

BEFORE THE ARBITRATOR

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

Case 566  
No. 64692  
MA-12977

(Vacancy Grievance)

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**Appearances:**

**Rachel L. Pings**, Attorney at Law, Eggert & Cermele, S.C., 1840 North Farwell Avenue, Suite 303, Milwaukee, WI 53202, appeared on behalf of the Association.

**Timothy Schoewe**, Deputy Corporation Counsel, Milwaukee County Courthouse, 901 North Ninth Street, Milwaukee, WI 53233, appeared on behalf of Milwaukee County.

**ARBITRATION AWARD**

The County and the Association are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association requested and the County agreed that the Wisconsin Employment Relations Commission designate an Arbitrator to resolve a grievance filed on behalf of Michael Schuh (Schuh or Grievant, herein). The Commission designated Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing on the matter was held at the Milwaukee County Courthouse on September 15, 2005. Initial briefs were filed by October 20, 2005. The Association filed a reply brief on November 4, 2005. By letter of November 4, 2005 the County declined to submit a reply brief and the record was closed on November 7, 2005.

**ISSUE**

The Association states the issue as:

Did Milwaukee County violate Sec. 3.28 of the Contract when it denied Schuh the requested assignment and failed to provide a written reason for the denial?

If so, what is the appropriate remedy?

The County states the issue as:

Did Milwaukee County violate Sec. 3.28 of the collective bargaining agreement when it did not grant the grievant an assignment to the process and division and failed to provide him with a written explanation for not so assigning him?

If so, what remedy?

The record best supports the selection of the Association's statement of the issue.

### **RELEVANT CONTRACT PROVISIONS**

#### **3.27 Assignment**

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When a Deputy is assigned from one bureau/division to another, all shift assignments shall be determined based on date of rank. This language shall not apply to employees who rotate for the eleven (11) week period as part of their initial orientation. For purposes of this section, the term "bureau/division" shall mean those work units between which assignments have been customarily approved as of January 1, 1984.

#### **3.28 Shift Selection**

Requests for assignment to a shift within a division shall be filed with the division head. Thereafter, as vacancies occur, they shall be filled by the employe in the division with the greatest seniority within classification having a request on file on the date that the vacancy occurred, provided he is qualified to perform all the duties and responsibilities of his assignment on that shift. If the most senior employe requesting such shift change is denied the request, the reason for denial shall be made known to the employee in writing.

### **BACKGROUND AND FACTS**

The Milwaukee County Sheriff's Department has a Special Operations Bureau which is made up of several Divisions. In July of 2004 Grievant, a Deputy, was assigned to the day shift of Special Operations Bureau/Courts Division as a Bailiff. As a Bailiff he worked in different Courts providing security and moving prisoners, among other things. Deputy Floryance was also a Deputy in the Courts division working the same shift as Grievant and with the same classification as Grievant. The Special Operations Bureau also contains a

Process division wherein Deputies serve process. A vacancy opened within the Process division day shift, which has a straight eight hours and starts and ends ½ hour earlier than Grievant's Courts division shift. The vacancy in this case was posted at the joint roll call of the Process and Courts divisions. Grievant, Floryance and others from Courts division requested to fill the upcoming vacancy. They submitted their requests to Sergeant Cox, who forwarded them up the chain of command. The assignment went to Floryance. Grievant was qualified to perform the duties and responsibilities of the Process division assignment. The Department considered factors other than seniority in filling the vacancy and the selection of the applicant who was chosen was made by the Deputy Inspector of the Bureau with input from the Captain and Sergeants. They did not consider this a shift matter, but rather a transfer between divisions. At least one of the other applicants other than Grievant had more seniority than Floryance.

The parties stipulated to the following two facts: 1) Mr. Schuh is more senior than Mr. Floryance; and 2) Mr. Schuh did not receive a response from the County in writing.

Within the Special Operations Bureau, Process division and Courts division are seen as the same source for deputies and staffing. The Deputies share the same Sergeants and Captain as their supervisors and attend the same roll call. Deputies from Courts fill in for those in Process during absences due to sick leave, vacations and other vacancies. They do choose their vacations differently and the divisions have different "org" numbers. Courts division has one shift, a day shift. Process division has two shifts. Some in the Association consider Courts and Process as the same division. Management views the two as separate divisions and they are shown as separate divisions on an organizational flow chart. Deputies from the jail and other divisions also fill in to work the Court's division when needed. When Deputies are transferred in they are transferred into either the Courts division or the Process division.

After Deputy Floryance was chosen for the vacancy Grievant filed a grievance alleging a violation of sec. 3.28 of the contract. The County denied the grievance on the grounds that sec. 3.28 does not apply to a shift selection between two different divisions. This arbitration follows from the grievance procedure.

Other matters appear as set out in the discussion, below.

### **POSITIONS OF THE PARTIES**

#### **County**

In summary, the County argues that the case is moot because Deputy Schuh has been transferred to another area of the Sheriff's Department. Sec. 3.28 requires the request to be made to the division head, and Schuh wrote to a front line supervisor, not the division head. Sec. 3.28 speaks to shift changes. Schuh really desired a particular assignment, not a shift

change. This intrudes upon the powers of the Sheriff to perform his immemorial duties. The Sheriff is neither a party nor a signatory to the contract, and case law prevents the Sheriff's constitutionally protected power to assign from being limited by this contract. And past practice is that the Sheriff has and may assign as he did in this case. This is a request for an assignment in a different division, therefore sec. 3.28 does not apply and was not violated.

### Association

In summary, the Association argues that Milwaukee County violated Sec. 3.28 of the contract when it denied Deputy Schuh the requested shift change and when it failed to provide a written reason for the denial. The language of the relevant contract provision plainly dictates that Milwaukee County should have granted the shift change to Deputy Schuh. The plain language of sec. 3.28 dictates that a vacancy must be filled by the employee in the division with the greatest seniority. Deputy Schuh was qualified to perform the duties and that he was more senior than Deputy Floryance. Courts and Process were the same "division" under the contract, considering the same roll call, same supervisor, filling in for on another, Process vacancies are customarily filled by Courts, and the vacancy was only posted at the joint roll call.

Alternatively, even if Courts and Process were separate "divisions", the County was nonetheless required to grant Deputy Schuh the shift change request over Deputy Floryance because they were from the same "division". Sec. 3.28 still applies and Deputy Schuh should have been granted the shift change because he and Deputy Floryance were from the same "division". Section 3.28 plainly states that vacancies shall be filled by the employee in the division with the greatest seniority within classification, and Deputy Schuh was the more senior Deputy.

The case is not moot. The County stipulated to the issue. A remedy could include granting the shift change and also add clarification to Sec. 3.28 for future exercise. Placement in a different shift within the same division does not impede the Sheriff's ability to assign personnel. The contract does set mandatory parameters on the Sheriff's ability to grant shift change requests. Deputy Schuh's and Deputy Floryance's requests were properly submitted. Sergeant Cox was the proper person to submit the requests to, but was not the decision maker. Deputy Schuh requested a shift change, not an assignment change. The start times, end times and lunch break, or lack thereof, are different. Deputy Schuh wanted the earlier start time and finish time and a straight eight (8) hour shift. He was seeking a different shift, not different assignment. Courts and Process are essentially "joined at the hip", therefore Deputy Schuh should have been offered the vacancy based on his seniority within the division pursuant to sec. 3.28. And, past practice does not support the County's position on assignment.

## DISCUSSION

Grievant's request and grievance is based on sec. 3.28 of the contract and that is at the core of the issue stipulated by the parties to be decided. The applicability and interpretation of sec. 3.28 is required to resolve the issue.

The matter is not moot as suggested by the County due to Grievant's subsequent transfer. An award in Grievant's favor could result in a remedy affecting his request. And a ruling in the County's favor could result in guidance for application of sec. 3.28 in the future.

Contrary to the County's contention, the request was properly submitted to Sergeant Cox. He is part of the chain of command and the request was forwarded to the division head for consideration. The request was, ultimately, filed with the division head, who made the decision on who would fill the vacancy. Even though the request was properly filed, this technical, procedural objection by the County presupposes Sec. 3.28 applies. There being no procedural shortcoming here, there is no bar to considering the application of sec. 3.28 on the merits.

Turning to the merits of the request in view of sec. 3.28 of the contract, Grievant is correct that three matters are implicated here. There is no question as to the first two: Grievant was more senior than Deputy Floryance and Grievant was qualified to perform all the duties on the shift he was seeking. Grievant is correct in that the third matter to be determined is whether Courts and Process were the same "division" under the contract.

This arbitrator is persuaded that Courts and Process are two separate and distinct divisions within the same bureau and, therefore, Grievant, a Deputy assigned to the Courts division, was not entitled to the shift selection in the Process division. The uncontraverted testimony of Sergeant Cox was that the Sheriff's department organizational flow chart has Courts and Process as two different divisions with two different organizational, "org", numbers. Deputies are transferred into one or the other division. Further significant distinctions and distinguishing features between the two include there being one shift in Courts, and two distinct shifts in Process, vacations are selected in each division independently of the other, and the very real nature of the difference between the duties of a Bailiff and the duties of a Process Server. The record was not particularly well developed as to the actual duties of each. But what is in the record shows that these are fundamentally different duties. The different characteristics of these two divisions justifies their recognition independently of the other.

Different divisions are often contained within a larger unit, such as a bureau, and that is the type of organization presented in this case. It is not unusual that at some level there will be and is the same supervision over more than one division or level of organization, such as the case here. It is true that both Courts and Process Deputies were used to fill in for sick leave, vacation and other vacancies. But so were Deputies from Jails or other divisions. Courts and Process may indeed be "joined at the hip" as many recognize, but they are still two different bodies and two different divisions.

Applying the language of sec. 3.28 then, it applies to requests for assignment to a shift within a division. Vacancies shall be filled by the employee in the division within classification. It says division, not bureau. The section applies to employees in the division in which a vacancy occurs. Here, the vacancy was in the Process division and Grievant was in the Courts division. Grievant was not in the division in which the vacancy occurred. Thus, even though qualified to perform the duties, sec. 3.28 does not apply and does not require that his request be granted on the basis of his seniority.

At the hearing there was some limited testimony as to the phrase “bureau/division” as used in sec. 3.27 of the contract. However, there is no evidence as to what that meant in that section and, particularly, what were the work units between which assignments have been customarily approved as of January 1, 1984. That combined phrase is also limited to sec. 3.27 by its very terms. This is not enough of a blurring of the two terms, “bureau” and “division” to conclude they are one and the same for purposes of sec. 3.28. More importantly, sec. 3.28 does not use the term “bureau/division”. It only uses the term division. This distinction indicates that the two are not to be read together to mean one entity, but rather a division is a distinct and separate organizational entity.

Grievant’s other contention, that between he and Deputy Floryance he should have been granted the request because he has more seniority and they are both from the same division, is not persuasive. That would require an application of the seniority provisions of sec. 3.28 to a different division from which both requests are made. But sec. 3.28 is limited by its language. Reading the clause as a whole, it is referring to a shift within a division and employee in the division. The employee must be from the division in which the vacancy occurs in order to rely on the seniority provision in sec. 3.28. That is not the case here, where neither was in the Process division. Sec. 3.28 does not address or apply to requests from two or more employees in a different division. In that case, such as this one, the County can consider factors other than seniority in filling the vacancy.

Both parties have contended, either at the hearing or in their briefs, that past practice supports their position. However, both parties merely made the claim and neither presented any specific case, situation, Deputy, or vacancy from which to determine if there really was a past practice, what it was, and what its scope may have been. Past practice therefore is not of any help in interpreting what is otherwise clear contract language. And, past practice normally is not a basis to create an ambiguity in otherwise clear contract language.

The grievance contended that a prior grievance arbitration award concerning sec. 3.28 supports its position. FRANCKOWIAK, GRIEVANCE, No. 25311 (LAGOWSKI, DECEMBER 18, 1991). In FRANCKOWIAK, a Patrol division Deputy sought to pick his starting time within a shift of that division. Due to his seniority and, apparently, his qualifications, sec. 3.28 allowed him to pick his starting time within his assigned shift. There is nothing in the FRANCKOWIAK decision to indicate that there was more than one division involved. It appears there was only one division involved. The decision also references sec. 3.28 of the 1991-92

DSP Memorandum of Agreement without quoting any language. It is not known whether that language is the same as that in current sec. 3.28. Nevertheless, because there was only one division involved in FRANCKOWIAK and two separate divisions involved in this case, FRANCKOWIAK is not precedent for how to apply sec. 3.28 here and is not persuasive in such application.

Because sec. 3.28 does not apply, there was no requirement that the County provide Grievant with a written reason for the denial.

With the issue in this case being decided on what is a division within this bureau for purposes of a shift selection, it is not necessary to reach into the area of the Sheriff's Constitutional right to make assignments of personnel. This Award finds that these are separate divisions within the same bureau and therefore sec. 3.28 does not apply. Thus, there has not been and could be no infringement of any of the prerogatives of the Sheriff because a transfer of assignments between divisions has not occurred, and cannot occur pursuant to sec. 3.28 on the record in this case. While it is true that Grievant did want a different shift, it was a similar, yet different shift in a different division doing fundamentally different work. Because he had no right to rely on sec. 3.28 to effectuate his request, there is no need to go into the question of whether this was a shift change request or a transfer of assignment, and the Sheriff's Constitutional right to make personnel assignments.

Accordingly, based upon the evidence and arguments in this case, I issue the following

**AWARD**

Milwaukee County did not violate sec. 3.28 of the contract when it denied Schuh the requested assignment and failed to provide a written reason for the denial. The grievance is dismissed.

Dated at Madison, Wisconsin, this 25th day of January, 2006.

Paul Gordon /s/

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Paul Gordon, Arbitrator