecting someone other than the Grievant for the vacant Court Officer position. The Association initially filed a grievance (#98-54) when the County conducted a written examination as a pass-fail exam, contrary to the contract. After Hake brought that violation to the attention of Kathan, the County notified all the candidates that they would all be part of phase two, the oral interviews.

The next violation occurred when the County conducted the oral interviews without the two representatives from surrounding sheriffs' departments. The County then corrected that mistake by conducting another set of interviews of candidates.

The Employer corrected these specific violations after Hake called those violations to their attention. The Association asks that the Arbitrator not overlook the facts of this case, which show that the County acted arbitrarily and capriciously in the processing of the candidates by blatantly disregarding the existing procedure for testing candidates. Kathan stated in her letter that the County took a stuttering approach with the selection process. The Association asserts that the manner in which the County conducted the testing was tainted by the County's disregard of the specific steps and criteria set forth in the promotional procedure.

The Association submits that Widiker's qualifications for the Court Officer position were substantially equal to the qualifications of the person selected by the County. The Association is alleging that Widiker was the most qualified candidate and should have been selected by the County. He scored the most points on the written test, and the person selected – Zopp – scored only 57 points, not enough to pass the test when the County deemed 75 percent a passing score before it found out that the test could not be a pass-fail test. When Kathan translated the final test results, she gave Widiker 20 points and Zopp 15 points – a five-point difference, even though Zopp technically failed the written exam. This scoring process made the candidates as scored by the Employer relatively equal.

In reviewing the scoring of the oral interviews, the Association notes that Kathan's translation to total points summary gave Zopp a score of 20 points and Widiker 15 points – again, a five-point difference. Thus, they were scored relatively equal in the oral interview.

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In the final phase, the Department evaluation, Kathan translated the scores as 20 points for Zopp and 13.5 points for Widiker, for a 6.5 point difference.

The total points earned show Zopp with a total of 55 points and Widiker with a total of 48.5 points, a mere 6.5 point difference. The minimal point difference between Zopp and Widiker shows that the two candidates were substantially equal.

The Association argues that when the qualifications of the applicants are substantially equal, the Sheriff is required to make his selection based upon seniority. The County has the burden of proof to show that Zopp was better qualified than Widiker, because the County is the party responsible for the promotion. Under the collective bargaining agreement, the Sheriff must weigh and compare the relative qualifications and relative seniority of the applicants prior to the determination being made. If there is relative equality between the applicants, the Sheriff is required to consider seniority as the deciding factor.

The Association contends that the mere 6.5 point difference between Zopp and Widiker is not a significant point spread to justify promoting Zopp over Widiker, and the County's argument that Zopp was more qualified than Widiker based upon that difference is ludicrous. Management's right to exercise its judgment is accompanied by an obligation to establish that its decisions were based on fair, reasonable and objective standards. The Association believes that the Sheriff should not be allowed to merely pluck a name haphazardly from the eligibility list without first seriously considering and weighing the top three candidates' total qualifications and seniority before making the final selection.

If one looks at the experience of the candidates, there are significant differences. Zopp was a Corrections Officer working in the jail lock up area. Widiker rarely worked in the jail and his experience has always been in the area of court security. He assisted the Court Officer and clearly had substantially more experience for the position, which the County failed to consider in the promotion. One arbitrator has stated that experience usually is, and should be, one of the most important factors in determining ability.

The Association notes that the opinion of supervisors is usually entitled to some consideration where it is substantiated by evidence including periodic merit ratings. Widiker was only 6.5 points below Zopp, not a great difference between the candidates. Both were evaluated on their current positions. The Association points out that Widiker has the most seniority of the top three candidates. Moreover, the County did not give Widiker appropriate recognition for time performing the same duties (one-half of this total work time) in the Court Officer classification. The Association asks that the position be awarded to Widiker.

As to the second issue regarding pay issues, the Association maintains that the County violated the labor contract by refusing to pay the Grievant at the Court Officer level at various times in 1998. The first period of time is from June 26<sup>th</sup> through August 2<sup>nd</sup>, when Volkert ordered the Grievant to assume the duties of Court Officer pending the retirement of Jensen.

