

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**DOOR COUNTY DEPUTY SHERIFF'S ASSOCIATION**

and

**DOOR COUNTY**

Case 141  
No. 62810  
MA-12436

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Appearances:

Parins Law Firm, S.C., by **Thomas J. Parins, Jr.**, Parins Law Firm, S.C., 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305, for the labor organization.

**Grant Thomas**, Corporation Counsel, Door County, Door County Courthouse, 421 Nebraska Street, P.O. Box 670, Sturgeon Bay, Wisconsin 54235-0670, for the municipal employer.

**ARBITRATION AWARD**

The Door County Deputy Sheriff's Association and Door County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to an employee's lunch break, hours of work, and assignment. The Commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held on March 23, 2004 in Sturgeon Bay, Wisconsin. It was not transcribed. The parties filed written arguments and replies, the last of which was received June 7, 2004.

**ISSUE**

The Union states the issue as:

“Did the County violate the collective bargaining agreement by changing the hours of employment, lunch period and job duties of the Jail Sergeant – Administrator in January, 2003?”

If so, what is the appropriate remedy?”

The County states the issue as:

“Did the County/Sheriff violate the collective bargaining agreement by: requiring the Jail Sergeant to work a fixed schedule; mandating the Jail Sergeant to remain on premises during a paid meal period; or assigning certain jail duties and tasks to the Jail Sergeant?”

If so, what is the remedy?”

I adopt the question as posed by the county.

### **RELEVANT CONTRACTUAL LANGUAGE**

#### **ARTICLE 18 – WORK DAY AND WORK WEEK**

##### **Section 18.01 – Work Day and Work Cycle:**

The work day shall be eight (8) consecutive hours followed by a sixteen (16) hour off period except in cases of emergency, as may be directed by the Sheriff, Chief Deputy, or the Employee’s immediate supervisor, in which case the overtime rule as stated in **ARTICLE 17 – OVERTIME** shall apply. The normal work cycle for all employees, excluding the Jail Sergeant and Investigative Sergeant, Investigators, Court Liaison Records Clerk and Telecommunicators, shall be six (6) consecutive days on duty, followed by three (3) consecutive off days, and then repeating the cycle, based on 1,947 hours per year.

Part-time Telecommunicator work cycle shall be two (2) days of work followed by five (5) days off followed by three (3) days of work, followed by five (5) days off, then repeating the same cycle.

Section 18.02 – Lunch Break:

All Employees shall be granted a thirty (30) minute paid lunch period. Security Deputies shall take their lunch break as governed by the availability of coverage during their work shift.

Section 18.03 – Flexible Schedule:

Effective January 1, 1995, a new position was approved by the County Board, which will be filled as a Road Deputy. The hours of the position will conform to the language outlined in Section 18.01 with the exception of flexibility in schedule and with a minimum of twelve (12) hours notice.

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**ARTICLE 22 – MAINTENANCE OF BENEFITS**

Section 22.01 – Definition:

The Employer agrees to maintain in substantially the same manner such present benefits not specifically referred to in this Agreement. Such benefits are coffee and lunch breaks, time off for approved schooling, riot gear, weapons, badges, brief cases, and safety equipment supplies, squad cars provided and mileage for use of personal cars, lodging and meals out of County on County business. Employee will notify the Sheriff in writing of all outside jobs.

...

**ARTICLE 26 – MANAGEMENT RIGHTS**

Section 26.01 – County Rights:

The County possesses the sole right to operate County government and all management rights reposed in it. The business and the direction of the County Sheriff's Department and its working forces is vested exclusively in the County of Door, and the Sheriff, and includes but is not limited to the following: to hire, expand, direct and control all operations of the Door County Sheriff's Department; to direct and supervise the work of the Employees of the Door County Sheriff's Department; to determine by whom work shall be performed and the location where such work shall be performed; to determine to what

extent any service shall be added, modified or eliminated; to schedule the hours of work and assignment of duties in a manner not inconsistent with the provisions of this Agreement; to make and enforce reasonable rules; and to take whatever action may be necessary to carry out the functions of the County in situations of an emergency nature.

