

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KEWAUNEE COUNTY

and

**DRIVERS, WAREHOUSE & DAIRY EMPLOYEES, LOCAL 75,
AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

Case 68
No. 64355
MA-12878

Appearances:

Elma Anderson, Corporation Counsel, Kewaunee County, 620 Juneau Street, Kewaunee, Wisconsin 54216, on behalf of the County.

Jill Hartley, Attorney-at-Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of the Union.

ARBITRATION AWARD

The County and the Union are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Following a request from the Union, and the concurrence of the County, to appoint a member of its staff as impartial arbitrator to hear and decide a grievance, the Commission appointed Coleen A. Burns as Arbitrator. Hearing was held at Kewaunee, Wisconsin, on April 25, 2005. The hearing was not transcribed and the record was closed on May 26, 2005, following receipt of post-hearing written argument.

ISSUES

The parties stipulated to the following statement of the issue:

Did the County violate Article 3 (K) of the collective bargaining agreement when it refused to allow the Grievant to bid into the Huber/Transport Officer position in November, 2004?

If so, what is the remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 3: HOURS OF WORK

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K. SHIFT SELECTION

1. All shifts and slots, including the Court Security Officer, shall be open for bidding among full-time employees from November 1 to November 15 of any current year and to take effect on the following January 1st. Bidding shall be in order of seniority. From time to time, an employee may be assigned to work outside of the shift or slot for which he/she had bid, at straight time rate, as required by the sheriff or his designee.

2. When the filling of a permanent vacancy in any job description has been approved, according to the procedures outlined in the Kewaunee County Personnel Policy, full-time employees may bid, in order of seniority, for any open slot or shift at that time.

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ARTICLE 14: SENIORITY

D. JOB POSTINGS

The employer shall post any new or vacant position within the scope of the bargaining unit for a period of eight (8) calendar days. Any interested employee may apply for the position in writing to the County Administrator. At the end of the eight (8) days posting period, the applicants shall be interviewed by the County Administrator. The job shall be awarded to the senior qualified applicant except that transfers to the position of investigator shall be awarded on the basis of qualification, not seniority. An employee may move from one classification to another only if a vacancy in the classification occurs or a new position is created.

RELEVANT BACKGROUND

The Sheriff's Department consists of three divisions, *i.e.*, Jail/Dispatch, Patrol, and Investigation. The Radio Operator/Jailer, Court Security Officer, and the Huber/Transport Officer are within the Jail/Dispatch Division.

The collective bargaining agreement effective January 1, 1991 was negotiated between the County and WPPA/ LEER and included, for the first time, "K. Shift Selection." This Section K states, in relevant part, as follows:

All shifts and slots shall be open for bidding among full-time employees in December of any current year and to take effect on the following January 1st. Bidding shall be in order of seniority.

When the filling of a permanent vacancy in any job description has been approved, according to the procedures outlined under the Kewaunee County Personnel Policy, full-time employees may bid, in order of seniority, for any open slot or shift at that time. No employee shall be forced to move out of his or her current slot or shift.

. . .

On or about November 22, 1997, a grievance was filed, alleging a violation of Section K, Shift Selection. The grievance was signed by Thomas C. Vanness, as Grievant, and by a union Officer. The "Brief Description of Violation" states:

Informed by Sgt. Gulbrand on this date that we cannot choose between divisions for shift selections as we have done in the past. Second part of grievance, Slot/Shift selection for patrol division posted on bulletin board states that a First Shift Slot is unavailable until next road officer is trained.

A December 31, 1997 "Memo" from Chief Deputy Daniel F. Brusky to County Corporation Counsel Elma E. Anderson states, *inter alia*, that, on December 2, 1997, he met with Vanness and union President Gulbrand to discuss the grievance and that he denied both parts of the grievance. This statement is consistent with the December 2, 1997 Step One response that Brusky issued to Vanness, with copies to union President Gulbrand, which states:

Your grievance concerning the inability of employees to bid for slots between divisions of the department, as presented at the meeting with you and Chris A. Gulbrand this afternoon, is denied at Step one of the grievance procedure of the contract.

The "Memo" to Anderson also states:

Lt. Cmeyla and I had both previously advised Sheriff Zuege not to allow cross division bidding unless there was an open position to apply for when officers were bidding for 1998 shifts. After considering our reasons, Sheriff Zuege had decided to not allow employees to bid for slot in other divisions. In our opinions, the contract is not clear whether or not it must be allowed, and this department has done it both ways in the past. Some years cross division bidding was allowed and some years it was not. Vanness claimed that it was past practice because it had been done in the past, even though it had also not been allowed at other times. He also said that because the agreement to not allow bidding between divisions was not including when the last contract was agreed to, that means it is meant to be required.

. . .

On December 15, 1997, Brusky received a Step 2 a grievance, signed by Vanness, but not by a Union representative. This grievance described the "Issue" as:

The grievant and all other full time bargaining unit members were restricted from bidding shifts and slots between divisions within the Sheriff's Department. Previous shift bidding which took place under identical bargaining agreement language included inter-division bidding.

The "Requested Remedy" is "Re-bid all shifts and slots and allow unrestricted bidding of shifts and slots between all divisions, according to seniority."

When the County and WPPA/LEER negotiated their 1999-2000 contract, Section K was changed to state, in relevant part, as follows:

All shifts and slots, including the Court Security Officer, shall be open for bidding among full-time employees from November 1 to November 15 of any current year and to take effect on the following January 1st. Bidding shall be in order of seniority. . . .

The 2001-2003 and 2004-2006 collective bargaining agreements, negotiated between the County and Drivers, Warehouse & Dairy Employees, Local 75, Affiliated with International Brotherhood of Teamsters, do not contain any change in the Section K language.

Deputy Brian Schultz, hereafter Grievant, has been a full-time employee of the County Sheriff's Department since May of 1999; at which time he occupied the position of Radio Operator/Jailer. On or about November 19, 2001, the County posted a "Job Posting" for "Huber/Transport Officer" in the Sheriff's Department. This "Job Posting" states that "This notice is posted according to Article 14(D) of the Agreement." The "Characteristic Work of the Position", as set forth in the job description is:

Nature: Under the direction of the Jail Lieutenant, this position is responsible for the supervision of Huber Law inmates. Duties also include transportation of inmates to and from correctional facilities, courts, medical/dental appointments as well as filling in for Court Security Officer and perform Radio Operator/Jailer duties as needed.

The Grievant, a Radio Operator/Jailer, posted for and was awarded this job posting, effective January 1, 2002. As Huber/Transport Officer, the Grievant had a five day on, two day off, schedule; as did the Court Security Officer, who works Monday through Friday. The majority of the other bargaining unit employees normally worked a six day on, three day off, schedule.

In the fall of 2003, the Grievant advised Lt. Joseph Treml that he no longer wished to serve as Huber/Transport Officer and that he wanted to return to Radio Operator/Jailer. The Grievant was initially told that he could not go back because there was no Radio Operator/Jailer position. After discussions with the Sheriff, Lt. Treml posted the following:

If anyone is interested in the Huber/Transport Position for next year, please let me know. Must be certified Officer by January 1st. Try to get back to me before this Friday if possible. Any questions let me know.

Thank you.

Two Deputies expressed interest and the most senior was selected as Huber/Transport Officer. On December 15, 2003, the Sheriff issued the following "Memo:"

Subject: Schedule Change

Effective January 1, 2004, Deputy Brian Schultz will be on the 6-3 schedule working Dispatch/Jail. Also, effective this date, Deputy Christopher VanErem will be assuming the duties of the Huber/Transport Officer and will be working the 5-2 schedule.

The Grievant bid into a second shift Radio Operator/Jailer position for 2004.

Within the Jail Division, the bid sheet lists three shifts, *i.e.*, 1st, 2nd and 3rd, and within each shift are the lines which are open for bid. Each line identifies a sequence of days on and off within the 6-3 rotation. At the bottom of the bid sheet are the work schedules of the Huber/Transport and Court Security Officers.

In November of 2004, the Grievant advised Lt. Treml that the Grievant wished to return to Huber/Transport via the November shift bid. Lt. Treml responded that there was no vacancy in the Huber/Transport position and, therefore, the Grievant could not bid into the position.

On or about November 18, 2004, a grievance was filed, alleging that the County had violated Article 3 (K)1 by denying the Grievant the opportunity "to bid for slot in the jail division during annual bidding from November 1st to the 15th. This is for Huber/Transport position." By letter dated December 14, 2004, Kewaunee County Administrator Edward J. Dorner provided the County's Step 2 response, which included the following:

Having met in Step 2 of the Grievance Procedure to discuss the above grievance, Kewaunee County hereby denies the grievance.

The contract language for bidding refers to "slots and shifts" and not positions or jobs. Currently no vacancy exists in the huber/transport officer position, therefore no opening is available for Mr. Schultz in this position.

Thereafter, the grievance was submitted to arbitration. There are no issues concerning the timeliness or arbitrability of this grievance.

POSITIONS OF THE PARTIES

Union

The instant dispute arises over the meaning of the phrase “all shifts and slots” that is contained in Article 3 (K). Arbitrators must, where possible, give full faith and credit to ALL of the language agreed to by the parties and not legislate new language. The phrase “including the Court Security Officer,” establishes that the phrase “all shifts and slots” is not simply a reference to shift times and days on/days off; rather the phrase encompasses all positions as the Union contends.

The County asserts that the phrase means shift time and days on/days off. The County’s position is overly restrictive and contradicted by the language of Article 3 (K). If, as the County argues, the position of “Court Security Officer” was included as an expressed exception, then the parties would have used a different connector, such as “and.”

Under the County’s construction of the language, the Huber/Transport officer can never take advantage of the annual bid. Such a construction would lead to a harsh and nonsensical result that the parties surely did not intend. Consistent with arbitral principles, the Arbitrator should choose the construction that avoids a harsh, illogical or absurd result.

The County takes an arguably conflicting position regarding prior bids under Article 3 (K). When the Union identified employees who it believed had transferred between divisions during the annual bid under Section K, the County claimed that this was irrelevant because Huber/Transport and Radio Operator/Jailer are within the same division. The County also presented a prior grievance, which protested the County’s refusal to allow cross division bidding.

When the prior grievance was filed, Teamsters Local 75 was not yet the bargaining unit representative. This grievance does not establish Union acquiescence and must not be given any weight by the Arbitrator. More importantly, however, the record fails to establish the reason for the failure to pursue the grievance. It would not be reasonable to conclude that the grievance lacked merit because the County’s position was correct.

The elements of a binding past practice are clarity and consistency; longevity and repetition; and acceptability. The absence of officers transferring between divisions during the annual bid is not evidence of a past practice. As the County witnesses admitted, they did not know whether the lack of cross-division transfers was because employees believed they could not, or because no employee had wanted to do so.

During negotiations, the County proposed to include language in Article 3, Section K, prohibiting employees from cross-division bidding. The Union rejected those proposals. As soon as the Union learned that the County was taking the position that the Huber/Transport Officer was not a shift or slot open for annual bid, the Union grieved. The County is unable to demonstrate the element of acceptability.

The County has presented a document that it alleges is a union bargaining proposal to include the Huber officer in the November bidding process. This document, which the Sheriff states he found in his bargaining file, lacks any identifying marks establishing the document as a Union proposal. Union Steward Steve Gilray, who has participated in negotiations since Local 75 began representing the bargaining unit, testified that he had no recollection of any such proposal by the Union.

The document's interpretation of shifts and slots is that advanced by the County. Thus, it is as likely that this was a County bargaining unit proposal. Assuming *arguendo*, that the Union did make such a proposal, it would not establish that the Union believed that the existing language excluded the position from the bid. The document is suspect and unreliable. Accordingly, it should be disregarded.

The County violated the collective bargaining agreement when it refused to allow the Grievant to bid into the Huber/Transport Officer position. The grievance should be sustained and the County must be ordered to allow the Grievant to bid into the Huber/Transport position immediately.

County

The collective bargaining agreement provides for two types of bidding. Article 14(D) provides for bidding on "positions" when a new position is created or an existing position becomes vacant. Article 3(K) permits employees to bid, annually, on "shifts and slots."

The Jail Division works three shifts per day, *i.e.*, day shift (7 am to 3 pm), afternoon shift (3 pm to 11 pm), and night shift (11 pm to 7 am). Within each shift are several "slots", which represent days to be worked and days off. Commencing with the 1991-92 collective bargaining agreement, employees were permitted to bid, in order of seniority, on the shift and slot they would work; regardless of whether or not another deputy had been assigned to that shift or slot during the prior year.

A "position" as that term is used in Article 14(D) means a collection of regularly assigned, recurring tasks. Unlike the provisions of Article 3(K), to bid on a "position," the position must be vacant, either newly created so that there is no other employee occupying it, or vacant, because the incumbent has left the position. The record provides no evidence that anyone was ever permitted an Article 3(K) bid on any "position," except that of Court Security Officer, which was specifically added to Article 3(K).

In the 1999-2000 collective bargaining agreement, the position of Court Security Officer was added to the annual Article 3(K) bid. Had the parties intended the phrase “all shifts and slots” to include all positions, there would be no need to revise the contract language. Under well established principles of contract construction, to include one specific thing is to exclude all others. If the parties had intended to expand coverage to other positions, then the parties would have included a phrase like “such as the Court Security Officer.”

It is also significant that the Union proposed adding the position of Huber/Transport Officer to Article 3(K). If “all shifts and slots” applied to all positions, then the union would have no need to make such a proposal.

Due to the timing of the November 2003 switch, the Grievant may have erroneously believed that the voluntary switch arranged by Lt. Trembl was part of the annual bidding on slots and shifts. Lt. Trembl did take advantage of the annual bid to implement the switch on January 1, 2004. This switch, however, was outside the provisions of the contract and executed as a courtesy by management. It did not establish any precedent or obligation to arrange a switch upon the request of an employee.

To accommodate the Grievant’s request in November of 2004 would require bumping an employee from his position. Under the contract, bumping is permitted under only two circumstances. One circumstance is layoff, which is not present in this case. The second circumstance is the Article 3(K) language that permits an employee to bid on the Court Security Officer position.

The County did not violate the collective bargaining agreement when it refused to permit the Grievant to use the Article 3(K) bidding process to bump another employee from a position. The grievance should be denied.

DISCUSSION

The Union argues that the phrase “all shifts and slots” includes all positions within the Department and, therefore, the language of Article 3(K) provides the Grievant with a right to bid into the Huber/Transport Officer position. The County denies that the phrase “all shifts and slots” refers to positions. According to the County, “shifts” are hours of work and “slots” are days on and off. The County maintains that the Huber/Transport Officer occupies a position and not a “slot” and that, with the exception of the Court Security Officer, positions may not be bid under Article 3(K), but rather, may only be bid under Article 14(D).

Contract Language

Article 3(K) does not define “slots” or “shifts.” The word “slot” may be defined as “an assigned place in a sequence or schedule” or as “a position of employment in an organization or a hierarchy.” *The American Heritage College Dictionary* (3rd Ed., 2000) Thus, the word “slots,” on its face, is susceptible to an interpretation that supports either parties’ argument.

The Union argues that the phrase “including the Court Security Officer” establishes that parties intended to include all positions. The County responds that, if the parties intended the phrase “all shifts and slots” to mean all positions, then there would be no need to include the Court Security Officer. Each position provides a plausible construction of the plain language of the first sentence of Article 3(K).

The final sentence of Article 3(K) states: “From time to time, an employee may be assigned to work outside of the shift or slot for which he/she had bid, at straight time rate, as required by the sheriff or his designee.” By this language, the parties have clarified that overtime is not triggered by this change in “shift” or “slot.” Under Article 3(D), overtime is a function of hours or days worked. Thus, the most reasonable construction of the plain language of Article 3(K), as a whole, is that the words “shifts” and “slots” refer to work hours and work days, respectively.

“Shift schedules” are defined in Article 3(C). Under the express language of this provision, Investigators, the Court Security Officer, the School Liaison Officer and the Huber/Transport Officer are excluded from the identified “shift schedules.” The identified “shift schedules” are:

7:00 a.m.-3:00 p.m.
10:00 a.m.-6:00 p.m.
3:00 p.m. – 11:00 p.m.
7:00 p.m.-3:00 a.m.
11:00 p.m.-7:00 a.m.

The fact that Investigators, Court Security Officer, School Liaison Officer and the Huber/Transport Officer are not identified as occupying “shift schedules,” as that term is defined in the parties’ collective bargaining agreement, suggests that the phrase “all shifts and slots” refers to something other than these positions.

Article 3(K) does not reference the Huber/Transport Officer. As discussed above, it does reference, the Court Security Officer. As the County argues, under a well-established principle of contract interpretation, to include one specific thing is to exclude all others. One may reasonably infer that, by specifically including the position of Court Security Officer in the Article 3(K) bidding process, the parties have expressed intent to exclude all other similarly situated positions. Under Article 3(C), the similarly situated positions are Investigators, the School Liaison Officer and the Huber/Transport Officer.

In summary, the language of Article 3(K) is neither clear, nor unambiguous. However, the most reasonable construction of the plain language of Article 3(K), on its face and within the context of Article 3, is that the phrase “all shifts and slot” does not mean “all positions” and that, if the parties had intended the Huber/Transport Officer to be included in the Article 3(K) bidding process, they would have expressly referenced this position as they did with the Court Security Officer. Although the Union argues that such a construction is harsh and nonsensical, it is common to bid work schedules within a specific position.

Past Practice

When the Huber/Transport Officer position was established, it was posted and filled under Article 14(D), rather than bid under Article 3(K). Each party recognizes that this posting was appropriate.

The Grievant was awarded the Huber/Transport Officer posting, effective January 1, 2001 and remained in the position until January 1, 2004. The record does not establish that the Huber/Transport position was subject to the Article 3(K) bidding process for the “shifts and slots” that took effect on January 1, 2003. When the Grievant decided, in the fall of 2003, that he did not wish to continue as the Huber/Transport Officer, his Huber/Transport position was not part of the Article 3(K) bidding process, but rather, was filled via a response to the “Memo” posted by management on November 11, 2003. This evidence of “past practice” supports the County’s position, *i.e.*, that the Huber/Transport Officer is exempt from the Article 3(K) bidding process.

Lt. Trembl, the Jail Administrator, has been with the Sheriff’s Department for approximately eighteen years and has been responsible for Article 3(K) bidding for seven years. According to Lt. Trembl, the Patrol Division and the Jail/Dispatch Division each have their own Article 3(K) bidding schedule. If the phrase “all shifts and slots” meant “all positions,” it is likely that there would be a single bid sheet.

Sheriff John Cmeyla has been Sheriff for over two years. Prior to his election as Sheriff, he had been employed in various positions within the Sheriff’s Department. Sheriff Cmeyla was a Lieutenant at the time that the Vanness grievance was filed, on or about November 22, 1997.

It is evident that, prior to the filing of the Vanness grievance, there had been occasions on which the Department allowed Article (3)K bidding between the Jail/Dispatch and Patrol Divisions. (County #3) Sheriff Cmeyla confirms that the Vanness grievance was denied by the Department at Step 2 and that, thereafter, the union did not pursue this grievance. Sheriff Cmeyla states that he does not know why the union did not pursue this grievance. Although not conclusive, the failure of the then union, WPPA/LEER, to pursue the Vanness grievance reasonably gives rise to an inference that the union had accepted the County’s position, *i.e.*, employees could not use the Article 3(K) process to bid across Divisions. Notwithstanding the Union’s argument to the contrary, the fact that this Union was unaware of the Vanness grievance does not mean that the Vanness grievance is irrelevant.

Lt. Trembl could not recall any cross divisional bidding during his seven year tenure as Jail Lieutenant. Union Steward Steve Gilray, who has been employed in the Sheriff’s Department since 1992, recalls that several employees have moved from one Division to another Division. Deputy Gilray’s testimony establishes that he is not certain whether these moves occurred under Article 14(D) or Article 3(K).

The Grievant, who started as a part-time employee in August of 1998 and a full-time employee in May of 1999, recalls that there was some “switching” between Divisions. Initially, the Grievant recalled that, in 1999, “Bruce” moved from Jail to Road to Jail and that, in 1998, “Mark” was in the Jail and now is not in the Jail. Subsequently, the Grievant clarified that “Mark” was the Court Security Officer who returned to the Jail and that he did not know if “Bruce” moved under Article 14(D) or Article 3(K).

Effective January 1, 1999, Article 3(K) was modified to expressly permit bidding on the Court Security Officer. Thus, it would appear that “Mark” moved consistent with this contract modification.

As the Union argues, the failure of an employee to bid across divisions does not, in and of itself, establish that the employee, or the Union, understood or agreed that Article 3(K) did not permit bidding across Divisions. However, the failure of the record to establish that, since the denial of the Vanness grievance in 1997, there has been any cross Divisional Article 3(K) bidding, reasonably suggests that the parties mutually understood that cross Divisional bidding was not permitted under Article 3(K).

The Huber/Transport Officer is within the Jail Division. Thus, for the Grievant to bid from his position of Radio Operator/Jailer to Huber/Transport Officer is not a bid across Divisions. The evidence that there is not a single bid sheet, as well as the lack of cross Divisional bidding since 1997, is relevant to the instant dispute because it suggests that the parties mutually understood that Article 3(K) did not open all positions to bid by all employees, but rather, provided a limited bidding right.

Bargaining History

The record does not contain evidence of the discussions that lead to the inclusion of Article 3(K) into the 1991 collective bargaining agreement; or to its amendment in the 1999-2000 agreement.

The newly created Huber/Transport Officer was posted and awarded at the end of 2001. According to Sheriff Cmeyla, his file on the 2001-03 contract negotiations contained the following:

All shifts and slots within the Patrol and Jail Division including Court Security Officer and Huber Officer shall be open for bidding among full time employees from November 1st to November 15th of any current year and to take effect on the following January 1st.

Shifts are defined as days, afternoon or nights and slots are defined as the days off.

The record does not establish when the parties resolved their 2001-03 agreement.

This proposal was typed on an otherwise blank piece of paper. Sheriff Cmeyla states that he was there when this proposal was made and that it was a Union proposal that was rejected by the County. Union Steward Gilray, who participated in the 2001-03 contract negotiations, states that this was not among the Union's initial bargaining proposals; it may have been counter proposed by the Union; but that he does not recall the Union having made such a proposal.

Having no reasonable basis to discredit the Sheriff's testimony, the undersigned is persuaded that the Union made this proposal. There is not, however, sufficient context to enable the undersigned to understand the purpose of this Union proposal. It may be that the Union was attempting to clarify language to confirm a benefit that the Union understood it currently enjoyed, or it may be that the Union was seeking a benefit that it understood that it did not currently enjoy.

The Sheriff recalls that, during the negotiations that lead to the 2004-2006 contract, the County proposed to limit Article 3(K) bidding to each Division and that the Union rejected this proposal. As with the Union proposal discussed above, there is not sufficient context to enable the undersigned to understand the purpose of this proposal. It may be that the County was attempting to clarify language to confirm a benefit that the County understood it currently enjoyed, or it may be that the County was seeking a benefit that it understood that it did not currently enjoy.

Conclusion

For the reasons discussed above, the most reasonable construction of the plain language of Article 3 is that Article 3(K) does not provide the Grievant with the right to bid into the position of Huber/Transport Officer. Neither the evidence of bargaining history, nor the evidence of past practice, establishes that the parties have mutually agreed to any other construction of Article 3(K). Nor does the record establish that the parties have otherwise agreed that employees may use the Article 3(K) process to bid the position of Huber/Transport Officer.

Based upon the above, and the record as a whole, the undersigned issues the following:

AWARD

1. The County did not violate Article 3 (K) of the collective bargaining agreement when it refused to allow the Grievant to bid into the Huber/Transport Officer position in November, 2004.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 16th day of August, 2005.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

