

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
LOCAL 986-B, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

MANITOWOC COUNTY (SHERIFF'S DEPARTMENT)

Case 388
No. 62536
MA-12327

(Chris Corbett Shift Displacement Grievance)

Appearances:

Mr. Neil Rainford, Staff Representative, AFSCME Council 40, 1311 Michigan Avenue, Manitowoc, WI 54220, appearing on behalf of the Union.

Mr. Steven J. Rollins, Corporation Counsel, Manitowoc County, 1010 South 8th Street, Manitowoc, WI 54220, appearing on behalf of the County.

ARBITRATION AWARD

Manitowoc County (hereinafter referred to as the County or the Employer) and Local 986-B, AFSCME, AFL-CIO, (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen as arbitrator of a dispute over the County's decision to deny Chris Corbett her shift preference in order to maintain gender balance on a shift in the County Jail. The undersigned was so designated. A hearing was held on September 30, 2003, in Manitowoc, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. A stenographic record was made of the hearing. The parties submitted post hearing briefs and reply briefs, the last of which were simultaneously exchanged through the undersigned on March 5, 2004, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the relevant provisions of the contract and the record as a whole, the Arbitrator makes the following Award.

ISSUE

The parties stipulated that the following issue should be determined herein:

Did the Employer violate the collective bargaining agreement when it denied the Grievant, Chris Corbett, her annual shift preference assignment?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 2 - SENIORITY

- A. Seniority: It shall be the policy of the Sheriff's Department to recognize seniority.
- B. Definition: Seniority shall be defined for the purpose of this Agreement as the net credited service of the employee. . . .

ARTICLE 3 - MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

Manitowoc County shall have the sole right to contract for any work it chooses and to direct its employees to perform such work wherever located subject only to the restrictions imposed by this Agreement and the Wisconsin Statutes. In the event the Employer desires to subcontract any work which will result in the layoff of any County employees, said matter shall first be reviewed with the Union.

Unless otherwise herein provided, the Employer shall have the right to determine the specific hours of employment and length of work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of its department. The Employer may adopt reasonable work rules except as otherwise provided in this Agreement.

The Employer agrees that all amenities and practices in effect for a minimum period of twelve (12) months or more, but not specifically referred to in this Agreement shall continue for the duration of this Agreement. . . .

ARTICLE 26 HOURS OF WORK

- A. Jail Personnel: Corrections Officers shall work a six-three (6-3) work cycle, that is, the work day shall be eight (8) consecutive hours. The work shifts shall be as follows:

8:00 a.m. – 4:00 p.m. 4:00 p.m. – 12:00 midnight 12:00 midnight – 8:00 a.m.

. . .

- F. Selection of Shifts: Employees preferring a change in shift assignment may do so under the following rule:

1. The request shall be in writing;
2. Request must be made prior to December 2nd of each year;
3. Shift preferential status to be reviewed annually;
4. Assignment of shifts shall be based on the following:
 - a. Employees with less than one (1) year of seniority at the time of request can be assigned at the discretion of the employer.
 - b. Newly hired and employees moving to a new classification can be assigned for up to ninety (90) days for training purposes at the discretion of the employer.
 - c. Employees may be reassigned to shifts other than the shift assigned annually if a sickness or disability occurs for a period of fourteen (14) days or more.
 - d. Corrections Officers may be reassigned to shifts other than the shift assigned annually if required due to statutory restrictions on the ability of male corrections officers to work female inmates and vice versa.
 - e. In the event that shift assignments are made that displace employees from their selected annual shift, the employee who is assigned to a

different shift shall be the least senior on the shift provided they have at least one (1) year experience with the Manitowoc County Sheriff's Department.

5. Annual shift assignments other than the exceptions denoted in 4a-e above, shall be determined on the basis of seniority within classifications. The employee shall be entitled to exercise their seniority whenever a shift vacancy occurs.

. . .

BACKGROUND

There is relatively little dispute over the facts giving rise to this grievance. The County is a municipal employer providing general governmental services to the people of Manitowoc County in eastern Wisconsin. Among the services provided is police protection and the operation of a county jail through the Manitowoc County Sheriff's Department. Corrections Officers in the Jail are represented by AFSCME. The Sergeants in the Jail are not part of any bargaining unit. The Grievant, Christine Corbett, is a Corrections Officer with 10 years of service to the County.