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Jensen discontinued the duties, and the late Sheriff may have authorized Widiker to assume the Court Officer duties on June 26<sup>th</sup>. Volkert's testimony corroborates Widiker's testimony that they switched places during this time and Widiker should have been paid at the Court Officer's rate of pay for all hours worked in that capacity.

The second period of time that is in dispute is September 8<sup>th</sup> through the 28<sup>th</sup> - when Widiker was assigned by the County to train Zopp, who had been promoted to the position of

Court Officer. Widiker received the Court Officer pay between August 3<sup>rd</sup> and September 7<sup>th</sup>, and it was the County's responsibility to notify him of the change in pay status. No one advised him that he would not be paid for training Zopp, and the County simply took advantage of him during this period of time.

The third time frame are the dates in late November and early December when Widiker filled in as Court Officer while Zopp took personal time off. The Association asks that the County pay the Grievant the appropriate compensation for the work performed on November 30<sup>th</sup>, December 1<sup>st</sup>, and December 7<sup>th</sup> through the 11<sup>th</sup>.

### **The County**

The County asserts that it complied with the collective bargaining agreement's provisions for filling the Court Officer position. The County acknowledged that the test in phase one of the selection process test is not to be a pass-fail exam. While it initially established a passing grade, after reviewing the contract, it used the test to compare the applicants. No candidate was eliminated from consideration because the test results were below the unilaterally established standard.

While the grievance #98-54 asserts that the oral interview panel did not have two representatives from the surrounding sheriffs' departments on it, that assertion is inaccurate. Volkert, Kathan and Speer were on one interview panel, and Kathan, Lentz from Barron County and Gulbranson from Pierce County sat on another interview panel. The same questions were asked in both sessions. There is nothing in Exhibit B of the collective bargaining agreement that requires that all of the members of the interview panel sit at the same session. In another case where a promotion was challenged as well as two interview sessions, the arbitrator found the process acceptable, absent a definite showing of bias, unreliability, or improper motives.

Moreover, the County asserts, the interviews were highly organized and structured. Even if the split interview process breached the contract, the action should be considered de minimus or of such a slight departure that it is permissible.

Regarding grievance #98-73, the County contends that it considered all of the applicants' qualifications in the various phases of the selection process. All applicants had to have certain qualifications to even apply for the promotion. The collective bargaining

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agreement establishes a three-phase selection process, with each phase counting as one-third towards a composite score. The oral interview considered the candidates' experience, technical knowledge, education and skills. The contract provides that the Sheriff will select from the top three candidates, and even the Grievant concedes that the Sheriff could have chosen any of the top three candidates. He chose the number one overall rated candidate.

Turning to the grievances for pay for Court Officer duties, the County first notes that grievance #7 and #64 both assert that the Grievant should have been paid at a higher rate for

filling in for Jensen and Zopp. Widiker was required to assist the Court Officer as part of his job description. He admits that he filled in for Jensen without receiving Court Officer pay during his entire six-year tenure as Security Officer. Thus, he was performing as Security Officer and not as Court Officer when he filled in for her.

The County contends that performing the duties of a higher compensated employee on a temporary basis does not require additional compensation. In a case where there was no clear-cut evidence of any designation made by management for an employee to perform the work of a higher paid employee, a grievance was denied. In that same case, there was no clause that would guarantee higher pay for routine transfers of a temporary nature.

Regarding grievance #81: the County notes that it has the right to add the duties of the Court Officer to the Security Officer position for a temporary time period without additional compensation. Once the new Court Officer was appointed, Widiker's pay properly returned to the Security Officer level even though Widiker was asked to orient and train the new Court Officer. Since that request to perform additional duties was also temporary and similar in nature to his regular duties, there was no material increase in his workload that would require additional compensation. A wage adjustment is necessary only if the additional duties are so substantial an increase in the day-to-day demands made upon an employee as to outweigh the demands of similarly compensated employees.

