

BEFORE THE ARBITRATOR

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

and

LINCOLN COUNTY

Case 247
No. 66779
MA-13632

Appearances:

Mr. John Spiegelhoff, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1105 East 9th Street, Merrill, Wisconsin 54452, on behalf of the Union.

Mr. John Mulder, Lincoln County Administrative Coordinator, 1104 East 1st Street, Merrill, Wisconsin 54452, on behalf of the County.

ARBITRATION AWARD

Lincoln County Courthouse Employees, Local 332-A, AFSCME, AFL-CIO (herein the Union) and Lincoln County (herein the County) are parties to a collective bargaining agreement covering the period from January 1, 2006 to December 31, 2007. On February 28, 2007, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a change to the work schedule of Telecommunicators in the bargaining unit by the County. The Undersigned was appointed to hear the dispute and a hearing was conducted on April 10, 2007. The proceedings were not transcribed. The parties filed briefs by May 29, 2007, whereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues:

Did the County violate the collective bargaining agreement or past practice when it altered the rotating work schedule of Erik Thompson in the power shift position on October 30 and 31 of 2006?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 2 – MANAGEMENT RIGHTS

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

A. To Direct all operations of the County:

...

F. To maintain efficiency of department operations entrusted to it;

...

J. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, and to determine the work to be performed by employees;

...

L. To determine the methods, means and personnel by which operations are to be conducted.

Any unreasonable exercise or application of the above-mentioned management rights which are mandatorily bargainable shall be appealable through the grievance and arbitration procedure; however, the pendency of any grievance or arbitration shall not restrict the right of the County to continue to exercise these management rights until the issue is resolved.

ARTICLE 15 – WORK SCHEDULE

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

...

E. Correctional Officers:

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

...

H. 9-1-1 Telecommunicator: Rotating work schedule of 4 days on and 2 days off, with the normal hours of 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m., and 11:00 a.m. to 7:00 p.m. The Telecommunicator working the 11:00 a.m. to 7:00 p.m. shift may be assigned to work hours to fill the needs of the department irrespective of seniority. The Sheriff or his/her designee will provide a 5 day notice of changes in shift to the Telecommunicator working the 11:00 a.m. to 7:00 p.m. shift. Employees shall also be required to work 40 hours of training as scheduled by the County. All lunch periods and breaks shall be taken at the work site.

1. Shift selection for the 911 Telecommunicators and Correctional Guards will be based on position seniority. Shifts will be picked during October of each year for the following year. Shifts selected by Telecommunicators for the following year will be fixed. The Sheriff or his/her designee reserves the right to reassign shifts in case of an emergency and or prolonged shift vacancy.

BACKGROUND

Lincoln County employs Telecommunicators who work in the 911 Center of the Sheriff's Department and who are members of Lincoln County Courthouse Employees' Local 332-A. According to the terms of Article 15, Section H of the collective bargaining agreement there are four work shifts: 1st – 7:00 a.m. to 3:00 p.m., 2nd – 3:00 p.m. to 11:00 p.m., 3rd – 11:00 p.m. to 7:00 a.m. and a Power Shift from 11:00 a.m. to 7:00 p.m. The Telecommunicators normally work an 8 hour shift, rotating 4 days on and 2 days off. Three Telecommunicators each are assigned to 1st, 2nd and 3rd Shift and one Telecommunicator is assigned to the Power Shift. If there is a vacancy on one of the other three shifts, the Power Shift Telecommunicator may be assigned to cover it until it is filled.

In December 2005, a vacancy was created on the 3rd Shift as a result of the termination of a Telecommunicator. As a result, the Power Shift Telecommunicator, Tina White was assigned to work 3rd Shift until the vacancy was filled. On July 31, 2006, Erik Thompson was hired to fill the Telecommunicator vacancy. The County's practice has been to assign new hires to the same shift as their Field Training Officer during their training period. Upon completion of training, the Telecommunicator is then assigned to the shift that was vacant on his or her date of hire. Thus, during his training period, Thompson was assigned to 2nd Shift. Additionally, his schedule was somewhat altered from the typical 4-2 scheme at first to accommodate outside obligations of the employee.

