BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

and

OUTAGAMIE COUNTY

Case 270
No. 61564
MA-11983

Appearances:

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

Mr. James R. Macy, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Outagamie County, 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 Association and the County jointly requested the Wisconsin Employment Relations Commission to appoint Richard B. McLaughlin, a member of its staff, to serve as arbitrator to resolve Grievance Number 02-325, filed on behalf of the Association. Hearing was held on December 17, 2002, in Appleton, Wisconsin. Lee F. Behnke filed a transcript of the hearing with the Commission on January 10, 2003. The parties filed briefs and reply briefs by March 14, 2003.

ISSUES

The parties were unable to stipulate the issues for decision. I have determined the record poses the following issues:

Did the County violate the Agreement by maintaining Natalie Wilson as a Telecommunicator from the cessation of her active training in Step 3 until her transfer to the position of Cook on September 1, 2002?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I - MANAGEMENT RIGHTS

1.01 - Except as herein otherwise provided, the management of the work, and the direction of the work forces, including the right to hire, promote, transfer, demote, or suspend or discharge or otherwise discipline for proper cause, and the right to relieve employees from duty or to layoff employees is vested exclusively in the Employer, Outagamie County. In keeping with the above, the Employer, Outagamie County, shall adopt and publish reasonable rules which may be reasonably amended from time to time. The County and the Union will cooperate in the enforcement thereof.

. . .

ARTICLE IV - RULES AND REGULATIONS

4.01 - The rules and regulations of the Outagamie County Sheriff's Department as established by the County in accordance with the provisions of and pursuant to Chapter 111.70 of the Wisconsin Statutes shall be made a part of this Agreement by reference. The Union shall be given thirty (30) days notice on any new rule or regulation proposed before it becomes effective.

. . .

ARTICLE VII - GRIEVANCE PROCEDURE

7.02 - Only matters involving the interpretation, application or enforcement of this Agreement which may arise between . . . the County and the Union shall constitute a grievance . . . The written grievance shall include a

listing of the section violated, the details of the violation and the remedy requested. If these items are not listed, the grievance will be returned for the items to be included. . . .

Step 4. . . . In rendering his/her decision, the arbitrator shall neither add to, detract from nor modify any of the provisions of the Agreement. . . .

ARTICLE VIII - HOURS

8.01 - Work Week.

A. The normal work week for full-time employees classified as Telecommunicator, Correctional Officer, Utility Correctional Officer, Head Cook, Cook, Jail Clerk and Utility Jail Clerk will be 5 on -2 off, 5 on - 3 off, and the normal work day for such employees shall consist of an eight and one-third (8.33) hour shift.

. . .

ARTICLE IX - OVERTIME

9.01 - Employees will be compensated at the rate of time and one-half (1-1/2) based on their normal rate of pay for all hours worked in excess of their scheduled workday or workweek . . .

9.02 - In the event an employee has left work and is called in, the employee shall receive a minimum of three (3) hours pay at the employee's regular straight time rate of pay or overtime pay at the appropriate rate for the actual hours worked, whichever is greater, provided, however, that this provision shall not apply to hours worked that are consecutively prior to or subsequent to the employee's scheduled work hours.

9.03 - Overtime must be authorized and approved by the department head or division head before overtime can be paid.

. . .

ARTICLE XXII - SALARIES

22.01 - The salary schedule as set forth in Appendix "A", which is attached hereto and incorporated herein, shall be effective for the period of this Agreement. . . .

ARTICLE XXXI- AMENDMENT PROVISION

31.01 - This Agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the County and the Union where mutually agreeable. The waiver of any breach, term or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

ARTICLE XXXIV - CONDITIONS OF AGREEMENT

34.01 - This Agreement constitutes an entire agreement between the parties and no verbal statement shall supersede any of its provisions.

BACKGROUND

The County operates a dispatching center (Center) for Outagamie County and a number of Fox Valley municipalities, including Appleton. The Center is part of its Sheriff's Department. Brad Gehring has served as Outagamie County Sheriff since January of 1991.

The County has authorized twenty-five full-time equivalent positions of Telecommunicator to staff the Center. The position description for Telecommunicator summarizes its "normal" duties and responsibilities thus:

- Answers 911 emergency phone calls, dispatching appropriate police, fire, medical or other emergency units.
- Answers non-emergency calls, providing information to caller.
- Accesses computerized information, retrieving and analyzing data and providing to staff.
- Maintains radio contact with law enforcement, fire, and ambulance units within Outagamie County.
- Operates teletype and CRT to obtain driver information, vehicle registration, warrants, etc, providing information to officers.
- Monitors alarm and weather systems, dispatching staff accordingly.

- Provides Emergency Medical Dispatch service to callers until emergency units arrive.
- Maintains and updates records, including all components of the 911 database.
- Reports necessary maintenance and operational needs to appropriate personnel, following department guidelines.
- Maintains regular and predictable attendance, works overtime/extra hours as required.
- Performs other duties as assigned.

The Center does not typically have twenty-five full-time Telecommunicators on staff. As the position description notes, overtime can be a predictable component of the position.

Telecommunicators ordinarily work five days followed by two days off, then five work days followed by three days off (5/2, 5/3 schedule). At all times relevant to the grievance, Telecommunicators worked four shifts. The A shift is the day shift, B shift is the afternoon shift (2:40 p.m. through 11:00 p.m.), C shift is the night shift (10:40 p.m. through 7:00 a.m.) and E shift is a power shift (7:00 p.m. through 3:00 a.m.). One Telecommunicator staffs the E shift. The Center ordinarily staffs the B shift and the first half of the C shift with five Telecommunicators.

Training Telecommunicators is labor and time intensive. The Department maintains a five-Step training system. To become a full-time Telecommunicator, a trainee must successfully complete each step. Step One is an orientation process to communicate Center procedures to the trainee. Step Two is training in the handling of non-emergency calls. Step Three is training in emergency calls. Step Four puts a trainee in control of all the equipment, but under the watch of a mentor, who is another Telecommunicator. Step Five involves monthly oversight of the trainee's performance until the trainee successfully completes the probationary period. The steps are not rigidly defined. Some trainees take longer to train than others, and the length of time required for each step can vary from trainee to trainee. Some trainees are unable or unwilling to complete the training process.

Grievance 02-325 was prompted by such a situation. The grievance, dated July 17, 2002 (references to dates are to 2002, unless otherwise noted), states the underlying facts thus:

> Natalie Wilson is employed by the employer as a trainee in the telecommunications center. Wilson completed the first phase of her training as a call taker. Having successfully completed the first phase, Wilson was then moved to the radio console; the second phase of telecommunicator training. However, after a short period of time, Wilson was unable to deal with the

> frequent demands that the radio console presented. Subsequently, Wilson notified supervision of her intent to resign her position as a trainee in the telecommunications center.
>
> After notifying supervision of her intent to resign, Wilson applied for and was offered a vacant position as a cook for the jail. However, rather than transfer Wilson to the vacant cook's position once she was approved, the employer opted to improperly use Wilson exclusively as a call taker in the telecommunications center for an extended period of 2-3 weeks in an effort to avoid having to pay overtime to eligible employees.

The grievance form cites the governing contract provisions thus: "Violation of Article I - Management Rights, Appendix A - Classification, Grade, and Wage Schedule, and any other Articles and/or Sections of the collective bargaining agreement that may apply." The form seeks, as remedy, that the County "immediately 'cease and desist' from using Natalie Wilson as a call taker" and that eligible employees receive "their appropriate rates of pay for those hours improperly worked by Wilson as call taker."

The County hired Wilson sometime in mid-February. She completed Step One of her training in late-February, and completed Step Two in late March. She advanced into Step Three training, but did not complete it. She was actively involved in Step Three training in the teletype system in May. Documentation from her personnel file indicates that some of her trainers had reservations about her performance during Step Three training. None of the stated reservations sought Wilson's termination, or indicated that she was incapable of meeting the requirements of the position. Sometime in late June, the County stopped actively training Wilson to become a Telecommunicator.

Wilson had concerns regarding her desire to become a Telecommunicator. At some point in her training, she successfully requested a transfer to the position of Cook. The County retained her in the position of Telecommunicator until September 1, when her transfer to the position of Cook became effective. Jo Anne Hollmann is a Shift Supervisor in the Center, and oversees the training of Telecommunicators. She attached a note to a "Daily Observation Report" for Wilson's shift on June 23 and 24 that states: "Not reviewed w/Wilson as she turned in her resignation." Linda James has served as a Telecommunicator for nineteen years, and serves as the Association's Communications Representative. She testified that Wilson's resignation, and her retention to take non-emergency calls was noted by a supervisor during a pre-shift briefing. She could not recall the date.

Between late June and September 1, Wilson served in the Center, but did not perform duties beyond those she had successfully trained for. This meant she could respond to non-911 calls, but not to 911 calls. The Association calculates that Wilson worked 405.52 hours during this period.

At all times relevant to the grievance, the County's assignment of overtime distinguished between shift vacancies caused by events arising within forty-eight hours of the scheduled shift (Unscheduled overtime) and those vacancies arising more than forty-eight hours from the scheduled shift (Scheduled overtime). The County uses Sergeants, on a rotating basis, to set up and to oversee work schedules. At one point, the County used bargaining unit employees to perform this function. James, for example, once set up Telecommunicator schedules. At all times relevant to the grievance, the County has posted Scheduled Overtime. As of July, employees could bump less senior Telecommunicators from a posted overtime opportunity until twenty-four hours prior to the posted vacancy. Posted overtime is not guaranteed, and the County frequently pulls posted overtime opportunities prior to the scheduled shift. In July and August, the County scratched a number of shifts that Wilson worked from the overtime posting, with the notation "not needed." The reference was not exclusive to shifts worked by Wilson.

The Association's view of the County's overtime scheduling practices is codified in a document headed "Outagamie County Sheriff's Department & WPPA's LEER Division Guidelines For Assigning Overtime." This document, referred to below as the Guidelines, was created through the operation of a labor management committee. It is not signed or dated. Gehring facilitates labor management committee meetings. Neither he, nor any member of the County's Personnel Department, participated in the discussions that produced the Guidelines. James did not participate in the creation of this document, although she participated in the creation of one of its predecessors. She testified that Gehring has indicated his approval of the contents of the document. Gehring denied that he, or any designee on his behalf, has agreed to be bound by the Guidelines. The Guidelines include the following provisions:

> It is the responsibility of department management to insure that overtime is scheduled in the most efficient manner while at the same time being cognizant of the burden overtime places on employees. Except where there are mitigating circumstances, these guidelines should be followed when scheduling overtime.
>
> In the event of errors in the assignment of overtime according to these guidelines, the senior employee who was available and should have been assigned the overtime will be given the opportunity to work an equivalent number of hours of overtime. However the County will not be required to offer such makeup overtime work to the first three (3) errors made in any two (2) week pay period.
>
> . . .

DEFINITIONS:

UNSCHEDULED OVERTIME: Defined as overtime occurring when notice is received by the supervisor **48 hours OR LESS** before the absence from work occurs (sick leave, emergencies, funeral leaves, vacation etc.)

SCHEDULED OVERTIME: Defined as overtime occurring where notice is received by the supervisor **more than 48 hours** before the planned absence from work occurs (vacations, leave of absence, military leave, medical leaves, etc.)

SENIORITY: as defined in current contract

FULL SHIFT: defined as 8 hours and 20 minutes

Revised December 14, 1992 revised February 21, 1995
draft revision 04/04/96 revised May 23, 1996
revised April 1, 1999 revised May 3, 1999
revised 12/01/01 and submitted for 60 day trial period.

. . .

General Guidelines for Assigning Scheduled and Unscheduled Overtime:

1. Scheduled and unscheduled overtime preferences whether voluntarily or involuntarily will be filled by seniority, job classification, and the ability to work the specific assignment.

. . .

Neither the County nor the Association submitted the Guidelines for a ratification vote.

The County employs between 1,200 and 1,250 employees. Transfers between positions are not uncommon. Maxine Salfai is a Senior Human Resources Analyst, and testified that there is often a lag between the time an employee is offered a posted position and the time the employee can fill it. In her view, Wilson's transfer was handled as any other transfer. The lag time between the cessation of her training in Step Three and her assumption of the Cook position was not atypical. For example, in effecting two transfers into the Correctional Officer position, there was a roughly five-month lag in one transfer and roughly a one-month lag in the other.

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

THE PARTIES' POSITIONS

The Association's Initial Brief

The Association states the issues for decision thus:

> Did the County violate the terms of the collective bargaining agreement by improperly permitting Natalie Wilson to work exclusively as a call taker in the telecommunications center?
>
> If so, what is the appropriate remedy?

After an extensive review of the evidence, the Association contends that the County's retention of Wilson "as a call-taker" constitutes an abuse of discretion. This is improper as a matter of arbitral precedent and as an unreasonable exercise of the County's management rights.

Since the labor agreement "explicitly sets forth the various job classifications for the bargaining unit," and since there is no identified "call-taker" classification, it follows that "the County unreasonably and arbitrarily exercised its management's rights." Taking non-emergency calls is but one of the many duties of a Telecommunicator, and the County's use of Wilson as a call-taker for two months unilaterally created a position, and filled it with "an individual not qualified to do bargaining unit work."

The County's unilateral actions "unreasonably changed existing practices and working conditions." Telecommunicators other than Wilson take calls and dispatch. The County "has never relegated a trainee to the call-taking function after he or she" has moved beyond Step three training. Nor has the County "allowed a trainee who did not pass the training process to remain on the job" by performing only part of the telecommunicator function. The evidence will not support a conclusion that the County was unsure "as to Wilson's intentions of leaving her position with the Center." Nor does the evidence indicate the County ever permitted an employee who had resigned to stay on in a position they were unqualified to perform.

Nor did the County's actions serve any legitimate interest. The County's desire to cut overtime costs cannot justify a contract breach. Beyond this, Wilson's continued employment adversely affected other unit members by aggravating "the innate stressfulness of the position on several levels." Incumbent Telecommunicators could not rely on Wilson to assist with emergency call, and lost the benefit of their "internal rotation" system since Wilson's presence precluded a Telecommunicator from taking non-emergency calls on their final shift.

The County's actions violated the Guidelines, which are arbitrable under arbitral and

judicial precedent. Since the Guidelines govern overtime, they are a mandatory

subject of bargaining, and even if permissive, are enforceable as an integral part of the labor agreement. Article IX governs overtime, and the Guidelines address a gap in its coverage. Any County contention that the Guidelines are not arbitrable should, in any event, be estopped under doctrines established in arbitral and judicial precedent. Beyond this, the County should not be heard to complain that the interpretation of the Guidelines was not put into issue at hearing. A contrary conclusion would undercut any attempt by the parties to consensually establish procedures to address contractual ambiguities.

The County's assignment of Wilson to be a call-taker violates the Guidelines, and thus unreasonably applies its management rights. The use of Wilson impermissibly allowed the County to remove posted, scheduled overtime for unit members. A shift cannot reasonably be viewed as "not needed" if an unqualified employee fills it. Since the Guidelines establish criteria for the award of overtime, and since those criteria include seniority and the ability to work the specific assignment, the County's use of Wilson in hours of posted scheduled overtime "violates the Guideline criteria on two levels." First, Wilson bumped more senior employees, and second, Wilson lacked the ability to perform as a Telecommunicator. Nor can these hours be considered "regular hours" filled by a "regular employee." Rather, the hours were "specifically defined by the Guidelines as 'scheduled overtime.'"

The Association concludes by requesting that "the Arbitrator sustain the . . . grievance, order the County to cease and desist from using call-takers to perform bargaining unit work, cease and desist from unilaterally creating the call-taker position, award those employees who would have worked the overtime shifts had Wilson not been retained as a call-taker backpay at the overtime rate for those hours not worked, and retain jurisdiction to ensure compliance with the award."

The County's Initial Brief

The County states the issues for decision thus:

> Did the County violate Article I, Management Rights, and/or Appendix A of the Collective Bargaining Agreement when it maintained Natalie Wilson on schedule as a Telecommunicator until she transferred to a different position of Cook on September 1, 2002?
>
> If so, what is the appropriate remedy?

After a review of the evidence, the County contends that clear and unambiguous language in the labor agreement "reserves to the County the right to make the work assignments that it made in this case." Arbitral precedent puts clear language beyond the scope of interpretation, and, in this case, "the Agreement . . . reserves to the County all its inherent management

rights, including the right to assign employees work, as was done in this case."

The management rights clause unambiguously and exclusively vests in the County the authority to assign job duties and overtime. Wilson "remained a regular employee until she transferred to the position of cook." The County did no more than assign her, as a regular employee, regular hours.

Article VIII specifies the normal workweek for Telecommunicators. Since Wilson remained a Telecommunicator until her transfer, "the clear language indicates that (she) was to continue to receive her normal hours of work." If the County had not continued to assign Wilson those regular hours, she "would arguably (have) had a grievance." Since she had not resigned, and the County had not terminated her, "the clear language of the Hours provisions of the Agreement support the County's position."

Section 34.01 establishes that no right can exist unless it has been negotiated to be part of the Agreement. This underscores that the County had the authority to assign regular work hours to Wilson.

The Association "has failed to show that there has been any violation of the Agreement." Section 7.02 places a burden on the Association to "demonstrate which provision of the Agreement has been violated." The grievance form lacks specificity, but alleges no violation supported by record evidence.

The sole basis for the Association's case rests on the overtime provisions in the Guidelines. They are, however, irrelevant since "this is not an overtime case." More significantly, the Guildelines are not, and never have been "incorporated by reference into the Agreement." Testimony by Association and by County witnesses "clearly (establishes) that the document so heavily relied upon by the Association is not part of the Agreement and was never intended to be part of the Agreement."

Even if such evidence existed, "the Association's position would be illegal and in direct violation of the Sheriff's rights." The Agreement "is a contract between Outagamie County and the Association." The Sheriff "is not a party to the contract or this proceeding." Since the dispute turns on the Sheriff's assignment of regular hours and training, it impermissibly infringes on the Sheriff's authority, the "origins (of which) pre-date the Magna Carta." His authority is constitutionally protected in Wisconsin, and the subject of a long line of cases. The grievance questions authority that a labor agreement cannot regulate.

Section 7.02 limits the authority of the arbitrator. The Association seeks "that this Arbitrator add to the terms of the Agreement by requiring a termination of an employee who has not resigned, or to provide overtime to other employees at the expense of regular hours to another of its members." To accept the Association's view would take the award beyond the

scope permitted under Section 7.02.

Even if the agreement provisions were ambiguous, evidence of past practice supports the County. The County has historically permitted Telecommunicators "who did not complete all steps of training to perform job functions within their training experience." Beyond this, such employees "have been permitted to fill positions requiring overtime." This is the first time the Association has grieved.

The County concludes, "the grievance must be denied."

The Association's Reply Brief

The Association contends that the County "grossly misstates the Association's arguments" to permit it to use "fabrications as a foundation to convince the Arbitrator to deny the grievance." The Association contends that "the County violated the Agreement when it retained Wilson as a call-taker and assigned qualified telecommunicator overtime hours to an individual not qualified to perform (as) . . . a telecommunicator, working in a position not recognized by the . . . agreement." Whether or how Wilson resigned has no bearing on the Association's actual case.

Beyond this, on "an even more absurd level," the County attempts to force the Association into the position of demanding Wilson's termination. This ignores that Wilson "in fact, submitted her resignation." If Wilson continued, the County was obligated to continue her training rather than creating the non-contractual position of call-taker. The County's characterization of the record adds further "falsehoods" to its attempt to have the grievance dismissed.

The County's assertion that Wilson "was 'contemplating' resigning from the Center" obscures that she in fact resigned. To the extent the evidentiary record is weak on this point, the weakness stems from the County's refusal to over "non-hearsay evidence to support its contention."

The record will not support the County's assertion that "it maintained Wilson's schedule consistent with her training and with historical assignments given to other employees." Rather, the evidence shows that the County did not permit Wilson to remain in Step 2, but in fact moved her from Step 3 back to Step 2. Nor is the County's characterization that it gave regular hours to a regular employee any more persuasive. In fact, the County took posted overtime hours from qualified Telecommunicators to fill Wilson's schedule. Nor will the record support the assertion that the County followed past practice in permitting Wilson to remain in her position pending transfer. Wilson functioned as a call-taker, not as a Telecommunicator. There is no evidence the County has permitted employees to temporarily fill a position they are unqualified for. Nor is evidence that the County has permitted Telecommunicators to continue training at Step 2 relevant to this grievance. Wilson failed to

complete Step 3, and was retained solely to cut overtime.

The temporary assignment is, in fact, an unreasonable and illogical exercise of the County's management rights. Article VIII is inapplicable since Wilson did not perform as a Telecommunicator. The County's attempt to bring the language of the grievance procedure to bear on the grievance is similarly unpersuasive. The County asserts that an arbitrator cannot add to or modify the agreement, then contends that the Sheriff's constitutional authority provides interpretive guidance. Arbitral and Commission precedent denies validity to this argument.

The Association cautions that the "County cannot tag the Association with absurd and illogical arguments to substantiate its own case." Focusing on the Association's actual case demands that the grievance be sustained and make-whole relief awarded.

The County's Reply Brief

The County contends that Wilson's work assignment was no more than an assignment of regular hours to a regular employee, all occurring well within the scope of Article VIII. That the management rights clause clearly and unambiguously authorizes this assignment makes it "the sole clause . . . governing this case." The Association's failure to argue ambiguity in that clause in its initial brief waives any claim that the clause is ambiguous.

Nor will the record support the Association's contention that the County acted arbitrarily or capriciously. The evidence will not establish that the County created a "call-taker" position. Had the County done so, "the Association would have requested to bargain the impact." Rather, the County assigned call-taking duties as it has in the past, and the "County simply allowed Ms. Wilson to perform a job within her capabilities . . . until the cook position . . . opened."

That other employees have resigned when it became clear they would not successfully complete Step 3 has no bearing on the grievance. Unlike those cases, Wilson "did not resign her . . . position until her transfer." The County reasonably responded to her transfer request. Nor did the County "relegate" Wilson back to Step 2. Rather, "the County elected to discontinue expense and unnecessary further training in light of (her) request to transfer to another open position." Wilson did not resign, and the County did not terminate her.

Nor can the Association show that "the County's actions adversely affected other employees." The Association "attempts to parlay a reach for overtime hours for other telecommunicators at the expense of their own bargaining unit members." The record does not show Wilson received "either regular or overtime hours at the expense of other telecommunicator overtime opportunities." The record shows no evidence of added stress to Telecommunicators, and even if it did, it is hard to understand how added stress justifies

additional overtime.

To accept the Association's arguments would produce an absurd result. Abandoning the assertion that the County should have terminated Wilson, the Association contends that it was obligated to continue her training. This, however, flies in the face of evidence that Wilson "no longer wanted to train as a telecommunicator" and would work an unreasonable and absurd result.

The County contends that the crux of the grievance is "the Association's dependence" on the Guidelines. Article XXXIV precludes considering this document to be a part of the labor agreement. The Guidelines were "not agreed to by the parties and does not meet the express requirements of the bargaining agreement to be considered valid." Nor will the evidence support a claim that the parties met and agreed upon the terms of the Guidelines. The Association's assertion of estoppel cannot bring the document into the labor agreement. The Association's failure to assert the position at hearing waives it as a post-hearing claim. Even if the claim is considered, it lacks merit. The County never followed the Guidelines, even during the processing of prior grievances. Even if the Guidelines could be considered a part of the labor agreement, the labor agreement and past practice establish that there is no guarantee of overtime. In any event, Section 7.02 precludes use of the Guidelines as a binding document.

The County concludes that the grievance must be denied.

DISCUSSION

I have adopted an issue for decision that draws on, without fully adopting, either party's. The Association's view of the Agreement provisions at issue is broader than the County's, and is incorporated into my statement of the issue. The grievance form cites Article I, Appendix A and "any other Articles" that may apply. This catch-all phrase is not enough to put the entire agreement at issue, but it is evident the parties processed the grievance as a general one. Section 7.02 demands a statement of the sections violated, but also provides that if the grievance is deficient, it "will be returned for the items to be included." There is no evidence that the County returned the grievance. The Human Resources Director's response to the grievance asserts, "the continued employment of Natalie Wilson as a Telecommunicator is not a violation of the Labor Agreement." Against this background, there is no persuasive reason to restrict the issue as narrowly as the County's statement of the issue.

The County's statement of the issue persuasively narrows the issue contractually and factually, but presumes the answer to the issue by ignoring the cessation of Wilson's active training. The Association's similarly presumes its own answer by linking "improperly" to Wilson's work "exclusively as a call taker." I have adopted an issue broad enough to highlight that the dispute questions whether the County did no more than assign Wilson within the limits of her training pending a transfer or whether it improperly created a position to undercut

contractual overtime requirements.

The breadth of the County's response to the grievance reflects the interpretive difficulty the grievance poses. The grievance questions the implications of the County's retention of Wilson on the assignment of overtime, but lacks a sufficiently sound contractual basis to be enforceable. The explanation of this conclusion demands that the Association's asserted bases for the grievance be examined.

The Association contends that management rights must be exercised reasonably, citing arbitral precedent. As underscored by Section 7.02, an arbitrator's authority is to interpret the labor agreement. Precedent may play a persuasive role in addressing contractual ambiguity, but it is not a source of a contractual obligation. Section 1.01 does not state the "reasonableness" standard cited by the Association. However, the County cannot assert its rights under Article I as a basis to undercut other agreement provisions. Whether or not characterized a "reasonableness" standard, this is the interpretive issue.

The Association points to an express reasonableness standard in Sections 1.01 and 4.01, concerning County authority to publish rules and regulations. Neither provision, however, is a relevant source of authority over the grievance. The Guidelines do not appear to be work rules within the meaning of those sections. Each section is formal, stating a requirement that the work rules will be published. Section 4.01 cites the statutory provision governing the bargaining relationship, and demands thirty days notice from the County to the Association of new rules. The use of "adopt" in Section 1.01 and the notice provisions of Section 4.01 highlight the contrast to the Guidelines. Similarly, Section 1.01 mentions that the "County and the Union will cooperate" but links the cooperation to "the enforcement" of published work rules. The Guidelines thus appear to be something unique from the "rule-making" process. They appear to be the result of an informal consensus process, facilitated in part by the Sheriff. Association officials and Human Resources officials were not involved. The Guidelines were not put to any sort of formal ratification process by the Association, the County or the Sheriff. The informality and the consensus-based nature of their creation makes them a difficult fit for the formal processes of Sections 1.01 or 4.01, which point to a County based effort to define, then publish, work rules, subject to challenge by the Association.

Determining whether or not the Guidelines constitute work rules is not necessary to resolve the grievance. Even if not work rules, the Guidelines are relevant evidence to determine the assignment of overtime under Article IX. The testimony of the employees who create schedules indicates the Guidelines are a statement of how the Department assigns. The difficulty for the Association's position is that the Guidelines do not establish the violation it asserts. Rather, they beg the interpretive issue. The Association questions whether Wilson had "the ability to work the specific assignment." This view, however, restates its position that the County unilaterally created a non-unit position, thus violating the Agreement. The dispute cannot be focused as an overtime dispute under Article IX without first concluding the

violated Article IX if it did no more than grant Wilson regular hours as a Telecommunicator, pending the effective date of her transfer.

Thus, the crucial component of the Association's case is the demonstration that the County created a "call-taker" position in violation of the Agreement. There is, however, no reliable contractual basis to support this assertion. Testimony and the Telecommunicator position description establish that answering non-emergency calls is one of the duties of a Telecommunicator. It is undisputed that Wilson failed to successfully complete Step 3, and was thus not capable of answering 911 calls. It is also undisputed that Wilson successfully transferred to the Cook's position effective September 1.

The Association contends that the County's retention of Wilson as a "call-taker" has adverse implications on Telecommunicator overtime under Article IX. However, more adverse contractual implications surround the Association's view of the "call-taker" position.

Most significantly, the evidence will not support an assertion that Wilson resigned her position as Telecommunicator. Resignation poses a question of fact concerning whether an employee voluntarily terminated employment, see generally Volume 1, Chapter 22, especially Section 22.03(1), of Labor and Employment Arbitration, Bornstein, Gosline & Greenbaum (Matthew Bender, 2002). That Wilson stayed as a Telecommunicator ends inquiry on this point. That Hollmann placed a sticky note on a file noting a resignation, or that another member of management noted Wilson's resignation at a briefing has no bearing on whether Wilson voluntarily relinquished the position, unless the County, as employer, can "volunteer" it. In my view, this is an untenable position. Asserting the County has the burden to prove a resignation is no more tenable. If the County coerced the resignation, it would be a discharge. Proof on whether Wilson resigned must come from Wilson, not the County. Either party could have called her as a witness. Neither did.

The Association's argument turns, then, on whether the labor agreement precluded the County from retaining Wilson as a Telecommunicator. There is no agreement provision to support this. The loss of a specific shift or shifts of overtime following the decision to discontinue her active training cannot be labeled improper standing alone, absent a contractual guarantee of overtime. None exists. The point is not resolvable as a policy issue. There is no duty to maximize overtime, just as there is no duty to minimize it. Rather, the County cannot use its management rights under Article I to eliminate the provisions of Article IX. Even if past practice is considered to address the ambiguous relationship of Article I to Article IX, evidence on practice shows there can be a delay between when a position comes open, and when the successful applicant fills it. Nothing in the evidence persuasively indicates that the delay in this case was exceptional.

The contractual implications of adopting the Association's position are troubling. If "call-taker" is a new position not covered by the agreement, the dispute would seem to involve bargaining, not contract interpretation. More troubling is the impact on Wilson's position. If she was not competent to be a Telecommunicator, and had to be removed from the position, can the action be characterized as anything other than a discharge? How can it be a discharge without County action to terminate? What authority does an arbitrator have to remove her from the Telecommuicator position without a voluntary quit or employer action to terminate? To conclude Wilson remained as a Telecommunicator within the limits of her successful training poses no such interpretive problems. There is no evident undercutting of Article IX rights, since she filled the position as she would have as a continuing trainee. There is no evident problem under Article I, since non-emergency call taking is an assignable duty, not a position. Nor is there any dispute the County could have rendered the overtime shifts "not needed" with another trainee, or by short-staffing. At root, the Association's case demands that the cessation of Wilson's active training be given contractual significance as a termination. Short of proof that the County's continuing to assign her duties within her competence under Articles I and VIII undermined Article IX, there is no basis for granting it that significance. There is no such proof here. She continued as a Telecommunicator until the Cook position opened. To conclude she denied other unit employees overtime demands the conclusion she had no right to the work. This conclusion lacks a contractual foundation and unnecessarily poses her employment rights against other unit employees' interest in overtime.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. The Association forcefully asserts that Wilson's retention affected a number of working conditions. This can be granted, but begs the contractual issue. The asserted affect would have been the same, but without contractual significance, if the County nominally continued Wilson's training process. This line of argument places too great a significance on the cessation of training. The contractual significance of Wilson's retention turns on whether the County's assertion of its authority under Article I undermined Article IX. To conclude it did so on the facts posed here does less to affirm Article IX rights than to undermine Article I.

The Association's assertion that Wilson was incapable of performing her position affords no persuasive guidance. It is not immediately apparent that her retention pending the transfer differs from the retention of a trainee at Step 2 until the trainee can move to Step 3. To conclude otherwise unnecessarily pits the interests of full-time Telecommunicators against Wilson's contractual rights to continue as a regular employee until either her resignation or a discharge. As noted above, the record shows no resignation, and the discharge cannot be found without having an arbitrator bring it about.

I do not find persuasive the County's assertion that the contractual provisions cited above are clear and unambiguous. This point has no effect on the conclusions stated above,

but bears passing note. It is not clear, in the absence of a specific fact situation, whether the

assignment rights under Article I or VIII undercut the provisions of Article IX. Since the relationship of those provisions demands a factual context, it cannot be considered without ambiguity. Whatever the extent of the Sheriff's constitutional authority, it has no impact on the conclusions stated above. Whether he adopted the Guidelines or not, the Guidelines do not mandate the result sought by the Association any more than the contract does. Thus, whether they are independently enforceable or enforceable as work rules made part of the agreement plays no determinative role in this matter. Since their independent enforcement or enforcement as work rules is not determinative, Articles XXXI, XXXIII and XXXIV do not govern the grievance. The Guidelines are, in this matter, a piece of evidence concerning County assignment of overtime. Ultimately, it is the absence of a contractual basis rather than the presence of any of these provisions that is fatal to the grievance.

AWARD

The County did not violate the Agreement by maintaining Natalie Wilson as a Telecommunicator from the cessation of her active training in Step 3 until her transfer to the position of Cook on September 1, 2002.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 22nd day of April, 2003.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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