

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**LINCOLN COUNTY COURTHOUSE EMPLOYEES,
LOCAL 332-A, AFSCME, AFL-CIO**

and

LINCOLN COUNTY

Case 228
No. 63790
MA-12713

(Gary Frisch Grievance)

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, on behalf of the Union.

Mr. John Mulder, Lincoln County Administrator, 1104 East First Street, Merrill, Wisconsin 54452, on behalf of the County.

ARBITRATION AWARD

At all times pertinent hereto, the Lincoln County Courthouse Employees, Local 332-A, AFSCME, AFL-CIO (herein the Union) and Lincoln County (herein the County) were parties to a collective bargaining agreement covering the period January 1, 2002 to December 31, 2003, and providing for binding arbitration of certain disputes between the parties. On June 24, 2004, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding an alteration in the work schedule of Gary Frisch (herein the Grievant). The undersigned, a member of the Commission's staff, was appointed to arbitrate the issue. A hearing was conducted on November 3, 2004. The proceedings were not transcribed and the parties stipulated to an expedited award and waived the filing of briefs.

ISSUES

Did the County violate Article 15 of the collective bargaining agreement when it altered the work schedule of Gary Frisch in January 2004?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 The County possesses the sole right to operate County Government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to the following:

- A. To direct all operations of the County;
- . . .
- F. To maintain efficiency of department operations entrusted to it;
- . . .
- J. To manage and direct the working force, to make assignments of jobs, to determine size and composition of the work force, and to determine the work to be performed by employees;
- . . .
- L. To determine the methods, means and personnel by which operations are to be conducted.

. . .

ARTICLE 15 – WORK SCHEDULE

15.01 The normal hours of work for employees covered by this Agreement shall be up to forty (40) hours per week. The normal work schedule for certain classifications shall be:

...

E. Correctional Officers:

1. The schedule of the Correctional Officers will be as follows: 5 days on, 2 days off, 5 days on, 2 days off, 5 days on, 3 days off. By mutual agreement between the employee and the Sheriff the employee may work 10 hour days at straight time rate of pay when an employee is not scheduled to work 40 hours during that week. The 10 hour days will be used only to allow an employee to work 40 hours during that week.
2. Shifts selected by the employees will be fixed for the entire year. However, one male and one female position will be considered relief positions and these positions will change shifts in order to provide the necessary coverage as determined by the sheriff or his designee.
3. Employees with less than 18 months of service will be assigned shifts by Sheriff's Department Administration. All other employees will select remaining slots by seniority.

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BACKGROUND

In 1998, the County and the Union agreed to a 5/2, 5/2, 5/3 work schedule for correctional officers. This would occasionally result in weeks where an officer would not be scheduled for 40 hours of work and during those weeks officers were permitted to work 10 hour shifts to make up the difference. This agreement was codified in Article 15, Section 15.01, Paragraph E of the collective bargaining agreement. The language also provides that officers can make shift selections on an annual basis. The new schedule commenced with the adoption of the collective bargaining agreement and continued without interruption through 2003.

In the fall of 2003, the Department informed the correctional officers that the schedule for 2004 would be modified by starting with a 5/3 week, instead of a 5/2 week, which the ordinary schedule would have provided. This change was announced before November 1, which is when the period for making annual vacation picks commences, per Article 21,

Section 21.04 of the contract. Officer Gary Frisch grieved the change on October 20, 2003. The grievance was denied and was processed through the contractual procedure to arbitration. Additional facts will be referenced, as necessary, in the discussion section of the award.

POSITIONS OF THE PARTIES

The Union

The Union argues that for the first several years that the schedule language was in the contract there were no schedule changes and weekly schedules continued to rollover from year to year. Over time this became a recognized practice that bargaining unit members came to rely on when planning their annual vacations every year. The predictability of the schedule allowed them to anticipate their scheduled days off, as well as holidays, and allocate their vacation days accordingly. By altering the schedule, the County has deprived the employees of certainty, making it harder for them to plan vacations. Also, if the County is able to reshuffle the work schedule every year, it raises the possibility that some employees could be required to work more holidays or the same holidays from year to year, which would be inherently unfair.

The County

The County argues that, while the contract calls for a 5/2, 5/2, 5/3 schedule, it does not require that the schedule rollover from year to year. By contract the County is, therefore, within its rights to reset the schedule every year. Thus, there is no violation of the contract because the 5/2, 5/2, 5/3 rotation was maintained even though the sequence was staggered at the beginning of 2004. It should also be noted that no employee lost days off due to the change and that, because the change was announced before the period for making vacation picks began, there was no hardship on employees in planning for vacations.

The County further notes that it has the right under Article 2, Section F. to take steps to maintain the efficiency of its departments. In this case, the three regular first shift correctional officers, including the Grievant, had schedules wherein their 5/3 weeks all occurred in the same week. By altering the schedule, the County was able to stagger their rotations and thereby alleviate a staffing problem.

DISCUSSION

This grievance was originally brought by Correctional Officers Gary Frisch and Terri Pankow. Officer Pankow later withdrew as a grievant when she transferred out of the bargaining unit. Officer Frisch testified that the grievance was brought primarily due to the disruption caused by altering the rhythm of the 5/2, 5/2, 5/3 work schedule, particularly as it impacts planning for vacation and holiday work assignments. From the County's perspective,

the salient point is the need to promote efficiencies in department operations, in particular rearranging schedules of three supervisory officers whose 5/3 weeks fell at the same time. Both parties have their respective points.

From the perspective of the employees, they do not work a regular Monday-Friday schedule like most people. Thus their schedules do not follow the calendar, year in and year out, allowing them to anticipate days off and holidays when arranging vacations and the like. The 5/2, 5/2, 5/3 schedule means that every three weeks their schedules will be offset an additional day. Nevertheless, because the schedule pattern has been unaltered since its inception, the employees can, by using a calendar, plot their schedules out into the foreseeable future for planning purposes. There is a benefit of certainty to this arrangement, which is not totally answered by the County's argument that the schedule change was announced prior to the time set for vacation picks, in that employees who have long range vacation plans often beginning planning long before the picking period begins. Senior employees, who are virtually guaranteed their preferences, would benefit most from this.

On the other hand, the County's concerns cannot be ignored. It is important from an organizational standpoint to have the flexibility to schedule the workforce in a way that optimizes resources. Indeed, promotion of operational efficiency is one of the rights reserved to management under Article 2, Section F. If work schedules result in staffing problems, it seems reasonable that management would try to address them by rearranging the schedules, if it may.

The crux of the issue, it seems to me, and the difficulty for the County, is the interplay of the pertinent contractual provisions. Article 2, Section F., is controlling only to the extent to which it does not conflict with any other provision of the collective bargaining agreement. Article 15, Section 15.01, Paragraph E, Subparagraph 1., however, states: "The schedule of the Correctional Officers will be 5 days on, 2 days off, 5 days on, 2 days off, 5 days on, 3 days off." (emphasis added) It would appear to me that this declarative language supercedes the general management powers contained in Article 2. The County argues that this language does not preclude it from altering the sequence from year to year, but I disagree. If the Correctional Officers were on a regular Monday-Friday schedule, the language of Article 2 would not authorize the County to unilaterally alter the workweek to Sunday-Thursday or Tuesday-Saturday in the name of operational efficiency. It would have to bargain for such a change. These employees have no less a right, by virtue of a differently structured schedule, to expect consistency from year to year.

It is also noteworthy that Article 15, Section 15.01, Paragraph E, Subparagraph 2 states, in pertinent part: "Shifts selected by the employees will be fixed for the entire year." This reveals that when the language of the paragraph was negotiated the parties considered the implications of limiting some of the provisions in time to provide for changes from year to

year. That they did so with regard to shift selection, but did not do so with regard to work schedules permits the inference that the failure to so limit the language of Subparagraph 1 was a choice rather than an oversight.

From a remedial standpoint, Officer Frisch argued that in some way he would lose a day off in 2004 due to the schedule alteration. No direct evidence was presented on this point, however, and the County asserts to the contrary that he will receive all the days off to which he is entitled. Such a contention of pecuniary loss requires more than a bare assertion and I find that the Union has not carried its burden on this point.

For the reasons set forth, and based upon the record as a whole, I hereby enter the following

AWARD

The County violated Article 15 of the collective bargaining agreement when it altered the work schedule of Gary Frisch in January 2004. As and for a remedy, the County will cease and desist from further such unilateral alterations of the work schedule within the bargaining unit and will maintain the current rolling schedule from year to year, unless and until a different process is negotiated between the parties.^{1/}

1/ At the hearing, the parties stipulated that any award issued in favor of the Grievant would be applied uniformly throughout the bargaining unit.

The Arbitrator will retain jurisdiction of this award for a period of thirty days after issuance to resolve any issues that may arise in the implementation of the remedy.

Dated at Fond du Lac, Wisconsin, this 24th day of November, 2004.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc
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