

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 1312, AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

**JUNEAU COUNTY**

Case 142  
No. 66707  
MA-13605

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**Appearances:**

**Laurence Rodenstein**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for Local 1312, American Federation of State, County and Municipal Employees, AFL-CIO, which is referred to below as the Union.

**Mark B. Hazelbaker**, Hazelbaker & Associates, S.C., Attorneys at Law, 3555 University Avenue, Madison, Wisconsin 53705, for Juneau County, which is referred to below as the Employer or as the County.

**ARBITRATION AWARD**

The Union and the Employer 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 Union and the Employer jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as arbitrator to resolve a grievance concerning County action regarding Telecommunicator shift selection. On May 15, 2007, the parties filed a "Stipulation of Grievant and Employer Concerning Process For Resolution of Dispute." This document, referred to below as the Stipulation, included a submission of agreed-upon fact, evidence and a statement of the issues. The Stipulation waived evidentiary hearing, requesting that the grievance be resolved on the basis of the material included with the Stipulation and the parties' written arguments. The parties submitted their written argument by July 26, 2007.

In an e-mail dated September 14, 2007, I advised the parties of concerns regarding my understanding of the stipulation and requested to discuss them prior to setting out the facts

upon which I would issue an award. As a result, I conducted a teleconference call with the parties on September 21. During the conference call, the stipulated issue was clarified as well as certain problems in the identification of the exhibits. The parties agreed, however, that clarity on certain factual matters required evidentiary hearing, which was conducted in Mauston, Wisconsin on October 16. The parties offered clarifying testimony from Teri Wafle and Steve Coranado, and agreed to submit the 2003, 2004 and 2005 shift picks into the record. The parties chose not to supplement their previously filed briefs. In a letter filed with the Commission on October 26, the County noted that the “2005 shift selection sheet . . . cannot be located . . . and . . . we withdraw our request that this be made . . . an exhibit”.

### **ISSUES**

Paragraph 7 of the Stipulation states the issues thus:

- A. Did the Employer violate the Collective Bargaining Agreement by assigning day shifts of telecommunicator work to the newly created non-bargaining position of Telecommunicator Supervisor?
- B. Did the Employer violate a Consent Decree entered with respect to an earlier grievance concerning the hours assigned to the former position of Lead Telecommunicator?
- C. If the answer to either question A or B is yes, what is the appropriate remedy?

### **RELEVANT CONTRACT PROVISIONS**

#### **ARTICLE 2 – RECOGNITION**

The Employer recognizes the Union as the exclusive collective bargaining representative for all regular full-time and regular part-time employees of the Juneau County Courthouse, but excluding the Administrative Assistant II (Social Services), county maintenance supervisor, personnel coordinator, housing authority director, and soil and water technician, and excluding all other supervisory, confidential, managerial and professional employees.

...

#### **ARTICLE 4 – MANAGEMENT RIGHTS**

4.01 Subject to the provisions of this contract and applicable law, the Employer possesses the right to operate the county government and all management rights repose in it. These rights include, but are not necessarily limited to the following:

- A) To direct all operations of the County;
- B) To . . . schedule work;
- C) To . . . schedule and assign employees to positions . . .
- F) To maintain efficiency of county government operations . . .
- I) To introduce methods or facilities which are new or exist elsewhere;
- J) To change existing methods or facilities;
- K) To determine the kinds and amounts of services to be performed as pertains to county government operations, and the number and kinds of classifications to perform such services . . .
- M) To determine the methods, means and personnel by which county operations are to be conducted;
- N) Provided, with regard to paragraphs H through M above, the County will comply with its duty to bargain on such matters to the extent required by law.

#### **ARTICLE 5 – GRIEVANCE PROCEDURE**

. . .

##### 5.07 Arbitration:

. . .

B) Decision of the Arbitrator: The decision of the arbitrator shall be final and binding. The arbitrator shall not modify, add to or delete from the express terms of the agreement. . . .

#### **ARTICLE 8 – HOURS OF WORK**

8.01 The normal workweek shall be forty (40) hours. The work day shall commence at 8:00 a.m. and end at 4:30 p.m., with a one-half . . . hour lunch period from 12:00 to 12:30. However, employees may be assigned different work schedules in order to provide services outside the normal 8:00 a.m. to 4:30 p.m., Monday through Friday schedule.

Telecommunicators: The normal workday for telecommunicators shall be eight (8) hours. Full-time telecommunicators shall be scheduled to work a 4-2 cycle as follows: four (4) days on duty followed by two (2) days off duty. Part-time telecommunicators shall be scheduled to work a 2-4 cycle. In January of each year, telecommunicators shall select shifts by seniority. Employees shall be permitted to trade shifts by mutual agreement of the employees involved and with the prior approval of the immediate supervisor. The supervisor's approval shall not be unreasonably denied. The shifts shall be:

“A-1” Shift (full-time):	6:00 a.m. to 2:00 p.m.
“A-2” Shift (full-time):	10:00 a.m. to 6:00 p.m.
A-2 Swing:	2 A2 shifts and 2 A shifts
“B” Shift:	2:00 p.m. to 10:00 p.m.
B/A2 Swing	2 B shifts and 2 A2 shifts
P Shift	6:00 p.m. to 2:00 a.m.
“C” Shift:	10:00 p.m. to 6:00 a.m.
P/C Swing:	2 P shifts and 2 C shifts

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**ARTICLE 31 – WAGES AND CLASSIFICATIONS**

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Classes Assigned to Salary Grades

<u>Class Title</u>	<u>Grade</u>
<u>911/Civilian Telecommunicators</u>	
...	
Civilian Telecommunicator	11
Civilian Telecommunicator/Lead	12

**BACKGROUND**

The Stipulation includes the following statement of agreed-upon fact:

1. Juneau County is a municipal employer . . . and is a party to a collective bargaining agreement with Local 1312 for the period 2005 to 2007. The bargaining unit which is covered by the collective bargaining agreement includes telecommunicators employed in the Juneau County Sheriff’s Department.
2. Prior to 2001, the Juneau County Sheriff’s Department was located in the old Courthouse at 220 E. State Street, Mauston, WI. The telecommunicators were located in a telecommunications center located within the secured area of the Juneau County Jail on the third floor of the building.

3. The telecommunicators' center was next to the office of the Jail Administrator. At that time, the Jail Administrator doubled as the supervisor of the telecommunicators. The Jail Administrator's office location made it possible for that position to monitor and supervise activities within the dispatch center.
4. In 2001, Juneau County opened a new Justice Center located at 200 Oak Street, Mauston, WI. A new telecommunications center was built in the new building.
5. The telecommunications center is located in the Sheriff's Department, but is not located in the jail. The Jail Administrator's office in the new building is located within the secured area of the jail. That office is several hundred feet away from the telecommunications center. The Jail Administrator cannot monitor the operations of the dispatch center from the Administrator's office in the jail, or from any place within the jail. In order to supervise the dispatch center, the Jail Administrator would need to leave the jail entirely.
6. As a result of the physical relocation of the telecommunications center and changes in the operations of the center, in 2001, Juneau County decided to create a bargaining unit position known as Lead Telecommunicator.
7. The Lead Telecommunicator position was created as a lead worker position, in the bargaining unit, to provide day-to-day supervision and coordination of the telecommunications center. The Lead Telecommunicator was responsible for scheduling telecommunicators and assuring the Center was properly staffed.
8. After the new Lead Telecommunicator position was established, the Sheriff and Undersheriff became the ultimate supervisor of the telecommunications center. The Sheriff and Undersheriff are in the Justice Center on a basic schedule of Monday – Friday during the day, although they are always on call and on duty.
9. The Juneau County Sheriff's Department is always open. Accordingly, there always is at least one, and almost always two, telecommunicators on duty. To meet staffing needs on a 24/7 basis, the County staffed the telecommunications center over the years with varying mixes of full-time and part-time telecommunicators.

10. In 2003, the County restructured the telecommunicator positions. In lieu of the former staffing mix of six full-time and three part-time telecommunicators, the County expanded staffing to eight full-time telecommunicators. The telecommunicators work hours specified in the collective bargaining agreement at section 8.01.
11. The original Lead Telecommunicator was Teri Wafle, who held that position starting January 1, 2002, and continued in that capacity through June 28, 2006, when Lisa Lutz started as Lead Telecommunicator. Lisa Lutz was promoted to that position.
12. . . . Under the Agreement, shifts are to be awarded by bidding, with seniority the determining factor. . . . (A)s Lead Telecommunicator, Teri Wafle assigned herself "AO" [Administrative Office] shifts during the hours of 10:00 a.m. to 6:00 p.m.
13. Lisa Lutz was not the most senior telecommunicator when she became Lead Telecommunicator. When shifts for 2006 were posted, Teri Wafle was not awarded the shift Ms. Wafle desired because the Sheriff assigned Ms. Wafle to work the day hours so that she could interact with the Sheriff and Undersheriff.
14. Local 1312 and Teri Wafle grieved the assignment of daytime shift hours to Lisa Lutz, and the Consent Decree . . . resulted. The Union also grieved the failure of the County to offer the A-2 shift pursuant to Sec. 8.01 in the 2006 shift selection process.
15. The County then acted to create a non-bargaining unit supervisory position of Dispatch Supervisor and awarded that position to Lisa Lutz.
16. The instant grievance was filed in response to the Sheriff's assignment of Lisa Lutz to work a schedule in which she works two days per week on supervisory duties in which she does not perform significant amounts of dispatch work. She also is scheduled to work two regular shifts per week as a telecommunicator on the A2 shift, which has the hours of 10:00 a.m. to 6:00 p.m. Those shifts were formerly performed by members of the bargaining unit represented by Local 1312. Local 1312 did not agree to assignment of these hours to Lisa Lutz.

The Stipulation also includes a series of exhibits, which the Stipulation addresses thus, "The parties stipulate to the authenticity of all exhibits . . . but reserve all other objections as to relevance or admissibility, and are free to argue weight."

The "Instant" grievance is dated December 11, 2006 (references to dates are to 2006, unless otherwise noted), and states:

Article 8, Section 8.01 of the Collective Bargaining Agreement provides that shift selection occur annually. The designated shifts in Section 8.01 include A-2 Swing Shift. By the Departments failure to offer the A-2 Swing in the 2007 selection process, the Department is in violation of Section 8.01 and all other sections which may apply.

This is a union grievance filed on behalf of all the Telecommunicators. We believe that the question of the A-2 Swing as a shift for selection is settled by the Union's favorable 2006 arbitration award in the Wafle grievance. As such, the County's action is a failure to acknowledge the res judicata underlying the issue requiring the presence of the A-2 Swing for selection purposes.

As a remedy, the union asks that the County cease and desist, restore the status quo ante and provide Telecommunicators the opportunity to bid on the A-2 Swing shift.

Sheriff Brent Oleson responded in a memo dated December 19, which states:

. . . the contention is that because of the Wafle grievance consent award, the County is required to offer an A-2 swing shift. The Wafle grievance did not make such a determination. The County stipulated to entry of an award which restored Teri Wafle to her prior shift, nothing more. . . .

The Collective Bargaining Agreement lists the shifts which are available for the employer to schedule employees as needed. But nothing in the agreement creates any minimum staffing or obligates the employer to schedule bargaining unit employees in a particular shift. The Agreement does no more than specify what shifts the employer may use to staff the telecommunications center.

With respect to the contention that bargaining unit positions may not be filled by non-unit members, the shifts in question are not a bargaining unit position. As noted, the County created a new, non-bargaining position. Under Wisconsin law, supervisory personnel can work alongside the bargaining unit without forfeiting supervisory status. . . .

The parties were unable to resolve the grievance through the grievance steps preceding arbitration.

For 2003, Wafle worked the A2-A Swing Shift. The shift picks for 2004 became effective in April of that year. For 2004, Wafle worked the A-2 shift. A more senior employee, Michelle Lobenstein, selected the A2-A Swing shift. Wafle, Lobenstein and Shirley

Cox covered the A2 shift hours in 2004. Cox is more senior than Wafle. From April of 2004, Wafle scheduled herself to perform administrative duties while the Sheriff and Undersheriff were in the office. County records note these A2 shift hours used by Wafle to attend to office duties as "O" shifts. During these shifts, other Telecommunicators would cover for Wafle in the Dispatch Center while she did her office work. For 2006, Wafle selected the A2 Swing Shift, working that shift until April of 2006, when Lisa Lutz became the Lead Telecommunicator. After giving up the Lead Telecommunicator position, Wafle posted for a vacant P Shift, but the Sheriff denied the request, prompting Wafle to request the A-2 Swing shift but Oleson declined the request, placing the less senior Lutz in that shift. Prior to becoming Lead Telecommunicator, Lutz worked the C Shift.

The Union responded with a grievance dated March 29, seeking that "shifts remain same as picked in Jan." In an addendum to the grievance, Wafle alleged,

The nature of the grievance is the issue of shifts. . . . In section 8.01 it states in January of the year telecommunicators shall select shifts by seniority.

The relief I am seeking is that this is the shift by seniority I have selected for the year. Therefore should have the right to remain in this shift by seniority rights.

Oleson responded to the grievance in a memo dated March 31, which states:

The Lead Dispatch Position was created so there would be supervisory duties in dispatch on a part-time basis. Two of the four shifts in this position are dedicated to supervisory functions. When this position was created the schedule was established so that there would be three people on-duty two of the four scheduled work days for this position. It was on the days where there would be three on that the Lead Dispatcher would do office work. It is imperative that the Lead Dispatcher works during the day so that he/she can meet with Supervisory Staff to address issues that frequently arise. The reason the A/O Swing (A-Shift/Office-Shift) is the most beneficial to the Sheriff's Office is because it overlaps four out of the seven telecommunicator shifts allowing for the supervisory function of the job requirements. . . .

The parties could not resolve the grievance prior to arbitration. Throughout the processing of the grievance through arbitration, Wafle served in a B-A2 Shift.

In a letter dated September 25, 2006, the County advised the Union that it was considering "the need to abolish one of the existing telecommunicator positions and create in its place a non-bargaining supervisory position to assume supervisory duties over the unit." The letter added that its consideration of the point reflected "that some issues such as apportioning overtime, scheduling, and evaluating and deciding effectively to remove or retain staff members can't be made by members of the bargaining unit." The letter added, "It is our intention to place the supervisor on a predominantly day schedule . . . (to) cover some duties

in the telecommunications center.” The County added that the anticipated schedule “will change the mix of shifts available for posting when the sign-up sheet for 2007 goes up.”

The March 29 grievance was scheduled for arbitration on October 23. During the course of that hearing, the parties reached an agreement that Arbitrator Coleen Burns issue a Consent Award. She did so, in Dec. No. 7065, which states:

...

**CONSENT AWARD**

1. The grievance is sustained.
2. There will be a return to the schedule that was in effect before management’s action involving Lisa Lutz.
3. Teri Wafle will be returned to the A/A2 shift, effective with the November, 2006 schedule.
4. There will be no general repicking of shifts and the Lead Telecommunicator is on the A/A2 shift.
5. The Annual Shift Pick will be in December.

...

She issued the Consent Award on November 13.

On November 14, the County Board adopted Resolution # 06-99. The Resolution states:

...

**INTENT: ELIMINATE LEAD TELECOMMUNICATOR POSITION AND  
CREATE FULL-TIME DISPATCH SUPERVISOR POSITION**

**FISCAL IMPACT: \$0**

WHEREAS, when the Juneau County Sheriff’s Department moved into the new Justice Center five years ago, a substantial change in the operations of the dispatch function occurred because the dispatch center was relocated to a new and separate facility which was no longer physically part of the jail;

WHEREAS, the dispatch center had formerly been under the supervision of the Jail Administrator, an arrangement which was practical because the Jail Administrator's office was located immediately adjacent to the dispatch center;

WHEREAS, the County has attempted to supervise the dispatch function by having a lead telecommunicator who is part of the bargaining unit and works as a lead worker;

WHEREAS, the Sheriff has reported that he feels that the physical separation of the dispatch center, its growing significance in the operations of the Department and experience with personnel issues that have occurred during the past year, all suggest that there is a need to increase the level of supervision of the function by converting the lead telecommunicator position to a non-union dispatch supervisor position;

WHEREAS, the lead telecommunicator position is already paid more than the regular dispatchers and, therefore, it will not be necessary to increase the dispatch supervisor position's pay above that of the current incumbent in the lead telecommunicator position;

NOW, THEREFORE, BE IT RESOLVED AS FOLLOWS:

1. Effective December 1, 2006, the position of lead telecommunicator is abolished.
2. Effective December 1, 2006, the position of dispatch supervisor is created, to be outside the bargaining unit and assigned the supervisory duties specified in the attached job description.
3. The dispatch supervisor position shall remain in the same pay grade currently held by the lead telecommunicator. . . .

The Job Description for Dispatch Supervisor states the following **“RESPONSIBILITIES AND DUTIES:”**

- Supervisors daily activity of telecommunicators:
- Schedules and assigns duties to telecommunicators as the need arises, including ordering telecommunicators in to work mandatory hours and overtime;
- Participates in the hiring and firing of telecommunicators, presenting a recommended termination or selection decision to the Sheriff;
- Investigates violation of departmental policy and complaints and drafts reports to the Sheriff for implementation of appropriate actions;
- Recommends and takes an active role in investigating and imposing disciplinary manners, including preparation of recommended response to employee grievances;

- Has authority to suspend telecommunicators with pay if necessary in the supervisor's judgment to protect the interest of the county;
- Participates in administrative decision making regarding policies, procedures, and programs;
- Routinely meets with emergency service personnel throughout the County to improve the County's dispatch services;
- Completes performance evaluations of telecommunicators;
- Reviews and revises Agency procedures as the need arises;
- Ensures the dispatch center is in compliance with State and Federal Laws and regulations;
- Completes administrative functions such as payroll, monthly reports, records management, purchasing;
- Prepares a proposed budget for the telecommunications function, prepares the telecommunication center portion of the Department's annual report and budget preparation; monitors monthly expenditures and revenues.
- Operates as a telecommunicator when assigned or during emergency situations;
- Performs any other duties as directed by the Sheriff; Undersheriff or his/her designee.

The County returned Wafle to the A-2 Swing shift after the issuance of the Consent Award, but did not make the A-2 Swing shift available for the 2007 bidding process. As a result, Wafle returned to the B-A2 Shift when the 2007 shift selections became effective.

While Lead Telecommunicator, Wafle produced Telecommunicator schedules. County monthly time records designate office time spent by the Lead Telecommunicator with an "O" designation, thus creating "O" and "AO" shifts that follow the same hours of the shifts noted in the labor agreement. The "O" designation notifies employees that the Lead Telecommunicator may not be able to dispatch during those hours. Wafle scheduled herself to work well over one hundred "O", "A" or "AO" shifts between April of 2004 and September of 2005. Starting in September 2005 and continuing through the end of her tenure as Lead Telecommunicator, County monthly time records record Wafle's shifts as "A/O Swing". While working at least some of the "O", "A" or "AO" shifts, Wafle was not the most senior unit employee present on the shift. The County views this scheduling to reflect its administrative needs and to reflect that Wafle scheduled herself as Lead Telecommunicator without regard to seniority. Wafle and the Union do not believe she possessed that authority and Wafle does not believe she ever bumped a more senior employee from a shift the employee selected by seniority. From the Union's and Wafle's perspective, Sheriff Oleson's refusal to continue Wafle in the A-2 Swing shift after Lutz became Lead Telecommunicator is the first instance of a less senior employee moving another employee from a shift selected by seniority.

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

## THE PARTIES' POSITIONS

### The Union's Brief

The Union prefaces its review of the record by noting that the “parties were unable to stipulate to a common issue to describe the dispute”, then stating its view of the issues that “underlie this dispute” thus:

1. “Did the Employer violate the terms of the Consent Award of Arbitrator Burns when it refused to restore the A-2 shift to the instant bargaining unit and, instead, assigned the A-2 shift to a non-bargaining unit employee?” If so, what is the appropriate remedy?

2. “Did the Employer violate the terms of the collective bargaining agreement when it offered the A-2 shift and its bargaining unit work to supervisor, Lisa Lutz?” If so, what is the appropriate remedy?

After a review of the evidence, the Union contends that the Consent Award governs the grievance. The award codified a settlement agreement reached one day before “the County decided to formally sabotage the Consent Award.” Whatever its motivation, the County announced on November 14 that it was eliminating the Lead Communicator position and replacing it with the Dispatch Supervisor position. The result of this action was to remove the shift awarded to Wafle and grant it to Lutz. This result is “egregious” and unjustifiable.

Because the Consent Award involved the same employer, same worksite and same fact situation, it must be considered to bind the result in this grievance. The County’s actions permitted Lutz to claim through County resolution a shift she could not claim under the agreement, due to her lack of seniority. This resolution is a subterfuge, as manifested by the fact that “the County didn’t even bother to give Lutz a raise when she was ‘promoted’ from Lead (Grade 12) to Supervisor (Grade 12).” There can be no claim the “supervisory” duties had any value to the County.

Whether by force of precedent or by force of the parties’ agreement, the Consent Award must bind the County in this case. Section 8.01 must be given its intended effect until the County bargains a change. Nothing in the labor agreement supports the County’s attempt to remove the Lead Telecommunicator position from the unit. The rationale of the resolution eliminating the position establishes only the County’s desire “to circumvent the terms of the Burns Consent Award.” The purported transfer of unit work to a supervisory position only compounds the contractual infirmity of the County’s conduct. Arbitral precedent will not support the County’s attempt to eviscerate the work of the unit. If the County believed it had the contractual authority to transfer unit work to a supervisory position, it should have litigated its belief before Arbitrator Burns.

Because the County's conduct is "egregious in purpose and outrageous in execution" the grievance requires "a robust and punitive remedy." This requires something more than a cease and desist order, and perhaps demands "an Order compensating Local 1312 for the unit wages lost by the illegal outsourcing of this bargaining unit work." The remedy must work a disincentive for the County to repeat its "tawdry" behavior.

### **The Employer's Response**

The County notes that the issues are stipulated, and after a review of the evidence, contends that the Consent Award does not bar it "from assigning the work involved here to the Dispatch Supervisor." Since the relief granted by the Consent Award cannot exceed the relief demanded by the grievance, and since the grievance did not challenge the County's authority to create a supervisory position, it cannot bar County award of a day shift, outside of seniority, to the supervisor.

No subterfuge is involved. Rather, the County simply sought to have a supervisor available during hours that supervisory personnel work. The weakness of the Union's position is that the County did the same scheduling with Lutz that Wafle did while she served as Lead Telecommunicator. The Union did not grieve the scheduling on non-contract based shift hours until Lutz became Lead Telecommunicator. In any event, and in each case, the County sought no more than "a supervisory system which worked." The Consent Award has no bearing on the scheduling of a supervisory or quasi-supervisory position to meet with supervisors.

The Union's assertion of an "improper reassignment of bargaining unit work" has no record support. The labor agreement contains no mention of "bargaining unit work." Nor "does the contract mandate that the County fill every shift listed in the CBA." Rather, it mentions "eight different shifts to which telecommunicators may be assigned." It does not set minimum staffing levels and does not limit dispatch work to unit employees."

