

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**OZAUKEE DEPUTY SHERIFFS' ASSOCIATION, LOCAL 115
OF THE LABOR ASSOCIATION OF WISCONSIN, INC.**

and

**OZAUKEE COUNTY,
through its duly authorized Personnel Committee**

Case 50
No. 59340
MA-11256

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc., 2835 North Mayfair Road, Wauwatosa, Wisconsin 53222, appearing on behalf of Ozaukee Deputy Sheriffs' Association, Local 115 of the Labor Association of Wisconsin, referred to below as the Union, or as the Association.

Mr. Ronald S. Stadler, Michael, Best & Friedrich, LLP, Attorneys at Law, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of Ozaukee County, through its duly authorized Personnel Committee, referred to below as the County, or as the Employer.

ARBITRATION AWARD

The Association and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve Grievance No. 2000-26, which the Association filed on behalf of the entire unit. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on January 24, 2001, (references to dates are to 2001, unless otherwise noted) in Port Washington, Wisconsin. A transcript was made of the hearing, and was filed with the Commission on February 1. The parties filed briefs and reply briefs by April 3.

ISSUES

The parties stipulated the following issues for decision:

Did the County violate the collective bargaining agreement by promoting Deputy Carl Seeger to the rank of Sergeant effective May 21, 2000?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 4 – GRIEVANCE PROCEDURE

Section 4.01 – Definition: Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.

. . .

Section 4.05 – Arbitration Award: . . . The arbitrator shall not add to, subtract from, or modify the provisions of the Agreement.

. . .

ARTICLE 5 - MANAGEMENT RIGHTS

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

. . .

2. To manage and direct the work force;

. . .

4. To determine the size and composition of the work force;

. . .

7. To determine the competence and qualification of employees;

...

10. To determine the methods, means and personnel by which and the location where the operations of the County are to be conducted;

...

12. To hire, promote and transfer employees;

...

16. To make promotions and assignments to non-bargaining unit supervisory positions.

...

ARTICLE 7 – SENIORITY

...

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

a) **Notice of Vacancy.** A notice of all new and vacant positions in any classification included in the bargaining unit shall be posted on the department bulletin board for seven (7) calendar days provided that there is no existing eligibility list as set forth in Article 24, Section 24.01(A). Any employee desiring to fill any posted vacancy or new position shall sign the job posting notice. . . .

b) **Qualifications.** A general description of the job qualifications and duties shall be listed on the job posting notice, together with the date, time and place for any examination which may be conducted.

c) **Trial Period.** An employee, upon being awarded a new position pursuant to the above job posting procedure, shall serve a trial period of four (4) months in the new position. The four (4) month trial period shall be exclusive of any time spent in school to be certified for the position. An employee who is

determined to be unable to do the work of the new classification within such trial period shall be returned to his or her former position. The Employer may return the employee back to his or her former position at any time during the trial period, or at the conclusion of the trial period, subject to the grievance procedure. The employee may return to his or her former position if he or she so elects during the four (4) month trial period upon giving five (5) calendar days written notice to the Sheriff. The trial period for any particular employee may be waived or extended by mutual written agreement between the Employer and the Association. Continued service beyond the four (4) month trial period shall be deemed evidence of satisfactory completion of the trial period.

In the event an employee is returned or returns to his or her former position during the trial period as provided above, the County shall not be required to re-post the position, but may instead select another applicant who applied for the original vacancy, in accordance with Section 24.01, Subsection B – Job Award.

...

ARTICLE 24 - PROMOTIONAL PROCEDURE GUIDELINES

Section 24.01: The guidelines contained in paragraph A for promotions to bargaining unit positions will be adopted by the County Law Enforcement Committee. In the event these guidelines are revised, and the revisions are not agreed to by the Association, the job award for promotions will be as listed in paragraph B below:

A. PROMOTIONAL PROCEDURE

Placement on the eligibility list will be based on the following scoring: one-half (1/2) weight given to the written examination score, and one-half (1/2) weight given to the oral examination score. In addition, for each full year of service, .125 of a point, to a maximum of three (3) points will be added to the resulting written examination/oral examination score.

Written examination score - Candidates must receive a score of 70% or higher on the written test to be eligible to participate in the oral examination. The Personnel Director will handle the scoring of the written test and will initially indicate to the Sheriff and the Law Enforcement Committee whether the applicant passed or failed. The exact scores on the written examination will be disclosed to the Sheriff and the Law Enforcement Committee after the oral interview scores have been computed.

Oral examination score - Determined by averaging the scores of each Committee member, giving equal weight to each score, and then weighing the overall Committee score as 50% of the total, and the Sheriff's score as the remaining 50% of the total. Only the scores of those Committee members that were present and gave scores for the oral interviews of all the applicants for a particular eligibility list will be used to determine the average score of the Committee members. The Sheriff and the Committee members will score a particular applicant immediately after that applicant's oral examination and prior to the next applicant's oral examination. Candidates must receive a score of 70% or higher on the oral examination to be placed on the eligibility list.

An eligibility list shall remain in effect for a period of six (6) months, provided there are at least three employees remaining on that eligibility list.

Applicants will be placed on the eligibility list in the ranking order of their total scores, the applicant with the highest score being at the top of the list. The Sheriff has the option of selecting for the position any one of the top three applicants remaining on that eligibility list.

B. JOB AWARD.

The position shall be awarded on the basis of qualifications, skill and ability. In the event the qualifications, skill and ability of two (2) or more applicants are relatively equal, the position shall be awarded to the applicant with the greater seniority. Disputes over the person awarded the position may be processed through the grievance procedure.

In determining whether the qualifications, skills and ability of two (2) or more applicants are relatively equal, the County shall divide the total grade point difference between the top and bottom passing final scores by the number of applicants who passed the examination to arrive at an average grade point differential. If the grade point differential between the final scores of the top two (2) or more applicants is less than or equal to the average grade point differential between the top and bottom passing final scores, the applicants will be considered relatively equal within the meaning of this section and the most senior applicant shall be awarded the position. The following example will illustrate this computation.

Five (5) individuals have passed the written examination. The Applicants' final scores are as follows:

	<u>Final Scores</u>
Applicant #1	85
Applicant #2	81
Applicant #3	83
Applicant #4	81
Applicant #5	76

The difference between the top final score (85) and the bottom final score (76) is 9; 9 divided by the number of applicants (5) is 1.8. Thus, 1.8 is the average grade point differential. Since the grade point differential between applicant #1 and #3 is 2 points, applicant #1 and #3 are not considered relatively equal.

BACKGROUND

The Association filed Grievance No. 2000-26 on behalf of the entire unit. The grievance form lists Articles 5, 7, 24 and “any other appropriate Article” as the “Article or Section of Contract Violated.” Under the “Issue” heading, the form states: “The Association alleges that the County’s decision to promote Deputy Carl Seeger to the rank of Sergeant violates the terms of the collective bargaining agreement, as well as a long standing past practice.” As the appropriate remedy, the form requests that:

...

the County cease and desist from violating the terms of the collective bargaining agreement. Further, the Association requests that the County promote Officer Brian J. Parr to the rank of Sergeant. Finally, the Association requests that the County make Officer Brian J. Parr whole for all wages or benefits which have been lost due to the Sheriff’s failure to follow Article 24 – Promotional Procedure Guidelines of the collective bargaining agreement.

...

The Sergeant position questioned by the grievance became vacant in early January.

Seven unit employees took the written exam to qualify for the eligibility list from which the vacancy would be filled. One of those employees withdrew from the process prior to the oral interview process. The remaining six applicants had the following scores at the close of the interview process:

APPLICANT/ DATE OF HIRE	WRITTEN TEST SCORE	ORAL INTERVIEW SCORE		SENIORITY	AVERAGE
		COMMITTEE	SHERIFF		
Gary Last: 07/10/89	82.56	90.00	93.00	1.25	88.30
Patrick Daniels: 01/04/93	73.84	89.40	90.00	.875	82.70
Ronald Noll: 01/15/90	70.93	90.40	88.00	1.25	81.30
Brian Parr: 02/04/85	73.84	84.50	83.00	1.75	80.60
Daniel Gahan: 12/22/94	73.84	84.30	87.00	.625	80.40
Carl Seeger: 08/03/87	70.35	82.90	86.00	1.50	78.90

Sheriff Maury Straub offered the position to Last, who was made Sergeant on January 30. On April 4, Last requested to return, and ultimately did return, to the position of Patrol Officer. Straub then offered the position to Daniels, who, on April 12, declined the offer and requested that his name be removed from the eligibility list. Straub, on April 18, promoted Gahan to the position of Sergeant effective April 23.

The Association responded to Gahan's promotion by filing Grievance No. 2000-23. The grievance form states Articles 5, 24 and "any other appropriate Article" as the "Article or Section of Contract Violated." The "Issue" section of the form also mentions "a longstanding past practice." Under the heading "Facts", the form states:

1. That Ozaukee County and the Labor Association of Wisconsin, Inc., for and on behalf the Ozaukee County Deputy Sheriffs Association have a collective bargaining agreement in full force and effect during all times pertinent to this grievance.
2. That the aforementioned collective bargaining agreement contains Article, 24 Promotional Procedure Guidelines, which states in part that:

An eligibility list shall remain in effect for a period of six (6) months, provided there are at least three employees remaining on that eligibility list.

Applicants will be placed on the eligibility list in the ranking of their total scores, the applicant with the highest score being at the top of the list. The Sheriff has the option of selecting for the position any one of the top three applicants remaining on that eligibility list.

...

7. That as a result of Officer Last's return to the rank of Patrol Officer the top three names on the January 27, 2000 eligibility list were:

Patrick B. Daniels, Roland J. Noll, and Brian J. Parr.

- 8 That on April 18, 2000 Special Order 06-2000 was issued wherein Sheriff Maury Straub notified the Association that Deputy Daniel P. Gahan had been promoted to the position of Sergeant effective April 23, 2000.
9. That the above promotion is contrary to Article 24 - Promotional Procedure Guidelines and is therefore invalid.

...