## DISCUSSION

### Promotion Grievance

This is an unusual case, because the County has clearly violated the collective bargaining agreement at least twice in the promotional process, but the remedy suggested by the Association is not acceptable for reasons to be discussed below.

The County first violated the contract by considering the written exam to be a pass-fail test, despite the clear language of the promotion language in Exhibit B. The County should have been keenly aware of this language, since it was new to current contract. It is the same language that has been used for filling investigator positions. Moreover, the County admittedly used the procedure correctly to fill primary service deputy positions, or regular road patrol deputy positions.

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Then the County violated the contract again by proceeding with phase two or oral interviews without the correct composition on the interview panel, as also clearly defined in the labor contract. The County's explanation for this makes little sense. Having already made one error, management could have easily read all of Exhibit B to make sure they were in compliance with the procedure. The language was new, which would have been the first clue to making sure it was followed. The process was familiar – the County used it for patrol deputies as well as investigators.

The County rectified its errors and points out that the contract does not say that all of the

five panel members must interview the applicants at the same time. Where the language says that: “The Interview Panel will consist of five (5) members as follows . . .” a fair reading would mean that the interview panel consists of all five members. It is a common practice for interview panels to be used to rate applicants, and the common practice – in order to give the process some objectivity – is for all panel members to hear the same thing at the same time. The County may be correct that this violation may be somewhat technical or *de minimus* in nature, but the preferred way for an interview panel to operate is to sit together to hear all the applicants together, at the same time, under the same conditions.

Also somewhat disturbing is the phase three evaluation process. The Grievant was evaluated by someone who became his supervisor only six months before the evaluation, who had no personal knowledge of his work, and who relied on other employees to make the evaluation. Zopp was evaluated on a regular basis by her supervisor. The phase three process lacks some basic fairness. However, the language was just put into this contract, and the negotiators knew or should have known that the deputies in the patrol division were not getting regular evaluations, while the employees in the jail division received regular evaluations. Widiker was given an evaluation by someone in management --just as called for in phase three. So the parties got what they bargained for.

Due to the other two errors, it is clear that the County violated the contract. The County has shown no good reason for its failure to follow the familiar and negotiated process. However, the Association asks that the Arbitrator not order the County to start over with the promotional process, but to order the County to give the Grievant the position of Court Officer. That remedy is inappropriate for the violations here. Despite the errors, the Grievant and the Association got everything that was bargained for in the procedure. Even though the test was not supposed to be a pass-fail test, Widiker passed it and wound up on either of the two eligibility lists in the top three (or two) candidates. Even though the oral interviews were conducted with two panels, Widiker wound up on the final eligibility list in the top three candidates. Accordingly, Widiker was always among the top candidates and did not lose anything by the contract violations.

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The Association would like him to receive the job because the language states: “When candidates are determined to be substantially equal, seniority shall be the determining factor.” The Association makes a strong point that the differences between Zopp and Widiker are not so substantial as to bypass the more senior employee.

The sentence quoted above is considered to be a modified seniority clause. The term “substantially equal” or “relatively equal” are often said to mean that the employer must show that one employee has substantially or significantly greater ability to perform the work than the senior employee before the junior employee can be promoted. “Relatively equal” does not mean “equal” and a minor distinction cannot warrant disregarding seniority. Some arbitrators

use a “head and shoulders” distinction – the junior employee must be head and shoulders above the senior employee before the junior employee can be awarded the job. At any rate, there must be a definite, distinct, substantial, and significant difference between two competing candidates with respect to the qualifications or ability to perform the job in order to favor the junior employee over the senior employee. See INTERLAKE STEEL CORP., 46 LA 23 (Arb. Luskin, 1965).

I agree with the Association that the point difference between Zopp and Widiker was not substantial. Widiker scored first on the written exam, Zopp scored first on the oral interview, and their scores flip-flopped and were even under Kathan’s point system. It was the evaluation that made the difference. Kathan testified (TR – page 123) that if Widiker and Zopp both had 87 points in their final rankings, then they would be substantially equal and seniority would prevail. That’s a lot more than “substantially” equal – it is equal.

In a point system such as this, it becomes a subjective matter to decide what is a substantial or distinct difference that would warrant elevating the junior employee over the senior employee. The question becomes whether Widiker should have been rated first on the eligibility list and Zopp rated second.

The answer might be sure, but what effect would that have if the Sheriff can still pick anyone from the top three candidates? The Association argues that the Sheriff should not be able to just pluck someone off the list without regard to seniority where the contract says that seniority is the determining factor. However, the phrase regarding seniority does not apply to the Sheriff’s ultimate ability to choose a name from the top three candidates on the eligibility list.

The language in Exhibit B cannot be construed as the Association urges for the following reasons. First, the parties clearly understood – as demonstrated by testimony and documentary evidence – that the Sheriff could always pick anyone from the top three candidates, no matter what their ranking or other qualifications or lack thereof. Secondly, the

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language tracks the language of Exhibit C, which uses the same procedure to fill investigator positions. In Exhibit C, the language states: “When candidates are determined to be substantially equal, seniority shall be the determining factor *in position on the list.*” (Emphasis added.)

While the parties did not put the phrase “in position on the list” into the same sentence regarding seniority in Exhibit B, I believe that seniority is used to get a position on the list, not the promotion itself, because of the parties’ clear understanding that the Sheriff can pick any one of the top three candidates.

Third, the sentence following the sentence about seniority then talks about the Personnel



Department giving the Sheriff a list of the top three candidates, that the Sheriff always has three candidates from which to make a selection, etc. This language could be in conflict with the sentence regarding seniority, if the Association's interpretation were to prevail. There would be no way to reconcile both concepts – that the Sheriff gets a free pick of the top three candidates and that the Sheriff must pick the most senior employee if candidates are substantially equal. If the parties had meant to limit the Sheriff's ability to pick freely from the top three candidates, they would have clearly done so in the contract. Promotions and seniority issues are important matters in bargaining.

Thus, the preferred interpretation is that seniority gets one a placement on the list. Widiker was already on the list in the top three.

Even assuming that Widiker should have been placed first and Zopp second, nothing would have prevented the Sheriff from picking Zopp to be the Court Officer. Even assuming that the Sheriff was acting arbitrarily in picking Zopp, what difference would it make? He could have picked the third-ranked candidate. Widiker admitted that he and the late Sheriff did not get along well personally. Widiker could have been first on the list and the Sheriff could have gone to the second or third name on the list and bypassed him without giving a reason. This is what the contract allows. If it could somehow be demonstrated that the Sheriff picked Zopp under some misunderstanding that he had to pick the top candidate, then the decision could be overturned. But there is no evidence to show that. In fact, Kathan's letter to the Sheriff with the final eligibility list points out that he has the right to select from the top three candidates. The names could have been listed in alphabetical order and it would have not made any difference. The Sheriff could have thrown the three names in a hat and picked one of them.

Therefore, despite the two procedural errors in the process and the probable misinterpretation of the seniority clause, it is not appropriate through this arbitration process to give the Grievant the position. He had his shot at the job, he was on the list for it, and he did not get it. A more appropriate remedy is to either re-do the process or present the current Sheriff with a more appropriately ranked eligibility list, and that is a remedy that the Association does not seek and will not be so ordered.

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The collective bargaining agreement was not violated when the Sheriff picked Zopp to be the Court Officer. That was the basic question being asked in this portion of the Award, and thus grievance #'s 98-54 and 98-73 are denied.

### **Compensation Grievance**

The Grievant seeks the difference between his wage rate and the Court Officer's wage rate at three different periods of time – when Jensen was still on the job, when Zopp started and he trained her, and when Zopp was gone on personal leave.

It is true that employees who are even temporarily working out of class or performing the higher rated work may be entitled to the higher pay in some circumstances. See *Elkouri &*

In looking at grievances for out-of-class pay, arbitrators have often spoken of the key or core parts of a job, or the central core of a classification. For examples, in *WILSON JONES CO.*, 51 LA 35 (1968), Arbitrator Daugherty stated:

“ . . . (1) In all such cases the critical questions are (a) What are the key or core elements of the jobs involved which distinguish one job from the other(s) and justify the wage rate differentials between (among) them agreed to by the parties, and (b) did the aggrieved employee(s) perform actual work that ‘invaded’ said core elements? (2) In many such cases there are substantial areas of overlap in the operations specified for two or more jobs. That is, an employee in one job is authorized to do some of the work that another employee in another classification is also permitted to do. But in such case an employee in one job cannot properly be said to have taken over the work in another job until and unless he has been required to perform operations that the parties have agreed are key and relatively exclusive to the latter classification.”

An important element noted by Arbitrator Daugherty is whether the employee was *required* to work in another job. The parties in this case agree that Widiker was required to take over the Court Officer’s job from the time that Jensen left in early August until Zopp took the job in early September. Widiker was paid at the rate of the Court Officer during that period of time.

The parties do not agree on exactly what Widiker was asked to do for the time between June 26<sup>th</sup> and August 2<sup>nd</sup>, when Jensen was still physically present but apparently not doing all of the Court Officer’s duties. The record does not show that Widiker was required to perform the Court Officer duties. While he testified that Jensen and he were to switch positions, his

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testimony is unclear because he also testified that he continued to act as the Security Officer. In other words, Jensen did not switch positions with him. No one confirmed what Jensen was or was not doing during this period of time. Volkert did not confirm that he assigned Widiker Court Officer duties during this period of time, only that he was to take the job when Jensen left and there was no Court Officer until the vacancy was filled.

There is no clear indication that Widiker would be entitled to Court Officer’s pay between June 26<sup>th</sup> and August 2<sup>nd</sup>, based on the lack of a requirement that he perform the Court Officer’s job and the fact that Jensen was still available and on the job, or at least present.

The next period of time that Widiker seeks Court Officer pay is for the period between September 8<sup>th</sup> and 28<sup>th</sup> when Zopp started in the position of Court Officer and Widiker trained her. Widiker made an assumption that he would continue receiving Court Officer’s pay during

this period of time, but there was no indication from the Employer that it would pay him extra for the training. There is a significant overlap between the jobs, and the Security Officer is required to assist the Court Officer. Assisting could mean training someone new to the job, or giving that person assistance in learning the job. This was the first time that a new person worked in that position since Widiker was hired, so there was no precedent. There is no strong reason to pay Widiker extra for training the Court Officer.

The last period of time involves Zopp's time off on November 30, December 1, 7, 8, 9, 10 and 11, and Widiker asks for the Court Officer's pay during this period of time. In this case, it would be clear that the Security Officer "invaded" the core duties of the Court Officer's position, since the Court Officer was absent. However, that is only one part of the analysis. The County has shown that it has never paid out of class pay to the Security Officer when the Court Officer was absent over the past six years. Jensen was absent anywhere from 124 hours in one year to a high of 232 hours in a single year.

This is a difficult problem because an employer cannot assign the work of a higher rate employee on an indefinite basis without destroying the integrity of a wage scale. The parties have bargained for pay differentials between classifications, and those differentials are not meaningless. The top scale for the Court Officer is nearly \$3.00 an hour above the Security Officer's top rate. The parties surely agreed that the Court Officer had duties and responsibilities that were to be compensated well above the Security Officer. However, the parties have not bargained for any particular period of time to determine when someone should receive out of class pay for working out of class. There are seven days at issue here, or 56 hours of differential pay. The hours in the past have ranged from 124 to 232 without paying any differential. Given the lack of contract language determining when out of class pay should be received and the history in this case of not paying out of class for the Court Officer's absence, there is no basis on which to grant the pay.

All the grievances for compensation for filling in as Court Officer are thus denied.

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### AWARD

Grievance #'s 98-54 and 98-73 are denied. The Employer did not violate Appendix B when it selected someone other than the Grievant for the vacant Court Officer position.

Grievance #'s 98-64, 98-81 and 98-7 are denied. The Employer did not violate the collective bargaining agreement when it paid the Grievant at the Court Officer level for performing the job on an interim basis but not for filling in as Court Officer.

Dated at Elkhorn, Wisconsin this 3rd day of June, 1999.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator

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