

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**COUNTY OF KENOSHA**

and

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/  
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

Case 257

No. 66255

MA-13473

(Courthouse Screener Subcontracting Grievance)

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**Appearances:**

**Attorney Gordon E. McQuillen**, 822 South Gammon Road #2, Madison, Wisconsin 53719-1377, on behalf of the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

**Attorney Lorette Pionke**, Senior Assistant Corporation Counsel, County of Kenosha, 912-56th Street, Kenosha, Wisconsin 53140-3747, on behalf of the County of Kenosha.

**ARBITRATION AWARD**

The Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the County of Kenosha, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, Steve Morrison, of the Commission's staff, was designated to arbitrate the dispute. A hearing was held before the undersigned on February 5, 2008, in Fall Creek, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by May 9, 2008. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

## **ISSUES**

The parties stipulated to the issue to be decided by the Arbitrator as follows:

Did the County violate the collective bargaining agreement when it subcontracted with a private security firm to provide courthouse security screeners rather than using bargaining unit employees for this function.

If so, what is the appropriate remedy?

## **RELEVANT CONTRACTUAL PROVISION**

### **ARTICLE I - MANAGEMENT RIGHTS**

Section 1.1. Except as otherwise provided in this Agreement, Chapter 59.21 of the Wisconsin Statutes and existing Civil Service regulations, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for just cause; the right to decide the work to be done and location of work; to contract for work, services or materials; to schedule overtime work; to transfer employees; to take whatever action is necessary to carry out the functions of the County in situations of declared emergency; to establish qualifications for the various job classifications, however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this Agreement. The County shall have the right to adopt reasonable rules and regulations.

## **BACKGROUND**

The operative facts here are not in dispute. The County owns and operates a number of public buildings, one of which is the courthouse. The courthouse houses the Kenosha County circuit court and its support activity such as the circuit clerk. It also houses the Information Systems Office for the County. Following some high profile cases resulting in issues relating to courthouse security nationwide it became advisable for the County, through its Courthouse Security committee, to consider the implementation of a security plan for the courthouse. It acquired a magnetic device for use in the weapons screening process, incorporating it in its overall security plan to screen the public upon entry to the courthouse. Human beings were required to operate and monitor this device and to check handbags and the like of persons entering the courthouse in the event the device detected the possible presence of weapons. The people monitoring the magnetic device are called 'screeners'. The County opened a general bidding process for the purpose of obtaining these screeners and the successful bidder was JBM Patrol &

Protection. The County Sheriff also submitted a bid for these services using his sworn deputies as screeners. That bid was rejected as being too expensive. For a short period of time sworn deputies performed the duties of screeners while JBM came up to speed. Once JBM took over the screening operations, the sworn deputies were relieved of that task. The Union filed a grievance on the grounds that the screening process was Union work. This grievance was advanced through the contractual procedural steps and is now appropriately before the Arbitrator. Additional factual background will be set forth in the DISCUSSION section below as necessary.

### THE PARTIES' POSITIONS

#### The Union

Security to the courthouse is to be maintained by the Sheriff. The Wisconsin constitution supports this assertion as do cases which have clarified the traditional duties of an elected Sheriff in Wisconsin as being "service on the courts." By subcontracting with JBM the Sheriff has been improperly stripped of his duties and it is the deputies who now have been placed in the unusual position of having to exercise their contractual rights under the collective bargaining agreement in order to bar the County from taking away the constitutional rights of the Sheriff. "A. . . constitutionally protected power and prerogative of the office of sheriff recognized by the courts is the sheriff's special relationship with the courts. See WIS. PROF'L POLICE ASS'N V. DANE COUNTY, 106 Wis. 2D 303, 305, 316 N.W.2D 656 (1982)(WPPA I). This relationship between the sheriff and the courts is 'peculiar to' and 'gives character and distinction to the office of sheriff.' "

The decision to subcontract was politically motivated by the County Board by using the power of its purse-strings to prevent the Sheriff from exercising his constitutional duty to provide service to the courts. Because the Sheriff lacks the political will to press the issue of staffing, the deputies must do what the Sheriff will not do and because they are deputies of the Sheriff - an elected official - they have the right to assert his authority.

The action of the County was not merely a cost saving measure because the extra funds required to pay the deputies as screeners would be deferred by the federal government in the form of Federal Inmate Revenue, hence the traditional basis for forgiving an employer for subcontracting for services normally performed by the bargaining unit is not a factor here.

There are several flaws in the County's argument that to subcontract the screening service causes no harm to the bargaining unit. First, the deputies performed the service for about three months pending the contract finalization with JBM. Hence, that work was thereafter supplanted by the subcontractor. Second, if the deputies had performed the service the Sheriff would have had to have hired more deputies, thus increasing the number of bargaining unit members. Thus, the subcontracting action caused a lack of growth in the unit. Third, if the County gets away with this, what is to prevent it from subcontracting out for other jobs done by the deputies? For instance, if the County population grows the number of deputies must also expand. In that case the County Board could simply feel free to subcontract out for other services performed by the deputies and so long as the numbers of the unit members does not decrease it would be condoned. Fourth, the

County's position could be expanded down the road: "if the County can succeed in contracting out some of the duties of the deputies so as to avoid expanding the workforce, then why not subcontract out for even more of the deputies' duties so as actually to shrink the workforce? Eventually, through attrition, the ranks of the Sheriff's Department could be decimated.

By subcontracting the screener position the County was attempting to reduce the amount of overtime the deputies would have otherwise performed if they had been employed as screeners. The Sheriff's Department has regularly exceeded its overtime budget in the past and has always found a way to pay for it. It simply wanted to avoid having to "find" the money to pay for it here.

The County seemingly argues that inasmuch as the job description does not expressly refer to courthouse screening then those duties do not fall within that description. This argument is wrong for several reasons. First, the description notes that "This position performs a variety of duties connected with generalized police work. These duties include, but are not limited to. . ." This description does not purport to include all conceivable duties. Second, the description contains the following: "serving various typed (sic) of court-related orders and civil process; serving the courts and their functions by the transportation of inmates. . ." These duties are part of the traditional duties of Wisconsin sheriffs and are not all-encompassing. The County, through Director of Personnel Services Riedl's testimony, admitted that the deputies' job description was broad enough to encompass screeners and that if it were not, they could not have performed that function for the short period of time they did perform it.

The appropriate remedy is to make the deputies whole. This would be difficult here. So the Union suggests that the Arbitrator take all hours of work that have been performed by the subcontractors and then those hours "should be monetarized at the average rate of pay for deputies and the monetary value of that work distributed equitably among the members of the affected bargaining unit." The Union "appreciates that the traditional remedy for such improper subcontracting in this case may be too onerous for any arbitrator to contemplate and is willing to concede any back pay." So, what it seeks in this case is essentially a cease and desist award with an assignment of bargaining unit members to the screening positions. The County will have to figure out how to extricate itself from its contract with JBM. The Union is willing, "in the interests of the economic situation," to meet with the County and negotiate a satisfactory agreement as to how to implement the Arbitrator's award sustaining the grievance. The Union recognizes such an award would be unusual and, for this reason, "proposes an interim award provisionally sustaining the grievance and directing the parties to engage in negotiations to reach an equitable remedy between themselves. In the absence of such a mutual, voluntary resolution of the sustained grievance, the Arbitrator, having retained jurisdiction to supervise the ultimate issue of remedy, should then impose an equitable remedy on the parties (in this sense acting somewhat as an interest arbitrator).

### The County

Contract language explicitly reserves to management the right to contract for work and services or materials. The county contracted for services to provide security screening at the

courthouse. There are no contractual limitations on management's right to contract for these services. It need not place the Union on notice nor negotiate with the Union and the issue of subcontracting has never been a subject of collective bargaining.

In the absence of specific contractual language management is limited by recognition, seniority, wage and other such clauses in the agreement and standards of reasonableness and good faith are applicable to determine whether contracts are violated. One must balance the employer's legitimate interests in efficient operation and effectuating economies on the one hand, and the stability of the bargaining unit on the other.

Here, the County had the contractual authority to enter into the contract for screening services and the job security of the unit members was not threatened thereby. The integrity of the bargaining unit was not compromised. No deputy lost overtime work. The Sheriff's Department was already shorthanded and the deputies sought relief from the overtime. When the Sheriff asked the County Board for more deputies, the Board granted his request, but there remained much overtime.

Regarding an incident in the courthouse involving an unruly patron, the deputy involved required assistance to restrain the individual. The screeners on duty sat by and watched the scuffle. The deputies were angered by the failure of the screeners to lend assistance and so they argue that they have been negatively effected by the inaction of the screeners. The Deputy involved radioed for help and got it. This protocol would have been the same if the event had transpired before the screeners were in place. The Union argues that if a deputy had been conveniently located at the door the back-up would have been in place. This conclusion is related to the effectiveness and efficiency of the system, not to the terms of the collective bargaining agreement and while having a private security firm at the door of the courthouse may be awkward for the Deputies it is not a violation of the collective bargaining agreement.

The work of the screeners is not Deputy work. Deputies are assigned to the courthouse for various duties. They maintain order in high profile cases if needed and they transport prisoners to and from the courtrooms. They routinely patrol the building. These duties have not changed because of the screeners being placed at the front door. The Sheriff is still called upon to respond to the needs of the courthouse. If screeners have trouble at the front door they are instructed to call 911 and the Sheriff is dispatched to deal with the problem. Screeners have no law enforcement authority. The duties of the Deputy Sheriff are set forth at joint Exhibit #3 as follows:

“Position performs a variety of duties connected with generalized police work. These duties include, but are not limited to: patrolling in marked patrol squads and on motorcycles; responding to calls for service and various types of assistance; enforcing federal, state and local laws; investigating traffic accidents and crimes; serving various types of court-related orders and civil process; serving the courts and their functions by transportation of inmates. Specialized police work includes but is not limited to: bicycle patrol; water patrol on Lake Michigan and various

inland lakes; dive team; community relations work such as DARE program; hazardous device unit (bomb squad); tactical response team.”

Entry-level screeners are certified as security officers after having taken a 40 hour course while Deputies are trained for months and participate in ongoing training. The Deputy is trained in law enforcement procedures and has the power to arrest while the screener only has the duty to look into peoples’ bags, ask them to empty their pockets, and guide them through the magnetometer. The Deputy, on the other hand, is a sworn officer of the law and derives his authority from the Sheriff and has diverse duties.

“At common law, the Sheriff has authority superior to anyone in the County. This authority was extended to the Sheriff’s duty of ‘attendance upon the court’ in *WISCONSINN PROFESSIONAL POLICE ASSOCIATION V. DANE COUNTY*, 149 Wis.2D 699 (Ct.App. 1909) citing *Watson, A Practical Treatise on the Law Relating to the Offices and the Duties of Sheriffs* reprinted in *5 Law Library 1, 1* (1835). The courts have cited that the constitutionally protected powers of the Sheriff cannot be limited by a Collective Bargaining Agreement. These powers include law enforcement, preserving the peace, and criminal investigation. The duties of the Deputy Sheriff derive from the Sheriff’s duties. The function of the Sheriff’s duty upon the Court is one of the traditional functions of the Sheriff. The law has repeatedly upheld the power of the Sheriff to perform his constitutional duties under the common law free of the constraints of a Collective Bargaining Agreement. Under the common law duty of attendance upon the court, the Sheriff was to provide for the transport and the housing of prisoners, maintain the jail and enforce the Orders of the Court. Traditionally, the Deputies in Kenosha County have provided for transport of prisoners, maintained a patrol of the courthouse to periodically check the status of the building, and responded to the needs of the judges while the courts are in session. They do not act as bailiffs. The Sheriff also employs jailers who guard the jail who are not sworn deputies. The jailers have their own union. They are paid on a different scale than the Deputies.”

Beginning screeners are paid \$15.95 per hour. The proposal to the County for Deputies to act as screeners was \$48.11 per hour. It was the cost of posting Deputies at the door of the courthouse which discouraged the Board from awarding the contract for these services to the Sheriff. The decision to award the contract to the private firm was influenced by a cost benefit analysis. Because the County knows it is in need of trained Deputies for law enforcement, placing a highly trained Deputy at the door of the courthouse to check for metal objects all day is not justifiable in the minds of those persons who balance the budget.

The Sheriff’s Department continues to maintain control over the Courthouse and the security there. It continues to perform the same functions with respect to the courts.

### **The Union’s Reply**

The County focuses its attention solely on the subcontracting provision in Article I but does not address the part that says “adopt reasonable rules and regulations,” and when the County decided to subcontract the screener service it did so by adopting a “rule or regulation” concerning

who will perform that service. The Union believes that this rule is unreasonable. The County believes it had an unfettered right to subcontract but that right is limited by standards of reasonableness and good faith.

Regarding the overtime issue, simply because the Sheriff was burdened by overtime this does not translate into permission for an employer to subcontract work that rightfully belongs to the bargaining unit. If it did, the employer could subcontract work as a means of limiting overtime work for any bargaining unit rather than increasing the size of the unit, an absurd result.

Regarding the incident at the courthouse involving an unruly patron, had Deputies been stationed at the door of the courthouse in the first place, there would never have been an incident. The purpose of courthouse screening is to prevent such confrontations before they progress to a crisis. Only Deputies can interrupt such a confrontation and because the screeners lack any law enforcement authority placing them at the door of the courthouse is unreasonable.

The job description of the Deputy Sheriff is broad enough to encompass the screener duties. "That the security screener job description does not include any law enforcement duties serves to demonstrate why those screeners are not the ones who should reasonably be performing the courthouse security functions."

"Curiously, the County argues that the authority of the Sheriff to provide, among other things, service on the courts cannot be curtailed by a collective bargaining agreement. That same reasoning is essentially the very reason why the County ought not have usurped the Sheriff's authority to serve the courts by subcontracting out security for the courts, which the judges had demanded. The fact that the judges seem to have accepted the use of non-sworn screeners also cannot be deemed to rationalize that usurpation." Cost, alone, cannot excuse that usurpation either. The fact that screeners are paid substantially less than Deputies does not rationalize the County's unreasonable subcontracting.

Using non-sworn screeners does free the Deputies up for other work, as the County argues. However, that, too, is an unreasonable application of the County's management right to subcontract.

### **The County's Reply**

It is true that the traditional duties of the Sheriff have included attending to the court. The Sheriff still maintains that role. His authority is not diminished by this action.

Whether the Sheriff's power, derived from common law and the constitution, may be asserted by the Union, as the Union argues, and whether a collective body of sworn deputies has the authority to declare that their Sheriff's authority has been usurped is a subject for another work. The Sheriff submitted a bid to the County for use of deputies as screeners. It was rejected. At the same time, the Sheriff needed more deputies due to excessive overtime. The Board granted

his request and the bargaining unit increased in size. There was no decrease in bargaining unit member numbers as a result of the subcontracting.

The Sheriff was not stripped of his duties. He continued to be of service to the courts in the same manner he was before. Before January, 2006, there was no screening at the front door of the courthouse. Deputies performed that function for a short time while the contract with JBM took effect. The Sheriff chose not to force the issue of courthouse security and that issue is not consequential in this argument. The County did not exercise its political will, as the Union claims, it exercised its right to subcontract under the agreement. That right is explicit. The analysis applied by the Union is the analysis one should apply in the ABSENCE of explicit contractual language.

The Union argues that if the County prevails here it will subcontract to save money at every opportunity and avoid expanding the workforce. That argument is speculative and the issue for discussion here pertains to this set of facts only. The Union's argument that in the future positions for sworn personnel will be supplanted by cheaper, non-unit alternatives misses the mark. Those positions are good examples of bargaining unit work which cannot be supplanted by others. The work of the screeners, on the other hand, is not bargaining unit work and the decision to subcontract for this service was economical and logical.

### DISCUSSION

The issue to be decided by the Arbitrator is whether the County violated the provisions of the collective bargaining agreement, specifically Article 1, the management rights provision, when it made the decision to subcontract with a private security firm for the provision of services. The services in question are "screener" services provided at the front door of the County courthouse. The County takes the position that these services constitute non-bargaining unit work, while the Union says they are.

The screeners perform essentially two specific duties: first, they guide members of the public visiting the courthouse through a magnetic device called a magnetometer. This magnetometer identifies whether the person being guided through it is carrying or concealing metal objects which could constitute a weapon. Second, the screener, in the event the magnetometer signals the existence of metal, asks the person to empty his or her pockets, bags, etc., and checks to see if it is a weapon or not. In the event of confrontation or trouble at the front door, the screener is directed to call 911 to summon the proper law enforcement authorities to deal with the problem. In this case, the proper law enforcement authority is the County Sheriff's Department. The Sheriff's Department is manned, of course, by Sheriff's Deputies, all of whom are members of the Union. Screeners are not sworn law enforcement officers, as are the Deputies, nor do the screeners have any law enforcement authority or duty. They are not armed. Their training consists of a forty hour course in general security. They are civilians.

The Union argues that the work of screeners is bargaining unit work because it relates to courthouse security. The Union relies heavily on the testimony of Robert Riedl, the County's

Director of Personnel Services, who testified that the security of the courthouse was to be maintained by the Sheriff. The Union argues that because courthouse security is to be maintained by the Sheriff, and because screeners' duties relate to courthouse security, and because screeners are not Sheriff's Deputies, then it follows that "the Sheriff has been improperly stripped of his duties" because he no longer maintains courthouse security. This argument, creative as it may be, misses the mark. Screeners do not provide security for the courthouse, the Sheriff does and always has. In the event of a security issue, the screeners are directed to call the Sheriff. In the past, before screeners, the Sheriff was called upon to provide security in the courtrooms for high profile cases; to check the building periodically for security; to transport inmates to and from the courthouse while court was in session; to respond to the courthouse when necessary in emergency situations; and to provide overall security in other high profile or emergency situations. All of these things were, and are still, done by the Sheriff. The subcontracting of the screener service has not changed the nature of the Sheriff's responsibility to maintain courthouse security in any way. Contrary to the Union's assertion that the Sheriff has been prevented from exercising his constitutional duty to provide service to the courts, the record fails to support such a notion. As mentioned above, nothing has changed regarding the duties provided by the Sheriff due to the addition of the screening service.

The Union argues, not persuasively, that the motive of the County was not merely to save money, because some of the cost of the Sheriff's bid proposal for these services was to be offset by federal funds. The undersigned supposes this argument is meant to suggest some sort of Union animus. There is no evidence of that here. On the contrary, the evidence firmly supports the conclusion that the private contractor's bid, at roughly one-third that of the Sheriff's bid, was economically more attractive and reasonable to those members of the County Board charged with the responsibility of spending the taxpayer's money.

The Union argues that because Deputies performed the function of screeners during the period of time between the decision to place screeners at the front door of the courthouse and the time the private firm was put into place (a period of about three months) this work was thereafter supplanted by the private screeners. According to the Union, this created a detriment to the unit by constituting "lost" work. This argument is also unpersuasive. Deputies performed the screening function as a temporary, albeit expensive, measure. The County's intent was never to continue using Deputies in that role. The Union argues that the Deputies are qualified to do the screener job and that their job description is broad enough to encompass that job. The Deputies' job description refers to specific duties and includes the phrase "These duties include but are not limited to." Therefore, concludes the Union, the screener job should be included within the penumbra of the Deputies' job description. The Arbitrator notes the first sentence of the Deputies' job description which says "This position performs a variety of duties connected with generalized police work." It's a long reach to conclude that screeners are involved in police work in any way, generalized or otherwise.

The fact that the judges had initially requested that the Sheriff provide security is irrelevant. The evidence suggests that the judges are satisfied with the screener services provided at the courthouse. Also irrelevant is the Union's argument that "if the County gets away with

subcontracting out some of the Sheriff's constitutionally mandated duties - courthouse security- then what is to prevent it from subcontracting out for other jobs done by the deputies?" The undersigned has found that the provision of the screener service has not relieved the Sheriff of any of his duties, constitutionally mandated or otherwise. What prevents the County from subcontracting for jobs done by the Deputies in the future is the right of the Union to resort to the contractual grievance procedure. If it believes that actions taken by the County in the future violate the contract, whether by subcontracting or any other reason, it may file a grievance. That grievance will be decided on the merits and the facts pertaining to that matter. The undersigned considers only the merits and the facts of this case.

The Union's argument that the County was attempting to reduce the amount of overtime that the Deputies would receive if they had been able to assume the screener position falls short too. The screener position is not police work and thus is not the Deputies' position to acquire. In any event, the Sheriff sought, and received, extra Deputies from the Board in order to address the overtime issues in the County. Thus, the screener position did not effect the overtime of the Deputies in any way nor did it result in the loss of any Deputy positions.

Regarding the Union's argument concerning the unruly patron in the courthouse and the failure of the screeners to come to the aid of the Deputy thereby depriving him of immediate back-up, this situation is no different than any other civilian in the community failing to come to the aid of a Deputy under similar circumstances. While a civilian's failure to come to the aid of a police officer in distress may make a statement about the courage or the civic pride of the individual civilian involved, it does not make the case for replacing all civilians with sworn law enforcement officers so that active duty officers will always have immediate back-up. Taken to extremes, this is what the Union argues.

The foregoing arguments presented by the Union are arguments normally reserved for situations where the contract is silent on the subject of subcontracting. That is not the case here. The agreement is clear on the subject. It says, in Article 1, "Except as otherwise provided in this Agreement . . . the County retains all the normal rights and functions of management . . . this includes the right . . . to contract for work, services or materials . . ." and "The County shall have the right to adopt reasonable rules and regulations." The Union agrees that the County may subcontract for services and does not seem to disagree that the screeners provide a service. The Union does say that the last sentence in Article 1 requiring that any rules or regulations adopted by the County be reasonable, places a restriction upon the County's right to subcontract. In other words, if the County exercises its right to subcontract, it must do so in a reasonable way. Because the County gave the screener position to a private firm rather than giving it to the bargaining unit, and for the other reasons set forth above, the Union argues that the subcontracting actions of the County were unreasonable, and for that reason the grievance should be sustained. The contract contains no other potential limitations on the County's right to subcontract, nor does the Union so argue. As has been made clear above, the undersigned does not agree that the County's actions here were unreasonable. To be sure, this contract, as all contracts do, embody the implicit assurance that the parties will act with fundamental fairness and in good faith toward each other. This record supports the conclusion that the parties have done so.

In light of the above, it is my

**AWARD**

The County did not violate the collective bargaining agreement when it subcontracted with a private security firm to provide courthouse security screeners rather than using bargaining unit employees for this function.

The grievance is dismissed in its entirety.

Dated at Wausau, Wisconsin, this 21st day of July, 2008.

Steve Morrison /s/

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Steve Morrison, Arbitrator

