BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BROWN COUNTY SHERIFF DEPARTMENT
NON-SUPERVISORY EMPLOYEES

and

BROWN COUNTY

Case 676
No. 62212
MA-12199

Appearances:

Aaron Halstead, Attorney at Law, Shneidman, Hawks & Ehlke, S.C., appearing on behalf of the Union.

James Kalny, Attorney at Law, Davis & Kuelthau, S.C., appearing on behalf of the County.

ARBITRATION AWARD

The Union and Employer named above are parties to a 1999-2001 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint Steve Morrison to hear and resolve a job bulletin grievance. Mr. Morrison held a hearing on June 17, 2003, in Green Bay, Wisconsin. After the hearing, but before the parties filed their briefs, Mr. Morrison left the WERC. Karen J. Mawhinney was assigned to issue the award. The parties completed filing briefs on October 13, 2003.

ISSUES

The parties did not stipulate to the framing of the issues. The Union would frame them as follows:

> Did the County violate Article 9 of the collective bargaining agreement when it failed to assign Sergeants Tim Johnson and Mary Schartner, effective January 1, 2003, to the positions for which they had signed on the job bulletin posted by the County in December 2002?

To what remedy is Sgt. Johnson entitled under Article 15 of the contract relating to overtime wages?

The County would frame the issue as follows:

Did the County violate Article 9 of the collective bargaining agreement when it temporarily held the Grievants in their positions until an adequate number of replacements could be promoted and trained? If so, what is the appropriate remedy?

The Arbitrator prefers the County's framing of the issues.

BACKGROUND

The collective bargaining agreement states in Article 9, Job Bulletins:

A job bulletin, for all jobs, except those critical to department efficiency and polygraph operator and K-9 patrol officers, effective January 1st of every year, shall be posted no later than December 10th, and subsequently signed by bargaining unit seniority, subject to personal qualifications, and the needs of the department. Brown County will neither financially gain or lose when employees change jobs or shifts because of the job bulletin provision.

The job bulletin, also called the duty roster, was posted on or about December 1, 2002. Jail sergeants often post out of the jail into other sergeant positions. That is what happened here and led to this grievance. Two sergeants in the jail – Tim Johnson and Mary Schartner – signed the bulletin to move out of the jail. Johnson wanted to be a patrol sergeant and Schartner wanted to be an investigative sergeant. Johnson was working a third shift at the jail, from 11:00 p.m. to 7:00 a.m. The patrol sergeant shift he wanted was from 3:00 p.m. to 11:00 p.m. Schartner's hours would not have changed – she was working 3:00 p.m. to 11:00 p.m. in the jail and would keep those hours in the investigative sergeant position.

On December 23, 2002, then-Sheriff Thomas Hinz advised the Union President, Alan Phillips, that there were not enough jail sergeants to fill the positions, and that Schartner and Johnson were going to remain in the jail to help operate it until February of 2003. Hinz told Phillips that one of the jail sergeants, Larry Malcomson, was going to have some surgery and would not be available to work for four to six weeks. There were not enough people on the sergeants' eligibility list to promote people into those positions. Hinz said that the jail could not operate with three jail sergeants because no one could have any time off. There are currently six jail sergeants. Without Malcomson, Johnson, and Schartner, there would only be three sergeants left at the jail. Phillips demanded to bargain over the situation

Hinz based his decision to not allow the two sergeants to change positions on the contract language that refers to Department efficiency and the needs of the Department. He intended to allow Johnson and Schartner to go to their posted positions in the job bulletin as quickly as possible, which would be when a sergeants' eligibility list was re-established and sergeants were trained for the positions. Johnson and Schartner were allowed to pick their vacation times in their new positions, even though they remained in their old positions. Hinz felt that it was a temporary solution to a crisis. He noted that the last time the bulletin came up, the Department was short about 23 positions and sergeants were not allowed to move until replacements were trained.

The collective bargaining agreement states that an eligibility list is to be established for sergeants, and the list was to remain in effect for two years, ending May 31, 2001. The list probably would have expired again on June 1, 2003, although the contract language does not reflect that. The list had been exhausted by the time that Johnson and Schartner signed for positions outside of the jail. Phillips had talked to Chief Deputy Edward Janke in August of 2002 about the list. He suggested that they get a new list ready because of the few people on the current list at that time. The parties met in November and bargained on that issue. Janke sent a memo to Phillips on November 4, 2002, asking for an agreement to establish a new two-year list with an effective date of August 1, 2002 so that employees hired prior to August 1, 1994 would be eligible for promotions. Phillips responded on November 13, 2002, agreeing to establish a new sergeant eligibility list and change the dates from the current contract language.

Hinz felt that the parties could not have avoided the problem as early as August of 2002, because the Chief Deputy was working on a new sergeants' list with the bargaining unit. Also, the job bulletin cannot be implemented until the County's budget is completed. While the County's budget was being put together, the County was negotiating with three neighboring villages to provide police services.

The new Sheriff, Dennis Kocken, took office January 6, 2003 and discussed the matter with Phillips. The promotion procedure for sergeants generally takes about a month, and the training period takes another month. Jail sergeants are in charge of about 600 inmates. They handle a crisis, call people in, decide whether to evacuate the facility, handle suicidal inmates, decide whether someone needs restraints, etc. In the past, the jail had problems with high rates of suicide, issues of excessive force, and liability issues.

The sergeants' promotion exam was set for January 7, 2003, pursuant to the parties' agreement to do it as soon as practical after the first of the year. Applicants received notice of their combined scores on January 17, 2003. Training plans for the new jail sergeants were established in the middle and later parts of February of 2003. Sergeant Zeigle replaced Johnson on or about March 24, 2003, and Sergeant Bain replaced Schartner on April 5, 2003.

Greg Rabas is a patrol sergeant and the Union Vice President. He recalled that a previous sheriff prohibited Don Stewart from going to his chosen bulletin position. Stewart was suspended and the Sheriff placed him in the courthouse rather than on the road, where Stewart wanted to be. Rabas also remembered other times when the Union had discussions with the Sheriff about the need to temporarily assign people to positions or different hours than they signed for. He stated that management always came to the Union asking for a mutual agreement to change those hours during temporary assignments. Rabas was aware of situations where officers were paid time and a half when assigned to work a shift other than their regular shift. He recalled one example around 1995 or 1996 when officers were moved to fill an 11:00 a.m. to 7:00 p.m. position. Their normal hours would have been 3:00 p.m. to 11:00 p.m. They were paid four hours of overtime for working outside their normally assigned shift. The parties settled the matter without an arbitration decision. These situations were never posted on the job bulletin.

There were some bulletin positions in the drug task force that were not filled. The Department management talked to the Union and they mutually agreed to not fill those slots or two or three years.

The parties stipulated that between January 1, 2003, and March 26, 2003, Johnson worked 440 hours, or 55 eight-hour shifts. During that period of time, he worked 196.5 hours of overtime.

THE PARTIES' POSITIONS

The Union

The County posted the positions, and the "needs of the department" were served by the posting of these positions or they would not have been posted. There is no contention that the two sergeants did not sign by bargaining unit seniority or that their personal qualifications were insufficient. The circumstances under which the positions were posted and signed met all the criteria in the first sentence of Article 9. While the County believes that there was an alleged crisis or emergency in the jail that allowed it to ignore Article 9, the contract does not support the contention that an alleged emergency situation justified an exception to the usual bulletin process. There is no language that permits the County to ignore the bulletin process in the event some crisis or emergency exists. The parties have written specific language where they intended an exception to a contract provision for an emergency.

The Union argues that the contract's specific provision for emergency exceptions in other instances is strong evidence that the parties did not intend for an emergency or crisis exception in this situation. In the past, where the County has desired to assign officers to positions other than those for which they signed under the bulletin, it has been by agreement with the Union. Moreover, the Union submits that there was no emergency. The lack of

officers on the sergeants' eligibility list was the direct result of the County's failure to act when the Union brought it to the County's attention that few, if any, employees on the list were interested in promotion. The Union told the County about the matter in August but the County delayed three months before beginning to address the Union's proposal. The Union also advised the County in November of 2002 that it agreed to post the sergeant testing opportunity – and seven weeks remained in the year. The testing process takes only three to four weeks, and the jail sergeant training process takes only four weeks. Thus, there was sufficient time to develop a sergeant eligibility list and train jail sergeant candidates before the end of the year. The County knew that it was a common occurrence for sergeants to post out of the jail. An emergency or crisis is an unexpected or unavoidable circumstance.

The Union urges the Arbitrator to reject the County's contention that the phrase "the needs of the department" constitutes some type of catch-all phrase that allows the County to disregard the bulletin process when it deems it necessary. Hinz conceded that the phrase "except those critical to department efficiency" relates to the question of whether a particular position will be posted in the first place. Nonetheless, Hinz maintained that the "needs of the department" phrase overrode the bulletining process. The contract cannot reasonably be interpreted to mean that, because it would create an exception to the bulletin process that literally swallows up the rule. If the Sheriff has the power to disregard the newly-chosen assignments because he is merely deciding the needs of the Department, then the discretion he has would go unchecked by all of the other language the parties have negotiated.

The Union submits that the "needs of the department" are already reflected when the decision has been made to post positions each December. The phrase relates to the question of what will be posted, not whether people will be allowed to move into their new positions once they have signed the job bulletin. It is undisputed that on all previous occasions where the County has desired to move an officer from his or her signed-for position and into a different one, that desire has been accommodated by agreement between the parties, not by unilateral County action. To the extent the agreement is ambiguous, the parties' practice established that the needs of the Department are jointly determined by the County and the Union. The County's conduct violates that practice, and by extension, the collective bargaining agreement.

The Union also asserts that Sergeant Johnson is entitled to overtime pay for the hours he worked between January 1 and March 26, 2003. Article 15 provides that officers shall be compensated at the rate of one and one-half times their normal rate for all hours worked outside of their normally scheduled hours. Sergeant Johnson was not allowed to move out of the jail until March 26, 2003. As a result, he was forced to remain on the 11:00 p.m. to 7:00 a.m. shift, rather than moving to the 3:00 p.m. to 11:00 p.m. shift he would have worked had he been assigned per the bulletin. Between January 1 and March 26, 2003, he worked 55 eight-hour shifts outside of the hours he would have worked in the patrol sergeant position. His hourly rate of pay during that time period was $26.30. Regardless of the result of the first issue posed, there is no question that he is entitled to half-time pay, or $13.15 an hour for 440 hours. Thus, Sergeant Johnson is entitled to $5,786.11 in wages as a result of the Sheriff's refusal to allow him to move into the patrol division during the first three months of 2003.

The County

The County argues that Article 9 permits the suspension of the bulletin in accordance with the needs of the Department. The restriction on management's' right to schedule should be narrowly construed and considered in the context of the essential service provided in public police protection services. The issue appears to be the scope of the phrase "the needs of the department." It is difficult to understand what that phrase means under the Union's interpretation. Apparently, the Union believes that the Sheriff determines the needs of the Department in settling the schedule through the bulletin. The management rights clause already gives the Sheriff the ability to schedule and assign work. The Union's reading of the phrase renders it meaningless. The County reads the phrase to mean that it reserves management rights to make sure that the needs of the Department, and therefore the safety of the public, are addressed regardless of the bulletin process. It is possible that due to unanticipated personal preference, vacancies and unanticipated illness, that movements within the bulletining process may not adequately address the needs of the Department. That is what happened in this case.

The phrases "subject to the personal qualifications and the needs of the department" are stated in the conjunctive, which means that both are applied to the rest of the sentences in the same manner. The qualifications language restricts the most senior patrol officer from a sergeant's position. Likewise, the entire bulletin process must be subject to the needs of the Department. The County's reading of Article 9 gives meaning to all the language and leads to a consistent result. If the bulletin was allowed to go forward as signed, the needs of the Department in terms of supervision and direction of the jail by qualified personnel would not have been addressed.

The County asserts that the Sheriff had the authority to assign staff to cover the crisis that arose in this case. The Union did not offer evidence contradicting the conclusion of two Sheriffs and the Chief Deputy that there was a crisis or emergency in this case caused by the lack of jail sergeants. The lack of sergeants was dangerous to the operation of the jail. Management was not directly responsible for this emergency. The creation of an eligibility list was delayed in part at the request of the Union. The emergency was of a limited duration. From the time that the Sheriff became aware of the crisis until Sergeants Schartner and Johnson were replaced, management acted as expeditiously as possible. Moreover, the Sheriff had the constitutional authority to hold the sergeants in their positions within the jail. He has the constitutional duty to maintain custody and control the jail and prisoners therein as part of the immemorial principal and important duties of a Sheriff at common law that are constitutionally protected. Article 9 can be read in a manner consistent with the Sheriff's constitutional powers. Fulfilling the Sheriff's constitutional duties would encompass the needs of the Department. The "needs of the department" language was intended to allow the Sheriff to address issues of general safety of the public and the performance of the Sheriff's constitutional duties without collective bargaining agreement restriction.

The County submits that there is no entitlement to damages and Article 15 does not apply. The Union appears to argue that the bulletin normally establishes the hours, and therefore, overtime kicks into effect because Sergeant Johnson was not working the hours he bulletined for. The Union reads the phrase "normally scheduled hours" to be hours scheduled in the "normal" manner. The County believes that the contract and intent was that the "normally scheduled hours" was intended to mean the hours the employees are assigned to and expected to work on a routine basis to fulfill the 6-3 and 8 and ¼ hour per day scheduled of Article 14. Sergeant Johnson simply remained in the same shift he was in 2001. He was given notice that he was going to remain in that shift for a temporary period. He was not subject to periodic and sporadic changes of schedule for which overtime is often compensated. He worked the same normally scheduled hours he worked in 2001 until he was replaced. While Rabas testified that on one occasion some officers were asked to change their shifts and were paid time and a half for time worked during that change, that lone example is factually distinguishable from this case. The issue of emergency was not addressed in that case. The overtime was a result of a settlement of a grievance or a threatened grievance. The sole example offered by the Union cannot constitute a binding past practice. Finally, paying time and one-half would provide a windfall to Sergeant Johnson, who had "normally scheduled hours" in the 6-3 schedule. The fact that they were not the ones he bulletined for does not change the fact that they were normally scheduled hours under the contract.

In Reply, the Union

The Union finds the County's interpretation of the phrase "the needs of the department" nullifies the posting right gained in Article 9. The County wants the contract's management rights superimposed onto Article 9. What the contract gives with one hand – posting into positions – would then be taken away with the other hand if the Sheriff can refuse to assign people to positions for which they signed. The Union maintains that the needs of the Department are reflected by the form and content of the posting itself. If the phrase is ambiguous, then the past practice reveals that the agreement does not contemplate unilateral action by the Sheriff negating the bulletin process after posting and signing have occurred. As to the notion that the Sheriff may determine after employees sign for positions whether officers will be allowed to move would invest the Sheriff with authority not contemplated by Article 9.

The Union objects to the County's emergency argument and claims the situation was the direct result of the County's own inaction in the fall of 2002 with respect to the sergeants' eligibility list. The County knew in August of 2002 that the Union wanted to establish a new list but took no action until November of 2002 to do so. The three-month delay was the reason for the so-called emergency, and the County should not be allowed to benefit from its own inaction.

There is no need to interpret the state constitution. The Sheriff did not state at the hearing that his actions were pursuant to state constitutional powers. He asserted a right to act as he did based on his interpretation of the contract.

Regarding Johnson's hours, the County argued that he did not work outside of his normally scheduled hours based on Article 14. However, Article 15 distinguishes the days-on-days-off concept. Had the parties intended the right of a 6-3 employee to overtime wages to be dependent on whether he has worked outside the 6-3 schedule, then they would have spoken of working outside the employee's normally scheduled shift rather than normally scheduled hours. Moreover, Johnson's normally scheduled hours as of January 1, 2003 were to have been 3:00 p.m. to 11:00 p.m., not the 11:00 p.m. to 7:00 a.m. shift he was forced to work.

In Reply, the County

While the County agrees with the Union that the sergeants signed by seniority and personal qualifications, the Union ignores the language following those two requirements – the needs of the Department. Giving normal meaning to all terms of the subject portion of Article 9 leads to only one reasonable conclusion. The bulletin is subject to the needs of the Department. The Union's reading renders the phrase without meaning. It argues that the needs were served by the posting of the positions. If that were the case, the phrase could be deleted from Article 9 and there would be no effect.

The County asserts that there is no evidence of contrary past practice. The Union attempts to argue that where the County has needed to temporarily assign offices to positions or hours different than that which they signed, they have always reached an agreement concerning such temporary assignments. That argument misses the point. In this case, the jail was left understaffed by sergeants as a result of the bulletin process. This is unlike a situation where a temporary assignment arises outside of the bulletin process that requires an officer to change the shift that the officer has normally been working with little or no convenience.

The County disputes the Union's assertion that the situation was caused by the Sheriff. The County finds it remarkable that the Association did not even address the constitutional powers of the Sheriff.

Finally, the County believes that the Union has misapplied Article 15. The Union jumps to the conclusion that even though Johnson did not move out of his 11:00 p.m. to 7:00 a.m. shift on January 1, 2002, his normally scheduled hours changed to the 3:00 p.m. to 11:00 p.m. shift for which he had posted. The County contends that normally scheduled hours means just that, the hours that a person is usually scheduled to work. Johnson's hours did not change because he remained in his position. The Union also argued that recovery under Article 15 is independent of the issue of whether the Sheriff could suspend the bulletin under Article 9. Only through the 2002 bulletin could Johnson have any rationale to say that the 3:00 p.m. to 11:00 p.m. schedule constitute his normally scheduled hours.

DISCUSSION

This case turns on the meaning on the phrase – " the needs of the department" as stated in Article 9. The relevant language is:

> A job bulletin, for all jobs, except those critical to department efficiency and polygraph operator and K-9 patrol officers, effective January 1st of every years, shall be posted no later than December 10th, and subsequently signed by bargaining unit seniority, subject to personal qualifications, and the needs of the department. Brown County will neither financially gain or lose when employees change jobs or shifts because of the job bulletin provision. (Emphasis added.)

There are no issues about seniority or personal qualifications for the sergeants who posted out of the jail. The only question is whether the Sheriff properly delayed their movement to new positions under the contract. The phrase "the needs of the department" could leave plenty of room for interpretation, and the Union has a legitimate concern that it could be read to broadly as to swallow up the posting procedure entirely. However, this decision will deal only with the three-month delay and the immediate facts of this case. The jail sergeants were not denied their preferred positions – they were only delayed in receiving them.

Both parties cite some past practice to bolster their arguments. However, neither party meets the standards for a binding past practice. For a past practice to be binding, it must be unequivocal, clearly enunciated and acted upon, readily ascertainable over a period of time as a fixed and established practice by both parties. The Union cites an example of when officers worked outside their normal schedules and were paid time and a half, but it cites only one example and without enough detail to determine whether it is the same situation. That example clearly does not help establish any past practice. The County cites an example of when officers were not allowed to move to their signed positions in the bulletin, but again, there is no evidence of a strong past practice. Thus, there are no practices that are binding or helpful in interpreting the contract language at issue here.

The Union would have the Arbitrator accept its interpretation that once the Department posts the bulletin, it has already determined the needs of the Department and it cannot deny anyone who signs the bulletin the opportunity to move as of January 1st. To accept that interpretation would mean that any needs of the Department that arose in the interim – between the posting and January 1st – could not be met or could not limit position movement. Surely the parties did not intend to mean that.

The better interpretation is simply to read the phrase "the needs of the department" just as the parties would have intended it – to allow Department needs to be considered along with seniority and qualifications. The phrase has to have some meaning, and the parties placed it in

conjunction with personal qualifications. Qualifications may be considered at any time in the process – and so may the needs of the Department. There are thousands of cases where qualifications in job postings are disputed after someone has posted for a job. The Union wants the "needs" phrase to be locked in at the time of the job bulletin, but the needs of the Department could be determined once management reviews who is posting out of which position. Or the needs of the Department could have changed by retirements, resignations, illnesses, injuries, etc. The facts that two sergeants wanted to post out of the jail while one jail sergeant was going on sick leave and no one wanted to post into those positions changed the needs of the Department in this case.

The Union argues that the "needs" of the Department relates to the question of what positions will be posted, not whether people will be allowed to move into their new positions once they have signed the job bulletin. That interpretation is clearly incorrect, as the language states "subject to" personal qualifications and the needs of the department. That qualify phrase "subject to" means that there still some hoops to jump through before employees get the positions for which they signed.

While the Union correctly senses that the "needs" language is a big enough hole for a truck to drive through, there is no evidence that the County has ever used this language to arbitrarily deny movement in a position or that the County has in this case arbitrarily delayed movement out of the jail. The County acted in good faith and advised the Union that there was a jail sergeant who would be on an extended leave for surgery and that there were no people left on the sergeants' eligibility list that would accept a promotion. Moreover, the County acted in a timely manner to create a new eligibility list, get people promoted to sergeants, and get them trained to work in the jail. The three-month delay in allowing Sergeants Johnson and Schartner to move to their new positions was not lengthy under the circumstances, and there is no evidence that the County did anything to stop them from posting out of jail or moving out to their preferred positions. In fact, this is a rather odd case in the multitude of posting cases in that there was no denial of the right to post out of the jail – just a temporary delay to fix a problem caused by one sergeant's illness plus the posting procedure.

The Union believes that the County could have anticipated the problem, because the eligibility list was exhausted and jail sergeants commonly post for other positions. Although the Union noted that the list was exhausted in August, the posting procedure did not take place until December. The County did not know that for certain until early December that two jail sergeants would post out of their positions, and the County was not required to make such an assumption well in advance of the bulletin. The record does not show exactly when the Sheriff knew that one jail sergeant would be on extensive sick leave. The County acted in a timely manner once it had full knowledge of the effect on the operation of the jail, and acted to rectify the situation in accordance with the contract, allowing employees to move into other positions as soon as feasible.

While the Union states that despite the outcome of the main issue, there remains an issue of overtime for Sergeant Johnson due to Article 15 of the collective bargaining agreement which states:

> Employees who work the 6-3 shift shall be compensated at the rate of one and one-half (1 ½) times their normal rate for all hours worked outside of their normally scheduled hours or in excess of 8.25 hours in any working day, as except as provided below. Employees who work the 5-2 shift shall be compensated at the rate of one and one-half (1 ½) times their normal rate for all hours worked outside of their normally scheduled hours or in excess of 8.00 hours in any working day, except as provided below.

I disagree that the overtime issue is separate from the main issue here. First of all, if the County properly left Sergeant Johnson to work as a jail sergeant and there is no contract violation, then it does not follow that the Union can still seek damages for the delay in moving to the new position. One issue is still tied to the other issue. There can be no independent violation of Article 15 if there is no violation of Article 9 in this case. It does not make sense to say that the County properly left Johnson in his jail sergeant position but that he still would be entitled to overtime because he could have been working different hours as a patrol sergeant effective January 1, 2003.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin, this 31st day of October, 2003.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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