Unlike other labor agreements, the one governing this grievance does not require that work historically done by unit members be restricted to them. There is no provision to prohibit the County from creating the Dispatch Supervisor position, then transferring duties to it. In fact, Article IV of the agreement grants the County the authority to do so. Its actions are "far from sinister" and seek no more than to assure "its dispatch center has proper supervision." A review of the facts establishes only that an "entirely reasonable state of affairs that prevailed for several years while Teri Wafle was the Lead Worker apparently was no longer good enough once she no longer wished to have those responsibilities." Rather than litigating a unit placement issue, the Union chose to pursue a grievance which asserts the "breathtaking assertion" that the County "may not, in the process of creating a non-union position, assign any work performed by bargaining unit members to that position." A review of Commission precedent confirms that the County acted well within the scope of its management rights. Beyond this, Commission precedent establishes that the County may assign supervisory duties to a non-unit position which also performs work done by bargaining unit members. The County acted prudently to schedule the Dispatch Supervisor to work hours

when the Sheriff and Undersheriff are present. It is under no duty, legal or contractual, to tailor work hours to “suit the desires of its bargaining unit.”

The Union’s remedial claims are frivolous, as manifested by the hyperbole of its arguments. The Union specifies no remedial request, but the agreement will not support any remedy that can be characterized as punitive. A review of the evidence demands that the “Arbitrator . . . deny the grievance and dismiss the grievance on its merits.”

### **The Union’s Response**

The Union notes that the County’s “principal defense” is the “necessity to create a supervisory position to address the geographic challenges posed by the new justice center building.” The Union does not challenge the County’s decision “to create a supervisory position”, but objects to “the manner in which the County cannibalized the disputed bargaining unit position.” The County’s actions essentially ignored the provisions of Section 8.01. Taken to its logical conclusion, acceptance of the County’s position would “allow it to dissolve the entire bargaining unit and, derivatively, the Agreement, absorbing all of the bargaining unit work into non-represented positions.”

Section 8.01 establishes the “integrity of the bargaining unit” by specifying certain shifts and their selection by seniority. By creating the supervisory position, the County evaded Section 8.01, permitting a Dispatcher to achieve a shift her seniority did not entitle her to. Neither the duties nor the pay rate of the newly created position can justify its “supervisory” nature. Since this action took place after the Consent Award, it points to “bad faith” and to a “‘shot across the bow’ of the Commission’s administration of MERA.” The County’s actions challenge “not only the integrity of the instant bargaining unit” but “the very foundations of Wisconsin labor law.” The County should not be permitted to use its ordinance authority to overturn an arbitration award. Rather, the County should take its concerns to the collective bargaining process.

The County’s conduct demands a remedy more “robust” than a cease and desist order. The Union should be reimbursed “for the loss of bargaining unit work, including the loss of union dues.” Even assuming an arbitral remedy is limited to “make whole” relief, the Union seeks nothing more than the restoration of the contractual status quo as well as the reimbursement of its costs. This remedy flows “organically from the explicit terms of the agreement.”

### **DISCUSSION**

The conference call clarified that Paragraph 7 of the Stipulation states the issues. The parties’ arguments show friction generated by the grievance’s evolution. That friction did not, however, surface during any other part of the process. The source of the friction is the Union’s concern with protecting “bargaining unit work.” This is the common thread underlying the stipulated issues.

As the Union argues, "bargaining unit work" is a reference underlying a considerable amount of arbitral precedent. The Union's citation of *The Common Law of the Workplace*, St. Antoine, editor (BNA, 2005), highlights that the reference arises as a function of contract language or of arbitral inference, *SEE SEC. 4.1 AT 120*. The inference can reflect an arbitrator's reaction to an erosion of the bargaining unit, whether or not bad faith is involved. The evidence here manifests some friction, but will not support an inference of bad faith regarding County conduct. That point is more specifically addressed below.

Whatever merit the broad reference to "bargaining unit work" has as a general proposition, if it is to be applied consistent with the demand of Section 5.07B) that an arbitrator not "add to" the "express terms of the agreement", then the reference must be given a foundation in the language of the labor agreement. Here, the Union puts that focus on Section 8.01.

The County persuasively notes that no cited agreement provision refers to "bargaining unit work." Article 2 defines the unit through reference to employees and employee positions. The duties of a position thus define the unit placement of the employee occupying the position. Resolution of the stipulated issues turns, then, on the asserted evisceration of seniority in the County's use of rights under Article 4 to implement Article 8.

The Union urges that "bargaining unit work" underlies both stipulated issues. Under its view, the Consent Award solidified, as "bargaining unit work," the A-2 Swing shift assigned by the County to Lutz. Since Lutz' position is not within the unit and since the shift is "bargaining unit work, it should have remained with Wafle, whose position is within the unit. In my view, the crucial determination is not the work involved, but the Dispatch Supervisor's unit placement.

This general conclusion must be specifically tied to the issues. The reference to the "newly created non bargaining position" focuses the first issue on County action after the creation of the Dispatch Supervisor position, which followed the issuance of the Consent Award. The parties do not dispute that the County returned Wafle to the A-2 Swing shift after the Consent Award. The dispute focuses on the County's refusal to make that shift available in the bidding process for 2007 shifts. In the Union's view, County compliance gave Wafle roughly one month of a shift she had a right to claim throughout 2006 and 2007.

The Consent Award resolved the March grievance, definitively establishing a County violation of the labor agreement. The March grievance pitted the County's right to assign under Section 4.01, specifically Subsections C) and M), against the specified shifts and shift selection by seniority specified in Section 8.01. Since Section 8.01 specifically governs shift selection, it is less than evident how the more general reference of Subsections 4.01C) and M) could be read to reassign the A-2 Swing shift to a less senior unit employee. The Consent Award establishes that the parties agreed that the County's application of Section 4.01 was inappropriate.

The first issue questions whether the shifts of Telecommunicator work established at Section 8.01 demand that Lutz' A-2 Swing shift hours be submitted for selection by seniority in 2007. The difficulty with the Union's view is that the agreement does not refer to "bargaining

unit work". Section 8.01 does not contain any mandate beyond the designation of what Telecommunicator shifts "shall be." Article 2 lends no support for the Union's assertion, for it defines unit placement by position and by position duties. The first issue takes Lutz' non-unit status as a given. To accept the Union's view reads Section 8.01 not as a designation of shifts, but as a prohibition against a supervisor performing any Telecommunicator duties. The language of Section 8.01 will not stretch that far. Nor does the record contain persuasive evidence of past practice, bargaining history or any other contract provision to support the stretch.

Examination of the second issue underscores the interpretive difficulty posed by the Union's assertion of "bargaining unit work." More specifically, that reference rests solely on arbitral inference. The contract, however, highlights that the determinative point is not whether a supervisor can perform telecommunication work, but whether Lutz is a supervisor. If the County had not acted to supplant the Lead Telecommunicator position, the Union's position is persuasive, since the Consent Award establishes that the contract does not permit the County to assign Telecommunicator shifts to unit employees outside of the seniority selection process.

Put in contractual terms, the settlement of the March grievance established that the County's general right to assign duties and to create unit member schedules under Section 4.01 cannot be applied to overturn the seniority based shift selection process of Section 8.01. If this settlement, as confirmed in the Consent Award, established the A-2 Swing shift as bargaining unit work, then the County's failure to offer that shift to Telecommunicators in the 2007 shift selection process violates Section 8.01. However, the contractual issue posed by the grievance underlying the second stipulated issue is contractually distinct from the grievance that prompted the Consent Award. Article 2 excludes supervisors from the unit. If Lutz is a supervisor, then there is no specific counterweight to the County's general right to assign under Section 4.01. As a supervisor, Lutz' shift is not governed by Section 8.01 because she is not a member of the unit defined by Article 2.

The scope of this conclusion is best detailed by tying it more closely to the parties' arguments. Whether or not Wafle was authorized as Lead Telecommunicator to schedule herself to a day shift without regard to seniority has no bearing on the grievance. The evidence supports the Union's view that Wafle created schedules without undermining the seniority shift selection of any other unit employee. Granting this, however, has no bearing on the issues. The contractual infirmity prompting the Consent Award is the mutual recognition that County action to assign, under Section 4.01, Subsections C) and M) cannot overturn the seniority based shift selection process mandated in Section 8.01 and confirmed by practice. The difficulty posed here is that the March grievance concerned the competing interests of unit employees. The County's creation of a non-unit position fundamentally altered that issue by making the interests at issue those of a unit employee covered by the labor agreement and those of a non-unit employee not covered by the labor agreement.

The Union's response is that the competing interests focus on bargaining unit work rather than on the unit placement of the affected workers. As noted above, there is support in arbitral precedent for this view. However, that support cannot be traced on this record to specific

contract language referring to or defining “bargaining unit work.” The reference is thus based on arbitral inference alone.

The evidence will not, however, support the inference. There is no persuasive indication of bad faith. The evolution of the Dispatch Supervisor is traceable to County restructuring of its law enforcement operations. As a personnel function, this traces to the creation of the Lead Telecommunicator position in 2001 through the County’s decision in 2003 to eliminate part-time Telecommunicator positions in favor of full-time positions. The restructuring process involved more than personnel. It included the building of a Justice Center, physically separated from the old courthouse. This process took the dispatch center from the Jail to the Sheriff’s department, which is housed in a separate building. This process manifests no indication that the County sought to erode the unit. Viewed from the perspective of full-time openings, the unit expanded. Nor is there an indication of bad faith in the creation of the Dispatch Supervisor position. The position reflects an ongoing effort by the County to provide on-site oversight of the dispatch center, which could no longer be provided by the Jail Administrator.

This change is, arguably, the erosion of the unit through the loss of the portion of the Dispatch Supervisor position that includes telecommunication duties. Even if taken this way, the action affords a tenuous basis to infer bad faith. The asserted erosion, even though effected immediately after the execution of the Consent Award, reflects no more than the County’s ongoing desire to provide on-site oversight of the dispatch center. Viewing the timing to indicate bad faith ignores that the County advised the Union of its contemplated action in September, well before the Consent Award. In any event, the erosion issue is squarely posed by determining the unit status of the Dispatch Supervisor. It is not clear how the inference of bad faith assists in the determination. More to the point, the first issue presumes that Lutz occupies a non bargaining unit position.

Even if the unit status of the Dispatch Supervisor is considered in issue, the evidence affords no substantial support for the inference of bad faith. The Union accurately notes that the County resolution creating the position funded it at the same wage as that of Lead Telecommunicator. Whatever this says about good or bad faith, this is only one indicia of supervisory status. The position description of Dispatch Supervisor, standing alone, documents a supervisory position. If it accurately describes the position’s duties, there is little doubt the position is supervisory. More to point, this record does not pose how accurately the position description describes Lutz’ duties. In the absence of proof establishing that the Dispatch Supervisor is, in fact, a unit position, there is little to support the inference of bad faith.

The determination of supervisory status poses contractual and statutory issues. Whether the Dispatch Supervisor is a “supervisory” employee within the meaning of Article 2 poses a contractual issue. The statutory dimension of the issue is whether Lutz is a “Municipal employee” within the meaning of Sec. 111.70(1)(i), Stats., which excludes a “supervisor”. Sec.111.70(1)(o), Stats., defines “Supervisor.” The Commission has considerable precedent on each of these points. More significantly here, as the stipulated first issue notes, the parties do not question Lutz’ employee status.

Whether or not what constitutes a “supervisory” employee under Article 2 is posed for decision, it is worthy of some note that Commission precedent conditions a determination of the statutory propriety of unilateral employer action removing a position from a bargaining unit on first deciding the “employee” status of the position, see, for example, STATE OF WISCONSIN, DEC. NO. 18696 (WERC, 5/81); CUDAHY PUBLIC LIBRARY, DEC. NO. 26931-B (Gratz, 5/92) aff’d DEC. NO. 26931-C (WERC, 10/92); and BROWN COUNTY, DECS. NO. 28158-F & 28159-F (WERC, 12/96). The Commission’s approach highlights the practical value of determining the bargaining unit status of a position prior to assessing whether or not employer unilateral action regarding the position is proper. Here, if Lutz is not a supervisor, the Consent Award establishes that her shift should have been available for selection by seniority under Section 8.01. If she is a supervisor, then Section 8.01 does not apply to her shift, because she is not a member of the bargaining unit. This approach highlights that the grievance does not seek the protection of shift selection by seniority. Rather, it seeks to preclude the County from assigning dispatch duties to Lutz that can be performed during an A-2 Swing shift selected by a unit employee under Section 8.01. Beyond this, Commission law defining supervisory status has historically presumed a supervisor’s duties may include those performed by unit employees, see, for example, WEST BEND JOINT SCHOOL DISTRICT NO. 1, DEC. NO. 28491 (WERC, 8/95); CITY OF ANTIGO, DEC. NO. 29391 (WERC, 6/98); MANITOWOC COUNTY, DEC. NO. 31547 (WERC, 12/05).

Here, the statutory and contractual issues do not pose distinguishable issues. Article 2 excludes Lutz from the agreement as a supervisor, and there is no contract provision to define “bargaining unit work.” The agreement grants the County the authority to assign work to positions but does not preclude a supervisor from performing telecommunication duties. The record will not support the inference of bad faith, and there is no erosion of the unit beyond whatever time Lutz spends in telecommunication duties. Section 8.01 defines the shifts of Telecommunicators within the bargaining unit but does not mandate staffing levels or limit County authority to assign work. Whether viewed contractually or statutorily, the determinative point regarding the resolution of the stipulated issues is Lutz’ supervisory status.

In sum, the County did not violate the labor agreement by assigning the duties of the Dispatch Supervisor position to Lutz. That her duties may include those performed by Telecommunicators within the scope of Article 2 does not alter this conclusion unless or until the overall duties of the Dispatch Supervisor position are insufficient to make its incumbent a “supervisory” employee. Because there is no dispute that Lutz occupied a non bargaining unit position at the time covered by this grievance, the County committed no contract violation. The County did not violate the terms of the Consent Award because the March grievance prompting that award questioned the shift assignment of two unit employees, while the grievance posed here questioned the shift assignment rights of a bargaining unit employee (Wafle) against those of a non bargaining unit employee (Lutz). Section 8.01 does not govern shift assignment of a supervisory employee, and does not mandate specific County staffing levels of the shifts listed at Section 8.01. There is, then, no contractual basis to grant Wafle the A-2 Swing shift in 2007 and no contractual basis to preclude the County from setting Lutz’ hours as a supervisor.

**AWARD**

The Employer did not violate the Collective Bargaining Agreement by assigning day shifts of telecommunicator work to the newly created non-bargaining position of Telecommunicator Supervisor.

The Employer did not violate a Consent Decree entered with respect to an earlier grievance concerning the hours assigned to the former position of Lead Telecommunicator.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 26th day of November, 2007.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator

