

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WAUPACA COUNTY LAW ENFORCEMENT OFFICERS' ASSOCIATION,  
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

and

**WAUPACA COUNTY**

Case 121  
No. 59716  
MA-11384

*(Cameron Durrant Grievance)*

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Appearances:

**Mr. Gerald Ugland**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 35, Plover, Wisconsin 54935 on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney James R. Macy**, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, on behalf of the County.

**ARBITRATION AWARD**

At all times pertinent hereto, the Waupaca County Law Enforcement Officers' Association (herein the Union) and Waupaca County (herein the County) were parties to a collective bargaining agreement dated December 21, 1999, covering the period January 1, 1999 to December 31, 2001, and providing for binding arbitration of certain disputes between the parties. On February 23, 2001, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding the pay rate assigned to Cameron Durrant (herein the Grievant) upon his transfer to the position of Patrol Deputy and requested the submission of a panel of WERC staff from which to select to arbitrate the issue. The parties subsequently designated the undersigned to hear the dispute and a hearing was conducted on January 9, 2002. The proceedings were transcribed and the transcript was filed on February 11, 2002. The County and Union filed their initial briefs on March 11,

2002, and March 13, 2002, respectively. The County filed a reply brief on April 1, 2002. On April 3, 2002, the Union indicated it would not be filing a reply brief, whereupon the record was closed.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

### ISSUES

The parties were unable to stipulate to the framing of the issues. The Union would frame the issues as follows:

Is the grievance arbitrable?

If not, it shall be dismissed.

Did the Employer violate the collective bargaining agreement by its placement of Cameron Durrant on the wage schedule when he was awarded the position of Patrol Officer?

If so, what is the appropriate remedy?

The County would frame the issues as follows:

Is the Grievance arbitrable in that this matter has been grieved and settled by these parties in the past?

Is the Grievance timely in accordance with the requirements of Article VIII of the Collective Bargaining Agreement?

Did the County violate the Collective Bargaining Agreement when it placed Officer Durrant at the 85% hire rate under the wage Appendix of the Collective Bargaining Agreement upon his transfer on July 24, 2000, from a non-represented Transport Officer position to a Patrol Officer position?

If so, what is the appropriate remedy?

The Arbitrator frames the issues as follows:

Is the grievance arbitrable?

If so, did the County violate the collective bargaining agreement when it placed the Grievant at the 85% pay rate under Appendix A of the agreement upon his transfer to the position of Patrol Officer?

If so, what is the appropriate remedy?

### **PERTINENT CONTRACT LANGUAGE**

#### **ARTICLE VIII – GRIEVANCE PROCEDURE**

- A. Definition of Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract. The Association may be the Grievant in cases where it feels that it has a collective grievance of its members. The term, "Representative", shall mean that member of the Association appointed by it to fulfill the functions enumerated in this article.
- B. Steps of Grievance Procedure:
1. The Grievance Procedure shall consist of four (4) steps hereinafter set forth. All grievances not initiated or filed by the grievant or his representative within the applicable timelimits specified in this Article, shall be deemed abandoned. A grievant may initiate, present and process his grievance with or without a representative or representatives. All times hereinafter set forth in this Article, unless otherwise specified, are working days and are exclusive of Saturdays, Sundays and any Holiday recognized by this Agreement. All time requirements set forth in this Article may be waived or extended by mutual agreement of the parties.
  2. A grievance affecting a group or class of Employees may be submitted in writing by the Association Board to the Sheriff or Chief Deputy or his designee directly and the processing of such grievance shall commence at Step 2.

3. All grievances, whether individual or group, shall be submitted to and reviewed by an Association Board prior to Step 2 of the Grievance Procedure. It shall be the responsibility of the Association Board Member(s) reviewing the grievance not to cause an undue delay in its processing.

Step 1: The Employee, individually or with the Association representative, shall orally state his grievance with his immediate supervisor within seven (7) days after he knew or should have known of the cause of such grievance. The immediate supervisor shall confer with the Employee in relation to the grievance, after the Association representative is given the opportunity to be present at said conference. The immediate supervisor shall, within two (2) working days orally inform the Employee and the Association representative of his decision. In the event of a grievance, the grievant shall continue to perform his assigned tasks and grieve his complaint later.

Step 2: If the grievance is not settled at the first step, within seven (7) days of the decision in Step 1, the Employee or his representative shall prepare a written grievance on the agreed upon forms provided by the County and present it to the Sheriff or Chief Deputy or his designee whichever is applicable. The Sheriff or Chief Deputy or his designee, shall confer with Employee in relation to the grievance and the Association representative shall be afforded the opportunity to be present at this conference, which shall take place within five (5) days after receiving the written grievance. Following said conference, the Sheriff or Chief Deputy or his designee shall respond within five (5) days in writing.

Step 3: If the grievance is not settled at the second step, the Employee or his representative may appeal the written grievance to the Personnel Committee through the Personnel Coordinator by sending notice of the appeal to the Personnel Committee through the Personnel Coordinator within ten (10) days after receipt of the written decision of the Sheriff or Chief Deputy or his designee. The Personnel Committee through the Personnel Coordinator of the Waupaca County Personnel Committee shall discuss the grievance with the Employee, the Sheriff or the Chief Deputy or his designee, and the Association representative should he desire to be present at this conference. Following the conference, the Waupaca County Personnel Committee shall respond within ten (10) days in writing.

Step 4: Arbitrations

a. Time Limit: If a satisfactory settlement is not reached in Step 3, the Association must notify the Personnel Committee through the Personnel Coordinator in writing within ten (10) days that they intend to process the grievance to arbitration.

b. Arbitrator: Any grievance which cannot be settled through the above procedures may be submitted to an arbitrator. The parties shall request a list of five (5) arbitrators from Wisconsin Employment Relations Commission. The parties shall alternately strike names from the list until one (1) remains, who shall be appointed the Arbitrator. The toss of a coin shall determine which party shall make the first strike.

c. Arbitration Hearing: The Arbitrator selected or appointed shall meet with the parties at a mutually agreeable date within thirty (30) days of appointment to review the evidence and hear testimony relating to the grievance. Upon completion of this reviews and hearing, the Arbitrator shall render a written decision to both the County and the Association, which shall be binding upon both parties.

d. Costs: Both parties shall share equally the costs expenses of the arbitration proceeding and fees of the arbitrator, if any. However, expenses relating to the calling of witnesses or the obtaining of depositions or any other similar expense associated with such proceedings shall be paid by the party at whose request such witnesses or depositions are required, which shall be conducted in the County Courthouse.

e. Transcript: If either party desires a transcript, it may cause such a record to be made, providing it pays for the record. If both parties request such a record, they shall share the cost equally and a copy shall be made available without charge to the arbitrator.

f. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement without written approval of both parties.

**APPENDIX "A"**

	<u>1-1-99</u>	<u>1-1-00</u>	<u>1-1-01</u>
Patrol Officer			
(Monthly)	\$2986.67	\$3076.27	\$3168.56
(Hourly)	17.23	17.75	18.28
Investigator/Sergeant			
(Monthly)	\$3166.46	\$3261.45	\$3359.29
(Hourly)	18.26	18.81	19.37

Note: New Employees shall be hired and paid as follows:

Hiring rate	85% of the above rates.
After 12 Months	90% of the above rates.
After 24 Months	95% of the above rates.
After 36 Months	100% of the above rates.

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**OTHER RELEVANT LANGUAGE**

**ARTICLE VI – PROBATIONARY PERIOD**

New employees shall be classified as probationary Employees and shall have no seniority until such time as they have accumulated twelve (12) months of continuous employment with the County as an Employee of the Sheriffs Department and completed all required state certification. Employees on probation shall not have access to Article VIII of this Agreement. After completion of probationary period, which shall be proof of satisfactory completion, the Employee shall be placed on the seniority list as of his date of hire.

**County of Waupaca**

Subject: Promotion/Transfer Pay Procedure  
Date: July 01, 2000

**THE BELOW S.O.P. IS EFFECTIVE IMMEDIATELY**

In order to establish uniformity and consistency when employees are promoted or transferred to another position, the following criteria will determine the level of pay.

1. Upon promotion to another position of higher pay, an employee will enter that position at the step on the pay scale which results in a pay increase for the employee. Subsequent step increases shall occur on the annual anniversary of the date on which the pay increase took effect.
2. Upon promotion or transfer to another position of lower pay, an employee will enter that position at the same percentage step on the pay scale that applied in the employee's former position. Subsequent step increases shall occur on the annual anniversary of the date on which the pay increase took effect, unless the new position is non-represented. In such cases, step increases shall be paid on January 01, as per the Waupaca County Personnel Policy.

. . .

**BACKGROUND**

Waupaca County has, for many years, been in a bargaining relationship with its Sheriff's Department employees, with the composition of its bargaining units changing a number of times over the years. Within the bargaining units, and also among non-represented employees, pay grids have been developed that typically establish a top rate for each classification, set the hire rate for new employees at 85% of the top rate and provide for 5% step increases annually on the employee's anniversary date until the top rate is reached. In this situation, it has not been unusual for employees to transfer to different positions thereby moving from one bargaining unit to another, from a represented position to a non-represented

position, or vice versa. In these cases, the County has consistently treated an employee's original date of hire as their seniority date for the purposes of vacation and benefits. Less consistent has been the practice regarding placement and movement on the pay grid in these cases, leading to confusion as to whether or not a transferred employee was to be placed on the same step in the new pay grid as they were on in their previous position and whether their date of hire or date of transfer would be used as the anniversary date for step increase purposes.

The County hired the Grievant as a non-represented booking security officer on January 5, 1998 at 87% of the Grade 7 pay rate. He received a step increase to the 90% rate on January 5, 1999. The Grievant transferred to a position as a corrections officer on July 20, 1999, at which time he was placed on the pay grid at the hire rate of 85% of the top rate for a corrections officer. On May 1, 2000, the Grievant was transferred to the non-represented position of transport officer, whereupon he was placed at 95% of the Grade 8 pay rate, although his pay rate decreased from \$14.03 per hour to \$13.83 per hour. On July 17, 2000, the Grievant was offered the position of patrol officer by Chief Deputy Allen Kraeger and was told that, if he accepted the position, he would be placed on the pay grid at 85% of the top rate for a patrol officer, in accordance with a new County personnel policy. He also received a letter informing him of the offer and the pay rate of the position. The Grievant accepted the position the next day by signing and returning the letter. At the time of his transfer, although he was placed at the entry level on the pay grid, the Grievant's pay rate was increased from \$13.83 per hour to \$15.09 per hour. The Grievant commenced his new duties on July 24, 2000, and received his first paycheck on August 11, 2000. Subsequent to his transfer, the Grievant was provided with a copy of the County's new transfer policy (Cty. Exh. #3), which he acknowledged in writing on August 30, 2000.

At some point after the Grievant's transfer, the Union, through its local President, Officer Peter Bosquez, approached Department management with the concern that the Grievant was not placed on the patrolman's pay grid at the same level he had occupied on the transport officer's pay grid and was advised that the Grievant's placement was in accordance with the County policy. Subsequently, on September 19, 2000, the Union advised Captain Harlan Dietz of the grievance pursuant to Step 1 of the contractual grievance procedure. The oral grievance was denied and a written grievance was filed on September 25, 2000, pursuant to Step 2, and was again denied, both on substantive grounds and as to timeliness, whereupon the matter advanced to arbitration. Additional facts will be referenced, as necessary, in the discussion section of this award.

## POSITIONS OF THE PARTIES

### The County

#### Arbitrability

The County argues that the grievance is not arbitrable. The grievance procedure specifies that a grievant must orally relate his grievance to his supervisor within seven days after he knew or should have known of the cause of the grievance. The Grievant was on notice as to the issue at least by August 11, 2000, when he received his first paycheck, making August 18 the deadline for starting the grievance process, yet the County was not informed of the grievance until September 19. Numerous cases hold that arbitrators should enforce clear and unambiguous contract language as written. Further, where the language in question concerns grievance filing time limits, the language should be strictly enforced unless the parties have, by agreement or practice, nullified it. (citations omitted) A grievance raised nearly a month after the deadline, therefore, must be dismissed.

The grievance is also moot because the issue was previously resolved in the settlement of a prior grievance. Under principles of *res judicata* and *stare decisis*, arbitration settlements, like final awards, have a precedential effect on subsequent grievances on the same issues between the same parties. In this Department, the Union previously grieved this issue on behalf of another employee, Julie Thobaben, which the parties settled. The settlement provided that Thobaben's hire date would be used for purposes of seniority and accrual of other employment benefits, but her transfer date would be used for purposes of step movement on the pay grid. That settlement is binding on the parties here, so the grievance should be dismissed on that basis.

#### The Merits

The transfer policy implemented by the County provides that any employee transferred into a position with a higher pay grid will be placed on the lowest step that provides a pay increase. An employee transferred to a position with a lower pay grid will be placed on the same step that applied to the employee's former position. This policy codified the Thobaben grievance settlement and made it applicable County-wide. Since the Union and Grievant did not grieve the implementation of the policy at the time, they cannot complain about it now. Prior to adoption of the policy there was no existing practice as to grid placement which met the criteria applied by arbitrators to determine a binding practice, i.e., that it must be

unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. CELANESE CORP. OF AMERICA, 24 LA 168 (1954). In fact, practice as to grid placement changed with each successive sheriff. Thus, the Thobaben grievance settlement and resulting policy constitute the “practice” of the parties, to the extent one can be said to exist.

In this case, the Grievant was placed on the patrol officer grid at the step that provided a raise from his previous position as a transfer officer and given subsequent step increases on his transfer anniversary, in accordance with the policy. The Thobaben settlement and resulting policy are consistent with the language of the contract and were applied consistently to the Grievant, therefore the grievance should be dismissed.

### **The Union**

#### **Arbitrability**

The Union contends that the grievance is arbitrable. The date the Grievant was informed of the Employer’s determination as to the appropriate wage scale is not the proper benchmark for commencing the timeline of the grievance procedure. Rather, the Grievant is entitled to use the date he knew of his actual loss as the starting point for the grievance procedure timeline. After learning of the Grievant’s loss, the Union made inquiries to the Sheriff without response and then filed the grievance approximately two or three weeks later. This is consistent with the past practice of the parties, which has been to address concerns and resolve them, if possible, outside of the grievance procedure, as evidenced by the testimony of Officers Terrance Wilz and Clint Thobaben, who had similar problems in the past that were successfully resolved without resort to the grievance procedure. Where the parties have been lax in the observance of timelines in the past, arbitrators are hesitant to enforce them and to insist on strict adherence to contractual time limits now would chill the current relationship of trust between the parties.

#### **Merits**

The Union argues that the pattern within the Department has been that date of hire within the Department is the determining point for purposes of seniority and movement on the pay grid. This is consistent with Article VI of the contract. The testimony of Officers Terrance Wilz, Peter Bosquez, James Gorman, Brad Hardel and Todd Rasmussen reveals that all positions in the Department have the same 3-step, three-year pay grid construct and that the consistent practice within the Department has been that officers transferred from another

position within the Department to patrol retain their original hire date for seniority purposes and are placed on the same step in the patrol grid that they were on in their previous position. Thus the established past practice within the Department is that transferred employees receive credit for all continuous service within the Department when establishing the new pay rate. This practice is universally known and of long standing and should be enforced. The Grievant should have been placed at the 100% rate on the date of his transfer and is entitled to corresponding back pay from that date.

### **The County in Reply**

#### **Arbitrability**

The Union does not contend that the grievance was filed within the timeline established in the grievance procedure set forth in the contract. The Union concedes that the Grievant had seven business days from the time in which he knew of his actual loss to file his grievance. Therefore, since he received his first paycheck after his transfer on August 11, 2000, he had until August 22 to initiate the grievance process. In fact, however, he did not informally raise the issue with the County until nearly three weeks after he received his check and didn't commence the grievance process until September 19, 2000. Instead, the Union contends that the County somehow waived the timelines, but offered no evidence of this at the hearing. There was no such agreement, and, inasmuch as the contractual timelines are clear and unequivocal, the contract should be enforced according to its terms.

The Union makes no argument to dispute the County's argument that this issue was previously addressed and resolved in the settlement of the Thobaben grievance. Therefore, this settlement should be regarded as controlling and precluding the instant grievance.

#### **The Merits**

The Union argues the existence of a binding practice of using an employee's original hire date for seniority purposes upon transfer. This ignores the evidence that each successive sheriff followed a different approach in addressing this issue. It also ignores the testimony of Chief Deputy Kraeger citing specific examples, including himself, of officers who were placed on a lower step on the pay grid upon transfer. Even were such a practice to exist, however, it was preempted by the settlement of the Thobaben grievance, which established the practice ultimately adopted in the County's transfer policy. The County's actions were consistent with the settlement and the policy and, therefore, the grievance should be dismissed.

### The Union in Reply

The Union did not file a reply brief.

## DISCUSSION

### Arbitrability

The grievance procedure set forth in Article VIII of the contract requires the employee to orally present the grievance to his supervisor within seven (7) days of the time he knew or should have known of the cause of such grievance. The procedure also calls for strict compliance with contractual timelines and states that any grievance not initiated or filed in a timely fashion shall be deemed abandoned, although the parties, by mutual agreement, may waive the timelines.

The Grievant was offered the position of Patrol Officer on July 17, 2000, at which time he was also informed that he would be placed on the pay grid at the 85% hiring rate. (Tr. 38, Un. Ex. #2) On July 18, 2000, the Grievant signed and returned the offer, in effect accepting the position. The Grievant began his new duties on July 24, 2000, and received his first paycheck on August 11, 2000. (Tr. 121, Cty. Ex. #10) Sometime thereafter, the matter was brought to the attention of the Union President, Officer Peter Bosquez, who then engaged in informal discussions, and possibly correspondence, with Captain Harlan Dietz about the problem, which did not resolve the issue. At that point, the Union determined to grieve the issue. The date the grievance was first formally presented to the County is in dispute. Officer Bosquez testified he notified Captain Dietz of the grievance sometime approximately two to three weeks after the Grievant had received his first paycheck (Tr. 13-14), which Dietz summarily denied, whereas Chief Deputy Kraeger testified it was presented on September 19, 2000, over five weeks later (Tr. 119). In either event, the written grievance itself was dated September 19, 2000, and received by the Chief Deputy on September 25, 2000 (Cty. Ex. #8).

On the whole, I am of the view that the County's perception of the times of the foregoing events is the more accurate. In the first place, Officer Bosquez was somewhat equivocal in his testimony:

Q: And then what did you do after that?

A: Well, once there was no response to the letter, then we informed, I believe it was, Captain Dietz that we would be starting a grievance.

Q: Do you recall approximately when you approached Captain Dietz?

A: Not exactly, but I think it was probably two or three weeks after Cameron's first paycheck, I believe.

Tr. p.13, ln. 20 – p.14, ln. 2

Further, the written grievance was received by the Chief Deputy on September 25, which, under Step 2 of the grievance procedure, had to have occurred within seven (7) days of the denial of the oral grievance. If, as the Union contends, Dietz immediately denied the grievance, this must have occurred no earlier than September 18 for the written grievance to have been timely. Nevertheless, even viewing the evidence in the light most favorable to the Union and resolving all doubts in its favor, it is clear that the grievance was not presented to the County within seven (7) business days after the Grievant knew or should have known of his claim. Under the clear language of the grievance procedure, therefore, the grievance is untimely.

The Union argues, however, that the contractual time limits should not be enforced on the basis of a history of lax application and/or waiver of the time limits by the parties, citing Elkouri and Elkouri, *How Arbitration Works*, pp. 277-78, 5<sup>th</sup> Ed. (1997). For various reasons, I do not find these arguments persuasive.

The Union's argument regarding lax application focuses on testimony from Officers Terrance Wilz and Clint Thobaben to the effect that they experienced similar problems when first transferred to the patrol unit, which were resolved informally after discussion with the Sheriff without resorting to the grievance procedure. The testimony makes no reference to time frame, however, and so does not support the argument that the parties ignored the grievance filing deadline while negotiating the resolutions of those disputes. One simply cannot determine from the testimony whether the negotiations regarding Officers Wilz and Thobaben extended beyond the deadline for filing grievances, or whether grievances were brought concurrently with the negotiations to protect against jurisdictional challenges in the event the negotiations failed. To read such into this record would be sheer conjecture. As such, I cannot conclude from the evidence that there is a history of lax enforcement of the contractual timelines.

Likewise, there is no evidence here that the County waived the timelines of the grievance procedure. The testimony of Officer Bosquez was to the effect that after learning of the Grievant's situation he sent two letters, first to the Sheriff, then to the Personnel or Law Enforcement Committee, requesting a meeting to discuss the situation, but not initiating the

grievance procedure. 1/ He did not receive a response to either letter and so informed Captain Dietz that the Union would pursue a grievance. There is no evidence that the County ever agreed to waive the timelines, either orally or in writing. Also, on this record I am unable to conclude that waiver can be construed from the surrounding circumstances. The cases referenced in the Elkouri footnote cited by the Union address situations where the parties, either in general or within the specific case, had mutually waived timelines in the past, or where the employer did not raise the timeliness defense until the hearing. There is no evidence that the County has ever waived the timelines set forth in the contract and, further, Chief Deputy Kraeger put the Union on notice on September 29, four days after receiving the written grievance, that the County considered it untimely.

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*1/ Although the Union presented testimony regarding the approximate date of the letters and the content thereof, the documents, themselves, were not produced at the hearing.*

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Finally, the Union argues that the grievance should be considered arbitrable on equitable grounds. In so doing it stresses that the Union needed time to conduct an investigation into the facts of the issue before filing a grievance and suggests that the County's lack of cooperation hindered its efforts. Thus, it maintains that it should not be penalized by having the grievance dismissed on timeliness grounds. I do not concur. The fact that the County was instituting a new transfer policy and that it would be applied to the Grievant was known weeks before the Grievant received his first paycheck. The only thing not "known" was whether the County would actually follow through. This was established when the Grievant received his first check. At that point, therefore, the Union knew all it needed to know for purposes of filing the grievance. It was not precluded from filing a grievance while conducting further inquiries to preserve its jurisdictional rights, but chose not to do so. I cannot, therefore, find an exception to the contract requirements on equitable grounds.

The contractual language regarding the time for filing grievances is clear and unambiguous. Furthermore, Article VIII specifically precludes the Arbitrator from modifying, adding to, or deleting the express terms of the contract. Thus, due to the procedural defects of the case, I do not reach a consideration of the merits.

Based upon the record as a whole, therefore, and for the foregoing reasons, I hereby enter the following

**AWARD**

The grievance was not filed within the timelines specified in Article VIII of the contract and, therefore, is not arbitrable. The grievance is dismissed.

Dated at Madison, Wisconsin, this 28th day of October, 2002.

John R. Emery /s/

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John R. Emery, Arbitrator