Corrections Officers are assigned to one of three shifts, and work a six on, three off schedule, with three rotations of staff on each shift. As the jail houses both male and female prisoners, the County maintains a fixed staffing ratio of three men to two women on each shift rotation. Normal staffing for a shift is six men and four women, including sergeants. Two officers are assigned to work the 2nd floor, which is a mix of minimum security male prisoners, maximum security female prisoners, and Huber prisoners of both genders. Two officers are assigned to the 3rd floor, which is all male and has a medium security side and a maximum security side. Two officers are assigned to juvenile detention. The juvenile officers must be one man and one woman for the entire shift. The other four officers float through the facility during the shift.

At the end of 2001, the Grievant bid into the first shift. She worked the shift all year, and bid for it again when the annual shift preferences were done at the end of the year. At about that time, Sergeant Michael Herman, the supervisor on her shift, left the Jail to become a road deputy. Herman was replaced by Sergeant Kelli Tice, who had bid into Herman's sergeant slot on the first shift from her slot on the third shift. As Tice counted towards the three to two male/female ratio, the County judged that there was one less slot for a female Corrections Officer on the first shift. The Grievant was the least senior female officer bidding on the shift, and the County denied her shift preference and assigned her to the second shift. The instant grievance was thereafter filed.

Additional facts, as necessary, will be set forth below.

POSITIONS OF THE PARTIES

The Position of the Union

The Union takes the position that the County violated the contract. The contract is clear and unambiguous in providing that shift preferences are to be honored according to seniority, with four narrow exceptions –employees with less than one year of service, employees who are new to the classification, employees who must be reassigned due to an extended illness, and employees who must be reassigned to meet statutory requirements on the availability of female and male personnel to deal with female and male prisoners. None of these apply to Corbett. It is clear that the only reason Corbett was moved was to accommodate the shift preference of Sergeant Tice.

Nothing in the contract allows the County to undermine the seniority of the Corrections Officers in order to satisfy the desires of unrepresented employees. If the County wants this right, it must bargain it, and it has not done so. By contrast, the County has in the past negotiated a preference for management employees in making vacation picks. Clearly, the County understands that its staffing decisions on the management side are intertwined with the operation of the collective bargaining agreement, and recognizes that it must bargain the balance between the two groups with the Union. Its failure to do so in the area of shift selection means that the plain language of the AFSCME contract governs.

The Union argues that the County's reliance on the male/female ratio exception in Article 26 is misplaced. It is the County itself that created the problem with the ratio by moving Sergeant Tice, and its only reason for doing that was its desire to give seniority based shift preference to the unrepresented sergeants. The County's desire to extend benefits of this type to its supervisors is its own business, but it has a binding contract with the Union and the obligations it has under that document must trump any unilaterally extended benefit for the supervisors.

Even if the County could make out a case for reassigning the Grievant in order to maintain the 3/2 gender ratio on the first shift, the County ignores the fact that such reassignments are only temporary. The wording of the exception makes it clear that the permanent shift assignment is that determined by seniority, and that moves made to accommodate the gender ratio are intended to be temporary: "Corrections Officers may be reassigned to shifts *other than the shift assigned annually* if required due to statutory restrictions on the ability of male corrections officers to work female inmates and vice versa."

The Union notes that the 3/2 ratio of males and females is entirely a creation of management, and is not required by statutes. Certainly, the County has an obligation to have a sufficient number of males and female officers on hand to deal with the mix of prisoners in the

jail. However, there is no evidence that a hard and fast 3/2 ratio is necessary or that the operations of the County would be in any way impaired if the ratio on a given shift was 70-30 or 50-50. Indeed, County work rules do not require a 3/2 ratio. They merely call for a minimum of two males and two females in the jail on each shift, potentially an 80/20 or 20/80 ratio. Clearly, the County could have kept the Grievant on the first shift even if it wished to also assign Tice to that shift, and would not have impaired its ability to run the jail efficiently.

The contract is clear that seniority is the basis for shift selection among Corrections Officers. The Grievant had the seniority necessary to hold on to her first shift assignment. She was moved to allow Sergeant Tice a place on first shift, but Sergeants have no rights under the contract, and there is no specific exception to the seniority provision for supervisors' preferences to trump the rights of bargaining unit employees. There is an exception allowing for temporary reassignments of Corrections Officers if required by the statutes, but there is no evidence that having Tice and Corbett on the same shift would have run afoul of the statutes. The County's own unilaterally created 3/2 ratio was the only factor prompting this reassignment, and there is nothing to suggest that maintaining that precise ratio is necessary to the operations of the Department. For all of these reasons, the Arbitrator should sustain the grievance and direct the County to place the Grievant on the first shift and make her whole for her losses.