Section 26.02 – Employer’s Exercise:

The Employer’s exercise of the foregoing functions shall be limited by the other provisions of this contract. However, the County has all rights, which it has at law except those expressly bargained away in this Agreement.

Section 26.03 – Association Rights:

The Association does not waive any of its rights as stated in Chapter 111 of the Wisconsin Statutes.

**BACKGROUND**

The grievant, Sgt. William Oakley, has served as the Door County Jail Sergeant – Administrator since April 1999, following service as a Security Deputy (starting in June 1992) and Patrol Deputy (starting in January 1995). He assumed his current position, a promotion, when no incumbent sergeant took the post.

At the time Oakley sought and accepted the position, it had been the practice for many years to allow the Jail Sergeant-Administrator (JS-A) to work flexible hours and take lunch outside the jail. The duties of the position did not involve security duties in the jail proper (“working the jail floor,”) but rather administrative duties, pursuant to the following position description:

**JAIL COMMUNICATION SERGEANT  
(JAIL ADMINISTRATOR)**

**GENERAL SUMMARY OF POSITION**

Reports to the Chief Deputy, administers the efficient and lawful entry to and operation of the County jail. Supervises the Jail/Communication Deputies, oversees and assists in the operation of the County law enforcement dispatch system.

**PRINCIPLE DUTIES AND RESPONSIBILITIES:**  
(refer to attached sheets for lists of specific responsibilities)

1. Proper admission of new inmate to include: completion of jail entry form; proper and legal charge; present new inmate before magistrate if necessary; identify new inmate with fingerprints and photographs; forward fingerprints and photos to FBI and CBI; placement of Conviction Order, Probation Detention Order in inmate's records; Notation of bond on jail admission form if applicable; and computer check of new inmate with FBI and CBI.
2. Maintain records for Maximum Security and Huber Law inmates.
3. Assign work schedule for dispatchers and jailers. Ensure jail maintenance and security, as well as inmate health and safety.
4. Ensure notification of: jurors selected for jury duty; bailiff of jury trial (in case of sequestered jury, two bailiffs (male and female) must be assigned for each eight hours); Clerk of Court about the names of those called for jury duty.
5. Receive, assign to deputy, return to originator, record, and audit status of Civil Process.
6. Receive, assign to deputy, collect and record, and audit status of all State, County, and Municipal warrants.
7. Ensure maintenance of secure portion of safety building.

**KNOWLEDGE, SKILLS, ABILITIES, AND EXPERIENCE REQUIRED:**

1. Ability to read, comprehend, follow oral and written instructions, to communicate both verbally and in writing, at a level associated with completion of a high school degree or equivalent training. Associate degree in Police Science desired. Related college courses or their equivalent in management of a correctional facility.
2. Knowledge of institutional management, Wisconsin Statutes, and Wisconsin Division of Corrections Jail Standards regarding requirements for properly maintaining inmates.

3. Ability to plan and assign work, direct and evaluate performance of persons working within the secure portion of the safety building. Knowledge of basic bookkeeping or accounting.
4. Able to establish a direct and harmonious working relationship with employees, inmates, county officials, law enforcement personnel, visitors, lawyers, and other county and outside agencies.
5. Knowledge of and ability to operate the County law enforcement dispatch/communication equipment.
6. Capable of providing in-service training about Wisconsin Statutes concerning retention of inmates, Civil Process, and Warrants as required.
7. Five to seven years of progressive jail administration/law enforcement work experience.
8. Knowledge of changes in state statutes and standards by attending required training.

**WORKING CONDITIONS:**

When in office environment, there is little or no discomfort from temperature, dust, noise, wetness or the like. In processing and maintaining custody of new inmates, there is the potential of engaging in violent and hostile people. Use of correct intake and custody procedures limits the probability of physical harm. Distractions caused by performing multiple duties simultaneously.

**DISCLAIMER**

“The above statements are intended to describe the general nature and level of work being performed by people assigned to this job. They are not intended to be an exhaustive list of responsibilities, duties, and skills required of personnel so classified.”

Oakley testified that during the interview with the civil service commission and the chief deputy, he was asked what hours he planned to work, rather than being told what the hours were. He added that he was never asked his views on having standardized hours, being required to take his lunch break within the jail, or having to work the jail floor. Oakley said he took the position because it was a promotion; because the administrative duties and supervisory

duties appealed to him, and because of the flex hours and freedom to leave the jail for lunch, aspects he said were “generally known throughout the department.” He added that he had “no interest in working the jail floor.”

Oakley became Jail Sergeant-Administrator in April 1999, and testified that from then on he was able to flex his hours, with the actual knowledge of his supervisors but without specific supervisory approval of each instance, and without any restrictions on the reasons for the flex. He did “not recall ever being ordered to flex” (which would have had implications in light of contractual overtime provisions).

Oakley also testified that since April 1999, he had been able to leave the jail for lunch, which he took when and where he wanted. He testified that, with his pager and cell phone, “there were no problems expressed because I was always able to be reached.” He added that there were times when he was indeed contacted that way, and performed timely supervisory duties.

Oakley also testified that when he posted for the position “there was nothing in the description about floor duties,” and that it was indeed an administrative/supervisory position, which is why he had his own office inside the jail.

This all changed upon the election of a new Sheriff, Gary Vogel. On his second day in office, January 8 2003, Vogel informed Oakley that he no longer had the freedom to flex his hours and take lunch off-site, and that his job would be changed to include routine assignment working the jail floor.

Since then, Oakley testified, there have been instances where he was paid overtime for working hours which would have been at straight time when he could flex his hours.

Former Sheriff Charles Brann served 18 years as a patrol deputy and road sergeant before he began his 14-year tenure in 1989. He testified that he was aware that the Jail Sergeant was allowed to leave for lunch, and said that there were “no problems with that.” He agreed with Oakley that the Jail Sergeant was allowed to flex his hours “on his own authority,” again without any problems, and that the position was “very much considered an administrative job (that) did not regularly take floor shifts.” Brann was not present for Oakley’s civil service interview. Brann said that he “consented to” the flex hours and off-site lunch, “but if I thought I needed to, I would have done things differently.” He said that with the subsequent creation of the Jail Lieutenant position, “reliance on the sergeant as an administrative position has probably lessened.”

Gary Vogel, who also had long experience in subordinate positions ( nine months as a jailer/dispatcher, nine years as a patrol deputy, nine years as road sergeant, three years as investigative sergeant) was elected Sheriff in 2002. Assuming office on January 7 2003, on January 8 he informed Oakley that henceforth he would be working a set shift of 8-4, and would not be able to leave the jail for lunch. "It was very difficult to know when he was in, when he was not in," he testified. "I saw a way to manage better, through a more structured approach." Vogel said it was "disruptive to not know when an employee is out of the building," and was the case when Oakley took an off-site lunch at an irregular time." As to the position's duties, Vogel said "some job assignments have changed somewhat," but that Oakley has been required to work the jail floor only "very sporadically."

Vogel said he did not discuss the changes with Oakley prospectively, but rather just announced the new regimen and ordered him to comply. He said that on "a limited basis," he had ordered Oakley to work a full shift on the floor, especially to avoid overtime.

Chief Deputy Gary Behling, a full-time unit employee since 1984 and upper management since 1999, corroborated Oakley's testimony as to the history of the Jail Sergeant's position and the change implemented by Vogel. He added that while he hadn't perceived the old way of flex hours and off-site lunch for the Jail Sergeant as a problem, he thought the changes had improved the functioning of the jail.

Subsequent to the changes Vogel unilaterally implemented in January 2003 regarding the flex hours, off-site lunch, and general duties, the county board on September 30, 2003 created a new position of Jail Lieutenant, to be filled in 2004, with the following position description:

**JAIL LIEUTENANT  
DOOR COUNTY SHERIFF'S DEPARTMENT**

**GENERAL SUMMARY OF POSITION:**

The Jail Lieutenant is responsible to plan, organize, implement, operations and programs in the Door County Jail. The Jail Lieutenant shall assign and direct subordinates, ensuring all policies, rules, regulations, orders, procedures and directives are enforced and implemented. The Jail Lieutenant shall make independent decisions or recommendations in the hiring, promotion, transfer, discipline or discharge of department employees in accordance with Door County Sheriff's Department Policies and Procedures and State of Wisconsin laws, rules and regulations pertaining to jail operations. The Jail Lieutenant is directly accountable to the Sheriff and Chief Deputy for the implementation of all the Sheriff's orders and direction concerning the operation of the jail.

**ESSENTIAL DUTIES AND RESPONSIBILITIES:**

1. Provides supervision and interpretation of procedures to subordinate jail staff. Develop, implement and monitor policies and procedures for jail operations and insure that these are readily available to employees in the jail.
2. Manage and counsel jail staff as required. Develop job descriptions, employee objectives, and perform supervisory employee performance evaluations. Relieve from duty any employee considered incapable of performing required job duties.
3. Meet with the Sheriff, Chief Deputy and other management staff to discuss policies, procedures, and programs that affect the operation of the jail. Participate as needed to assist with department-wide planning and program development. Attend meetings as required to represent the jail, as requested by the Sheriff or Chief Deputy.
4. Receive the complains and notification of the grievances of employees, and use independent judgement in making recommendations to the Sheriff to effective adjust the complaints and grievances.
5. Prepare the jail budget, monitor the budget and prepare reports and analysis as required. Responsible for fiscal status of jail operations, this includes: managing accounts receivable; managing accounts payable; and supervising jail support staff.
6. Research, plan, organize and conduct division training as required. Responsible for training of jail employees in compliance with the State's certification program. Attend training programs as required to keep current on issues affecting jail operations. Administer jail in-service training program.
7. Utilize a wide variety of specialized computer systems to prepare data for program evaluation requirements. Utilize this information and data to plan, organize and implement program changes in the jail as required.
8. Manage required programs related to the housing, booking and releasing of inmates. This management ensures that: inmates are informed of jail rules; proper inmate release dates are accomplished; inmates are

properly qualified, prior to release on the Huber law program; the correctional facility maintains fire and safety codes as required; and jail responsibilities related to the transportation of inmates are accomplished.

9. Communicate with a variety of agencies and administrators regarding the jail's division operations. These communications include: District Attorney's Office, Public Defender's Office, State Department of Corrections, United States Bureau of Prisons, members of the clergy, and medical professionals.
10. Manage all aspects of contracted services in the division. These contracts include: inmate housing (state and federal); inmate food service; inmate concessionary service; inmate health service; and alcohol and drug abuse screening service.
11. Ensure that all inmate complaints are investigated. Manage all aspects of inmate disciplinary program and proceedings, provide due process as required by law.

**KNOWLEDGE, SKILLS, ABILITIES, EDUCATION AND EXPERIENCE  
REQUIRED:**

1. Must be knowledgeable of computer hardware, software and accessories as well as Wisconsin State Statutes and rules and regulations regarding housing of prisoners. Must be knowledgeable about safety issues and proper safety procedures and be flexible and adaptable to change. Must be able to keep accurate records and make detailed reports.
2. Associate degree in Police Science with five (5) years law enforcement experience or an equivalent combination of education and experience which provides the necessary knowledge, skills and abilities for the position of Lieutenant. Supervisory experience desirable. Certification in accordance with state law enforcement standards.
3. Must possess above average oral and written communications skills.
4. Good basic mathematical skills.

5. Must have the ability to evaluate situations, based on training and experience, and make good decisions based on practices, rules and procedures.

**PHYSICAL REQUIREMENTS:**

Over 75% of time worked requires the following:

- \* Sitting at desk or work station
- \* Bending/twisting at desk or work station
- \* Reaching for telephone, paper, manuals, etc. at desk or work station
- \* Hearing, listening on the telephone, to other employees, and the public.
- \* Near Vision performing work at desk or work station

Medium fingering used when typing, writing, moving sheets of paper.

Approximately 25% of time worked requires talking to other employees and the general public.

Approximately 20% of time worked requires the following: Standing, walking, climbing stairs, using far vision, performing low lifting and carrying (10 lbs. or less), and low fingering, turning equipment on and off, light switches, etc; low to medium handling.

The following are required in unusual situations: Stooping; kneeling; crouching; lifting 50-80 lbs; carrying up to 40 lbs; pushing up to 10 lbs; low fingering in handling money.

**WORKING CONDITIONS:**

Normal office working environment with little or no discomfort from temperature, dust, noise, fumes, odors, poor ventilation, wetness or the like. Hazards include being in the near proximity to the jail, which creates a limited potential for engaging hostile and aggressive inmates. In addition, in unusual situations, may be exposed to mechanical and electrical hazards. Interruptions to daily work schedule are caused by telephone calls and inquires of department personnel.

**EQUIPMENT OPERATED:**

Typewriter; computer keyboard, terminal and printer; calculator; copy machine; and fax machine.

**DISCLAIMER**

“The above statements are intended to describe the general nature and level of work being performed by people assigned to this job. They are not intended to be an exhaustive list of specific responsibilities, duties, and skills required of personnel so classified.”

**POSITIONS OF THE PARTIES**

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

The County violated the collective bargaining agreement by unilaterally abolishing the jail sergeant's off-site lunch period, which had been established by a valid past practice which is supported by undisputed facts. It is unequivocal that the grievant and his predecessors had been able to take their half-hour lunch off-site, that the grievant regularly did so with the knowledge of both the former and current sheriff. The practice was also readily ascertainable over a reasonable period of time, accepted by both parties since before 1989.

The insertion of the reference to “lunch breaks” in the maintenance of benefits section of the agreement (sec. 22.01) shows the County agreed to keep just such a benefit as this unless negotiated to the contrary.

It may be true that the grievant is getting paid for time when he's not working, but this benefit has been a long-standing past practice and as such cannot be unilaterally altered by either party. It is especially wrong to alter this practice when the collective bargaining agreement holds a specific provision supporting the lunch period benefit.

The County also violated the agreement by unilaterally changing the hours of work, which a 15-year past practice had established was flexible at the jail sergeant's discretion. Again, this has been of great benefit to the incumbent.

Flex time has also benefited the County, as the grievant could use it to attend training or other county business without incurring overtime, and to supervise all shifts within the jail. Again, unrefuted testimony established flex time was clearly enunciated and acted upon by all parties. There was no change in circumstances to justify the elimination of flex time, or example of problems cited. Moreover, hours of employment is a mandatory subject of bargaining; the County should have sought these changes at the bargaining table not by a unilateral change.

The County also violated the collective bargaining agreement by changing the job duties of the jail sergeant-administrator. There is an established past practice of the Jail Sergeant-Administrator being able to leave the facility for lunch, as well as a 15-year past practice, unequivocal and open, allowing the JSA to set flexible hours., and that this practice was of great benefit to the employee.

In support of its position that the grievance should be dismissed, the County asserts and avers that its inherent management rights, plus the Sheriff's constitutional authority, authorized the changes, if any, in the Jail Sergeants-Administrator's hours and assignments.

The County created the new position of Jail Lieutenant, assigned by the Sheriff to assume some of the Sergeant's so-called administrative duties. Working the jail floor has now become a basic reason for the existence of the position at all. In the exercise of its inherent management rights an employer must act reasonably, and not capriciously or in bad faith. The record here satisfies that standard.

The collective bargaining agreement sets no restrictions on the County's right to set the sergeant's hours, and setting a standardized daily shift is a reasonable and appropriate exercise of its discretion and judgment. The collective bargaining agreement does not give the Association the right to restrict the County's inherent management rights, and preventing these so-called changes would seriously impair the county's ability, and impermissibly interfere with its right, to assign and direct the workforce.

Further, the actions the Association challenges fall squarely within the Sheriff's constitutional and statutory authority.

Any claim the Association makes about purported past practice should be discounted, because the Sheriff's exercise of discretion in *allowing* the activities are different from the Sheriff *acceding* to a custom or past practice. That a former sheriff chose to exercise his authority to allow the sergeant to leave the jail during lunch does not prevent future sheriffs from exercising their authority in a different manner.

Finally, it is not fair to the other employees to allow the Jail Sergeant to leave the facility for a non-working meal period. If the sergeant wants to leave the facility and not perform any duties, the period should not be counted as time worked.

In reply, the Association posits further as follows:

The County errs in stating the sergeant is only being "occasionally" assigned to work the jail floor, which duties have in fact been made regular and recurring.

The County also errs in asserting that the Association has the burden of proof. In fact, the award should be based on the facts without any expressed burden.

The County's argument that there are no expressed or implied restrictions on management rights in the collective bargaining agreement is patently untrue. One particular limitation in sec. 26.01, which provides that lunch breaks, among other benefits, will be maintained in substantially the same manner. Other management rights are limited by past practice, such as have been shown here.

The County offers no evidence in support of its claim that the position's job description has not been negotiated, and such mere assertions should be given no weight. The County also offers no authority for its assertion that it has the authority to make unilateral changes in the detailed job description.

It is unfair to the employee who has posted into the position to allow the County to change his job description. The job duties should remain the same until a change is negotiated, or at least until the position is next posted.

The County's argument that it can change the Sergeant's position just because it created a new lieutenantancy cannot be upheld; otherwise, the County could just create "new positions" all of the time to get around any collective bargaining agreement provisions.

The County is incorrect in claiming the collective bargaining agreement does not restrict its right to set starting and stopping times, because the issue is more than the hours of work. The real issue is the County unilaterally changing the hours by not allowing the sergeant to flex his hours as is the past practice. As an established past practice, the flexing of hours is part of the collective bargaining agreement, and as such would be a mandatory subject of bargaining. A change in hours or conditions of employment has to be bargaining before implementation.

Granting the relief sought does not add to the agreement, but rather only maintains the *status quo* until a change is negotiated and thus does not interfere with any of the county's rights.

It is also simply not the case that the grievance involves matters constitutionally or statutorily reserved to the sheriff. None of the matters involved in this grievance are what gave the office "character and distinction" at common law, but concern instead administrative and executive duties of the sheriff. As such, they can be regulated by statute or collective bargaining agreement.

The past practice of off-site lunch break and flexible hours is very clear, and the County makes a two-faced argument in its denial. The evidence established a 15-year practice of the Jail Sergeant-Administrator being allowed an off-site lunch break; that Sgt. Oakly may not have exercised that option every day does not negate the practice.

Contrary to the County, the issue is the Jail Sergeant-- the maintenance of his off-site meal period pursuant to sec. 22.01 and the continuation of his right to flex his hours pursuant to past practice.

The County failed to show how the established practices disrupted its operations or created problems, and should not be allowed to benefit by modifying the agreement through unilateral changes to mandatory subjects of bargaining.

In its response, the County posits further as follows:

Because the collective bargaining agreement is silent on the issues at hand, whether or not there is a binding past practice is critically important. The Association's argument is eloquence without justification, and should not prevail.

The Association is simply wrong in its characterization of the facts, especially as to the understandings and actions of Sheriffs Brann and Vogel. In advancing its case, the Association takes an unwarranted leap of logic, fails to recognize the asserted practice existed because the Sheriff allowed, and can be changed by his successor(s).

The Association's complaint about the change in duties fails. Not only due to the county's inherent right to assign and direct, which it exercised reasonably, but also due to the change in circumstances.

Seeking to avoid or confuse the issue, the Association wrongfully ignores the county's arguments about management rights and the sheriff's authority. The issue to be considered is not whether the collective bargaining agreement *permits* management's action; it is whether the agreement *prohibits* the action.

The Association cavalierly brushes aside the fact that the jail sergeant was the only position within the jail working 7.5 hours and being paid for 8. The incumbent jail sergeant should consider himself lucky to have had the benefits he enjoyed due to former Brann's exercise of discretion, rather than unhappily bemoaning his fate. There is nothing unfair about treating this employee the same as the others; fundamental fairness argues strongly against continuing the asserted practices.

The Association's remedies are also improper. Its call for a cease and desist order belongs in a different forum. And its suggestion that the grievant be paid overtime for each day he ate lunch in the jail strains the Wisdom of Solomon, if not credulity. Nor is reimbursement of hours related to his loss of flex time justified, as there is absolutely no record evidence to support either the assertion or the requested remedy.

### DISCUSSION

This grievance concerns three changes Sheriff Gary Vogel ordered in Sgt. William Oakley's hours of work and conditions of employment – eliminating his ability to take lunch off-site, eliminating his ability to “flex” his hours, and directing him to provide security services within the jail (“working the jail floor.”) The Association asserts all three changes violated past practice and the maintenance of benefits clause of the collective bargaining agreement, while the County contends all were authorized by the Sheriff's management rights, both inherent and contractual pursuant to Article 26.

There is one critical element of the County's argument that is not part of my analysis – consideration of the constitutional nature of the Sheriff's position and powers. My sole role and responsibility is to determine whether the county's conduct violated the collective bargaining agreement and/or, if applicable, past practice. I leave to other, more appropriate and more qualified forums, questions of constitutional prerogative.

The standard to establish a past practice has been well-settled for half a century; in its most famous articulation, to become binding on both parties, a practice must be “unequivocal; clearly enunciated and acted upon; readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties.” *CELANESE CORP. OF AM.*, 24 LA 168, 172 (Justin, 1954). Or as the U.S. Supreme Court held in a seminal case, a practice “must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. (I)t must be accepted in the sense of being regarded by those involved as the normal and proper response to the underlying circumstances presented. *UNITED STEELWORKERS OF AMERICA V. WARRIOR & GULF NAVIGATION CO.*, 363 U.S. 574, 581-581 (1960).

The testimony herein leaves little doubt about the existence of the practices which the Association claims. Not only did the grievant testify convincingly, and without effective rebuttal, about the practices, but both the incumbent Chief Deputy and the former Sheriff corroborated his testimony.

But whether those practices were immune to challenge and beyond change, however, is a separate question from whether or not they existed.

At the time the parties negotiated their 2002-2004 collective bargaining agreement, they mutually understood that the Jail Sergeant-Administrator had the freedom to take his 30-minute paid lunch period at a time and place of his choosing. That agreement, as did the prior agreement, established that county “agrees to maintain in substantially the same manner such present benefits not specifically referred to in this Agreement,” including “coffee and lunch breaks ....”

The specific provisions of section 22.01, explicitly maintaining the benefits of “coffee and lunch breaks,” supersedes the general management rights enumerated in Section 26.01. The County does not rebut the Association's emphasis on the importance of Section 22.01; rather, it doesn't even acknowledge the existence of this section, either in its brief or its reply. But you cannot negate a provision of the collective bargaining agreement simply by ignoring it. Accordingly, Sheriff Vogel could not summarily and unilaterally change the administration of the lunch break and abrogate the benefit the Jail Sergeant enjoyed.

There are, however, no such specific provisions maintaining Oakley's general hours of duty and assignment. Section 22.01 is specific about its list of benefits, limiting its coverage by its express terms to the enumerated items (e.g., coffee and lunch breaks, riot gear, weapons, lodging and meals, etc.) The list of benefits to be maintained does not include hours of work and assignments.

There is a doctrine in contractual interpretation that the inclusion of certain items in a list implies the exclusion of items not so listed. I generally subscribe to that doctrine. The fact that 12 items are enumerated in the maintenance of benefits clause (down to the level of badges and brief cases), but that hours of work and assignments are not, establishes that hours and assignments are not within the protection of section 22.01.

Hours of work and assignments are, however, listed specifically in section 26.01, which details what aspects are within the county's management rights. Pursuant to that provision, the county has the "sole right" to operate County government, with the "business and direction" of the Sheriff's Department being "vested exclusively" in the County and the Sheriff, including the right "to schedule the hours of work and assignment of duties in a manner not inconsistent" with the terms of the collective bargaining agreement.

Past practice may be relied upon to clarify ambiguous contract terms, or to provide guidance where the agreement is silent; past practice is not to be relied upon to contravene the agreement's specific terms to the contrary. Moreover, it is widely held that management has "wide authority ... to control methods of operation and to direct the workforce, including the right without penalty to make changes if these do not violate some right of the employees granted by the written contract," including "changing work schedules (and) reassigning work...." Elkouri and Elkouri, *How Arbitration Works*, 6<sup>th</sup> Ed. (BNA Books, 2003), p. 614. For example, in *ALBEMARLE CORP.*, 115 LA 1601 (Goodman, 2001), the arbitrator found that there was a past practice regarding the determination of work schedules, but that a broad (albeit brief) management rights provision in the collective bargaining agreement allowed the company to impose a 12-hour day on employees who preferred to retain their 8-hour shifts.

The specific terms of the agreement grant to the County and Sheriff the exclusive right to set the hours and assignment of the Jail Sergeant-Administrator. In light of those specific terms, the past practice of the Jail Sergeant flexing his hours and doing purely administrative/supervisory work cannot prevail.

It is understandable that Oakley feels aggrieved at the change in the nature and conditions of his job. Given his unhappiness at his new hours and duties, he may regret he took the posting, and wish to request that he be allowed to return to his former position as patrol deputy. However, it is beyond my authority to order the County to offer such an option.

There are two elements of the remedy that require comment. The first is the Association's request that I direct the County to post a document stating that it has violated the collective bargaining agreement, and that it is taken appropriate remedial steps. Such an order is appropriate in a complaint proceeding, but is not the norm in a grievance arbitration.

The second is the Association's request that Oakley be paid 30 minutes overtime for each work day that he was "ordered to stay in the building and have a working lunch." The County dismisses this request as unwarranted.

Given the grievant's testimony that he was both available and called upon for supervisory services even when taking lunch off-site prior to January 2003, and the absence of evidence as to his regular and recurring duties, if any, during lunch since then, I agree with the County that 30 minutes overtime pay for each lunch period since January 8 2003 is not supported by the record or the collective bargaining agreement.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

**AWARD**

1. That the aspect of the grievance regarding the change in the Jail Sergeant-Administrator's lunch break is sustained;
2. That the aspects of the grievance regarding the change in the Jail Sergeant-Administrator's hours of work and assignment are denied;
3. That as remedy, the Sheriff shall restore the Jail Sergeant-Administrator's lunch break to the way it was handled as of January 6, 2003.

Dated at Madison, Wisconsin, this 26th day of August, 2004.

Stuart D. Levitan /s/

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Stuart D. Levitan, Arbitrator

SDL/gjc  
6714

