BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY SHERIFF'S DEPARTMENT EMPLOYEES, LOCAL 990, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

COUNTY OF KENOSHA, WISCONSIN

Case 249
No. 65640
MA-13279

Appearances:

Thomas Berger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 044635, Racine, Wisconsin 53404-7013, appearing on behalf of Kenosha County Sheriff's Department Employees, Local 990, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Lorette Pionke, Senior Assistant Corporation Counsel, Kenosha County, 912 56th Street, Kenosha, Wisconsin 53140, appearing on behalf of County of Kenosha, Wisconsin, referred to below as the County, or as the Employer.

ARBITRATION AWARD

The Union and the County executed the following "Settlement Agreement", dated June 20, 2005:

1. The parties will execute the predecessor collective bargaining agreement.
2. The parties will proceed to arbitration over the pending grievances over the Jan. 31, 2005 memo. The parties will not delay the picking and scheduling of the arbitration pending the Administration Committee step.
3. The parties will arbitrate before . . . Rick McLaughlin . . .
4. Neither party will raise any procedural bars to consideration of the grievance(s) on the merits.
5. The case will be submitted to the arbitrator on oral arguments and the arbitrator will be requested to issue a letter award within 14 days of the close of the record.
6. Case No. 64451 will be dismissed.

On February 1, 2006, the Union filed a request to arbitrate under the settlement agreement. On February 10, 2006, the Commission's General Counsel advised the parties of Commission receipt of the request and advised them that "we need at least half of the $500 filing fee that applies to grievance arbitration cases" to open the file. On February 28, 2006, the Union filed its half of the filing fee. A hearing on the matter was held on June 27, 2006, in Kenosha, Wisconsin. No transcript was made of the hearing. Prior to the start of the hearing, the parties stipulated that the fourteen day request noted in Paragraph 5 of the Settlement Agreement was not a jurisdictional matter, but that they wished a decision as soon as practicable. At the close of the hearing, the parties considered whether to submit the matter on briefs or oral argument, and when it proved impossible to consensually set a briefing schedule, agreed to submit the case "on oral arguments".

ISSUES

The parties did not stipulate the issues for decision. The Union states the issues thus:

> Did the County violate Article 5.3, Article 21.8 or Article 22.1 of the collective bargaining agreement by denying vacation trade/shift swaps?
>
> If so, what is the appropriate remedy?

The County states the issues thus:

> Whether the County violated Article 5.3, Article 21.8, past practice or past arbitration awards by implementation of the January 31, 2005 memo?
>
> If so, what is the appropriate remedy?

I have determined that the record poses the following issues:

> Did the County's implementation of the Memo violate the collective bargaining agreement?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I - RECOGNITION

. . .

Section 1.2. Management Rights: . . . The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. . . .

ARTICLE V - HOURS

. . .

Section 5.2. Days consist of 24 Hours. Casual, vacation, kelly (applicable only at the Public Safety Building and Pre-trial Facility) and holiday time off shall be defined as 24 hour periods consisting of the employee's normal eight (8) hour shift, the eight (8) hours preceding the start time of the employee's normal shift, and the eight (8) hours following the conclusion of the employee's normal shift.

Employees utilizing casual days or vacation days shall not be called in or required to use an additional casual or vacation day within the 24 hours listed above. . . .

Section 5.3. Shift Exchanges. Upon request and with the approval of the Sheriff or the Sheriff's designee, bargaining unit members may exchange half shifts (four hours), full shifts or days with other qualified bargaining unit members. Exchanges must offset one another within a 28-day time period. Double shifts or the creation of overtime will not be permitted. Both days, shifts or portions thereof must be identified at the time of initial approval. Employees who engage in an approved trade shall be responsible for the hours assumed in the trade. . . .

ARTICLE IX - OVERTIME

. . .

Section 9.3. Anticipated Overtime - Full Time Employees Only. Scheduled overtime (overtime known at least 72 hours in advance) shall be posted on individual day sign-up sheets with a four (4) hour split available.

Seniority shall prevail. If no one signs up, the shift is split 4 hours each between the working least senior on previous and following shifts. If unable to contact least senior on following shift, next least senior and so on until someone is assigned. Twenty-four (24) hour notice to be given to those assigned.

Section 9.4. Unanticipated Overtime - Full time Employees Only.

(a) The County shall offer by seniority, the unanticipated overtime hours to employees working the previous shift, by seniority. Said employees shall have the right to work 4 or 8 hours of unanticipated overtime. In the event that no employee on the previous shift volunteers to work, the County shall have the right to require the least senior employee working the previous shift to work the unanticipated overtime with the option of working 4 or 8 hours of overtime. If the employee required to work accepts only 4 hours . . . the County shall utilize the provisions contained in this section by contacting employees on the shift following said unanticipated overtime by seniority, with the right to require the least senior employee scheduled to work the remaining 4 hours of unanticipated overtime.

(b) In the event the County is unable to fill any remaining overtime . . . the County shall in reverse seniority, call employees to work . . . If no one is contacted, the person assigned to the first 4 hours will be required to work the entire shift.

Section 9.5(a) No employee may be assigned, voluntarily or involuntarily, to work longer than 16 consecutive hours, except under unusual circumstances or as otherwise provided in this Agreement.

Section 9.5(b) Overtime at the Kenosha County Detention Center shall be pursuant to HOC DIRECTIVE: 98-17 dated September 25, 1998 attached hereto as Appendix "G". . . .

ARTICLE X - VACATIONS

. . .

Section 10.4. Scheduling: Vacation preference within the classification shall be selected on the basis of a first choice consecutive block of days by seniority. Each employee will receive one pick of consecutive vacation block which can consist of two (2) or all days by 15 February. All remaining

vacations will be selected on the basis of seniority. No employee's first pick will be bumped by high seniority's remaining picks. One employee per shift per classification may be scheduled for vacations.

Section 10.5. Emergency Leave: Up to five (5) days emergency leave may be granted to each employee provided the employee notifies the department head before taking the time off. Such leave shall be charged against vacation time. Request for leave shall not be unreasonably denied. . . .

ARTICLE XI - HOLIDAYS

. . .

ARTICLE XII - ACCIDENT AND SICKNESS PAY MAINTENANCE PLAN

. . .

Section 12.2. Casual Days: Every employee, in addition to the above coverage, will be entitled to six (6) casual days off per calendar year. . . .

(a) Casual days will be granted if verbal or written notice of the employee's intent to take such days is received by his/her department head at least twenty-four (24) hours prior to the scheduled date of such time off. The employee need not give any reason for the casual day taken under this subsection. . . .

(b) If an employee is unable to report to work due to sickness, the employee must notify his/her department head not later than one-half (1/2) hour before his/her scheduled starting time. The employee shall state the reason for his/her absence and the expected leave of absence. Any days taken under this section shall be charged to an employee's remaining casual days. . . .

ARTICLE XXI - GENERAL PROVISIONS

. . .

Section 21.8.: More than one employee may utilize a Holiday, Kelly Day, or vacation day provided no overtime is created under the established shift minimum existing at the time of the request. . . .

ARTICLE XXII - MAINTENANCE OF BENEFITS

Section 22.1: Any benefits received by the employees, but not referred to in this document, shall remain in effect for the life of this Agreement.

BACKGROUND

The Labor Agreement covers Jail Staff represented by Local 990. This portion of Local 990 is known as Local 990J. The County maintains two facilities staffed by Local 990J. One of the two facilities is a Pre-trial Facility, is located in downtown Kenosha, and is referred to as Downtown. The other is the Kenosha County Detention Center, and is referred to as KCDC. Downtown is authorized for fifty-seven Correctional Officer (CO) and Direct Supervision Officer (DSO) positions, while KCDC is authorized for seventy-four. Local 990J represented employees include, other than CO or DSO, Admissions and Release Specialists (ARS) and Cooks. The grievance concerns the terms of the 2003-04 Labor Agreement, which resulted from an interest arbitration award issued on November 17, 2004.

Reference to "the grievance" is not without ambiguity. The initial grievance form, dated January 31, 2005 (references to dates are to 2005, unless otherwise noted), lists "Policy/Class Action" next to the NAME OF EMPLOYEE entry; "Admission/Release Specialist" next to the "CLASSIFICATION" entry and "P.T. Facility" next to the "WORK LOCATION" entry. The "List applicable violation" entry includes the following sections: 1.2; 5.3; 9.3; 9.4; 9.5(a) & (b); 10.3; 10.4; 10.5; 21.8; 22.1, as well as "any other Article, Arbitration Award & Past Practice that may apply." This is the form the Union refers to as the grievance. An "Amended" grievance form dated February 15, 2005, was presented to Sheriff David Beth, and is the basis for the Sheriff's responses. That grievance repeats the "Policy/Class Action" entry, but adds "DSO's/CO's/Kitchen Staff" to the "CLASSIFICATION" entry and adds "+KCDC" to the "WORK LOCATION" entry. Unlike the initial grievance, it makes no reference to Article XXII. Unlike the initial grievance, it states the remedy required thus:

> 1 full casual day for each Shift Exchange denied. That Management be ordered to immediately cease and desist from violating the Labor Agreement . . .

Each form questions the same action, which is Best's issuance of a Memorandum on January 31, 2005. That document is referred to as the Memo, and states:

> **Overtime**
>
> Any anticipated and unanticipated assigned overtime is mandatory in accordance with Article IX of the Labor Agreement. The employee assigned any overtime is required to work the overtime.

Exceptions:

1) An employee assigned to overtime finds another qualified employee to fill the assignment. This overtime replacement must meet Supervisions approval . . .
2) Hospital Confinement, Industrial Injury, FMLA, Jury Duty, Military Leave, or Death in the Family.

Benefit time shall not be applied to assigned/mandatory overtime. Failure to work assigned overtime or have an approved replacement will result in discipline, starting with a written warning. Failure to notify and not report for assigned overtime duty will be dealt with to a higher degree of discipline.

Shift Exchanges/Swaps

Effective immediately, a shift exchange/swap request will not be approved by the Sheriff or his designee to any employee who still has casual time remaining per Section 5.3 . . .

Vacations

(I)n order to maintain proper staffing, effective in 2005 and continuing in the future, we are going to schedule for maximum employee coverage . . .

The maximum amount of employees of at any time on vacation is as follows per classification/shift . . .

Holidays

For scheduling purposes, if no day remains in the month to allow a holiday to be scheduled without creating overtime, up to two holidays may be granted by supervision. . . .

Prior to the Memo, Best had declared a staffing emergency in a memo dated December 17, 2004. That memo states:

Effective immediately, I have no choice but to declare a *State of Emergency* for the Pre-Trial Facility through 01-03-05. *This State of Emergency* affects all Correctional Officers and Admission Release Specialists.

> At this time, it is only necessary for me to cancel one 1/2 casual for an ARS employee on 12/25/04. No unscheduled casual or emergency vacation time will be granted from now through 01-03-05. Any employee who fails to comply with this emergency declaration will be subject to discipline up to and including termination.
>
> This declaration is subject to further restrictions as we review our staffing needs through January 3, 2005.

After issuing the emergency declaration, Best discussed staffing problems Downtown with his command staff. Those discussions produced a draft of the Memo, which Best issued to the Union, asking it to attend a brain-storming session on January 31 to address possible solutions, which he hoped could produce a revised draft of the Memo.

The balance of the background is best set forth as an overview of witness testimony.

David Beth

Beth assumed the office of Sheriff on January 6, 2003. Shortly after this, the Administrator of the Downtown facility, Lieutenant Edward Van Tine, advised Beth of ongoing problems regarding staffing Downtown over holidays, particularly Thanksgiving and Christmas. At the time, the parties were still attempting to bargain a successor to the 2000-02 labor agreement.

The absence of any mutual resolution to the problem led to the December 17, 2004 memo. That memo reflected that following contractual procedures could not yield a schedule for the Christmas holiday which could meet minimum staffing Downtown. Best asked Kathleen Fleiss, the President of Local 990, to assist. She did "very diligently", but Best could not staff the facility without the declaration of emergency.

The January 31 brainstorming session, in his view, did not elicit the Union support he had hoped for, and he saw no alternative but to issue the Memo. That the Memo worked is demonstrated by the fact that he could staff the Jail throughout 2005, without need of an emergency declaration. The Memo, in his view, did not alter any contractual benefit. It did create a disincentive to employees to save casual days until the end of the year. Even though an individual swap may not create overtime, employee attempts to avoid working the Thanksgiving or Christmas holidays through casual days inevitably forced involuntary call-ins and overtime late in the year.

Kathleen Fleiss

Bargaining for the 2003-04 Labor Agreement started in 2002. The parties did not discuss scheduling issues in any detail. Rather, the negotiations focused on a significant change in hours, including the loss of Kelly days, as well as significant insurance changes. Beth's attempts to discuss scheduling focused on the overworking of less senior employees Downtown and on holiday staffing. The Union consistently stated that the concerns had to be brought to collective bargaining and that the Union would not, as a matter of principle, address fundamental bargaining issues in informal discussions.

For this reason, the Union came to the January 31 meeting with a grievance already drafted and a complaint of prohibited practice being contemplated.

Ann McCormick

McCormick has worked at KCDC since June of 1998, and serves as the Unit Chair for Local 990J. McCormick has family who live out-of-town, and uses swaps frequently, perhaps thirty times in a year prior to the Memo. Beyond this, vacation picks are handled by seniority and it is difficult for low seniority employees to get desirable vacation time off without being willing to swap. Swapping is routine within KCDC, and is seldom denied. She was aware of only two denials, one for a DSO attempting a swap during training time, and one where the swap did not get completed within the contractual twenty-eight day period.

The Memo disrupted the KCDC swapping process. After its issuance, employees who wish to swap try to burn their casual days as soon in the calendar year as possible. This increases emergency leave usage. It also disrupted any employee who tried to make vacation plans in advance. Prior to the Memo, McCormick had scheduled a Mediterranean cruise. She could not get the required time off through vacation picks, and thus relied on swaps to put the cruise together. After the Memo, she started to cancel her plans. Best offered to review her use of vacation, but she was unwilling to do this, for it opened the possibility of her receiving favorable extra-contractual treatment. She was ultimately able to persuade another employee to use their casual days in time for them to make the trades necessary to open up the time for the cruise.

In her view, the emergency declaration was rooted in ARS staffing Downtown. The overtime side letter at KCDC meant that it did not suffer from Downtown staffing problems.

Georgette Johnson

Johnson has served at KCDC since June of 1998. Prior to the Memo, she used swaps frequently, and had never been denied. She has three children, and must be available for their activities as well as their illnesses. To follow the Memo meant she had to use up casual time to be available for swaps, but doing so limited the leave time she had available for unplanned absences, like a child's illness. Swaps rely on a limited pool of employees who are willing to swap, and the Memo made it very difficult to coordinate a swap, particularly early in the year.

Greg Hinzpeter

Hinzpeter has worked at KCDC since June of 1998. Hinzpeter swaps frequently and never had one denied prior to the Memo. He is an avid snowmobiler, and uses time in January and February of the year to snowmobile in Michigan. Vacation has to be scheduled by the fifteenth day of the month preceding the requested day off, and this makes it difficult to use vacation for snowmobiling, which turns on the vagaries of winter weather. Prior to the Memo, he had no problem working out swaps to free time in January and February, and would give up Thanksgiving to do so.

Edward Van Tine

As Downtown Administrator, Van Tine oversaw the work of supervisors who set schedules for Local 990J employees. He noted swaps were denied with some frequency by supervisors. Denials included swaps where gender specific duties could not be covered; swaps that affected scheduled training; and swaps where one officer had duty restrictions incompatible with another officer. Minimum staffing varies on the inmate population, which can swing widely.

Prior to the Memo, Van Tine had trouble staffing end-of-year holidays every year. Part of the difficulty is traceable to the fact that casual employees are not called for a forced overtime shift before or after use of a casual day. Downtown scheduling had become so problematic that two Union officials on several occasions sought a meeting with Van Tine and other supervisors to address the use of forced overtime Downtown. Because Downtown did not use the side letter governing KCDC, forced overtime always fell on the least senior employee. In Van Tine's view, those employees were being worked beyond reason. One had to work sixteen hours a day for five days, and one had worked for one month without any day off. Beyond this, such employees were unwilling to trade because of the enhanced risk of forced overtime before or after a swapped shift.

The January 31 meeting did not go well. Prior to the meeting, Union leadership changed and the incoming officers did not share their predecessors' view of the problem.

Prior to the Memo, the Sheriff had given supervisors "carte blanche" regarding the approval of swaps. The Memo tightened the rules and gave supervisors guidance on how to schedule. The result was better staffing on a year-around basis. Prior to the Memo, a declaration of emergency was an annual possibility, although only three emergencies, including that of December, 2004, had been declared in his twenty-four year tenure. From his perspective, swaps did not pose a management issue, since the Sheriff always has the tools to compel staffing. He did not know if the Memo addressed problems at KCDC.

Gary Preston

Preston, a Captain, serves as Detentions Division Commander. Among other duties, he oversees the Lieutenants who administer Downtown and KCDC. He did not believe the two facilities faced the same problems, with KCDC working under the terms of a side letter which addressed overtime procedures. Swapping is more common at KCDC than Downtown. Roughly one-half of KCDC employees participate in swaps, but less than one-third of Downtown employees do. There have been several causes for the history of end-of-year scheduling problems Downtown, including employee unwillingness to work extra shifts; employee unwillingness to work extra shifts during holidays; staff shortages due to injury or illness; staff shortages due to unanticipated turnover; staff shortages due to understaffing; and County leniency in granting vacation in February, traditionally a time of low inmate population, for the end of the year, traditionally a time of high inmate population. The Memo was modified in response to perceived problems, and has served to ameliorate end-of-year staffing problems.

The parties met prior to January 31 to address the problem, but the Union was focused on fighting the interest arbitration decision. The January 31 meeting did not go as Best had hoped, but Best concluded that he had to issue the Memo because continuing two more years without a labor agreement was administratively unthinkable.

Further facts will be set forth in the **DISCUSSION** section below.

The Union's Opening Statement

The Union contends that the Memo constitutes unilateral alteration of a major condition of employment. Beth and his predecessors had in the past routinely approved trades and swaps. To permit unilateral alteration of such a longstanding past practice, which is confirmed by unambiguous contract language, violates the labor agreement.

The opportunity to trade permits Local 990J employees the opportunity to attend family events, family illnesses, children's activities or to arrange vacations. Some needs may be small, others are significant life events, but all underscore that trading and swapping constitute a major condition of employment. The value to unit employees can scarcely be exaggerated. In spite of this, with no attempt to bargain or to renounce a known practice, the County implemented Beth's decision. This violates clear and unambiguous contract protections.

The County's Opening Statement

Staff shortages, particularly at Thanksgiving and Christmas created a near emergency in 2003 and an emergency in 2004. This forced Beth to declare an emergency in 2004 and to seek the Union's assistance to address what had become an ongoing problem. Beth's emergency declaration secured jail staffing for the 2004-05 Holiday Season, but the staffing problem remained. Beth attempted to get the Union to discuss the matter by issuing a draft Memo, then conducting a brainstorming session prior to the issuance of the Memo.

Examination of the Memo establishes Beth did nothing to violate the labor agreement. Rather, he clarified how his supervisors were to exercise their discretion to approve swaps. Swaps have always demanded approval.

The Memo embodies the Sheriff's constitutional, statutory and contractual authority. He is personally responsible for Jail security and his emergency declaration did what was necessary to assure security over the holidays. Implementation of the Memo did not deprive any employee of contractual benefits. Rather, the Sheriff acted to control the granting of casual days, which properly reflects the authority of his office and the authority the labor agreement recognizes.

The Union's Closing Statement

The Union concludes that County implementation of the Memo violated the collective bargaining agreement. The County made no effort, at any time relevant to this proceeding, to address a longstanding staffing problem. Examination of the evidence establishes that the Sheriff overreacted to a one-time staffing problem. The interest arbitration decision eliminated Kelly Days and the County added jail staff after the 2004-05 holiday season. This means the problem underlying the declaration of emergency was unlikely to persist.

In spite of this, the Memo upset a longstanding past practice, protected by Section 22.1. The practice was unequivocal, had been unchallenged prior to the Memo and affected a major condition of employment.

To remedy this violation, the remedy requested in the grievance should be ordered. That remedy is:

> That Mgt. be ordered to immediately cease and desist from violating the Labor Agreement as cited above. Each employee that has been forced to work under this mandate (be it OT, refusal of Shift Exchanges, Vacations, Holidays or Scheduling or other applicable benefit) be given 2 hrs. of Casual time for each hour worked. That every Jail Unit employee receive OT pay at the rate of 1 1/2 hr. of pay for each hour of OT that was worked by this mandate.

The County's Closing Statement

The grievance must be viewed historically, starting with the ongoing holiday staffing shortages that annually prompted either a declaration of emergency or nearly did so. A number of factors contributed to this problem including Kelly days, legitimate absence due to worker's compensation injuries or illness and employee use of casual time. The use of casual time exacerbated the problem because some employees insisted on retaining the days to make themselves unavailable at holidays. Beyond this, mandatory overtime was not distributed

equally, and lower seniority employees were being worked beyond appropriate limits. This problem prompted the December 17, 2004 declaration as well as Union attempts to help address the problem. The staffing shortage proved, however, intractable. This prompted Best to issue a draft memo to start more serious dialogue on the point. That effort also proved fruitless, and Best issued the Memo as a last resort. As events proved, the Memo did not solve, but greatly ameliorated the problem.

The Union amended the original grievance, and the amended grievance did not mention any County violation of Article XXII. This is the grievance that Best answered. Ultimately, either grievance poses the same issue, "Who is in control?"

Wisconsin constitution and statute as well as the contract and past practice leave no doubt regarding this issue. Best asserted control, because he had to under each of the sources of authority noted above. The contract demands approval of swaps by the Sheriff or his designee. The Memo did nothing but standardize and codify the basis for the approval. The Union ignores that the Sheriff could have denied each swap, but chose to act openly on the point. The Memo did not affect any contractual benefit. To accept the Union's view places Jail employees in control of the Jail, and neither law nor contract permits such a result. Employees were manipulating casual days to avoid work on holidays. The Sheriff responded by fulfilling his personal duty to control the Jail. It cannot be ignored that the Sheriff acts based on the public good, while individual employees act in their individual self interest. The Sheriff acted appropriately to harmonize his legal duty with the contract and that effort can be respected only by denying the grievance.

DISCUSSION

I have not adopted either party's statement of the issues, but both weigh in the resolution of the grievance. The Union's highlights that grievance's focus is the swap approval process of Section 5.3. The County's highlights that the Memo is broader. My statement broadly highlights that the grievance cannot be understood outside of the stew of contract provisions underlying the declaration of emergency and the Memo.

It is first necessary to whittle away what is not a viable means to resolve the grievance. The statutory and constitutional aspects of the Sheriff's authority afford no direct assistance. In my view, issues of external law can profitably be addressed in arbitration only if the contract requires it or if the parties mutually request it. In the absence of contract authority or stipulation, to address an issue of external law only adds another level to a dispute, with no assurance that an arbitrator's decision can resolve it. Here, the Union has not sought my opinion on external law. Beyond this, the procedure I act under militates against it. The settlement took the dispute from a statutory forum to a contractual one, and the parties' desire

for a swift answer points away from taking on the thicket of law regarding a Sheriff's authority. That authority does, however, serve as background. The contract must be interpreted in a way that does not unnecessarily conflict with it.

The originally filed grievance cites a stew of provisions. Listing them above highlights the complexity of the scheduling process. Witness testimony underscores this, but the end-of-year scheduling difficulty posed by casual day usage within the swap process is difficult to understand without reference to the governing sections.

Examination of the parties' positions, however, leaves Sections 1.2 and 5.3 as controlling. Section 5.3 highlights that the Sheriff's approval is crucial to the dispute regarding swaps. The management rights provision, cited in the original grievance, is subsumed throughout the parties' arguments, since the Union argues the Memo abused those rights, while the County argues the Memo did not.

Neither Section 21.8 nor 22.1 control the grievance. The Memo mentions Holiday and Vacation procedure, but the evidence affords no reason to believe the Memo adversely impacted either. Past Practice is significant to the Union's position, but Section 22.1 affords no ground for its concern. That section addresses "benefits", which are "not referred to in this document". However, Section 5.3 addresses swaps; Section 12.2 addresses casual days; Sections 9.3 through 9.5 and the provisions they incorporate address overtime assignment; Article X addresses vacations and Article XI addresses holidays. Past practice has significance to the dispute, but Sections 21.8 and 22.1 do not root it.

The Union's statement of the issue focuses its concerns on the swap process, and more specifically on supervisory approval. The Memo impacted that process by requiring that casual days be used prior to swaps. The focus of the Union's concern is that prior to the Memo, supervisory approval by "the Sheriff or the Sheriff's designee" under Section 5.3 was done without any across-the-board condition that casual days be exhausted prior to approval. The County counters that the Memo simply set open guidelines for the exercise of supervisory discretion, which could have been done implicitly case-by-case without announcing the rule.

This introduces the essential basis for resolving the grievance. The County urges that the Sheriff effectively established rules for the approval of swaps. Section 1.2 governs this process, authorizing County adoption of rules, but demanding that they be reasonable and not discriminatory. This establishes that a reasonableness analysis is the basis to address the grievance.

That analysis demands that the rule address a proven need and impose regulation only to the degree necessary to address it. Here, there is no basis to question either regarding Downtown. Best's testimony, together with that of his command staff, stand uncontroverted on the need to do something regarding end-of-year Downtown staffing. Van Tine's testimony

highlights that Union leadership repeatedly approached management regarding the difficulties traceable to forced overtime. Certain employees were being stretched to the limit, personally and contractually, to cover Downtown. There is no challenge that Downtown schedules for the Thanksgiving and Christmas holidays in 2004 did not have any available employees on the schedule for certain shifts and certain classifications. The evidence shows the Union attempted to assist the County in securing staffing short of an emergency declaration, but could not secure volunteers. The Union accurately notes that emergency declarations have been few over time. However, this does not rebut Van Tine's testimony that Downtown staffing annually flirted with an emergency declaration. The need for action is proven for Downtown.

Nor is there persuasive evidence to show that the Memo unreasonably regulated holiday, vacation or casual day usage through the demand that casual days be depleted prior to use of swaps. Preston's testimony stands unrebutted that Downtown uses the swap process less than KCDC and that the Memo assisted in releasing pressure on end-of-year staffing in 2005. In sum, the record establishes that the Memo reasonably regulated a proven need Downtown. That other factors, including increased staffing, assisted cannot undercut this.

The same cannot be said of the Memo's application to KCDC. Best's testimony, as well as that of his command staff, is uniform that end-of-year staffing did not pose the same problem at KCDC as at Downtown. Witnesses traced this difference in significant part to the side letter governing KCDC overtime procedures. The KCDC Administrator did not testify. This underscores that the need for the regulation came from Downtown. Testimony of Union witnesses further underscores the point.

The evidence thus shows a significant dichotomy. The evidence of need for regulation and for its efficacy Downtown is essentially uncontroverted, while the absence of a need for regulation and the hardship posed by conditioning swaps on the exhaustion of casual days at KCDC is essentially uncontroverted. McCormick's, Johnson's and Hinzpeter's testimony highlight the hardship the Memo's requirement posed on any KCDC employee who wished to take a vacation or use swap-related time at the start of the year. Significantly, there is no evidence of a need for the hardship caused by this regulation. The evidence establishes that end-of-year staffing is not the problem at KCDC that it is Downtown, due to the overtime side-letter and perhaps to other factors.

Thus, the Memo's reasonableness as a work rule is demonstrated Downtown, but not at KCDC. This does not pose a reason to view the rule as discriminatory. Contractually, Section 9.5(b) and Appendix G highlight that overtime is handled differently at KCDC than Downtown. Thus, the distinction between facilities is not unilateral County action. Uncontroverted testimony establishes that the complications of forced overtime at the end-of-year bear differently on Downtown than at KCDC. The grievance and the amended grievance

highlight that the parties do not treat the facilities as identical. The initial grievance focused only on Downtown, while the latter brought KCDC into the mix. This reflects that the Sheriff and his command staff focused the Memo on Downtown and on KCDC only to the extent they felt compelled to address the issue department-wide to assure a response Downtown.

Before addressing the Award, it is necessary to tie this conclusion more closely to the parties' arguments. The Union contends that the Memo adversely impacted past practice. The difficulty with this argument is that there is no practice that can overturn the need for the Sheriff's approval of a swap under Section 5.3. The practice is not unrestricted approval, but case-by-case approval without the condition of forcing the exhaustion of casual days prior to the approval of a swap. The reason the case-by-case approval formerly granted at KCDC can be granted significance as a contractual matter is that there is no evidence to show that the case-by-case approval process led to the same end-of-year staffing problems at KCDC as at Downtown. This impacts the reasonableness analysis rather than establishing an independently binding practice.

Union testimony questions whether the County ignored a bargaining obligation. That testimony is unhelpful. First, as noted above, the grievance's statutory dimensions cannot be meaningfully addressed here. Second, the County has the contractual right to promulgate a reasonable rule under Section 1.2. The Sheriff's attempt to draw the Union into the process on January 31 prior to the issuance of the Memo offered the Union the opportunity to become a partner in the reasonableness of the promulgation process. The Union's decision not to do so is less a principled stand on collective bargaining than the means by which the reasonableness analysis ended up in the hands of an arbitrator. The wisdom of that course is debatable, but poses no bargaining issue.

Under Section 1.2, the County is given the authority to adopt reasonable rules. The review above focuses only on that, by treating the Sheriff's Memo as the promulgation of a rule. Factually, this recognizes that the promulgation process demanded County action through the Sheriff's command staff and Personnel Department among others. Legally, this points away from the constitutional or statutory issues surrounding the Sheriff's authority. Whether or not a Sheriff has the legal authority to act unreasonably, the County has a duty to regulate reasonably under Section 1.2. More to the point here, there is no showing that KCDC employees needed to be brought under the mandate of exhausting casual days prior to obtaining supervisory approval of a swap.

The Award directs the County to cease and desist from enforcing that aspect of the Memo which demands that KCDC employees represented by Local 990J be required to exhaust their casual days prior to having swap requests reviewed. No further relief is ordered. The grievances seek essentially punitive measures. None is given here. Approval of a specific swap request cannot be assumed under Section 5.3. Make-whole relief requires finding actual damage. No such inquiry is appropriate here. The procedure I act under seeks speed, and

such an inquiry would be unduly time-consuming. Ultimately, the evidence indicates the County sought to address the inequities it became aware of, such as McCormick's cruise. Johnson's and Hinzpeter's testimony points to potential damage traceable to the Memo. Such damage is addressed by cease and desist relief. The Award goes no further. If the requirement that casual days must be exhausted is to be extended to KCDC by rule, the rule must either bring the Union into the process of tailoring the rule to KCDC or must do so through County action which reasonably addresses a need within KCDC.

AWARD

The County's implementation of the Memo did not violate the collective bargaining agreement as applied Downtown. That portion of the Memo which requires the exhaustion of casual days prior to the approval of a swap under Section 5.3 is not reasonable as applied to KCDC under Section 1.2.

As the remedy appropriate to the County's violation of Section 1.2., the County shall cease and desist from enforcing that portion of the Memo which requires the exhaustion of casual days by KCDC employees prior to the approval of a swap under Section 5.3. Such approval, prior to the promulgation of a reasonable work rule applicable to KCDC under Section 1.2, must be applied on a case-by-case basis.

Dated at Madison, Wisconsin, this 20th day of July, 2006.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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