The Position of the County

The County takes the position that it has fully complied with the contract, and the grievance should therefore be denied. The contract requires the County to make shifts available for seniority based bids on an annual basis. At the end of 2002, it did so. There was one fewer spot for a female on the first shift because the male sergeant had left and been replaced by a female sergeant. The available spots were put out for bids, and the senior employees were awarded the available spots. The Grievant did not have sufficient seniority to get a spot on the first shift, and she was awarded her second preference. That is what the contract requires and thus there can be no violation.

The Union's arguments in this case are aimed at dictating the assignment of supervisors and the ratio of male to female personnel on each shift. In order for the Grievant to remain on first shift, the Employer must discriminate against all female sergeants by prohibiting them from working the first shift. This is an untenable position. Management has reserved the right to supervise the workforce, as well as the rights to manage and direct the workforce, to transfer employees and take those actions necessary to provide for the effective operations of the Department. It cannot be required to give up those rights in order to make the Grievant happy. Neither can it be required to incur additional costs, or assign administrative personnel to the Jail, or any of the other suggestions the Union made in the course of the hearing. Certainly, the Employer could contort itself in order to have the Grievant work the first shift. However, it is not required to do so. All that is required is that available positions be open for

seniority bid. They were. The Grievant did not have the seniority to get her first preference, but that is a result that is directly contemplated by the contract. For these reasons, the grievance must be denied.

DISCUSSION

There are two issues in this case. The first is whether the County's decision that a 3 males to 2 females staffing ratio should be maintained on each shift is consistent with the terms of the collective bargaining agreement. The second issue is whether the County's decision to assign Sergeant Tice to the first shift, and thereby reduce the number of available positions for females, violated the Grievant's seniority rights.

A. The Consideration of a 3:2 Gender Ratio

The collective bargaining agreement calls for an annual posting for shift assignments, and requires that these be accomplished by seniority within classification, with certain exceptions. One of those exceptions recognizes that gender is a factor in shift staffing:

Corrections Officers may be reassigned to shifts other than the shift assigned annually if required due to statutory restrictions on the ability of male corrections officers to work female inmates and vice versa.

The Union argues that this exception does not apply to annual shift selection, but only to temporary realignment of shifts in the course of the year. The County does not directly address this point, other than to say that the word "temporary" does not appear, and that any such realignment may in fact last for the balance of the year until the next shift selection period. The question of what the permissible duration of a mid-year realignment may be is not really presented in this grievance, and I decline to offer any opinion on that issue.

The cited exception is relevant in that it strongly suggests that the male-female ratio is a permissible factor in the annual selection process. Rather plainly, the gender balance required in a mixed population jail must be weighed in determining what positions are available on each shift for employees to post into. Otherwise the annual seniority selection process would always be subject to immediate revision to achieve the necessary balance, unless by pure chance the preferences of the workers and their levels of seniority generated the desired gender ratio. That is not the shift selection process described in the record of this hearing, and would not be a rational process for the parties to have designed. From the employees' point of view, it would significantly undermine seniority rights, since it would potentially allow a relatively senior employee to bid into a shift, then immediately be displaced after the seniority based bidding is complete. From the County's point of view, failure to consider gender balance in

the posting of shift vacancies would not reflect the actual staffing needs of the jail, and would require the County to engage in a seniority bidding process which would be largely academic.

The fact that gender balance on each shift may be considered does not automatically mean that the 3 to 2 staffing ratio per shift is valid. The Union points out that the statutes do not dictate such a ratio and that a minimum of two men and two women per shift would satisfy the law. The Union also argues that with absences and off days, an actual 3 males to 2 females ratio is more the exception than the rule. Both of these points are true, as far as they go. However, assuming that the Union is correct that the reference to “statutory restrictions on the ability of male corrections officers to work female inmates and vice versa” applies only to mid-year shift realignments, there is no specific contract provision that prevents the County from determining that the desirable male to female staff ratio in this mixed population facility should exceed the absolute minimum allowed by the statutes. The County has retained the general rights of management, and these would customarily be understood to include determining the size and composition of the work force. Clearly such a right could not be exercised arbitrarily or as a subterfuge for undermining the other provisions of the collective bargaining agreement, but beyond that there is little in the contract to limit the County’s discretion to decide that a 3 to 2 ratio is the most desirable means of insuring a proper gender balance in the jail. The 3 to 2 staffing ratio is not an arbitrary goal – it generally approximates the population of the jail and insures that that day to day absences will not result in too few female staffers being on hand to satisfy the statutory requirements. Moreover, the 3 to 2 ratio is not something that was put in place to frustrate the Grievant – that is the ratio that has been used for some time in the jail.

The Union is correct that the 3 to 2 ratio is not absolutely required by the statutes, and that the County actually operates with a varying ratio of men to women depending upon leave usage and the like. Both of these facts are beside the point. The County has the right under the contract to manage the work force, and this includes the right to determine the staffing ratio. There is no evidence that its decision is arbitrary or contrary to any other specific provision of the contract. The setting of the ratio has an impact on what positions are available on each shift, and thus limits the full exercise of seniority rights. So too does the decision that ten employees per shift, rather than eleven or twelve, are all that is required to operate the jail. The fact that a basic management decision may impair the range of choices available to senior employees does not mean that management has no right to make such decisions.

B. The Assignment of Tice

The central complaint of the Grievant is that the Department gives sergeants the right to express a preference for shifts, counts the sergeants toward the 3 to 2 ratio, then posts available male and female positions to the bargaining unit. Thus, the replacement of a male sergeant with Tice on the first shift caused an extra male position to be opened to the bargaining unit when the annual shift selection was conducted, but reduced the number of

female positions by one, resulting in the Grievant's displacement. The Union argues that the seniority based posting system guaranteed to unit members by the contract cannot be subverted by giving sergeants preferential treatment in shift selection.

The Union's position is premised on the notion that the County is obligated to assign sergeants in such a way as to maximize the exercise of seniority rights in the bargaining unit. Aside from the mere assertion, there is little to suggest that this is correct. Shift selection is by seniority within classification: "Annual shift assignments other than the exceptions denoted in 4a-e above, shall be determined on the basis of seniority within classifications." The County has unquestionably followed this provision, within the confines of what openings it determined were available within the Corrections Officer classification. The Union's theory would effectively extend the reach of this provision to dictating how the assignments within the sergeant's classification are made. A collective bargaining agreement cannot be read to interfere with the Employer's fundamental right to select and assign supervisors unless there is very specific language to that effect.

The Union suggests that such language is implied in this agreement, since there was at one point contract language specifying that sergeants would go first in vacation selection. This, the Union argues, is an admission by both parties that the unit employees' rights under the contract trump the rights of supervisors where the two conflict, unless specific provisions are made to the contrary. That broad conclusion goes well beyond any permissible inference from the prior contract language. The record of this case shows that there was once a provision specifying the order in which sergeants and corrections officers picked vacations, with sergeants picking first. The fact that the parties, for a time, agreed on a unified system of selecting vacations by itself proves little that is relevant to this case. There is no evidence of what the intent of the parties might have been in agreeing to this provision, who proposed it or why, what system it replaced, how it was administered, why it was removed from the contract, or what system replaced it when it was removed. Such a unified system of vacation scheduling has advantages to both parties, and it is possible to speculate about any number of motives for its inclusion in the collective bargaining agreement. Whatever their motives, the language does not implicate the basic right of management to select and assign supervisors.

The Union's theory would have the shift bidding process determine the number of bargaining unit openings, male and female, on each shift, rather than having the bidding process be a means of allocating the openings the Employer believes are necessary to staff its operations. It would have the assignment of supervisors dictated by the shift preferences of the bargaining unit members. All of this is a reverse image of the customary understanding that management has the right to assign its supervisors and to determine its staffing requirements, with the labor contract then specifying how employees are chosen to fill the necessary positions. This is not an impossible result, but it is an unusual result, one which would require far more specific language than is present in this collective bargaining agreement.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Employer did not violate the collective bargaining agreement when it denied the Grievant, Chris Corbett, her annual shift preference assignment. The grievance is denied.

Dated at Racine, Wisconsin, this 14th day of September, 2004.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator