

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**KEWAUNEE COUNTY (SHERIFF DEPARTMENT)**  
and  
**TEAMSTERS LOCAL UNION NO. 75**

Case 55  
No. 59520  
MA-11320

(Overtime Grievance)

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**Appearances:**

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jonathan M. Conti**, 1555 North RiverCenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of the Union.

**Attorney Elma Anderson**, Corporation Counsel, Kewaunee County, 620 Juneau Street, Kewaunee, Wisconsin 54216, on behalf of the County.

**ARBITRATION AWARD**

According to the terms of the 1999-2000 collective bargaining agreement between Kewaunee County (County) and Kewaunee County Professional Police Association (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the County's refusal to pay an overtime payment for an unscheduled open day-shift on October 14, 2000. Hearing was held at Kewaunee, Wisconsin on March 13, 2001. No stenographic transcript of the proceedings was made. The parties agreed to file their briefs directly with each other, postmarked April 30, 2001 and they agreed to waive reply briefs. All documents in the case were received by May 1, 2001, whereupon the record was closed.

**ISSUES**

The parties were unable to stipulate to an issue or issues before the Arbitrator in this case. The parties agreed that the Arbitrator could frame the issue based upon the relevant evidence and argument in the case as well as the parties' suggested issues.

No. 6232

The Union suggested the following issue in this case:

Did the County violate the collective bargaining agreement when it did not offer the Grievant, Richard Karman, an unscheduled open day shift on October 14, 2000?

If so, what is the appropriate remedy?

The County suggested the following issue for determination herein:

Did Kewaunee County violate the collective bargaining agreement when Sergeant Flaherty moved himself into the 7:00 a.m. to 3:00 p.m. shift on October 14, 2000 instead of offering it to off-duty personnel as overtime?

If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case I find that the Union's suggested issue should be determined herein.

### **RELEVANT CONTRACT PROVISIONS**

#### **ARTICLE 3: HOURS OF WORK**

##### **A. WORK CYCLE**

The regular work cycle that employees work is as follows:

WORK six (6) consecutive days, then OFF three (3) consecutive days, then WORK six (6) consecutive days, then OFF three (3) consecutive days, then, the entire above cycle is repeated.

##### **B. WORK DAY**

A work day shall consist of eight (8) consecutive hours.

C. SHIFT SCHEDULE

Shift schedule, for all officers except the Court Security Officer shall be as follows:

7:00 a.m. – 3:00 p.m.  
10:00 a.m. – 6:00 p.m.  
3:00 p.m. – 11:00 p.m.  
7:00 p.m. – 3:00 a.m.  
11:00 p.m. – 7:00 a.m.

Hours of work for the Court Security Officer shall be 8:00 a.m. to 4:30 p.m. Monday through Friday, with a one half hour break for lunch, and such other times as the Circuit Court or Family Court Commissioner shall be in session.

D. OVERTIME

All hours worked in excess of an eight (8) hour work day, on a day off, or outside of the sixth (6<sup>th</sup>) consecutive work day, except for attendance at nonmandatory (sic) schools or training, shall be paid at the rate of time and one-half (1 ½) without pyramiding. The Court Security (sic) Officer shall be paid at the rate of time and one-half for all hours in excess of eight (8) per day and forty (40) per week.

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F. DISTRIBUTION OF OVERTIME

1. Whenever possible and practicable overtime shall be distributed equally among full-time personnel in each classification first before being offered to other full-time employees and then permanent part-time personnel. The Court Security Officer shall be eligible to accept overtime hours in the Kewaunee County Sheriff's Department, which he or she is otherwise qualified to perform, at the discretion of the department head, or his/her designee.

2. If there is less than 24 hours notice of an unscheduled shift, full-time employees in that classification, on their day off shall be offered the shift, in order of least overtime to most overtime. If no employee in that classification on their day off wants the shift, employees in that classification working that day may split the shift. If no employee in that classification wants to split the shift, an employee in that classification working that day may take the full open shift.

3. If there is more than 24 hours notice of an unscheduled shift, all full-time employees in that Classification scheduled to work on that day, shall be given the opportunity to move into the open shift according to seniority. Whatever shift is then left open, shall be offered up for overtime to full-time employees in that classification, in order of least overtime to most overtime.

. . .  
H. AUTHORIZED ABSENCE

A day of authorized absence shall be a day in which authorization for such absence has been obtained from the department head or his/her delegated assistant in writing prior to the day of absence, except in case of absence due to illness. Absence due to illness shall be counted as an authorized absence only if in compliance with other sections of this Agreement.

. . .  
K. SHIFT SELECTION

All shifts and slots, including the Court Security Officer, shall be open for bidding among full-time employees from November 1 to November 15 of any current year and to take effect on the following January 1<sup>st</sup>. Bidding shall be in order of seniority.

When the filling of a permanent vacancy in any job description has been approved, according to the procedures outlined under the Kewaunee County Personnel Policy, full-time employees may bid, in order of seniority, for any open slot or shift at that time. No employee shall be forced to move out of his or her current slot or shift.

When the Department Head or his designee has notice, at least 24 hours in advance of an unscheduled open shift, all full-time employees scheduled to work on that calendar day in that classification, shall be given the opportunity to move into that open shift according to seniority. When there is less than 24 hours advance notice, or when all full-time employees scheduled to work on that calendar day in that classification have refused the shift, full time employees, in that classification, who are on scheduled days off, will then be offered the chance to fill the open shift. Then, full time employees in any other classification shall be offered the work. Thereafter, the shift will be offered to regular part-time personnel. Under this section, an offer of work shall require only a single telephone contact at the employee's residence. An employee who cannot be contacted personally in this manner shall be deemed to have rejected the offer.

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## FACTS

The Grievant, Richard Karman, has been employed by the County as a Jailer/Radio Operator for the past seven years. The contract provides that employees in the jail as well as patrol officers will work a six/three cycle – six consecutive working days and three consecutive days off. The contract also provides for three shifts in the jail/dispatch area: 7:00 a.m. – 3:00 p.m.; 3:00 p.m. – 11:00 p.m.; and 11:00 p.m. – 7:00 a.m.

At approximately 10:00 p.m. on October 13, 2000, Deputy Mark Jandrin called Jail Sergeant Flaherty and indicated that he would be unable to work his regular shift (7:00 a.m. – 3:00 p.m.) on October 14, due to illness. Rather than call to fill the 7:00 a.m. – 3:00 p.m. shift, Sergeant Flaherty decided to put himself into Jandrin's open shift. Sergeant Flaherty's regular shift is 3:00 p.m. – 11:00 p.m. At approximately 10:00 p.m., Sergeant Flaherty called Richard Karman at home and stated that someone had called in sick for October 14<sup>th</sup> and that Flaherty had a second shift open. Karman indicated that he was not interested in working the second shift on October 14<sup>th</sup>. At no time during their conversation did Flaherty indicate to Karman that the original open shift had been created on the first shift, not the second shift, and Karman did not reveal to Flaherty his reason for declining to work the second shift on October 14<sup>th</sup>.

Union Steward and Sergeant of Patrol Gulbrand, stated that if an open shift occurs within 24 hours of the starting time of that shift then employees who are on their off-days should be called and offered the overtime, from the person with the least amount of overtime worked to the one with the most overtime worked. Sergeant, Gulbrand makes up the schedule for his patrol staff. According to minimum manning standards of the Department, if Gulbrand is working and a Jail/Dispatch employee calls in sick and no jail supervisor is present on that shift, Sergeant Gulbrand will fill the open shift as a supervisor only if the shift is down to two employees and one is sick.

Sergeant Flaherty stated herein that in October, 2000, his regular work shift was the second shift. Flaherty was then the Jail/Radio Operator Sergeant. Flaherty admitted that he moved himself into Jandrin's 7:00 a.m. to 3:00 p.m. shift after Jandrin called in sick at approximately 10:00 p.m. on October 13<sup>th</sup>, as it was a weekend and Lieutenant Trembl (who works Monday through Friday) was not there to handle scheduling. Flaherty stated that he wanted the night off for a change. Flaherty also stated that he has done this approximately four or five times, but that he could not remember any dates or give any examples when he did it or when and under what circumstances other Sergeants have done this. In addition, Flaherty stated that he never talked to anyone about moving himself into earlier shifts in the past. After he moved himself into the 7:00 a.m. to 3:00 p.m. shift on October 14<sup>th</sup>, Flaherty called the Grievant and asked him if he wished to fill the second shift on October 14<sup>th</sup>, which the Grievant declined.

Flaherty stated that after the grievance was filed he asked Lieutenant Trembl about the proper procedure regarding such shift openings. Flaherty stated that Trembl told him that if Flaherty had not been working on October 13<sup>th</sup>, the Jail or Road Sergeant could have decided how to schedule Jandrin's shift and Flaherty might have been called at home to fill that shift. Flaherty admitted that on October 14<sup>th</sup> he was not off duty, rather he was scheduled to work second shift. Flaherty also stated that since September of 2000 he has not moved himself into a more desirable shift with the exception of the October 14, 2000 incident. Flaherty admitted that given staffing, an additional sergeant would not have been needed on first shift on October 14<sup>th</sup>.

Lieutenant Trembl does the formal scheduling one month in advance for the entire department. Trembl admitted herein that when Jandrin called in on October 13<sup>th</sup>, Jandrin's first shift slot was then open. Trembl submitted schedules for the jail division covering various periods of time: 11/21/99 to 12/18/99; 4/11/99 to 5/8/99; 3/14/99 to 4/10/99; 10/22/2000 to 11/18/2000; 8/27/2000 to 9/23/2000; and 11/19/2000 to 12/16/2000. These documents showed that on eleven occasions employees on a back shift moved up when another employee on an earlier shift called in sick. However, these documents contained no information regarding when the employee who called in sick notified the department of their illness and there was no movement of supervisors into first shift slots from back shifts on this document. Trembl stated that supervisors such as sergeants can, without getting prior authority, let "a guy on a back shift work an earlier shift." Trembl stated that no prior grievances of this type have been filed and processed.

### **POSITIONS OF THE PARTIES**

#### **Union**

The Union argued that the language of the collective bargaining agreement contained in Article 3 is clear and unambiguous. Therefore, if less than 24 hours' notice of illness is given by an employee, the contract requires at Section F Subparagraph 2 that employees on their off-day will be offered the opening. Given the fact that Radio Operator/Jail employee Jandrin called in less than 24 hours prior to the start of his shift on October 14, 2000, to indicate that he would be ill, the only eligible group for Jandrin's shift were employees in his classification who were in off-duty status on October 14<sup>th</sup>. Therefore, because Sergeant Flaherty was already scheduled to work second shift on October 14<sup>th</sup>, he was not eligible to place himself in the open shift created by Jandrin's illness and Flaherty violated the contract by moving himself into Jandrin's first shift slot on October 14<sup>th</sup>.

As Grievant Karman was a full-time radio operator/jailer on his off-day on October 14<sup>th</sup>, he should have been offered the opening created by Jandrin's illness. In this

regard, the Union argued that it was not relevant whether Karman was the person with the least amount of overtime hours who should have received the vacant October 14<sup>th</sup> shift. The fact that Karman was eligible for the vacant shift and that he was the only employee who filed a grievance regarding it, requires the conclusion that if the Union is successful in this case, Karman should receive the remedy for the contract violation alleged.

In the Union's view, the County's argument that Karman was offered an overtime shift on October 14<sup>th</sup> and declined it and that the contract does not require that a specific shift be offered to eligible employees under Article 3, Section F, is without merit. The Union urged that the clear language of Article 3, Section F, subparagraph 2 requires that the open shift be offered to off-duty officers and therefore the County's argument is unpersuasive.

Even assuming, as the County does, that the contract language is unclear, the Union argued that the County failed to establish that a past practice exists which allows Sergeants or Lieutenants to disregard the language of Article 3, Section F(2). In this regard, the Union noted that Sergeant Flaherty's vague and unsubstantiated claims that he had moved himself into more desirable shifts in the past and that other sergeants had done the same is insufficient evidence to prove a past practice. Indeed, the Union noted that both Lieutenant Trembl and Sergeant Gulbrand stated in testimony herein that off-duty employees must be called to fill an open shift and that thereafter only if off-duty employees refuse can employees working that day move into the open shift created. Therefore, the Union urged that the Arbitrator find a violation of the contract in this case and order that Karman be paid back pay for the overtime shift he was denied on October 14<sup>th</sup>.

## County

The County noted that there is no dispute that Officer Jandrin gave less than 24 hours' notice of his illness on October 14<sup>th</sup>. The County stated "therefore, full-time employees in the classification of Radio Operator/Jailer on their days off should be offered the overtime shift opportunity." As Sergeant Flaherty offered Officer Karman eight hours of overtime on October 14<sup>th</sup> and Karman rejected this offer, the County contended that it had thereby met its contractual obligations to Karman.

The County noted that no language in the contract requires that overtime be offered on any particular shift and that nothing in the contract prohibited Sergeant Flaherty from rearranging the work shifts of employees already scheduled to work on October 14<sup>th</sup> (including himself) and then offering the resulting vacancy as overtime to off-duty employees.

The County noted that Sergeant Flaherty stated that he followed past practice by essentially moving himself into more desirable shifts in the past and stated that other sergeants had done the same. The County urged that time sheets submitted into evidence in this case

demonstrate that this kind of shift trading was done regularly and that the Union never complained about it prior to this case. Therefore, the County argued that no contract violation had occurred in this case and asked that the grievance be denied and dismissed.

### DISCUSSION

The facts of this case essentially are undisputed that Officer Jandrin called in sick less than 24 hours prior to his scheduled first shift on October 14<sup>th</sup>. It is also undisputed that Sergeant Flaherty decided, on his own, that he would take Jandrin's shift and offer his own second shift vacancy as overtime to off-duty Radio Operator/Jailers.

In my opinion, Article 3, Section F(2) is clear -- that if there is less than a 24 hour notice of an unscheduled open shift, full-time employees in that classification on their day off must be offered the vacant shift in order of least overtime to most overtime. Therefore, Sergeant Flaherty was not privileged to simply move himself into the unscheduled shift created by Officer Jandrin's illness. Rather, Flaherty should have called full-time employees in that classification, Radio Operator/Jailer, such as Karman who were on their day off and he should have offered them Jandrin's shift in order of least overtime to most overtime. Flaherty did not do this and he therefore violated the labor agreement. 1/

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*1/ It is clear that Officer Karman was on his day off on October 14<sup>th</sup>. The Union is correct that Karman is entitled to a ruling in this case in his favor whether or not he is the employee with the least overtime worked as he is the only employee who has complained about Sergeant Flaherty's actions.*

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The County has argued that there was essentially "no harm and no foul" in this case because Sergeant Flaherty offered Officer Karman an eight-hour overtime shift on October 14<sup>th</sup>, as no particular shift must be offered to employees under the contract language. I disagree. Article 3, F(2) is mandatory. It specifically states that employees in the same classification on their day off "shall be offered the shift," referring back to the shift made vacant by less than 24 hour notice of absence.

As I have found the contract language to be clear, the evidence submitted by the County regarding an alleged past practice is not relevant to this case. 2/ In any event, I note that both the testimony of Lieutenant Trembl and Sergeant Gulbrand essentially supported the assertions of the Union in this case 3/ and that the documentary evidence regarding shift trades offered by the County was insufficient to support a finding on the County's behalf as that documentary



evidence failed to show any reason why the shift trades were allowed and failed to give any information regarding when employees thereon had called in sick. In addition, there appeared to be no movements of supervisors into first shift slots from back shifts recorded on the documents submitted. Finally, Sergeant Flaherty provided no specifics regarding his own or other sergeants' use of the past practice he described herein.

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*2/ In any event, I am unpersuaded by Sergeant Flaherty's assertions herein that other Sergeants followed the same practice as he did and that he has switched shifts for a more favorable shift in the past without drawing complaints from the Union. These assertions were unsubstantiated by any documentary or other testimonial evidence and I do not find them persuasive.*

*3/ It is significant that there is no dispute that when Jandrin called in sick, his October 14, 2000 shift was open.*

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In all of the circumstances of this case, and based upon the record evidence and argument herein, I issue the following

### **AWARD**

The County violated the collective bargaining agreement when it did not offer the Grievant, Richard Karman, an unscheduled open day shift on October 14, 2000. The County shall therefore make Richard Karman whole for the eight hour shift opportunity he was denied.

Dated at Madison, Wisconsin this 31st day of May, 2001.

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