On May 8, Gahan asked to be returned to his former position. Straub noted his approval in writing on May 9. In a letter to Straub dated May 12, the Association withdrew Grievance No. 2000-23, stating:

...

Please be advised that the Association is withdrawing the above grievance due to Officer Gahan's decision to relinquish his Sergeant's position.

However, it is still the Association's position that the collective bargaining agreement requires the County to promote . . . Noll to the Sergeant's position. (Mr. Noll should also receive Sergeant's pay retroactively to April 23, 2000)

Therefore, the Association reserves the right to re-file a revised grievance should the County elect not to promote Mr. Noll to the Sergeant's position.

...

On May 16, Straub formally appointed Seeger to Sergeant, effective May 21, thus prompting Grievance 2000-26.

Much of the evidence submitted at the arbitration hearing focused on bargaining history. Article VI of the parties' 1978-79 labor agreement is entitled "Seniority." Section 6 of Article VI is entitled "Job Posting." Subsection c of Article VI, Section 6 is entitled "Job Award" and states:

The position shall be awarded on the basis of qualifications, skill and ability. In the event the qualifications, skill and ability of two (2) or more applicants are relatively equal the position shall be awarded to the applicant with the greater seniority. Disputes over the person awarded the position may be processed through the grievance procedure.

Subsection d of that section is entitled "Trial Period." The final paragraph of that subsection states:

In the event an employee is returned or returns to his or her former position during the trial period as provided above the County shall not be required to repost the position but may instead select another applicant who applied for the original vacancy, in accordance with subsection c. Job Award.

These provisions were not changed in any substantive sense until the parties' 1991-92 labor agreement. In that agreement, the parties inserted, at the end of Section 6 c), the three paragraphs that now appear as the final three paragraphs of Section 24.01 B.

In 1991, Michael Milas became Sheriff. The first collective bargaining agreement that involved him in an active role was the 1993-1994 agreement. In the negotiations that produced that agreement, he set a goal of revising the contractual promotion procedure. This became a controversial issue, and demanded a large number of meetings and a mediation effort. The parties ultimately reached a compromise, which the parties included as part of a Memorandum of Understanding attached to the labor agreement. The Memorandum of Understanding dealt with a number of issues, including promotions and posting. That portion of the Memorandum is referred to below as the Memorandum. The Memorandum was divided into Section A, entitled "Promotional Procedure Guidelines" and Section B, entitled "Job Award." Section B stated what had appeared in the 1991-92 labor agreement as Section 6 c). What appeared as Paragraph 4 of the Memorandum is stated, with minor exceptions not relevant here, as the introductory paragraph of Section 24.01 of the 1999-2001 agreement. Except as noted below, for all purposes relevant here, Section A of the Memorandum is the same as Subsection A of Section 24.01 of the 1999-2001 agreement.

In the 1993-94 labor agreement, the parties renumbered the “Seniority” article from 6 to 7. They also moved the subsection governing “Trial Period” from subsection d) to subsection c). The reference following “in accordance with” in the final paragraph of that subsection was changed to read “Paragraph 4 of the Memorandum of Understanding” from “Subsection c – Job Award.” In the 1995-96 labor agreement, what had appeared as the Memorandum became Article 24, in the same form as it appears in the 1999-2001 labor agreement. The final sentence of Section 7.06 c) continued, however, to refer to “Paragraph 4 of the Memorandum of Understanding.”

The reference following “in accordance with” in the final paragraph of Section 7.06 c) of the parties’ 1997-98 labor agreement reads “Section 24.01, Subsection B – Job Award” instead of “Paragraph 4 of the Memorandum of Understanding.”

It is undisputed that the Law Enforcement Committee adopted the guidelines specified in Section A of the Memorandum and that the Committee has not sought at any time subsequent to revise those guidelines.

The background noted to this point is undisputed. The balance of the background is best set forth as an overview of witness testimony.

Jerri Behnke

Behnke is a Deputy Sheriff assigned to the jail. He is an active Association member, who served on the bargaining committee that negotiated the 1993-94 labor agreement. He noted that Milas initiated bargaining concerning the promotional procedure, and that the Association bargaining committee was not receptive to the proposal. After a number of meetings, however, the parties carved out common ground that became the Memorandum. The Association communicated to the County’s negotiating team that permitting the Sheriff discretion over promotions could result in unwarranted favoritism. More specifically, Behnke stated that the Association feared the Sheriff could reject unwanted applicants during the trial period to lead to the candidate reflecting the Sheriff’s personal preference. The Association requested and achieved the procedural safeguard that appears as Section B of the Memorandum. The County used an attorney as its chief spokesman during this round of bargaining.

In the negotiations for a 1995-96 labor agreement, the County’s then incumbent Personnel Director, Michael Puksich, served as the County’s chief spokesperson. Those negotiations took only one meeting, lasting roughly two and one-half hours. At that meeting, the Association proposed, and the County agreed, to incorporate the Memorandum into the body of the labor agreement.

In the negotiations for a successor to the 1995-96 labor agreement, the County proposed modifications to Section 7.06 c) and to Section 24.01 A. The Association proposed changes to Section 7.06 b) and to Section 7.06 d). The Association also made a written proposal to the County concerning Articles 7 and 24. The proposal reads thus:

Article 7 – Section 7.06 – Job Posting and Article 24 – Promotional Procedure, lines 19-21 Regarding the eligibility list for promotions, it needs to be reevaluated and discussed at the bargaining table.

Ultimately, the Association and the County reached a tentative agreement for a collective bargaining agreement to cover 1997-98. During the course of negotiations, the parties reached a number of agreements regarding Articles 7 and 24. For example, Section 24.01 A was modified to state that an eligibility list would remain in effect “for a period of six (6) months.” The prior reference was “for a period of at least six (6) months.”

Behnke testified that in accordance with past practice, the Association prepared a list of changes to the labor agreement when the parties reached a tentative agreement for a 1997-98 labor agreement. Prior to the Association’s ratification vote, this list of changes was incorporated into a draft copy of the 1997-98 labor agreement. In this document, deletions from the 1995-96 agreement were highlighted by an overstrike of the deleted language. Additions to the language of the 1995-96 agreement were shaded. The final paragraph of Section 7.06 c) in this draft document read thus:

In the event an employee is returned or returns to his or her former position during the trial period as provided above, the County shall not be required to re-post the position, but may instead select another applicant who applied for the original vacancy, in accordance with ~~Paragraph 4 of the Memorandum of Understanding.~~ **Section 24.01, Subsection B – Job Award.**

Benke noted that Patrick Coraggio, as the Association’s consultant, prepared the draft document, and informed the unit that the County had approved the changes detailed in the draft. The unit voted to ratify the draft document, which became the 1997-98 labor agreement. Behnke did not know if the County actually received the draft document distributed to the unit prior to the ratification vote.

Behnke assisted in processing Grievance 2000-23 for the Association. He acknowledged that the Association took the position in that grievance that Gahan should not have been offered the Sergeant’s position because Straub should have chosen, under Section 24.01 A, between Daniels, Noll and Parr. In the letter withdrawing Grievance 2000-23, the Association advanced Noll as the next selection because Noll was the only unit member willing to grieve the matter. Behnke stated that sometime after issuing the withdrawal letter, the

Association reviewed the labor agreement and concluded that Grievance 2000-23 had asserted the wrong contract provision as the source of the grievance. The Association concluded that Section 24.01 B governed the selection of the applicants for Sergeant, and dictated that Straub choose Parr. Behnke informed Straub of the Association's change in position on May 23.

During the processing of Grievance 2000-26, the Association provided the County with documentation indicating that the application of the formula from Section 24.01 B generated an "average grade point differential" of 1.605. Applying this differential to Parr's and Seeger's scores dictated the conclusion that Seeger and Parr were not "relatively equal" regarding qualifications. To generate the "average grade point differential" Behnke discarded the seniority adjustment factor specified in the first paragraph of Section 24.01 A.

Michael Milas

Milas served as Sheriff from January of 1991 until June 1, 1996. Milas approached the negotiations for a 1993-94 labor agreement concerned with the role of seniority in the determination of promotions. He wanted to secure greater flexibility in choosing among applicants, and to lessen the role of seniority, particularly in cases in which the seniority difference was minimal. He noted the issue was controversial, and he acknowledged the Association voiced concern regarding expanding his flexibility to choose between applicants. He viewed the creation of what became Section 24.01 A as a significant and self contained effort. He did not understand the return of an officer to the pre-promotion position to trigger the operation of Section 24.01 B. The mistaken reference to the Memorandum in the 1995-96 labor agreement did not, in Milas' view, indicate the County wished to bring Section 24.01 B into the operation of Section 24.01 A. He also noted he could not recall receiving a draft contract document such as that provided to the bargaining unit for the ratification of the 1997-98 agreement.

Maury Straub

Straub has served as Sheriff since July 1, 1996. Straub once served as Association president and as a member of its grievance committee. Straub did not directly participate in the negotiation of the 1997-98 labor agreement. He was, however, kept advised regarding its progress. He stated no one advised him that the Association was proposing to make Section 24.01 B applicable to filling promotional openings if an officer did not complete the trial period and returned to the officer's prior position. If he had been so notified, he stated he would have opposed agreeing to such a change.

Straub affirmed that the Association processed Grievance 2000-23 as a dispute over his application of Section 24.01 A. Not until the processing of Grievance 2000-26 did the Association assert Section 24.01 B as the basis for the violation. In his view, if he had been

advised that Section 24.01 B applied to the selection between Parr and Seeger, he would have reposted the position. In Straub's view, Section 24.01 A applies to promotions, and Section 24.01 B applies to other types of vacancies. He noted that the County used Section 24.01 B when it filled a newly created position of Court Security Officer. He viewed that opening as a lateral transfer for a Deputy, and used Section 24.01 B.

Betty Klumb

Klumb is a Human Resource Analyst for the County. She plays a support role to the collective bargaining process, but does not participate directly in the negotiation process. She noted that the Association typically types the labor agreement once the ratification process is completed. She has never received a document like the draft document used in the Association's ratification of the 1997-98 labor agreement. She acknowledged that Puklich could have received such a document, if it had been hand-delivered to him.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Association's Brief

After a review of the factual background, the Association contends that the labor agreement "must be read in a manner that is consistent with the bargaining history between the parties." In this case "any doubts as to the intent of the language that may have been present are vanquished when the bargaining history between the parties is considered." In any event, the language of Article 24 and Section 7.06 C, must be read together "and are clear and unambiguous."

The current promotional procedure traces its roots to the 1993-94 labor agreement and to the then-incumbent Sheriff's desire "to modify the promotional procedure to allow the Sheriff the option of selecting one of the top three candidates from a list established by the County." That proposal proved controversial. Ultimately, the Association agreed to accommodate the County's concerns to hire from the top three candidates. The Association, however, insisted that in return the County agree to certain protections against deliberate manipulation of the list. More specifically, "the **parties agreed** that Section A of the new Memorandum of Understanding would be used as a method for promotions and Section B would be used to provide for replacements if any employees were voluntarily or involuntarily removed from the promoted position during the trial period." The parties attached the Memorandum to the 1993-94 labor agreement, then agreed to incorporate the Memo "directly into the 1995-96 collective bargaining agreement." However, an inadvertent error led the parties to leave Section 7.06 unmodified "to reflect the change into the newly created

Article 24.” The parties corrected this oversight during the negotiations that created the 1997-98 labor agreement, thus confirming the mutual intent underlying the Memorandum.

Sections 7.06 and 24.01 each employ mandatory language such as “shall” and “will”. Seeger’s promotion occurred while an eligibility list was still in effect. That the County “never presented a witness from its bargaining team to substantiate its interpretation” of Sections 7.06 and 24.01 underscores the weakness of its challenge to the Association’s view. In any event, arbitral authority underscores the need to give effect to all agreement provisions. Thus, Section 7.06 must be viewed as “an integral part of the promotional procedure.” That Straub honors the section “except for the portion that requires him to fill a vacancy caused by an employee returning to their former position using the Job Award subsection B in Article 24.01” underscores the relationship of the two sections. Straub’s unwillingness to follow the provision, however, highlights a “type of preferential treatment” that “is the exact reason why the Association bargaining committee fought for and obtained the safeguards currently found in the collective bargaining agreement since the promotional procedure was modified.”

Beyond this, the Association argues that Straub’s contention that Section 24.01 B “only applies to work assignments and not promotions . . . has no merit.” No more credible is any County inference “that the Association had clandestinely changed the collective bargaining agreement to suit the needs of the Association.” A review of the evidence establishes that the ratification document prepared by the Association accurately reflected the parties’ tentative agreement to change the 1995-96 labor agreement.

The Association concludes that the grievance “was a case in which there are no real winners.” To sustain or to deny grievance assists one employee’s desire to be Sergeant at the expense of another’s. However, the “issue that is of paramount importance to the Association . . . is that the integrity of prior contract negotiations be sustained by the Arbitrator.” To deny the grievance is to deny the validity of the bargained changes to the 1993-94 labor agreement.

The County’s Brief

After an extensive review of the evidence, the County argues that Seeger’s promotion complies with Section 24.01 A. The language of the section “could not be any more clear in that Section 24.01(A) is *the* procedure for awarding promotions and will only be displaced by Section 24.01(B) if the County revises the promotion guidelines and the revisions are not agreed to by the Union.” Since no such revision has occurred, Section 24.01 A governs the grievance.

Under Section 24.01 A, the Sheriff can select any one of the top three eligible candidates for a promotion. After selecting Last and Daniels, the Sheriff, relying solely on Section 24.01 A, selected Gahan. The Association grieved this selection, contending that the

Sheriff violated Section 24.01 A by not selecting Noll. Gahan subsequently voluntarily moved back to his original position, and the Association withdrew the grievance. After the Sheriff chose Seeger, the Union filed the grievance posed here, in spite of the fact that “the Sheriff strictly followed Section 24.01(A).” The grievance, unlike its predecessor, asserts that Section 24.01 limited the Sheriff’s selection pool to Noll and Parr. Relying on Section 24.01 B, read with Section 7.06, the grievance contends that because Parr and Noll are relatively equal, Parr’s greater seniority should have prevailed.

Recourse to Section 24.01 B is neither supported by the clear language of Section 24.01 A, nor by bargaining history. Association attempts to demonstrate that Section 24.01 B has applied to promotions in the past show no more than consistent conduct tracking the provisions of Section 24.01 A.

Section 7.06 c) plays no role in promotions under Section 24.01 A, unless the Association’s view that it can be invoked by an applicant’s return “to his or her original position within the four (4) month trial period” is credited. If this interpretation is given credence, the County “urges the Arbitrator to apply the doctrine of mutual mistake and reform the contract to exclude this language because the language does not reflect the true intent of the parties.” Arbitral precedent supports use of this doctrine “where both parties sign off on contract language which does not correspond to their actual agreement.” Evidence of a “mutual mistake” must inevitably be found in bargaining history.

More specifically, the County notes that the relevant language of Section 7.06 c) “was first included in the parties’ 1997-98 Agreement.” The Memorandum underscored that Section 24.01 A governs promotions whether or not “the vacant position was created by an employee returning to his or her original position during the four (4) month trial period.” The parties exchanged no express proposals to amend the final paragraph of Section 7.06 c) prior to executing the 1997-98 labor agreement. The Association’s draft of changes to the agreement falls far short of demonstrating mutual discussion of, much less County assent to, the change. The County “is not alleging that the Union fraudulently amended the last paragraph of Section 7.06(c)” but urges that its inclusion in the 1997-98 labor agreement “is a classic case of a parties’ mutual mistake” demanding reformation.

Even if Section 7.06 c) governs the grievance, the “Sheriff has two options with respect to filling that vacancy: (1) reposting the position; or (2) follow Section 24.01(B).” Straub’s testimony establishes that he “would have reposted the position rather than awarding it to Parr.” This view of Section 7.06 c) should not, according to the County, obscure that the record, viewed as a whole, demands that “this grievance should be denied.”

The Association's Reply Brief

As preface to its arguments, the Association notes that any County assertion of an agreement between it and the Sheriff is misplaced. The County and the Association negotiate the labor agreement, and “even though the current Sheriff may not be happy with the promotional procedure found in the labor agreement, he must abide by it” until the County and Association “agree to modifications.”

Beyond this, the Association argues that its grievance regarding Gahan's selection affords no guidance regarding this grievance. The earlier grievance did not cite Section 24.01 B, but did focus generally on the “terms of the collective bargaining agreement” and “a long standing past practice.” That the Association withdrew the grievance “without prejudice” establishes that the withdrawal affords no insight beyond “the weakness” of the County's “untenable position.”

The County's assertion of a mutual mistake is no more tenable, according to the Association. That it failed to assert “this issue prior to the date of hearing” violates “a tacit duty” to engage in the “open exchange” of views mandated by a multiple step grievance procedure. Even though the agreement may not require the County “to share its strategy with the Association prior to an arbitration hearing,” the County must “provide proof and support for its position.” That proof, under the authority cited by the County must be by “clear and convincing evidence.” The County's failure to call any of the witnesses “who **were physically present** during negotiations for the 1997-98 labor agreement” establishes that its assertion of “the mutual mistake argument is nothing more than a red herring.” A review of the evidence establishes, according to the Association, that reformation of the contract would in fact overturn agreed to provisions, and would rest on no direct evidence of a mutual mistake.

More specifically, the Association notes that Milas' testimony affords direct evidence only regarding the initial creation of the promotional procedure. Straub's testimony shows only that he declined to assert an active role in the 1997-98 negotiations, and “chose to delegate this function to an unnamed Lieutenant.” Klumb's testimony turns solely on her supportive clerical duties. She did not attend negotiations. The absence of any direct testimony must be considered determinative against the County's position.

A more balanced view of the evidence establishes that the Association agreed to a new promotion procedure in the 1993-94 agreement, but successfully negotiated procedural protections in return. The County's asserted view of the procedure would gut contractual seniority, and flies in the face of credible testimony that each side forcefully advanced deeply held views of the new procedure. Straub's unhappiness with the negotiated procedure cannot warrant overturning contractual protections long ago mutually agreed upon by the County and the Association.

The Association concludes by requesting that “the Arbitrator uphold the grievance and order the County to award the Sergeant’s position to Deputy Brian J. Parr effective April 23, 2000.”

The County’s Reply Brief

Asserting that the Association’s focus on Section 7.06 c) is no more than an attempt “to distract the Arbitrator,” the County concludes that Section 24.01 A clearly and unambiguously supports its selection of Seeger. From the title of the section to its bargaining history, it is apparent that Section 24.01 “governs all promotions.” Association assertion of the need to construe the agreement as a whole cannot obscure that the Association ignores the role of Section 24.01 A. The section governs all promotions, without regard to whether “someone returned to his or her original position during the four (4) month trial period.” Seeger, as one of the top three eligible applicants, was available for selection for Sergeant by the Sheriff.

Assertions that the Sheriff violated the spirit of the agreement are unpersuasive. There is no evidence the Sheriff manipulated the eligibility list. Rather, the Sheriff’s first two choices voluntarily chose not to accept the position. There is, in any event, no credible evidence that the Sheriff used any criterion not within Section 24.01 A.

Nor can the Association’s view of bargaining history be accepted. There is no clear evidence the parties agreed to utilize Section 7.06 c) in the promotion process. Nor can the changes that appeared in the 1997-98 agreement be characterized as “a housekeeping oversight.” Earlier reference to the Memorandum did no more than focus on the need to apply a single procedure to govern promotions if the County changed existing guidelines without Association consent. To bring Section 24.01 B into a standard promotional case thus constitutes a radical departure from prior agreements. Straub’s testimony establishes that the County would not tolerate such a change since it would be “a reversion back to the old antiquated method for promotions whereby seniority was the primary standard.” Association conduct represents no more than “an honest mistake”, but a mistake nonetheless.

The County concludes that “this grievance should be denied.”

DISCUSSION

The parties stipulated the issues, but those issues pose troublesome interpretive points. The parties agree that the Sergeant position constitutes a promotion for the applicants on the eligibility list, and that Section 24.01 governs promotions. Beyond this, the interpretive difficulties grow. The relationship of Subsections A and B of Section 24.01 poses the initial layer of difficulty. That difficulty is compounded by the relationship of Section 7.06 c) to the interpretation of Section 24.01.

In the absence of Section 7.06 c), the language of the prefatory paragraph of Section 24.01 would clearly establish the relationship of Subsections A and B. Since the County Law Enforcement Committee adopted the standards of Section A, and has not proposed to revise them, there is, in the absence of Section 7.06 c), no need to apply Subsection B.

The interpretive issue centers on whether Section 7.06 c) alters the relationship of Subsections A and B of Section 24.01. As the Association reads Section 7.06 c), Gahan's return from a trial period triggers the final paragraph of Section 7.06 c), which alters the focus of the selection process from Subsection A of Section 24.01 to Subsection B.

The relationship of Section 7.06 c) to Section 24.01 is not clear and unambiguous. The County urges that this ambiguity is apparent only, since the relationship of Subsections A and B is unclear only if Section 7.06 c) is applied. This difficulty is eliminated if that relationship rests on a mutual mistake. If there is a mutual mistake, and if the labor agreement is reformed to eliminate that mistake, the difficulty in applying Section 24.01 disappears.

As underscored by the authority cited by the parties, reformation demands the existence of a mutual mistake. More significantly, Section 4.05 of the labor agreement denies an arbitrator the authority to "add to, subtract from, or modify" agreement provisions. Thus, if the reformation asserted by the County is to be granted, under Section 4.05 it must rest on a proven, mutual mistake.

The evidence will not, however, document the existence of a mutual mistake. Whether or not the County received the ratification documents voted on by the Association, those documents call for the modification reflected in Section 7.06 c). Thus, any mistake is something other than mutual. The County has not offered any direct evidence from the negotiations that produced the 1997-98 agreement to establish precisely what the parties agreed to, if anything, beyond completing the incorporation of the Memorandum into the labor agreement. Thus, even if there were a mistake, it is not apparent what the contract would be reformed to. There is, then, no persuasive basis to support reformation of the agreement.

This complicates the interpretive issue, for the relationship of Sections 7.06 and 24.01 is ambiguous. The most persuasive guides to resolve contractual ambiguity are past practice and bargaining history, since each rests on the conduct of the bargaining parties whose intent is the source and the goal of contract interpretation. Past practice is of no assistance here. What evidence there is of practice can support either party's view of Section 24.01. Straub's filling of certain vacancies from a 1997 eligibility list is reconcilable either to the County's view that the Sheriff acted under Subsection A or with the Union's view that he acted consistently with Subsection B. The Association's use of Subsection A as the determinative provision in Grievance 2000-23 also undercuts the assertion that the parties share a commonly understood practice regarding the promotional process.

This focuses the interpretive issue on bargaining history, which is the strength of the Association's position. While the force of the Association's position must be acknowledged, I do not believe it dictates the result the Association seeks. The strength of the Association's position is that Section 7.06 c) must be granted meaning, and it unambiguously points to Section 24.01 B. As the Association views it, bargaining history underscores this relationship, since the parties amended Section 7.06 c) to complete the agreement by which the parties created a procedural safeguard against a sheriff's manipulation of the eligibility list.

While the force of this argument is apparent, it also poses interpretive difficulties. First, it creates contractual conflicts. The final paragraph of Subsection A grants the Sheriff the authority to select "any one of the top three applicants remaining on that eligibility list." This is not consistent with the weighing process set forth in Subsection B. Beyond this, Subsection A specifies a potential three-point adjustment to an applicant's test score to reflect years of service. This adjustment conflicts with the "grade point differential" formula specified in Subsection B. Since seniority prevails in Subsection B in cases where "qualifications, skill and ability" of applicants "are relatively equal," the point adjustment specified in Subsection A double counts the seniority factor. Behnke acknowledged this when he deducted the Subsection A service points prior to his application of the "grade point differential" formula of Subsection B to the applicants from the Subsection A eligibility list remaining after Gahan's return from the Sergeant position trial period.

The Association argues that these contradictions are resolved through a review of bargaining history. The bargaining history proven at hearing, however, fails to establish this. The evidence establishes that in 1993-94 the parties agreed to alter the promotional process in a way that cut into the Association's preference for seniority, but which afforded the Association some procedural protection against abuse. Beyond this, it is established that in 1997-98, the parties completed the incorporation of the Memorandum into the labor agreement, as had been agreed upon in the bargaining for a 1995-96 agreement.

This established fact fails, however, to dictate the conclusion the Association seeks. The risk the Association sought to address in the bargaining for a 1993-94 labor agreement was manipulation by the Sheriff of the trial period to remove an unwanted applicant in order to move a favored applicant into the group of three finalists. In the 1993-94 labor agreement, the check specified in Section 7.06 c) was "Paragraph 4" of the Memorandum. That paragraph, however, essentially set forth the introductory paragraph of Section 24.01, under which the check is that Subsection B will apply if the negotiated procedures of Subsection A are either not ratified or changed without Association consent. This assured the Association that the erosion of seniority could go no further than the procedure specified in Subsection A.

Beyond this, however, the link between the result sought by the Association in this grievance and the bargaining history that created Section 24.01 is less than apparent. The abuse sought to be checked by the Association focuses on a sheriff's manipulation of the trial period. The language of Section 7.06 c), however, does not focus on unilateral action. Rather, it is triggered if "an employee is returned or returns" to a former position. This reference has less than a direct bearing on curbing a sheriff's abuse of authority. Beyond this, the check the Association reads into the final paragraph does nothing to right a sheriff's wrongful removal of an employee from a trial period. Whatever check the final paragraph affords is triggered solely if an applicant desired by the sheriff scores one position short of the top three employees from an eligibility list. This is, at best, a narrow check on potential abuse.

Even thus limited, the asserted check is problematic. It is not clear how the selection of one of two applicants remaining on an eligibility list checks the wrongful removal of an applicant from a trial period. The remedy is not extended to the employee who suffered the wrong. Under Section 7.06 c), the return of an employee from a trial period is grievable. Even in this reference does not apply, Section 4.01 would appear to cover such a dispute. In either event, the attempt to address the wrongful removal from a trial period opens up the possibility of contradictory results if an arbitrator sustains the grievance of the employee wrongfully removed from a trial period. The use of seniority in selecting a successor to the wrongfully removed employee only complicates the process.

Further difficulties arise in linking the bargaining history to the result the Association seeks. Even if the final paragraph of Section 7.06 c) is interpreted to incorporate Subsection B, it also permits the County to "re-post the position" rather than following the eligibility list. How this checks a sheriff's abuse of authority is less than apparent. Nor does the Association's reading of bargaining history clarify the processing of grievance 2000-23. If Subsection B clearly applied to promotions, it is not apparent why it did not emerge as the governing provision until after Gahan's voluntary return from a trial period.

This cannot, however, mask the interpretive difficulty posed by the grievance. As the Association points out, the final paragraph of Section 7.06 c) must be afforded meaning. Straub's view that it applies to job assignments and to cases not involving promotions, such as the County's creation and filling a Court Security Officer position, is problematic. Section 7.06 governs job postings, not daily job assignments. Beyond this, Straub implied the Court Security Officer position involves a lateral transfer not demanding a test. Subsection 24.01 B, however, clearly contemplates the administration of a test.

On balance, however, the County's view of Subsection B of Section 24.01 causes fewer interpretive conflicts than the Association's. That it minimizes the scope of Section 7.06 c) regarding promotions must be granted. This does not, however, eliminate any meaning to the final paragraph. The final paragraph does apply to non-promotional, posted vacancies. That

Straub did not equate a test to the filling of the Court Security Officer position is not troubling as a contractual matter, since Section 7.06 b) states that an “examination . . . may be conducted.” Where an examination is given, Subsection B of Section 24.01 governs its evaluation regarding a non-promotional vacancy.

More significantly, Subsection B retains the meaning it has had since the creation of the Memorandum. It will govern promotions if the County Law Enforcement Committee revises or rejects the provisions of Subsection A without Association agreement. Thus, the County’s reading of Subsection B does not render it meaningless. It is also at least arguable that the provisions of Subsection B might come into play if the County or a sheriff abused the promotional process specified in Subsection A. No such abuse is evident in this case. Against this background, denying the asserted role of the final paragraph of Section 7.06 c) regarding this promotion squares the language of Section 24.01 with the promotion process. The Association’s reading of Section 7.06 c) into the promotion process unnecessarily puts the provisions of Subsection B into conflict with those of Subsection A.

The Association’s view of bargaining history remains a troublesome point. I do not, however, believe the conclusion stated above denies meaning to that history. The negotiations that resulted in the 1997-98 labor agreement were quite short. There is no evidence that would even imply that the Association sought to create an agreement never reached by the parties. The difficulty with the Association’s view of the meaning of that bargaining history is similar to the difficulty with the County’s view of the reformation issue. In both cases, the evidence stops short of the conclusion asserted. The evidence of the abbreviated negotiations for the 1997-98 labor agreement establishes that the parties sought to complete the incorporation of the Memorandum into the labor agreement. This falls short of establishing that the parties mutually understood that this incorporation, reflected in the final paragraph of Section 7.06 c), substantively changed the relationship of Subsections A and B of Section 24.01. The brevity of the negotiations more than any implication of wrongdoing makes it difficult to conclude the parties mutually considered the substantive change argued in this proceeding. Mutual intent is the basis of an arbitrator’s authority. Just as the absence of that intent precludes reformation, it precludes granting the broad scope to Section 7.06 c) that the Association seeks in Grievance 2000-26.

The violation asserted by the Association demands reading Section 7.06 c) to require the use of Section 24.01 B to fill the vacancy created by Gahan’s return to his former position. Thus, the conclusion that it does not apply to the promotion demands denial of the grievance.

AWARD

The County did not violate the collective bargaining agreement by promoting Deputy Carl Seeger to the rank of Sergeant effective May 21, 2000.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 14th day of May, 2001.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

