

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**LABOR ASSOCIATION OF WISCONSIN, LOCAL 108**

and

**ST. CROIX COUNTY, WISCONSIN**

Case 185  
No. 61554  
MA-11979

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Appearances:

**Mr. Thomas A. Bauer**, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of the Labor Association of Wisconsin, Local 108, which is referred to below as the Association.

**Mr. Thomas B. Rusboldt**, Weld, Riley Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of St. Croix County, Wisconsin, which is referred to below as the County.

**ARBITRATION AWARD**

The County and the Association 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 Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve Grievance No. A/2002-17, filed on behalf of Dave Gifford. The parties agreed that resolution of the grievance would address a series of grievances filed on the same issue, affecting five deputies. Hearing on the matter was conducted on December 4, 2002, in Hudson, Wisconsin. No transcript was prepared of the hearing, and the parties filed briefs and a reply brief or a waiver of a reply brief by February 5, 2003.

**ISSUES**

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

Did the work schedules posted by the County on June 12, 2002 and implemented in July of 2002 violate the collective bargaining agreement?

If so, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS**

**ARTICLE 3 - MANAGEMENT RIGHTS**

**Section 1:** The County possesses the sole right to operate County government and all management rights repose in it. The County agrees that in exercising any of these rights it shall not violate any provisions of this Agreement. These rights include, but are not limited to, the following:

1. To direct all operations of County government. . . .
3. To . . . schedule and assign employees within positions within the bargaining unit. . . .
7. To introduce new or improved methods or facilities or to change existing methods or facilities. . . .

**ARTICLE 4 - MAINTENANCE OF STANDARDS**

Except as provided by this Agreement, the County agrees that all reasonable conditions of employment in existence at the signing of this Agreement shall be maintained at not less than the highest minimum standards and the conditions of employment shall be improved wherever specific provisions for changes are made elsewhere in this Agreement.

The parties unqualifiedly agree to bargain regarding any changes which occur in the wage, hours or conditions of employment which may arise out of application of this Article during the term of this Agreement. If Agreement cannot be reached, the issue may be submitted by either party to arbitration in accordance with the procedure as outlined in Article 8, Paragraph E.

. . .

**ARTICLE 6 - WORK WEEK - CALL-IN PAY - OVERTIME**

**Section 1:** The scheduling of the workweek shall be determined by the Department Head subject to the following:

**A. Primary Service/Deputies:** Primary Services/Deputies who are on patrol shall work a (6/3), eight and one-half (8 1/2) hour day schedule with a fixed shift. The eight and one-half (8-1/2) hour day shall be at straight time. Shifts shall be selected by the employees in that particular classification on a seniority basis. The County shall list all available shifts for the classification and the employees shall list their preferences in rank order. Failure to list order of preference will result in loss of seniority for shift selection purposes and the County will treat the employee as if she/he was the least senior employee. . . .

**F. Filler Shifts:** Shift fillers are used within several classifications to fill vacant shifts due to vacations, compensatory time, schooling, sick leave, leaves of absence, and other related times. Filler shifts are part of the usual shift pick rotations and are chosen in the usual manner, by seniority. . . .

**Section 3 - Overtime:**

1. In the event that an employee is called in to work for a court appearance or for other duties not immediately after a regularly scheduled work shift, he/she shall receive one and one-half (1-1/2) times his/her regular hourly rate of pay for all time worked except that he/she shall be guaranteed a minimum of two (2) hours pay at said premium rate.
2. All employees shall be compensated at the rate of time and one-half (1-1/2) for all time worked in excess of their regular work day or regular work week/cycle. At an employee's option, he/she may receive said time and one-half (1-1/2) compensation in the form of accrued compensatory time rather than receiving compensation in cash. The employee must indicate his/her choice in this regard at the time of submission of overtime vouchers. Accrued compensatory time shall be used at the employee's discretion subject to approval of the Department Head or his/her designee. Compensatory time accumulation may not exceed forty (40) hours. In addition, each year the accumulation in place on December 1 shall be paid out prior to the end of the calendar year. . . .

**Section 4:** . . . If the County chooses to fill a vacant shift or part thereof, it shall utilize people in the classification in which the vacancy occurs. This shall be done on a rotating seniority basis for employees who are available . . . Nothing contained herein shall preclude the County from calling an employee early or extending an employee's shift to cover a vacant regular full-time shift or part thereof.

**BACKGROUND**

Gifford filed grievance no. A/2002-17 on June 12, 2002 (references to dates are to 2002, unless otherwise noted). Sergeant John Schilts schedules deputies for the County. On June 12, Schilts posted the following notice, referred to below as the Notice:

To all patrol officers:

In an attempt to control our already "out of control" overtime budget, we are forced to make some changes to the regular schedule. Please read the July schedule closely as some of you have significant changes. I'm sorry for any inconvenience that this may cause.

Deputies make shift selection preferences every six months, and Schilts, on a seniority basis, constructs schedules based on those preferences. At the time of the shift selection that immediately preceded the Notice, the County maintained the following shifts:

A Shift: 5:30 a.m. to 2:00 p.m.  
B Shift: 9:00 a.m. to 5:30 p.m.  
H Shift: 1:30 p.m. to 10:00 p.m.  
D Shift: 6:00 p.m. to 2:30 a.m.  
F Shift: 9:30 p.m. to 6:00 a.m.

Gifford selected a B shift. Attached to the Notice was a revised work schedule, which covered July, and which moved Gifford to an H shift on five days. Four other officers were affected by the revised schedule and filed grievances. The revised schedules can be summarized thus:

DEPUTY	PRE-NOTICE WORK SCHEDULE	POST-NOTICE WORK SCHEDULE	NUMBER OF MODIFIED SHIFTS
David Gifford	B Shift	H Shift	5
Dean Fayerweather	B Shift	H Shift	6
Michael Winberg	Split H/B (HHH/BBB) Shift	Straight H Shift	6
James Sander	D Shift	F Shift	3
James Mikla	D Shift	F Shift	5

At the time of the shift selection process that immediately preceded the Notice, the County maintained filler shifts for the Day, PM and Night shifts. They were posted and filled by seniority, with D. Johnson serving as the Day Filler, S. Knudson serving as the PM Filler, and C. Stewart serving as the Night Filler. As of the date of the arbitration hearing, the County had moved to a three-shift system of staffing, and did not use filler shifts.

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

**David Gifford**

Gifford has worked for the County for nine and one-half years. He stated that overtime shifts are typically filled by seniority, and that the deputies filling the three filler shifts could have been used to avoid the changes stated in the Notice.

**Michael Winberg**

Winberg is the Association President, and at the time the Notice was posted, had selected a split H/B shift. On the six days on, three days off cycle (6/3), Winberg worked three days on an H shift, then the next three on a B shift. The changes to his July schedule affected his B shift days, requiring him to work a straight PM shift for two weeks.

After reading the Notice, Winberg approached the Sheriff, Dennis Hillstead, and asked him what prompted the changes. Winberg stated that Hillstead responded that he had no other options, and that the changes would have to stand unless an arbitrator stopped him. Hillstead did not mention the overtime budget.

Winberg stated that the shifting of work schedules affected the month of July only, and was the first time that schedules had been altered in that fashion. Filler shifts had been altered in the past, but other shifts had not. The July revisions did not eliminate all overtime for that month. In every other month, the County filled vacancies through a rotating seniority system, based on an informal posting of vacant shifts. In Winberg's view, that system has been constant throughout his years of County service, and is reflected in the execution of a document dated October 4, 2000, which is referred to below as the Addendum, and which states:

...

Patrol:

- Shift fills, extensions and call outs will be by seniority
- Crime scene security will be provided for by full-time road deputies for the first 8 1/2 hours, then by part-time deputies as necessary.
- Crime scene security will be assigned by seniority if it involves overtime shifts.
- Overtime shifts will be filled by seniority first.
- Sheriff reserves the right, in emergency situations with exigent circumstances, to make assignments based on the need to protect life and property.

...

Winberg acknowledged that he and other deputies worked considerable overtime in 2002.

### **Dennis Hillstead**

Hillstead has served the County both as a Deputy Sheriff and as Sheriff. He has served roughly four years as Sheriff. He stated that the County does not have a formal policy, but prefers to have at least three patrol deputies per regular shift. Maintaining three officers per regular shift became difficult in July due to a number of factors. Two officers (Deputies Nelson and Mattila) were off due to on-the-job injury, a vacancy resulting from a retirement (Deputy Niederer) had not been filled, and the County's Process Server (Deputy Belongnia) was unavailable for work due to a stroke. Mattila's absence, for example, coupled with the scheduled off-days of Deputy Bondarenko, demanded that he move Sander and Mikla to provide coverage for the F shift on July 1 and 2.

The Notice was the first time that the County shifted back hours to man shifts. The four vacancies noted above made it difficult to fill shifts. Workload demands had, by July, effectively exhausted his overtime budget. Shift fillers could not have covered all of the holes in the staffing of the regular shifts. Hillstead noted that he decided to shift back the B and D power shifts to cover these holes for a variety of reasons. For example, on July 3, 4 and 5, shifting back Gifford's and Fayerweather's shifts covered vacation days taken by E. Johnson that coincided with D. Johnson's scheduled days off. On July 9, 10 and 11, Winberg shifted back to an H shift because those three days were E. Johnson's scheduled days off. Shifting Winberg's hours back was less disruptive than moving D. Johnson from his A shift. Similarly, shifting Sander's and Mikla's D shift back shift three and one-half hours to cover an F shift left vacant by the scheduled off days of two F shift deputies produced less disruption to their normal schedule than moving Knudson's scheduled H shift by eight hours. Beyond this, Hillstead acknowledged that Knudson's attendance at school in July complicated the alteration of his schedule. The use of Mikla also placed him in his coverage zone, while the use of Knudson would have moved him from his coverage zone. The schedule changes neither required any affected officer to work beyond the scheduled eight and one-half hour shift, nor required any affected officer to return to work from home.

Hillstead acknowledged that a Jailer filled in for Niederer, but noted that she moved from the PM shift to the Day shift to do so. Nelson had been on Worker's Compensation and unable to perform patrol duties for roughly three and one-half years as of June.

### **John Shilts**

Shilts has served the County for fifteen years, and has served as its primary scheduler since May of 2000, when he became a Sergeant. He noted that vacations granted prior to Niederer's retirement and to Mattila's injury complicated staffing in July. Prior to the Notice, only filler shifts had been moved. The County, throughout his tenure, filled vacant shifts through a system of rotating seniority.

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

## THE PARTIES' POSITIONS

### The Association's Brief

Grievance No. A/2002-17 states the issue for decision thus:

Did the Employer violate the terms and conditions of the collective bargaining agreement when the Employer unilaterally changed Deputy Dave Gifford's normal work shift from a "B" shift to an "H" shift for July 4, 6, 12, 14, and 22, 2002?

If so, what is the appropriate remedy?

The Association contends that prior to the grievance posed here, the County has never "shifted back" two shifts of deputy sheriffs. Rather, the County followed the Addendum. The agreement provides for filler shift positions for each shift, and those officers were available to fill "some of the vacant shifts on the July schedule without the need to 'shift back' officers." The Sheriff did not use filler shift officers and did not follow the Addendum.

A review of the evidence establishes that the County's intent was to avoid the payment of overtime. The labor agreement, however, makes this inappropriate. The Maintenance of Standards provision stated at Article 4 demands that changes in hours must be bargained. The County did not bargain the change. Beyond this, the creation of the "shift back" undercut the conditions of employment established before and after July of 2002, thus violating Article 4.

Nor does the evidence establish any emergency that could justify the change of shifts. The Sheriff did have four unit employees out during July. However, Niederer retired in May, and was replaced by July. Nelson was on limited duty due to a work related injury. However, Nelson had not been on patrol for years, and his absence had no staffing impact in July of 2002. Sick leave taken by Mattila prior to and following July of 2002 was filled through overtime. The stroke suffered by a process server had no impact on the staffing of patrol deputies. That nine employees were off on vacation in July of 2002 belies any assertion that the Sheriff faced an emergency. The evidence establishes that the Sheriff "was concerned that his overtime budget was almost exhausted, and that he did not want to pay out any additional overtime." This motivation falls short of establishing a contractually valid reason to alter work shifts.

The Association concludes that the County's violation of the labor agreement demands that the affected officers be made whole by the paying the following hours at the overtime rate: Gifford, 22.5; Fayerweather, 27; Winberg, 27; Sander, 10.5 and Mikla, 17.5. Beyond this, the Association requests that the County be ordered to "cease and desist from further violations of this nature," and to pay the Association's "costs and fees associated with the filing and processing of this grievance to arbitration."

### **The County's Brief**

The County states the issues for decision thus:

Did the County violate the collective bargaining agreement when it required the grievants to work outside of their normally scheduled shifts?

If so, what is the appropriate remedy?

After a review of the evidence, the County contends that Article 3, Section 1, 3 grants it the authority to "schedule and assign employees." Other agreement provisions limit this general grant of authority, but none of those provisions are applicable as the Association asserts.

More specifically, the Association cannot complain that the Sheriff's actions undercut shift selection procedures. Article 6, Section 4 specifies that overtime be filled "on a rotating seniority basis for employees who are available," but also permits the County to call an employee in early or to extend an employee's shift. The County concludes that "encompassed in its right to call an employee in early or extend an employee's shift is the right to slide a shift back some hours." The Sheriff's action is consistent with Article 6, Section 4 and with Article 3, Section 1.

The Association's remedial request ignores that none of the grieving employees "worked more than the normal eight and one-half hours during any of the shifts in question." Beyond this, Article 6, Section 2 "describes the only circumstances under which an officer is entitled to overtime pay." There are only two such circumstances, neither of which is applicable to the grievance.

The grievance "is fact and language specific." This means other cases afford no significant guidance. A review of the language of the agreement against the evidence establishes that "the Employer had the right to reassign the grievants to the later shifts without violating the agreement or incurring overtime." It follows that the "grievances must be dismissed."

### **The Association's Reply Brief**

The Association chose not to file a reply brief.

### **The County's Reply Brief**

The County acknowledges that the agreement provides for shift fillers at Article 6, Section 1, F. The provision falls short, however, of mandating their use in a given circumstance. The agreement cannot persuasively be read to require the use of shift fillers or to deny "shifting back." That this is the first "shift back" has no bearing on its validity. In any event, shift fillers "were not available for all of the shifts that needed to be partially covered."



The Association's remedial request obscures that "(n)one of the Grievants worked in excess of their regular workday or week." Thus, no agreement provision affords them overtime. Even if it did, "the Grievants have already been paid straight time."

Article 4 does not apply since Article 6, Section 4 specifically authorizes the shifting back. Current budgetary constraints underscore the wisdom of the shift back process. Employees have "no vested interest in maximizing overtime."

### DISCUSSION

The parties did not stipulate the issue for decision, but their conflicting statements do not differ significantly, and I have drawn on each. The Association's has the virtue and the liability of being fact-specific. It narrowly focuses on the July changes, but is restricted to the facts posed by the Gifford grievance. Since the parties stipulated that this proceeding governs five grievances, my statement of the issue is not restricted to the changes made to Gifford's schedule. Beyond this, the narrowness of the Association's statement of the issue contrasts unpersuasively with the breadth of its remedial request. The County's statement of the issue has the virtue and the liability of breadth. It is broad enough to cover the facts of each grievance, and to highlight that the grievances call several agreement provisions into question. However, its breadth implies a greater reach to the resolution of the grievance than I find persuasive. I have stated the issue to clarify that only the July changes and the circumstances that provoked them are at issue.

The parties' arguments put Articles 3, 4 and 6 in dispute. As the County points out, Article 3 at least in part governs the dispute, since Subsections 1, 3 and 7 grant it the authority to direct and schedule deputies as well as the ability to introduce improved methods. This broad authority is, however, limited by the admonition of Section 1 that the County "shall not violate any provisions of this Agreement." The interpretive issue is, then, whether any other Agreement provisions limit the broadly stated rights of Subsections 1, 3 and 7.

Article 4 does not. By the terms of the first paragraph, the procedural and substantive rights of Article 4 apply "(e)xcept as provided by this Agreement." This restates the interpretive dilemma of Article 3, which is to determine whether specific Agreement provisions govern the grievances.

The issue thus turns to Article 6. Section 1 makes scheduling subject to Subsection A, which sets forth the standard workday, workweek and the shift selection process. Sections 3 and 4 of Article 6 govern overtime.

The County persuasively argues that the issue on the merits of the grievance is not strictly speaking an overtime issue. Subsection 1 of Section 3 makes overtime available for "a court appearance or other duties not immediately after a regularly scheduled shift." This

provision addresses call-in pay. Subsection 2 addresses "time worked in excess of" the "regular work day or regular work week/cycle." The shift back process implemented by the Notice did not ask deputies to work beyond the eight and one-half hour workday or the 6/3 work cycle.

While the grievance does not strictly concern the overtime provisions, it does concern the integrity of the shift selection process established by Article 6. Article 6, Section 1, A demands "a 6/3, eight and one-half (8 1/2) hour day schedule with a fixed shift." The following two sentences establish straight time pay for the regular workday and the shift pick process. The Notice overturned the shifts selected, by seniority, of the affected deputies. This action reads the reference in the first sentence to a "fixed shift" out of existence. The shifts implemented by the Notice were not subject to the selection process, and the fourth sentence of Subsection 1, A demands that the County "list all available shifts for the classification." Beyond this, the shifts implemented by the Notice were not "selected by the employees in that particular classification on a seniority basis." To read Subsections 1, 3 and 7 of Article 3 to govern the facts posed here would unpersuasively pit their general provisions against the specific requirements of Subsection 1, A of Article 6. More to the point, it would render the shift selection process meaningless.

This conclusion must, however, be restricted to the facts posed here. The July work schedules cannot be persuasively considered an "improved method" of scheduling. They sought to assure the presence of three deputies per regular shift in a different fashion than the five shifts posted for shift selection. The improvement was to avoid unnecessary overtime payment. The Association cannot persuasively claim an entitlement to maximize overtime. However, it can persuasively claim that the "improved method" reference cannot trump the "fixed shift" requirement and the shift pick process.

Other facts could more persuasively pit the County's right to assign against the provisions of Article 6. It is not necessary to speculate on such facts to note that the evidence does not afford a persuasive basis to find the Notice was prompted by an emergency or by "exigent circumstances" as contemplated by the Addendum. All except one of the absences cited by the County as complicating factors in the July scheduling process occurred well before June. It is not surprising that the County authorized a number of vacations in July. However, those absences cannot be treated as an emergency situation without reading the vacation entitlement out of existence.

Hillstead's testimony establishes that he and Schilts created a shift back process that efficiently filled vacant slots without unnecessary overtime, and with a minimum of disruption to employees. It is not necessary to discredit the effort that created those schedules to note that they presume policy authority not granted by the Agreement to an arbitrator. The Agreement seeks no more from an arbitrator than the enforcement of the terms of the Agreement. Article 6 does not grant the latitude that the County asserts in this proceeding. In sum, the schedules implemented by the Notice violated the terms of Article 6, Section 1, A.

This poses the issue of remedy. The "cease and desist" portion of the Association's remedial request cannot be granted. The authority to rule on the facts of this grievance can carry no more than persuasive authority to any other set of facts. There is no reason to believe such an order is necessary in any event. The shift back process affected only July, and the County no longer has a five shift system.

The Association's request for fees and costs in bringing the grievance can be seen as a make whole measure. The persuasive force of this argument presumes that no other remedy is possible. If another remedy is possible, the request appears punitive. There is no evidence of bad faith. The Notice attempted to creatively address a budgetary dilemma. That it breached the Agreement demands that the Grievants be made whole, not that the County be punished.

On balance, the Association's request that the Grievants be awarded overtime for those hours that they would not have worked but for the shift back is persuasive. As the County notes, the Agreement arguably does not make this an overtime situation since the total number of daily and work cycle hours worked were not "in excess" (Article 6, Section 3, 2) of the requirements noted in Article 6, Section 1, A, or "immediately after a regularly scheduled work shift" (Article 6, Section 3, 1). However, the contractual breach is that the County overturned the "fixed shift" requirement and the shift selection process of Article 6, Section 1, A. The point of a make whole remedy should be to affirm the integrity of the shift selection process that produced the "fixed shift." As the references to "regularly scheduled work shift" (Article 6, Section 3,1) and to "regular work week/cycle" (Article 6, Section 3, 2) establish, the provision of overtime is an appropriate means to enforce the integrity of a "fixed shift" (Article 6, Section 1, A).

The alternatives are less than palatable. The "fixed shift" requirement grants some stability to a work shift to permit a deputy to plan daily life activities. To attempt to measure the disruption to each deputy would be costly and fruitless. To award the fees and costs sought by the Association to deter a breach of the Agreement makes the breach more egregious than it is. Thus, the provision of overtime represents a contractually appropriate, if not specifically mandated, measure of the breach posed here. As the County persuasively points out, the deputies have already been paid straight time for the hours at issue. Thus, the net effect of the Award entered below is to demand the payment of a 1/2 time premium for those hours worked by the Grievants that they would not have worked but for the implementation of the Notice. The affected hours for the deputies are 22.5 for Gifford; 27 for Fayerweather; 27 for Winberg; 10.5 for Sander; and 17.5 for Mikla.

### AWARD

The work schedules posted by the County on June 12, 2002 and implemented in July of 2002 violated the collective bargaining agreement.

As the remedy appropriate to its violation of Article 6, Section 1, A, the County shall compensate the Grievants, at the overtime rate, for those hours worked by each Grievant that he would not have worked but for the implementation of the work schedules posted by the County on June 12, 2002. The County may offset the 1 1/2 times premium payment requirement by any amount already paid at straight time.

Dated at Madison, Wisconsin, this 4th day of March, 2003.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator