

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**VERNON COUNTY PROFESSIONAL POLICE ASSOCIATION,
REPRESENTED BY THE
WISCONSIN PROFESSIONAL POLICE ASSOCIATION,
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

and

VERNON COUNTY, WISCONSIN

Case 132
No. 61421
MA-11930

Appearances:

Ms. Melissa M. Thiel Collar, Staff Attorney, WPPA/LEER Division, 340 Coyier Lane, Madison, Wisconsin 53713, appearing on behalf of Vernon County Professional Police Association, represented by the Wisconsin Professional Police Association, Law Enforcement Employee Relations Division, referred to below as the Union, or as the Association.

Mr. Mark B. Hazelbaker, Hazelbaker and Russell, LLP, Attorneys at Law, 3240 University Avenue, Suite 3, Madison, Wisconsin 53705, appearing on behalf of Vernon County, Wisconsin, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Association and the County are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union and the County requested the Wisconsin Employment Relations Commission to appoint an Arbitrator to resolve Grievance No. 02-296, filed on behalf of the Association. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing was held on October 21 and 30, 2002, in Viroqua, Wisconsin. Lisa R. Creeon filed a transcript of the hearing with the Commission on November 7, 2002. The parties filed briefs and reply briefs by February 3, 2003.

ISSUES

The parties stipulated the following issues:

Did the County violate the collective bargaining agreement when the Sheriff awarded a vacant patrol position to Kenneth Frye rather than to Emilee Nottestad?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE III - FUNCTIONS OF MANAGEMENT

3.01 Except as otherwise provided in this Agreement, the County retains the normal rights and functions of management and those it has by law.

. . .

ARTICLE X - GRIEVANCE PROCEDURE

. . .

10.04 Step 3. Arbitration.

. . .

B. The Board of Arbitration shall have no power to add to, or subtract from, or modify any of the terms of this Agreement . . .

ARTICLE XXVII - JOB POSTING AND TRANSFERS

. . .

27.03

- (A) There will be six (6) categories of employees in the Department for the purpose of promotion: Dispatch; Investigation; Jail; Patrol; Sergeant; and Records. . . . When a vacancy occurs within each of these categories, the first opportunity to post for the vacancy shall be afforded to other employees already serving position within that same category.

The most senior employee within a category shall be awarded the vacancy. . . .

- (B) If no employee already employed in category posts for the vacancy, the position shall be opened to other employees in the department. Only those applicants who meet the prerequisites for the position shall be considered. If more than one (1) employee posts for a vacancy, the employer shall administer a written examination using a test approved by the City and County Testing Services of the State of Wisconsin or some other public agency which approves employee examinations. The examination score, an oral interview score, a training score, an experience score, and a seniority score will be combined and averaged to numerically determine the top three candidates. The top three numerically ranked candidates are then submitted to the Sheriff for selection. In the event of a tie in scoring, seniority by employment date shall receive preference. If no employee qualifies, the vacancy shall be filled by recruitment from outside the department, and outside candidates shall be subject to the same examination process.
- (C) Every employee moving to a position in another category shall serve a sixty (60) day training period in which the employee and the employer may evaluate the compatibility of the employee and the position. At any time during the sixty (60) day period, the employee may elect to return to their former position without loss of seniority. The employer may, at any time during the sixty (60) day training period elect to return the employee to the employee's former position, which shall also be without loss of seniority. The employer's decision to return an employee to their former position shall be reviewable under the grievance procedure of this Agreement. In the event the employer returns an employee during the training period or the employee chooses to return to their former position, the applicant next in line, as determined by the rating system in item (B) above, shall be given opportunity to qualify and this procedure shall continue until the vacancy is filled.

BACKGROUND

The Association filed the grievance on June 12, 2002 (references to dates are to 2002, unless otherwise noted). The grievance form alleges a violation of "Article 27 (27.03[3][c]) job posting and transfers" and seeks as a remedy that the County "(p)romote the person who was next in line as determined by the rating system." The County Personnel Committee responded on July 17, with a memo that states:

The Personnel Committee on a unanimous vote denied the grievance based on: It was the intention and the language specifies that the five rated areas are used to determine the top 3 candidates which are then submitted to the Sheriff for rating and selection. The 5 step process that proceeds the Sheriff's selection is solely for the purposes of narrowing the candidates to the top three which are then submitted to the Sheriff. The Sheriff . . . utilizes performance based criteria to make his selection from the top three. . . . The Committee is clear "as described by the rating system in item (B)" as indicated in the contract, but is questioned by the Union, refers to the whole selection system including the Sheriff's final ranking of the three to make his selection.

Evidence submitted at the arbitration hearing tracked the themes set out in this correspondence.

Deputies who staff the Jail, Dispatch Center and Patrol are cross-trained to permit them to perform duties across the divisions. The County Jail is licensed for twenty-seven inmates, and consistently operates at its maximum or higher. The County, at the time of the arbitration hearing, had to house roughly as many inmates at non-County institutions as it housed in its own jail.

Early in 2002, the County started an Electronic Monitoring Program (EMP) to alleviate jail overcrowding. It was necessary to create an oversight position manned by a Deputy to monitor inmates eligible for release under EMP restrictions. A Deputy from the Patrol Division filled the position, thus creating a vacancy in the Patrol Division. The County posted the Patrol Division vacancy on February 11. The job posting states:

. . .

Position: Deputy Sheriff - Patrol Officer
Night Shift (4:00 pm to 1:00 am)

Qualifications: All full-time employed Deputy Sheriffs are eligible to apply. Preference will be given to Patrol Division Officers before opening to other department divisions.

Requirements: All applicants must submit to the following and will be scored equally in each of the five areas listed below.

- | | |
|--|------------|
| 1. Written test by the Wisconsin Testing Service | Counts 20% |
| 2. Oral Interview/Examination | Counts 20% |
| 3. Training Background | Counts 20% |
| 4. Experience Background | Counts 20% |
| 5. Seniority | Counts 20% |

...

Five Deputies signed the posting: Charles Jacobson; Emilee Nottestad; Kenneth Frye; and Matthew Sutton.

Each of the Deputies completed a written examination on March 9 at the University of Wisconsin-LaCrosse, and to an interview conducted on March 11. By March 11, each applicant supplied the County with documentation of their seniority, experience and training. The County stated the requirements of the examination and interview process in a written posting that states:

...

Those participating are listed below. Please report to the County Personnel Office at the time indicated. The interview panel will consist of staff that is familiar with patrol operations from three (3) outside law enforcement agencies (patrol sergeants). The Undersheriff and County Personnel Coordinator will promulgate the interviews, but will not participate in the scoring process to submit the final three (3) to the Sheriff.

...

Gene Carey is the County Sheriff, James Hanson is the Undersheriff and Lisa Berg is the Personnel Coordinator. Hanson documented the results of the testing process in a series of memos dated March 20. The data from those memos can be summarized thus:

APPLICANT	INTERVIEW	SENIORITY	EXPERIENCE	TRAINING	WRITTEN EXAM	TOTAL
Charles Jacobson	17.60	10.00	5.50	11.00	17.15	61.25
Emilee Nottestad	15.79	1.00	1.00	4.00	17.39	39.18
Kenneth Frye	12.16	1.50	1.00	4.50	14.20	33.36

Hanson gave the memos to each applicant, and informed Carey of the identity of the three highest scoring applicants. As soon as Carey knew the identity of the applicants, and before he knew their scores, he selected Jacobson to fill the vacant Patrol position.

Jacobson accepted the position, and started the training period. He did not complete it. In a memo headed "To Whom It May Concern" and dated May 10, Jacobson stated:

In accordance with the 2001-2002 union bargaining agreement Article XXVII(c), I do hereby request to return to my former position. That being the 1st shift/2nd swing dispatch shift. . . .

After learning of the request, Carey decided to select Frye, and authored a memo to Hanson dated May 10, which states:

Concerning Deputy Jacobson's decision to return to his previous position, my next choice for the position will be Ken Frye. I base this choice on our previous conversations on our concerns about Emilee having problems w/chain of command, as discussed w/sgt. Olson and Lt. Emerson. We will not announce this decision at this time because of scheduling problems.

The scheduling problems involved working Jacobson back into the Dispatch schedule. In an e-mail to all Deputies dated June 3, Carey announced the selection of Frye thus:

The current road position that was vacated by Deputy Charles Jacobson, has been filled by Deputy Ken Frye. This transition will be over the next 2 to 3 weeks. Once Ken is in the position permanently the same 60 day period begins. Once again I would like to thank those who participated to the vacancy process, and all were qualified deputies. Congratulations Ken, and good luck.

Carey did not discuss the decision with Nottestad prior to this e-mail.

The Association filed the grievance on June 12. Prior to filing the grievance, Jason Leis, the Association's Vice-President, discussed the matter with Don Henry, who was the Association's President at the time the parties agreed to modify Section 27.03. The Association's President at the time of the grievance's filing was Emilee Nottestad's husband, Shane Nottestad, who is referred to below as S. Nottestad.

Nottestad started full-time employment with the County as a Jailer/Dispatcher on July 6, 2001. Frye started full-time employment with the County on July 3, 2001. At the time of the arbitration hearing, Nottestad was one of two female Deputies who served on the third shift as a Jailer/Dispatcher. Her immediate supervisor, as a Jailer, was Lieutenant Ron Emerson. Her immediate supervisor, as a Dispatcher, was Sergeant Bruce Olson. Olson works the first shift. Nottestad also served as a Patrol Deputy on an as-needed basis to fill vacant shifts. State statutes require the County to have a female Jailer on duty when it houses female inmates. Thus, the presence of female inmates in the Jail has a bearing on the County's ability to cover an absence of a female Jailer, or to assign a female Jailer to non-Jail duties.

On July 4, Carey, Nottestad and Leis met to discuss the Carey's determination to extend Nottestad's probation period from July 5 to October 5. Carey was concerned that Nottestad's supervisors were uneasy regarding her willingness to follow the chain of command and her attention to office detail such as time sheets. Nottestad did not believe those concerns were valid or well articulated, but she and Leis executed an agreement to extend the probation period to avoid a summary termination. The County eventually determined that she had successfully completed the probationary period.

The Bargaining History of Section 27.03

In the 1999-2000 labor agreement, Section 27.03 consisted of the following paragraph:

Employees desiring to apply for such vacancies shall sign the posted notice. Only those applicants who meet the prerequisites for the position shall be considered. The qualified applicant with the longest service record shall be given the first opportunity to qualify for the vacancy. Said employee shall demonstrate his/her ability to perform the job during a sixty (60) calendar day training period; and if he/she is deemed qualified by the Employer after said training and trial, he/she shall be assigned to fill the vacancy and shall receive the rate of pay of the classification. Should such employee not qualify or should he/she himself desire to return to his/her former position without loss of seniority. In this event, the applicant next in line of seniority shall be given opportunity to qualify and this procedure shall continue until the vacancy is filled.

The bargaining for a successor to this agreement took place in the Fall of 2000. Michael Peterson served as the Association's chief spokesman and Mark Hazelbaker served as the County's. Carey was, during this time, a member of the bargaining unit. He was elected to serve as Sheriff in November of 2000, and took the office in January of 2001.

Late in the bargaining process, the County proposed to alter Section 27.03 to move away from a seniority-based selection system for promotions. On October 6, 2000, the parties reached an agreement in principle on a successor to the 1999-00 agreement. Hazelbaker summarized the tentative agreement in a letter to Peterson dated October 9, 2000, which states:

1. The employees' wages will be increased 7.0%, across-the-board, on January 1, 2001, and January 1, 2002.

2. Language will be added to the Contract which will provide that promotions within the department will be made within six separate seniority tracks. Employees posting within a section of the department may be awarded another position solely on the basis of seniority. People seeking to transfer from one promotional track to another, however, must satisfy the Sheriff, through testing, that they are qualified. Language will be developed to reflect this. The Sheriff will also be able to fill vacancies on a temporary basis for as much as thirty days using available personnel, but that 30-day assignment will give no advantage to the person temporarily assigned.

. . .

I look forward to finalizing the language on these items, and getting the Contract ready for ratification. I wish to note, in conclusion, that the County was reluctant to grant an increase of this magnitude because of its financial constraints. The County does not begrudge the employees their desire for a better quality of life. It believes that they deserve the wages which result from this agreement. However, it is important to note that the increase granted in this agreement, which is much larger than any other increase granted to County employees in the recent past, was driven largely by the inescapable conclusion that we are in “catch up” posture due to the fact that the wages paid to employees in this unit are more than \$3.00 behind the leader among the comparable counties, and below the average wages paid. It was also significant that the Sheriff reported that he has had a great deal of trouble filling vacancies, and has had a significant decrease in the number of applications for vacancies, which he attributes greatly to the wage rates being paid. . . .

After some discussion, the parties agreed to amend Section 27.03 to read as set forth above. A draft of the resolution to put the tentative agreement before the County Board for ratification noted the amendment to Section 27.03 and to the “magnitude” of the across the board increases traceable to the “catch-up” posture and hiring difficulties noted in Hazelbaker’s letter to Peterson. This resolution summarized the change to Section 27.03 thus:

Employees posting within a track of the department may be awarded another position solely on the basis of seniority. Employees seeking to transfer from one promotional track to another, however, must satisfy the Sheriff, through testing, that they are qualified.

The resolution ultimately placed before the Board also noted the “catch-up” nature of the wage increase, and summarized the alteration of Section 27.03:

Employees posting within a track of the department may be awarded another position solely on the basis of seniority. Employees seeking to transfer from one promotional track to another, however, must satisfy the Sheriff that they are qualified. This will be determined by written test, oral interview/testing, experience, training and seniority.

Henry initialed a copy of this resolution to indicate the Association's agreement.

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

Emilee Nottestad

Nottestad served the County as a part-time employee for several months prior to her hire into a full-time position. She also serves as a part-time police officer for the City of Viroqua. Sometime in the Fall of 2001, Hanson had to leave work under sick leave. In his absence, Olson assumed scheduling duties. Olson did not schedule her to work as a fill-in for vacant patrol shifts with the frequency that Hanson had. She noted that she and Leis overheard Olson say that the public felt safer when a man responded to a call rather than a woman. She did not discuss the matter with Olson, but Leis did. Leis and S. Nottestad raised the comment with Carey and Hanson, who ultimately met with S. Nottestad and Nottestad regarding it.

She learned from Hanson that she was ranked number two of the applicants for the Patrol vacancy, and had earned the highest score on the written test. She asked him whether the rankings would survive that vacancy, and understood Hanson's response to be that if another vacancy occurred within a year or so, the County would likely select the highest ranked applicant to fill it, as they had done in the past.

She acknowledged she had some difficulty dealing with Olson. He was sufficiently condescending in responding to questions she asked that she found it preferable to take her questions to other employees. Olson and Emerson formally evaluated her in late January and early February. Both evaluations gave her an overall performance rating of "Meets standards." Emerson's mentioned that she "(h)ad to be told twice to keep up her time sheets" and that she "could use some improvements completing assigned task or duties." Olson's mentioned concerns with thoroughness on two "core evaluation factors" and noted concerns with her tact in dealing with others on three others. Olson noted that she "will be a big asset to this department." Nottestad stated that although she disagreed with parts of each evaluation, she did not question them, because they were delivered informally and neither supervisor gave any indication that the evaluations might hurt her employment or promotion prospects.

Even though the “chain of command” type of concerns raised by Carey were addressed on several occasions, she did not feel any supervisor ever articulated what behavior on her part triggered the concern.

Jason Leis

Leis testified that the Association filed the grievance because Frye was not the “next in line” to fill the vacancy. He talked to unit members and to Henry to determine if they thought the County had appropriately implemented Section 27.03. He understood Henry’s position to be that the “next in line” should have been the next highest ranked applicant. In later meetings concerning the grievance, Leis learned that Henry had informed Berg that Frye’s promotion was appropriate. Leis questioned Henry about it, and understood Henry’s response to be that he had changed his mind. Leis affirmed Nottestad’s recall regarding Olson’s comment about the public perception of female deputies. He confronted Olson regarding the statement, but Olson simply responded that he believed that is how the public perceives law enforcement officers. He could not recall when this occurred, but believed it probably occurred late in 2001 or early in 2002.

Don Henry

Henry has served the County as a Deputy for roughly twenty-one years. He served as Association President during the bargaining for a successor to the 1999-00 labor agreement, which set strict seniority as the mechanism for filling positions. The County proposed, and the Association agreed, to change that system to a merit process. He stated his understanding of the changes agreed to in October of 2000 thus:

My understanding was the sheriff was going to have the say as to who went where in the position. He would be able to pick out of, I believe it was a pool of three top candidates (Transcript [Tr.] at 130).

He acknowledged speaking to Leis concerning the Sheriff’s selection of Frye over Nottestad, but denied ever stating that Nottestad should have been considered “next in line” to Jacobson. Rather, he told Leis that if he thought the selection should be grieved, he should take the matter up with Peterson. Henry stated that he viewed the Sheriff’s selection of Frye as contractually proper, and affirmed that he stated this position to Berg.

Gene Carey

Carey served as a Patrol Officer before becoming an Investigator, then Chief Investigator for the County. availability for Patrol Shift fill-in work is dependent on that factor. Nottestad’s gender played no role in his decision to select Frye or in her assignment to

fill-in vacant shifts other than to the degree necessitated by the presence of female inmates in the Jail.

Carey made the selection to select Jacobson and to replace him with Frye. At the time he selected Frye, he knew that Nottestad had scored second on the testing process and that Frye had scored third. He detailed his reasoning for selecting Frye thus:

A His work performance, his evaluations, his ability to work with others, his demeanor around the public . . .

Q At the time that you made the decision as between Emilee Nottestad and Kenneth Frye, at that time when you made that decision, did you think both of them were qualified to work the road?

A No . . . Based on the evaluations, my impression of Deputy Nottestad was that there was some degree of resentfulness toward authority. I believe that law enforcement is a quasi-military type of operation, you have to have rank. We wear uniforms, that's just the way it is. You have to follow direction because if you don't, someone could get hurt or things may not get done the way that this administration believes they should be. And ultimately I'm the one responsible for the decisions my officers make (Tr. at 149).

He stated the employees' formal evaluations played a role in his thinking, but that he relied heavily on the opinions of his managers and his own sense about the applicants' work performance. He was concerned that Nottestad could not seem to work effectively with Olson, and bypassed him with work related questions. In his view, Frye "(o)nce given a task fulfilled (it) without question, concise, followed orders, everything" (Tr. at 155). Carey stated that he applied his own ranking system when he had to select between the three highest ranking applicants, and that the selection process turned on his exercise of discretion regarding who is the most qualified applicant. In his view, Nottestad was not qualified for the position Frye filled, at the time he had to make the determination.

When he learned of the statement attributed by Nottestad and Leis to Olson, he confronted Olson, who denied making it. He directed Hanson and Sergeant Crume to investigate the matter. They concluded there was no reason to reject Olson's denial, and Carey accepted their conclusion.

James Hanson

Hanson noted that the County has applied the terms of Section 27.03 B on at least three promotions. The first was the selection of Scott Bjerkos to become a Detective Investigator. The second was the selection of Jason Crume to become a Patrol Sergeant and the third was the selection of Bruce Olson to be a Dispatch Sergeant. In each case, the employee selected had earned the highest score under the interview/testing process. He denied ever telling Nottestad that the County always selected the highest ranked applicant. He noted he refers the three highest ranked applicants to Carey for his selection among them. He did not typically supply Carey with their scores or their numerical ranking at the time of the referral.

Hanson noted that he might have had some influence in the selection of Frye, and stated that the assertion that her gender accounted for Frye's selection was "ridiculous" (Tr. at 231).

Charles Suhr

Suhr has served as a Deputy for the County for roughly nineteen years. He is a member of the Association, but does not occupy an elective leadership position. He has attended the bargaining sessions during the bargaining for the 1999-00 and the 2000-01 labor agreement. The Association permits any unit member willing to devote the time to the bargaining process to sit in as a member of the bargaining team. Seniority governed promotions in the 1999-00 agreement. The County proposed changing that process in the bargaining for a 2000-01 labor agreement. The Association voted to agree to that change, in order to "promote the best qualified person to any vacancies" (Tr. at 239). The County never proposed to extend the Sheriff's discretion to select among the three top applicants to any pick other than the initial pick for a promotion. In his view, the Association did not vote to extend the Sheriff any discretion in choosing between applicants beyond the first choice.

Michael Peterson

Peterson is a Business Agent for the WPPA/LEER Division. The County's proposal to alter Section 27.03 in the 2000-01 labor agreement was made as a concept. The Association agreed in concept to the proposal, including the Sheriff's discretion to choose the single applicant among the three highest ranked applicants to fill a position. The Association did not agree to give the Sheriff any discretion beyond the first pick. The County never proposed language to grant the Sheriff that discretion, and the Association never intended to grant it. The parties never explicitly addressed the issue. In his view, the testing process established the most qualified applicants, and the Sheriff's discretion extended only to the initial selection of the single applicant he deemed most qualified for the position. Throughout the bargaining that led to the alteration of Section 27.03, Peterson treated Henry as the Local's lead spokesman. The Local does not have bylaws, and Peterson treated Henry's opinion as that of

the Local. Thus, Henry signed the resolution that the County Board voted on to ratify the tentative agreement reached in October of 2000.

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

THE PARTIES' POSITIONS

The Association's Initial Brief

After an extensive review of the evidence, the Association argues that the collective bargaining agreement clearly and unambiguously "mandates that the remaining candidate with the highest score, as determined by the merit system, must be given an opportunity to qualify for the promotion should the candidate selected first choose to return to his or her former position." Arbitral precedent establishes this proposition generally, and the language of Section 27.03(B) and (C) are sufficiently clear to establish the merit of the grievance without recourse to any other evidence. More specifically, Nottestad was "next in line" as established by "the rating system in Section 27.03(B)." A more detailed review of the language establishes that "the Sheriff's opinion is not included in the merit based rating system." That discretion can be exercised only after candidates are ranked through "examination, oral interview, training, experience, and seniority." Significantly, the "next in line" applicant "shall be given an opportunity to qualify" for a promotion. Arbitral precedent establishes that "shall" clearly and unambiguously states a mandate "not left . . . to either party's discretion." Nor can there be reasonable dispute concerning what "the opportunity to qualify" means.

Even if the collective bargaining agreement was not clear and unambiguous, "well accepted tenets of contract interpretation support the Association's position." Fundamental to all rules of contract interpretation is that an arbitrator's role is to enforce the parties' evident intent. It is apparent that the parties mutually understood that the revisions to Section 27.03 were designed to create a merit-based promotional system to replace the preexisting seniority-based system. The County's correspondence detailing the changes as well as the testimony of each party's bargainers establishes this. There is no evidence that the Association ever "had or expressed the intent, in agreeing to relinquish strict seniority promotions for merit-based promotions" to give the Sheriff "divine authority to choose either the first or the second candidate for the promotion." Rather, the evidence establishes that the Association agreed to a system that granted the Sheriff the discretion "to choose among three candidates" who emerged from a merit-based screening system.

To conclude otherwise adopts the "nonsensical" position "that the Association would relinquish its established objective seniority rights" for "a subjective system" turning on "favoritism and biases." Nor is there evidence that the Association ever granted the Sheriff the discretion to choose a second candidate for promotion as the County argues. There is no

evidence of across the table discussions of this point, or even a specific County proposal to establish such discretion. Arbitral precedent precludes awarding through arbitration a point never secured in bargaining. Beyond this, the County's view improperly reads the parties' intent to permit the selection of a qualified applicant rather than the most qualified candidate as the second candidate for a promotion.

Bargaining history evidence supports the Association's position. Under the 1999-2000 labor agreement, the "next in line" candidate qualified for a trial period on the basis of seniority. The County drafted the successor language for the 2001-2002 agreement, and "simply removed 'based on seniority' and replaced it with 'as determined by the rating system in item (B) above.'" It is clear from this that the "*process* of choosing the second candidate was unchanged from the predecessor to the successor agreement." This left the selection process for the second applicant unchanged but for the substitution of merit for seniority. In both cases, the selection process refers to one applicant, not to the Sheriff's discretion over several applicants.

Construing the agreement as a whole supports the Association's position. The Association's interpretation of "next in line" and "rating system in item (B)" grants meaning to each reference, while the County's reads both out of existence. Similarly, the Association's view grants meaning to the "seniority tie-breaker" reference of Section 27.03. If the County's view is accepted, there is no reason for a "seniority tie-breaker" since the Sheriff's discretion renders the concept of a tie in seniority irrelevant. The agreement establishes distinguishable processes for determining a first and a second candidate for a promotion. The County's view unpersuasively makes these processes indistinguishable, turning solely on the Sheriff's discretion. To conclude otherwise would lead to absurd results, reflecting unfettered discretion rather than a merit-based selection process.

In any event, any ambiguity in Section 27.03(C) must be construed against the County, since it proposed the contractual changed and drafted the language. In fact, the evidence establishes that the County did not propose the change until after a tentative agreement had been reached. At no point in the reduction of the concept proposed by the County to its codification in the contract did the parties consider the impact of the changes on the selection of a second applicant. Even if this tenet is disregarded, the County's language provides for the Sheriff's discretion regarding the first applicant but not the second. The explicit provision for discretion regarding the first candidate precludes implying it for the second.

A review of the limited practice under the revised language establishes that the County "has routinely chosen the candidate with the highest score for a promotional position." The only distinction posed here is "the Sheriff's disdain for Deputy Nottestad."

That disdain has no objective basis. The merit-based selection process established Nottestad's qualifications. What the Sheriff prefers when presented "with the top three qualified candidates for the first selection is at his discretion" but cannot establish the contractual ability of the Sheriff to find any of these applicants "unqualified."

An examination of the evidence shows no support to warrant the Sheriff's unwillingness to refuse to offer the promotion to Nottestad. Job evaluations provide no objective support for the Sheriff's reasons to select certain applicants or decline to select Nottestad. Nor will the evidence afford a solid basis to conclude Nottestad was unable to work with others; required repeated instructions; posed a risk to public safety; or could not follow the chain of command. What evidence there is to substantiate the Sheriff's concern with Nottestad turns less on merit than on staffing concerns, particularly the statutory mandate that the County staff the jail with female jailers when it houses female inmates. This consideration evidently affected Nottestad's ability to secure part-time patrol shifts prior to the full-time opening posed here, and affords reason to question whether the Sheriff's preference for a male applicant reflects a similar thought process. The selection of Nottestad for a full-time position would demand two employees to replace her on a full-time, rather than (a) part-time or day by day basis." However, the promotion of "a dispatcher/jailer to patrol based on sex does not (fit) any of the promotional criteria set forth in the Agreement."

The Association concludes that the grievance must be sustained and that "Deputy Nottestad be promoted to the patrol deputy position with seniority and benefits from the date of the second promotion." The Association also requests that "the Arbitrator . . . retain jurisdiction to ensure compliance with the award."

The County's Initial Brief

The County notes that "(i)f the language does indeed recognize the Sheriff's power to assign deputies as a matter of discretion, the Union's attacks on the Sheriff's motives and the wisdom of his decision are beside the point." It follows that "the vast bulk of the information presented at the hearing was . . . unnecessary."

Because "(a)ll contracts, including collective bargaining agreements, are deemed to incorporate existing law" it is necessary to resolve the grievance "within the framework of the constitutional powers of the Sheriff . . . under . . . Article VI, Section 4." To conclude otherwise would render an award meaningless, "because it may be vacated by the court on review." A line of cases sets the necessary framework: *WISCONSIN PROFESSIONAL POLICE ASSOCIATION V. DANE COUNTY (WPPA I)*, 106 Wis.2d 303 (1982); *WISCONSIN PROFESSIONAL POLICE ASSOCIATION V. DANE COUNTY (WPPA II)*, 149 Wis.2d 699 (Ct.App., 1989); and *MANITOWOC COUNTY V. LOCAL 986 B*, 168 Wis.2d 819 (1992); and *STATE EX. REL. BUECH V. MILWAUKEE COUNTY*, 171 Wis. 474 (1920). Under these cases, "it is undeniable that the

sheriff's constitutional power allows the Sheriff to ignore collective bargaining agreement provisions which purport to tell him or her which deputy is to be selected to do particular jobs." BUECH may limit this authority somewhat, but "is inapposite to the instant case" since "the question involved is not initial employment of deputy sheriffs." The other three cases, in any event, were decided in light of BEUCH.

More significantly, the grievance questions the broader issue of the Sheriff's right to assign deputies. Since the Jailer and Patrol Officer positions share the same pay rate, the sole question is "which deputy sheriff would be assigned the apparently desirable work of driving a patrol car as opposed to working in the jail." Under the line of cases noted above, "that call is expressly reserved for the Sheriff to make." Since it does no good to construe the agreement in a fashion that will result in its vacation, and since it is appropriate to interpret the agreement in a fashion designed to preserve it, "the Arbitrator should put a gloss on the language which interprets it in a fashion that is consistent with the command of the Constitution." Since "the parties clearly intended that the Sheriff would have, at all points in the process, the right to select any of the top three candidates for the new assignment to patrol" the proper interpretation of Section 27.03 preserves the contract.

The evidence establishes that the parties intended to grant "the Sheriff the right to select any of the top three candidates without restriction." The evidence demonstrates the parties mutually understood this point at the time Section 27.03 was revised. Henry's testimony affirms this point. The Association's attempt to discredit Henry's testimony should be rejected, for it does not more than "to, in effect, re-write history."

Beyond this, the provisions at issue are ambiguous, and relevant interpretive guides favor the County's view. Association contentions that the provisions are clear must be rejected. That two Association Presidents disagree on the interpretive point establishes this. Beyond this, the "next in line" reference cannot be applied to a selection process without interpretation. If the Sheriff initially selected the applicant with the second highest score, and then had to select another applicant, who is "next in line"? Whatever answer is given to this question turns not on simple arithmetic, but on the interpretation of language. Different, and conflicting, answers are possible.

The "fundamental problem with the language which renders it ambiguous is its internal inconsistency." The ambiguity could result in the absurd result that the Sheriff could exercise complete discretion on the initial pick, but none on subsequent picks. More specifically, the Association's view would deny the Sheriff the bargained for discretion to use his own perceptions of the relative strengths of qualified candidates. The Association's view cannot clarify why the parties would agree to give the Sheriff "complete discretion in the first instance but no discretion" in subsequent instances.

The Association's "attempts to confuse the issue with irrelevant innuendo" must be rejected. The Association's view that the language is unambiguous is belied by the bulk of the evidence it submitted. The "hours of testimony that went to motives, sinister purposes, and the correctness of the County's proffered rationale for its actions" must be rejected as irrelevant. Assertions that any County employee acted based on concerns with gender are no more than assertions. Further, assertions that the Sheriff lacked a solid basis to prefer Frye over Nottestad serve no evident purpose: "If the Sheriff had discretion to make the choice, he did not have to have any factual basis upon which to make this decision, let alone an accurate one." Even if the Association's interpretation is adopted the assertions serve no purpose, since her score dictated her selection.

In any event, if motives are to be considered relevant, the Association's cannot withstand scrutiny. Under one Association President's view, Frye should have been selected. Under his successor, the choice became Nottestad. That the successor is Nottestad's husband underlies the ultimate futility and harm of using motives as a basis for resolving a dispute. A dispassionate review of the record demands the grievance be dismissed.

The Association's Reply Brief

The Association contends that the County's brief includes "malicious and unsupported accusations." The Association, not Nottestad, is the Grievant, and arguments impeaching the motives of Association representatives should not be credited. No more compelling are arguments that the Association's positions are internally inconsistent or augmented by too voluminous a record. The County mischaracterizes Association arguments regarding Frye's selection and regarding the Association's representation of his interests. Evidence concerning bargaining history is more compelling than the County admits, even though it relies on testimony of Association members rather than Association officials.

The County's contention that the labor agreement must be construed within the framework of external law, including the State Constitution, is "erroneous and without authority." Arbitral precedent and Section 10.04 B restrict the arbitrator's authority to the four corners of the written agreement. Beyond this, the County's arguments concerning the Sheriff's constitutional authority obscure that the "Agreement is between the County and the Association" and that the "Sheriff is not a party to the Agreement." In the absence of an express incorporation of his constitutional authority into the Agreement, there is nothing for an arbitrator to enforce. Similarly, "the County has no standing to assert the Sheriff's constitutional powers." Even it had standing, the County has failed to demonstrate Section 27.03 conflicts with those powers. Case law does not address whether a promotion falls within the Sheriff's constitutionally protected authority, and no arbitrator has authority to reach the issue. Beyond this, "the doctrine of equitable estoppel prohibits the County from making its constitutional argument." Since the County proposed and drafted the language at

issue, it should not be heard to assert “that its own language is unconstitutional.” Nor should it be permitted to raise an argument not raised during the processing of the grievance.

The evidence establishes that the parties’ intent in revising Section 27.03 was to create a merit-based selection process, not give unfettered discretion to the Sheriff. Cary’s testimony regarding bargaining history is not credible since he was a Deputy at the time of the negotiations, was not a member of the negotiating team, and did not regularly attend bargaining sessions. Henry’s testimony establishes no more than that the Sheriff was granted certain discretion over the selection of a first candidate for a promotion.

Section 27.03(C) must be considered clear and unambiguous. The “next in line” reference refers to the merit selection process, not to the Sheriff’s discretion. The County’s hypothetical questions concerning the “next in line” reference do no more than establish the absurd result that the highest scoring candidates would never be considered for selection if the Sheriff initially selected a lower scoring applicant. The assertion that the language is ambiguous calls into question only the County’s own effort in drafting the language. Nor can the County’s arguments be considered to establish that the Association’s reading of the section produces an absurd result. Limiting the Sheriff’s discretion over the selection of a second applicant is less of a stretch than concluding the Association gave up a strict seniority system of selection for one granting the Sheriff unfettered discretion.

The Association concludes that the County’s litigation of the grievance has been unduly contentious, and that the evidence demands that the grievance be sustained and appropriately remedied.

The County’s Reply Brief

The County argues that the Association’s brief “focuses, unacceptably, on an unwarranted attack on the integrity of the Sheriff and a number of members of the Department.” That this impugns unit members is “shocking” and “does great violence to the rights and interests of a fellow bargaining unit member who quite obviously was given no representation.”

The County contends that the Association “completely misapprehends the language of Section 27.03.” The changes made to the 2001-02 agreement divided the Sheriff’s Department into six promotional tracks, and created a new process “for filling vacancies when no one within a promotional track posted for a vacancy.” The new system did not award the vacancy solely on the basis of seniority, but created a testing process designed to determine the relative qualifications of applicants. The process generated the three highest ranking applicants for selection by the Sheriff. Under the old system, the sixty day training period was the necessary means to find an applicant to be “deemed qualified.” Under the new language, “the employees

qualify by being tested and are selected by the Sheriff.” The new language makes the selection effective immediately, and awards the higher rate to an applicant upon selection rather than upon completion of the training period. The final sentence of Section 27.03 focuses the significance of these changes. The reference to “opportunity to qualify” no longer means “that the employee shall be given the position for a 60-day trial period.” Rather, it means “the chance to be included in the list of three given to the Sheriff.”

For the Association’s interpretation to be persuasive, the language of Subsection B should be the same as that in Subsection C. Thus the “next in line” applicant should not be given an “opportunity to qualify,” but should be noted as the applicant who “shall be selected by the Sheriff.” Any other conclusion eviscerates the parties’ bargained for departure “from a seniority-based promotion system to one in which relative skills, abilities and qualifications would be considered with seniority to be given weight, but not to control.” The County’s view grants meaning to the language in both sections, and is consistent with the parties’ intent. That the language demands interpretation is made evident by the Association’s devotion of twenty-three pages of argument to attempt to establish the clarity of the language.

Association arguments that seniority is crucial to the operation of a union make it impossible to understand why the Association asserts Nottestad’s position over the more senior applicant. Nor is there any evident reason for this preference. The assertion that Frye reflects the choice of a “good ol’ boy’s network” is belied by the Association’s abandonment of Frye. To the extent motives must be considered, the advancement of Nottestad’s interests after the election of her husband as Association President contrasts starkly to the testimony of the Association members who negotiated the language at issue and who “thought the Sheriff was correct and within his rights under the language . . . in promoting Kenneth Frye.”

The sheer bulk of the Association’s arguments belie the assertion the contract is clear and unambiguous. If the language was clear, “it is hard to understand why it requires seventy-one pages of argument to explain the issue.” Similarly, the conflicting testimony of Association representatives makes the ambiguity evident. Nor can the ambiguity of the language be construed against its drafter, since “the language in question was developed by both of the parties working together.” That the language was mutually understood is established by Henry’s testimony that Frye’s selection fell within the discretion he thought the Sheriff had. The Association’s attempt to distance itself from that testimony establishes only its own bad faith.

Nor can Association attempts to attack the Sheriff’s motives be credited. The personal attacks on the Sheriff are “irrelevant, inaccurate and offensive.” The sole issue for decision is the scope of the Sheriff’s discretion. If, as the County asserts, he has the discretion to select any of three applicants, then his basis for selection is irrelevant. If, as the Association asserts, he has the discretion only to select the next highest ranking applicant, and evidence on the

basis of the selection remains irrelevant. At best, the evidence on this point is inflammatory, and designed to “persuade the Arbitrator that Nottestad should win the grievance because the Sheriff is inept, corrupt or dishonest.”

Association evidence and argument concerning the correctness of the Sheriff’s decision to select Frye fail to establish that “the Sheriff created a separate ranking system of his own, without authority under the Agreement.” Rather, it demonstrates “the Sheriff used his discretion thoughtfully, considerately and wisely.” Attempts to make this decision arbitrary or gender-based lack evidentiary support.

Beyond this, “the Arbitrator should disregard the Union’s inflammatory rhetoric.” A review of the Association’s brief manifests “a broad-brushed personal attack upon the County, the Sheriff and other Department members and officials.” References to “feeble” County arguments or to “divine” actions by the Sheriff cannot be considered persuasive. Personal attacks on Olson rest on no more than uncorroborated hearsay, “entitled to no weight whatsoever.” A review of the evidence affords no reason to believe the County made any gender-based decision.

The record, although voluminous, poses a basic issue of interpretation. The Association’s “overblown case fails to prove a violation of the Agreement” and the “grievance should be denied.”

DISCUSSION

Subsections (B) and (C) of Section 27.03 govern the stipulated issue. With one exception, there is little stipulated ground to assist in the resolution of the grievance. The exception flows from the County’s reservation of its right to challenge “the jurisdiction of the Arbitrator.” The County originally stated this assertion in a written “Objection to Jurisdiction of the Arbitrator and Motion to Dismiss the Grievance” filed at the start of the hearing. After considerable discussion, the parties stipulated that I lacked the legal authority to address the motion, but could address the contractual merit of their positions.

This stipulation poses the threshold matter in the resolution of the grievance, which is the County’s assertion that Section 27.03 must be interpreted consistently with the Sheriff’s constitutional authority. This argument poses a fine line, since the Association contends the labor agreement does not grant an arbitrator authority to interpret law, while the County asserts the contract must be interpreted consistently with external law.

In CITY OF MENASHA, MA-7361, MA-7362 & MA-7363 (McLAUGHLIN AS PANEL CHAIR, 4/97) AT 16, I addressed the role of external law in the interpretation of a labor agreement thus:

Arbitration can meaningfully be applied to statutory issues. To be meaningful, however, there must be some assurance that the exercise of contractual jurisdiction over a statutory issue can resolve a dispute. That assurance can come from language in a labor agreement requiring the application of statutory law, or from the bargaining parties' stipulation. In the absence of such assurances, an arbitral foray into external law can only add another level to a dispute.

MENASHA addressed statutory issues, but is applicable to the argument posed here. Neither the labor agreement nor the parties' stipulation is sufficiently broad to authorize an interpretation of the Sheriff's constitutional authority.

Section 3.01 arguably permits an interpretation of external law, by providing that "the County retains the normal rights and functions of management . . . that it has by law." The difficulty is that the issue turns on the Sheriff's constitutional authority. There is no dispute that the County has the legal authority to enter into a labor agreement with the Association (see WPPA I, 106 Wis. 2d at 316). It is not, however, the County's "normal rights . . . of management . . . by law" that are in dispute. Rather, the dispute is whether the agreement resulting from the County's authority to contract with the Association infringes upon the Sheriff's constitutional authority. Section 3.01 does not grant the authority to reach that issue.

Thus, the agreement does not incorporate the Sheriff's constitutional authority, and the Association has not stipulated to my consideration of that authority. This precludes consideration of the County's argument under MENASHA.

The Association's arguments understate the persuasive force of the County's argument, which demands further discussion. The County's assertion that labor agreements are deemed to incorporate external law has support in arbitration commentary and cases, see for example, "The Arbitrator and the NLRB," Robert G. Howlett, from *The Proceedings of the Twentieth Annual Meeting of The National Academy of Arbitrators*, (BNA, 1967) 67, 83. A related line of thought is that where there are competing interpretations of the contract, the interpretation that is reconcilable to external law is preferable to the one that renders the agreement invalid, see "Ruminations About Ideology, Law and Labor Arbitration," Bernard Meltzer, *Ibid.*, 1, 15-16, and "The Role of Law in Arbitration," Richard Mittenenthal from *The Proceedings of the Twenty-first Annual Meeting of The National Academy of Arbitrators*, (BNA, 1968) 42, 43. Not surprisingly, these views are not uniformly accepted, cf. "When Should Arbitrators Follow Federal Law?" Michael Sovern from *The Proceedings of the Twenty-third Annual Meeting of The National Academy of Arbitrators*, (BNA, 1970). The debate continues, see *The Common Law of the Workplace*, Theodore St. Antoine, editor, (BNA, 1998) at 76-77, and the force of the County's position must be acknowledged. Nor does the Association's citation of Section 10.04 alter this. The County does not seek an interpretation that adds to or modifies agreement terms. Rather, it seeks to have those terms enforced consistently with external law.

However, the conclusion that a labor agreement is subject to external law does not demand the conclusion that an arbitrator's interpretation of the law is necessary or desirable. Arbitration is a forum choice, and the determination of the scope of that forum is a legal issue. This restates the dilemma addressed in *MENASHA*, which is to determine when an arbitral foray into external law serves a worthwhile purpose.

Of specific significance here, the County does not seek my interpretation of the scope of the Sheriff's constitutional authority. Rather, the County urges that its interpretation of Section 27.03 should be preferred because it will not produce conflict with the Sheriff's constitutional authority. This begs the contractual issue and presumes the persuasive force of its reading of a line of cases culminating in *MANITOWOC*.

Ultimately, the line the County seeks to draw is too fine for arbitration. The cases it cites are not unambiguously applicable to the grievance. *WPPA I* (106 Wis. 2d at 313) and *WPPA II* (149 Wis. 2d at 701) focus on a "sheriff's attendance on the court", and are not directly applicable to the award of the Patrol position at issue here. Nor is *MANITOWOC* directly applicable. Viewed on the broadest level, *MANITOWOC*, as *WPPA I* and *WPPA II*, addresses the "duties which 'gave character and distinction' to the office of sheriff at common law" to define what is "constitutionally protected" (168 Wis. 2d at 826). The case cannot meaningfully be applied on so general a level. The *MANITOWOC* majority specified that "the precise question in this case is whether the nature of the job assigned by the Manitowoc county sheriff falls within the scope of the sheriff's constitutionally protected powers" (*Ibid.*, at 829). The *MANITOWOC* majority's answer to that issue was even more narrowly framed:

Where the courts eventually decide to draw the line regarding which activities of a sheriff involve law enforcement and preserving the peace such that they are constitutionally protected is not at issue here; the focus here is on the job assigned - undercover detective work - and undercover detective work is part of a modern sheriff's traditional and historical duties of law enforcement and preserving the peace. *Ibid.*, at 831.

However the evidence is characterized, this is not the issue the grievance poses. The Sheriff and County assigned Nottestad to Patrol duties on a part-time basis, and the grievance questions whether she should receive those duties on a full-time basis. Whether this makes the promotion more akin to *BUECH* than to *MANITOWOC* is debatable. The issue here, however, is whether the debate is resolvable in arbitration.

This highlights the interpretive difficulty posed by the County's position. The County and Sheriff have reserved their right to challenge my jurisdiction under the labor agreement, but urge that the labor agreement be construed consistent with the demands of external law. However that law may be interpreted, its application to this matter is less than clear. This

means the scope of MANITOWOC and BUECH must be seriously considered, and neither party to the labor agreement nor the Sheriff has agreed to place that issue squarely before me. Under MENASHA, there is no assurance that my opinion on this issue will do anything beyond adding another level to the dispute. Thus, the County's view that Section 27.03 must be interpreted consistently with the Sheriff's constitutional authority does not afford a persuasive means to address the grievance.

The focus thus becomes the interpretation of Section 27.03 as a matter of contract. The threshold interpretive issue is whether the language of Section 27.03 can be considered clear and unambiguous. Each subsection is ambiguous. Even if each was clear, their relationship is not. Subsection (B) states a formal evaluation process that produces numerically stated scores. This objectively stated process culminates in a subjective act -- the exercise of the Sheriff's discretion. The sentence stating the conclusion of the process places the "top three numerically ranked candidates" before "the Sheriff for selection." The subsection is silent on the degree of discretion afforded the Sheriff and on what, if anything, guides his discretion. Ignoring these ambiguities, the following sentence specifies that "(i)n the event of a tie in scoring, seniority . . . shall receive preference." On its face, this reference demands interpretation. Can there be a tie in scoring if the Sheriff's selection is determinative? If "tie" is a reference to any combination of scores that would yield more than three claimants for placement on the list of three, what does it mean to give "preference" to the more senior candidate? Presumably "placement" on the list of three is the issue rather than "preference," which implies selection.

The language of Subsection (C) is no clearer. The "next in line" reference demands interpretation on its face. Is "next in line" a numerical reference or a reference to formal evaluation scores? If numerical, the Sheriff's initial selection of the second highest rated applicant arguably puts the third highest rated applicant "next in line" if the initial selection does not fill the vacancy on a permanent basis. If a reference to formal evaluation scores, the applicant "next in line" is arguably the highest ranked of the remaining applicants. Beyond this, the reference to "the rating system in item (B) above" is unclear. What, if any, role does the Sheriff's discretion play in that rating? These problems are compounded when the two subsections are combined. How is the Sheriff's discretion reconciled to the numerical rankings in the selection of the initial applicant? The problem is exacerbated by the situation posed here, where the selection process is directed to a "next in line" applicant.

Thus, the interpretive dispute turns on the reading of the ambiguous language of Section 27.03. In my view, past practice and bargaining history are the most persuasive guides to resolve ambiguity, since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation.

On this record, past practice is an unreliable guide. At root, the persuasive force of past practice rests on the agreement manifested by the parties' conduct. In this case, there is no persuasive evidence of agreement on Section 27.03(C). The County selected the highest ranked applicant in positions awarded to Bjerkos, Crume, Olson and Jacobson. This falls short of establishing that the County thought it was bound to make these selections. Initially, it must be noted that the selections focus on Subsection (B). More significantly, the selections follow the interpretive position the County asserts here. More specifically, Carey's and Hanson's testimony establishes that Hanson does not routinely communicate anything beyond the identity of the top three ranked applicants to Carey. Carey acted without knowing the test scores of the applicants when he chose Jacobson. The same appears to be true of other applicants. This conduct is not reconcilable to a conclusion that the selections reflect agreement that Carey must select the numerically highest ranked candidate.

Nottestad's testimony that Hanson told her that the County looks to the highest ranked applicant has no bearing on this conclusion. Whether Hanson made the statement is disputed. In any event, it is fruitless to attempt to determine whether Hanson made the statement as Nottestad alleges, or whether Nottestad drew what she hoped to hear from whatever Hanson said. Whatever Hanson said or did not say, his conduct in providing the "list of three" to Carey without simultaneously supplying test scores makes it impossible to conclude that the County saw itself to be bound to the selection of the highest ranked applicant.

This turns the resolution of the contractual ambiguity to bargaining history. This criterion is decisive and favors the Association's interpretation. As preface to an examination of this conclusion, it is appropriate to highlight what is not in dispute. Late in the bargaining for a 2001-2002 agreement, the County proposed to modify the promotion procedure that in the 1999-2000 agreement turned primarily on seniority. The parties reached an agreement in concept in October and after the conclusion of face-to-face bargaining reduced the understanding to writing. The revised system divided the Sheriff's Department into six categories, retaining seniority as the primary criterion for filling intra-category vacancies, and implementing the Subsection (B) and (C) formal evaluation process for those vacancies that were not filled by an intra-category applicant. The County proposed the change from the seniority system for extra-category applicants and the Association agreed to it to produce more merit-based selections than the prior system. Suhr's, Henry's and Peterson's testimony do not conflict on these basic points. The October 9, 2000 summary of the tentative agreement and the resolutions developed for Board ratification underscore these basic points. The difference between the parties did not become evident until the selection process moved beyond Subsection (B), with Jacobson's return from Patrol to Dispatch.

The interpretive dilemma is the amount of Carey's discretion regarding the selection of a second extra-categorical applicant for a vacancy. The County asserts the Sheriff enjoys no less discretion than in the first pick. The context of the bargaining and the agreed-upon language will not, however, support this assertion.

Most fundamentally, there is no testimony that the County proposed to the Association the result it seeks here. None of the witnesses who were present at bargaining testified that the scope of the Sheriff's discretion concerning a second pick was discussed. Peterson and Suhr specifically denied the existence of any such discussion. Henry testified that he believed the negotiations produced language that supported the Sheriff's action in selecting Frye. However, his testimony falls short of establishing that the parties considered this during the bargaining that produced Subsections (A), (B) and (C). Rather, his testimony reflects his current opinion that the negotiations produced language consistent with Carey's selection of Frye. The evidence establishes that this view was not raised during the bargaining that produced the Subsection (C). The absence of a proposal during bargaining undercuts the County's claim to enforce its view through arbitration.

The context of the bargaining further undercuts the claim. The range of discretion sought by the County for the Sheriff is broad, if not unfettered. Nothing in the context of the bargaining supports a conclusion that the parties sought to grant such a range of discretion to the Sheriff. That the issue surfaced late in bargaining and was reduced to writing outside of face-to-face discussions undercuts a claim that the change sought was as fundamental as the County asserts. The parties limited the change to extra-categorical vacancies. Within categories, seniority remains the primary criterion. Similarly, there is no evidence that the significant wage increase afforded in the 2001-2002 agreement can be traced, even in part, to the requested change. Rather, the October 9, 2000 summary and the ratification resolution link the wage increase to hiring difficulties and to the differential between County wage rates and those of comparable counties. Thus, it does not appear the County "paid" for a fundamental change in the seniority system. Rather, the change came at the end of bargaining, in a fashion mutually agreeable to the parties.

The agreed-upon change turned on filling vacancies by merit. Each of the documents summarizing the tentative agreement highlights, in various ways, that the change sought was to establish qualifications to the Sheriff through a system of tests and interviews. None of the documents leading to Board ratification point to an exercise of discretion by the Sheriff that has no basis in the formal evaluation process. There is, then, no persuasive evidentiary basis that the parties understood the seniority-based system was to be supplanted by one turning on the Sheriff's discretion outside of the testing/interview process. Viewed against the bargaining context, the negotiations afford little support for the County's interpretation.

Significantly, the language adopted by the parties affords further support for the Association's view. The strength of the County's view is that the reference in Subsection (C) to "the rating system in item (B) above" incorporates the Sheriff's exercise of discretion to select one of the three highest ranked applicants. Subsection (B) does not, however, expressly mention the Sheriff's discretion. Rather, it establishes his "selection" of one of the "top three numerically ranked applicants." There is no mention of expanding the group of three, and no

clear location for the Sheriff's discretion in "the rating system" set forth in Subsection (B). The coupling of "the" with "rating system" implies a single, objectively stated process. Whatever is said of the Sheriff's discretion, it is an individual matter, which inevitably varies from Sheriff to Sheriff. Subjective discretion can be part of a rating system, but the silence of Subsection (B) on this point militates against such an inference here.

Similarly, other contractual references limit, rather than expand, the Sheriff's discretion. Subsection (B) specifies that if no departmental applicant qualifies, the vacancy can be filled through outside recruitment, provided "outside candidates shall be subject to the same examination process." This reference to "the same examination process" must be linked to the numerically driven testing/interview procedure. If the Sheriff had discretion to select outside of it, there would be no need to mention the "examination process." Presumably, the generation of scores for internal applicants acts as a check against using a lower standard for external applicants.

These considerations come to a head in the reference to "the applicant next in line." This reference, as the more general context of bargaining, strongly points to agreement based on merit principles. As Hanson's and Carey's testimony confirms, there is no "next in line" based on their view of the top three applicants. Rather, the three highest ranked applicants constitute an undifferentiated group, to be distinguished solely by the Sheriff's selection. This is why Carey did not seek and Hanson did not supply specific test scores for the top three applicants. However, if there is to be a line, there must be some means to establish its order. Subsection (B) establishes the means, which is a numerically set scoring system. The County's view of the "applicant next in line" renders that reference superfluous.

Similar considerations govern the reference, in Subsection (B), to a tie breaking procedure. Seniority operates as the tie breaker. This is consistent with the context of the bargaining for at least two reasons. First, it confirms that the parties never contemplated a wholesale revision of the seniority system. Beyond this, it confirms that "scoring" became the centerpiece of the selection process to the extent seniority was abandoned. The numerical score thus became the measure of merit, and merit supplanted seniority. Where merit is equal, seniority remained the primary criterion for selection. This reference cannot persuasively be equated to the exercise of the Sheriff's discretion. Nothing in Section 27.03 demands scoring by the Sheriff, and there is no evident reason for a tie breaker if the Sheriff's discretion governs the final selection. Even assuming that the tie breaker assures that no more than three applicants can be submitted to the Sheriff for selection affords no support for expanding the scope of his discretion.

In sum, the context of the bargaining that divided Section 27.03 into separate subsections and the language ultimately produced through that bargaining do not support a conclusion that the parties agreed to provide the Sheriff the discretion argued by the County in this grievance.

This has been an exhaustively argued case, and it is impracticable to address each argument. However, because the matter has been well and avidly argued, it is appropriate to tie the conclusions stated above more closely to the parties' arguments.

Each party has asserted axioms of contract interpretation to support their views. A number of those axioms are subsumed in the conclusions stated above. In my view, the persuasive force of rules of contract interpretation is bound to the tightness of the relationship between the axiom and the parties' conduct in bargaining or in contract administration. More specifically, the contention that Section 27.03 should be construed against the County as its drafter affords little, if any, guidance. This axiom is better suited to the interpretation of "form" agreements where one party has little, if any, input into the creation of the agreement. The agreement posed here is an arms length transaction in an ongoing relationship. The Association cannot persuasively assert it has no responsibility in the development of the language of Section 27.03.

Each party asserts the result sought by its counterpart could produce an absurd result. Neither line of argument is helpful. As a general matter, an arbitrator's determination of what is absurd has no evident foundation in the bargaining parties' conduct, and arrogates an unduly broad level of discretion to an arbitrator. The interpretive issue should turn less on how the arbitrator logically evaluates an agreement than on how the agreement was in fact negotiated or administered. That the parties would permit the Sheriff more discretion in the selection of an initial applicant than in the selection of a second applicant cannot be dismissed as logically absurd. It could reflect the difficulty of drawing the line defining the scope of a Sheriff's discretion. Nor is it logically absurd that the Association would bargain away a seniority-based system. What is more compelling here is that the evidence does not establish that the County in fact proposed in bargaining the result it seeks in arbitration. Nor is there evidence the Association in fact agreed to supplant the seniority-based system with the degree of discretion sought by the County and the Sheriff.

Concepts of estoppel do not assist in resolving the grievance. Whether the County should be estopped from asserting a challenge to the constitutionality of language it proposed is a legal conclusion. The contractual ramifications of the argument do warrant some discussion. The October 9, 2000 summary indicates that the thoughts of the then-incumbent Sheriff played a role in negotiations. The absence of any discussion in 2000 of the constitutional ramifications of the proposed changes to Section 27.03 underscores that the parties never considered the legal issues argued here. This underscores the conclusion that the parties did not, during bargaining, see the proposed changes to be as sweeping as the County now argues.

Beyond this, it is of some worth to stress other factors that do not afford meaningful guidance in resolving this dispute. The County's view that the interpretive dispute does not demand inquiry into factual issues of motivation or of the qualifications of Nottestad or Frye is

persuasive. The interpretive issue under Section 27.03(B) and (C) does not require inquiry into the Sheriff's or the Association's motives. Rather, the interpretive issue is whether Carey has the discretion he asserted in selecting Frye. As concluded above, the numerical scores generated under Subsection (B) made Nottestad, not Frye, the "next in line" applicant under Subsection (C). Frye's or Nottestad's qualifications outside of the formal evaluation process play no role in this determination.

More specifically, there is no credibility determination necessary or helpful to this conclusion. The receipt of evidence on the bases of Carey's selections or applicant qualifications reflects that the evidence was relevant to the theory of a party. The Association sought to rebut the assertion that Nottestad was unqualified for the position, and the County sought to rebut the assertion that Carey acted on any basis other than his professional evaluation of Frye's and Nottestad's work performance. Similarly, conflicting evidence on bargaining history was received to permit argument on resolving contractual ambiguity.

The fervor of those post-hearing arguments warrants some comment. Resolution of the contractual dispute exhausts the authority of an arbitrator. Resolution of inter-personal disputes is not within that grant of authority. The two issues, however, are not unrelated, and the explanation of the resolution of the contractual aspect of the dispute may have some bearing on its inter-personal ramifications. The absence of a need for credibility determinations needs to be underscored. Henry was a credible witness. That his view of the application of Section 27.03(C) is not accepted above says nothing beyond the fact that his view developed after the discussions that produced the language at issue. The crucial interpretive fact is what was contemplated in the Fall of 2000. That Leis perceived Henry to have changed positions during the processing of the grievance plays no role in this proceeding. It is unclear whether Leis' testimony reflects what Henry said or how Leis interpreted it. In either event, none of the testimony is helpful in interpreting the agreement. Similarly, what Olson may or may not have said concerning public perceptions of female deputies affords no guidance here. Even if Leis' and Nottestad's perception of the statement is accurate, neither witness could reliably date it. There is no established link between it and Nottestad's assignment to road duties. Even if there was, it is Nottestad's numerical score under Subsection (B) that turns the application of Subsection (C). What Olson said has no useful bearing on this point.

Similarly, the assertion that gender played a role in Carey's selection of Frye cannot afford a meaningful means to resolve the grievance. As noted above, Nottestad's numerical score under Subsection (B) turns the operation of Subsection (C). Even if the exercise of Carey's discretion posed a determinative issue, there is no persuasive evidence that he or his management team acted on anything beyond their assessment of Frye's and Nottestad's work performance. The evidence manifests cracks within the inter-personal relationships within the department. Resolution of the contractual issues is not assisted by resolution of the credibility disputes. Whether or not this formal determination bears on the informal determinations made

on the work site, the fact remains that resolution of the contractual dispute is not assisted by the credibility disputes.

The Award entered below states the violation found above. The Award states Nottestad's entitlement to a sixty-day training period under Section 27.03 (C). The make-whole component of the remedy turns on Nottestad's successful completion of the training period. I have retained jurisdiction to address remedial issues, as requested by the Association. As a result, the Award is stated in general terms. This permits the parties some flexibility to address the issue of remedy, and preserves the formal process if such issues cannot be resolved consensually.

I stress that my retention of jurisdiction has no bearing on the County's assertion that I lack the authority to apply the labor agreement in a fashion that conflicts with the Sheriff's constitutional authority. This legal point must be left for the County and the Sheriff to assert as they deem appropriate.

AWARD

The County did violate the collective bargaining agreement when the Sheriff awarded a vacant patrol position to Kenneth Frye rather than to Emilee Nottestad.

As the remedy appropriate to its violation of Section 27.03, the County shall offer the Patrol position posted on February 11 to Emilee Nottestad, and shall offer her the opportunity to serve a "sixty (60) day training period" under Section 27.03 (C). If Emilee Nottestad successfully completes the training period, the County shall make her whole for the difference between what she earned in her present position, and what she would have earned but for the County's violation of Section 27.03.

To address any issue regarding the implementation of the remedy set forth in this Award, I will retain jurisdiction over the grievance for not less than forty-five days from the date of this Award.

Dated at Madison, Wisconsin, this 1st of April, 2003.

Richard B. McLaughlin, Arbitrator

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