After September 21, 2006, Thompson was regularly working the 2nd Shift on a normal 4-2 rotation and on October 29 he was supposed to begin 4 days on. After working October 29, however, he was scheduled off on October 30 and 31, then began working a normal 4-2 schedule again. Additionally, on November 1 Thompson was assigned to the Power Shift as his regular work assignment. On November 1, Tina White filed a grievance over the assignment on the basis that she had requested the Power Shift and was senior to Thompson. The grievance was subsequently sustained by the County, whereupon White was returned to the Power Shift in January 2007 and Thompson was assigned to 3rd Shift. On November 6, 2006 the Union filed a grievance over the alteration of Thompson's work schedule on October 30 and 31. Thompson was unable to grieve the matter himself, due to his probationary status. The Union contended that under the contract and prevailing practice the County did not have the right to alter the 4-2 schedule without Union consent. It sought to have Thompson's original 4-2 schedule re-established. The County denied the grievance and the matter proceeded through the contractual process to arbitration. Additional facts will be referenced, as necessary in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the language of Article 15.01(H) is clear and unambiguous and mandates a rotating 4-2 schedule for Telecommunicators. The record establishes that this

schedule has been in effect without deviation since the Telecommunicators were added to the bargaining unit in 1995. While it is possible for employees on the Power Shift and probationary employees to have their shifts altered, this does not affect the 4-2 rotational pattern.

Reading the contract as a whole also supports the argument that the 4-2 rotation cannot be unilaterally changed. Article 15.01(E) sets forth the work schedule for Correctional Officers and mandates a 5-2, 5-2, 5-3 schedule rotation. This is another example of a fixed work rotation in the bargaining unit and supports the assertion that the Telecommunicators' schedule should also remain unchanged. On one occasion in the past, the County attempted to alter the rotation of the Correctional Officers based on its management rights. The matter was grieved and this arbitrator sustained the grievance. LINCOLN COUNTY, Case 228, No. 63790, MA-12713 (Emery, 11/24/04) Both Article 15.01(E) and (H) make it clear that while shifts are subject to change from year to year, schedule rotation is not.

Past practice also supports the Union. There has never been a change in an employee's work rotation since the Telecommunicators were accreted to the bargaining unit in 1995. This has been true whether or not the employees have been probationary. Although Thompson's timecards reveal that at first he was not working a strict 4-2 rotation, this was because he was still working at another job, so needed a different schedule. After he was exclusively working for the County his schedule did not deviate from 4-2 until the events herein. The only exception is when a senior employee bumps a junior employee on shift preference and then would assume the junior employee's rotation on the new shift.

The County's justifications for the change of less overtime and a need for more training by Thompson are not supported by the evidence. On the other hand, if the County prevails, working conditions will be changed for the employees causing disruption and uncertainty to their schedules and resulting in more, not less, overtime.

The County

The County asserts that its action in altering a new employee's rotation was within its management rights as described in Article 2 of the contract. The contract specifies that shifts of Telecommunicators will be fixed yearly, but there is no language guaranteeing that the work rotation will be fixed. Nor is there any evidence that management ever bargained away its right to determine the work schedule of new employees. The County agreed to a 4-2 schedule and an annually fixed shift rotation, but never conceded its right to alter the 4-2 schedule of a new employee.

This is not a case where the County altered the rotation of a long-time employee, but a new employee who did not have a long history of working a consistent schedule. Because he had no settled routine of working a specified schedule, Thompson was minimally inconvenienced by the change, so there was no tangible harm to any member of the bargaining unit due to the change. On the other hand, the Chief Deputy testified that the change could

potentially save the County overtime, which justifies its action because it was in the overall best interest of the Department.

DISCUSSION

The incident that occasioned the grievance in this matter involved the action of the County in handling the initial assignment of Telecommunicator Erik Thompson upon completion of his training at the end of October 2006. At that time, the County assigned him to the Power Shift, ostensibly as his permanent assignment, and also adjusted his 4-2 work schedule to better align the work rotation of the Telecommunicators in order to avoid additional overtime. The assignment to the Power Shift was grieved by another, more senior, Telecommunicator who had posted for the shift, and that grievance was resolved internally. The remaining issue is whether the County violated the contract or past practice by altering Thompson's 4-2 schedule.

This case, as the Union points out, is factually very similar to a previous arbitration in this bargaining unit in which I sustained the grievance of a Correctional Officer whose work schedule had been altered. LINCOLN COUNTY, CASE 228, NO. 63790, MA-12713 (Emery, 11/24/04) In that case, where the contract language setting the work schedule for Correctional Officers called for a 5-2, 5-2, 5-3 work rotation, the County adjusted the work schedule of the Correctional Officers for the coming year, but early enough so that they were aware of the schedule before the time for vacation selections. Both parties essentially made the same arguments as here. The Union asserted that the contract did not give the County the right to alter work schedules and that such alterations were unduly burdensome to the employees who relied on the consistency of their schedules in planning time off. The County argued that the contract was silent on the right to alter work schedules and so the County was permitted to do so under its retained powers to promote operational efficiency. I held that since the contract established a 5-2, 5-2, 5-3 rotation without providing for exceptions, the County was required to follow it, largely because, unlike employees who work Monday through Friday, the Correctional Officers could not plan on regular weekends off and so depended on the consistency of their schedule to schedule vacations and other time off. As I stated there, "If the Correctional Officers were on a regular Monday-Friday schedule, the language of Article 2 would not authorize the County to unilaterally alter the workweek to Sunday-Thursday or Tuesday-Saturday in the name of operational efficiency. It would have to bargain for such a change. These employees have no less a right, by virtue of a differently structured schedule, to expect consistency from year to year."

The facts of this case differ from the previous case, however, in that there the schedule change affected all the Correctional Officers, many of whom had been working on the same rotation for five years, whereas here the change affected one employee who was still on probation. Understandably, the County sees this as being a significant difference and the Union does not. Beyond that the arguments here track those of the previous case closely – the appropriate interpretation of the contract's silence as to schedule changes and the merits of schedule continuity versus operational efficiency.

I reiterate the view I expressed in the former case. The contract identifies the normal work schedule for Telecommunicators as being a 4-2 rotation assigned to one of four identified shifts, with shifts to be selected by the employees annually based on seniority. Notably, while Section 15.01 (H) allows for reassignment of shifts in the case of emergency or prolonged vacancy, it says nothing about work schedules. The doctrine of *expressio unius est exclusio alterius* would suggest, therefore, that by including only the right to alter shifts in the contract language, the parties intended to exclude the right to alter schedules. It is my view, therefore, that once the work rotation of a Telecommunicator is established it may not be unilaterally altered by the employer without agreement to do so. Managing the workplace in order to optimize operational efficiencies is the purview of the employer, but it does not trump contract language guaranteeing the work schedules of the employees. As I noted previously, if the County wants such an exception, it must bargain for it.

Having made the above holding, however, does not dispose of this case. The facts reveal that the affected employee, Erik Thompson, was on probation at the time his schedule was changed in October 2006 and that the change coincided with the completion of his training and corresponding assignment to a permanent shift. While in training, Thompson's schedule was changed numerous times, either to accommodate other commitments of the employee or to facilitate scheduling him at the same time as his Field Training Officer. The record also establishes that scheduling trainees in this way is an accepted practice. Thus, even, though Thompson was working a fixed 4-2 schedule for approximately the last 5 weeks of his training, it is not clear that this was intended to be his permanent schedule once training was completed. Indeed, it would seem reasonable to suppose that the time when the permanent schedule would be established would be coincident with the permanent shift assignment occurring at the end of training and I find that it is within the County's authority to initially establish an employee's work rotation to best meet its staffing needs. Here, the County altered Thompson's schedule at the same time it assigned him to the Power Shift in order to align the rotation of the workforce most efficiently. The fact that the shift assignment was ultimately determined to have been to be in error does not invalidate the corresponding establishment of Thompson's work rotation. Once having been set in October 2006, however, the County is obliged to honor the schedule it established into the future, even if the subsequent change in shift assignment eliminates the scheduling efficiency it had hoped to create. This is no different than is the case annually when employees' shifts are subject to change, but their schedules are not.

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

AWARD

The County did not violate the collective bargaining agreement or past practice when it altered the rotating work schedule of Erik Thompson in the power shift position on October 30 and 31 of 2006. The grievance is, therefore, denied.

Dated at Fond du Lac, Wisconsin, this 18th day of February, 2008.

John R. Emery /s/

John R. Emery, Arbitrator

