

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

and

MILWAUKEE COUNTY DEPUTY SHERIFF'S ASSOCIATION

Case 642	Case 643	Case 644	Case 645	Case 646	Case 647
No. 67639	No. 67640	No. 67641	No. 67642	No. 67643	No. 67644
MA-13964	MA-13965	MA-13966	MA-13967	MA-13968	MA-13969
Case 648	Case 649	Case 650	Case 651	Case 652	Case 653
No. 67645	No. 67646	No. 67647	No. 67648	No. 67649	No. 67650
MA-13970	MA-13971	MA-13972	MA-13973	MA-13974	MA-13975

(Holiday Overtime Use)

Appearances:

Cermele & Associates, S.C., by **Mr. Matthew L. Granitz, Esq.**, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53213, on behalf of the Association.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, on behalf of the County.

ARBITRATION AWARD

On December 28, 2007, the Milwaukee County Deputy Sheriff's Association (Association) filed twelve separate grievances concerning twelve Bailiff deputies normally assigned to the Courts Division who were reassigned by the Sheriff for one day, Monday, May 28, 2007 (Memorial Day) to patrol County Parks.¹ On January 17, 2008 the County insisted these cases go through the normal grievance procedure. These cases were then held in abeyance from February 14, 2008 until May 28, 2008 when the parties requested hearing dates be set. On May 29, 2008 these cases were scheduled to be heard on July 10, 2008. The hearing was cancelled at the County's request with the agreement of the Association. Mediation was then scheduled for September 16, 2008 and a hearing date was set for September 29, 2008 if mediation failed. Mediation having failed, the cases were then heard on September 29, 2008 at Milwaukee, Wisconsin. By joint agreement of the parties, no transcript was taken and no briefs were filed. The parties offered documentary and testimonial evidence and they orally argued their positions on September 29th. At the end of the hearing, the record was closed.

¹ The Grievants' names are as follows: Domask, Gruenberg, Herrara, Schroettner, Gottschalk, Colon, Lehmann, O'Donnell, Cieslik, Pawlak, Conley, Schnier.

STIPULATED ISSUES

- 1) Did Milwaukee County violate Sections 3.02(1)(e) and 3.15(4) when it assigned the Grievants to work straight time on Monday, May 28, 2007, Memorial Day?
- 2) If so, what is the appropriate remedy?

STIPULATIONS OF THE PARTIES

Prior to the instant hearing the parties jointly agreed that only the Conley Grievance (Case 652, No. 67649, MA-13974) would be heard by the Undersigned and the parties expressly agreed that all twelve grievances listed in the caption of this Award would be determined and decided by the Award in the Conley case.

RELEVANT CONTRACT PROVISIONS

Part 1

1.02 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is:

- The right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed;
- The right to determine the number of positions and the classifications thereof to perform such services;
- The right to direct the work force;
- The right to establish qualifications for hire, to test and to hire, promote and retain employees;
- The right to assign employees, subject to existing practices and the terms of this Agreement;
- The right, subject to civil service procedure and Secs. 63.01 to 63.17, Stats., and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action;
- The right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy, procedures and practices and matters relating to working conditions giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Association.

By the inclusion of the foregoing managements rights clause, the Milwaukee Deputy Sheriffs' Association does not waive any rights set forth in S. 111.70, Stats., created by Chapter 124, Laws of 1971, relating to bargaining the impact upon wages, hours or other conditions of employment of employees affected by the elimination of jobs within the Sheriff's Department by reason of the exercise of the powers herein reserved to management.

PART 3

. . .

3.02 OVERTIME

(1) All time credited in excess of eight (8) hours per day or forty (40) hours per week shall be paid in cash at the rate of one and one-half (1.5) times the base rate, except that employees assigned to continuous jury sequestration shall be paid sixteen (16) hours at their base rate and eight (8) hours at the rate of one and one-half (1.5) times the base rate for each 24-hour period of uninterrupted duty, and except that first shift hours worked in excess of forty (40) per week shall be paid at the rate of one and one-half (1.5) times the base rate.

(2) Overtime needs and required staffing levels shall be determined by the Sheriff.

(3) All scheduled overtime shall be assigned within classification as follows:

(a) Employees shall volunteer for overtime and their names shall be placed on a list in seniority order within each work unit.

(b) When necessary to schedule overtime the assignment shall be rotated by seniority among all volunteers on the list within the work unit where the overtime is being scheduled.

(c) In the event an employee refuses to accept an overtime assignment or there are insufficient volunteers for the work unit where overtime is required, the least senior employee in the classification in the work unit shall be required to work the overtime assignment.

(d) Employees will not be scheduled for overtime when they are liquidating accrued time off or during an approved leave of absence or

disciplinary suspension.

(e) For an event identified by the Sheriff as a Special Event, the above procedure shall be utilized on a departmental basis. In the event there are insufficient volunteers for a Special Event overtime assignment the Sheriff shall rotate in the inverse order of seniority among all employees in the department in the classification.

(f) Employees shall not be permitted to volunteer to work during a period of scheduled vacation, personal time, holiday time or compensatory time unless approved to work by the Sheriff. However, for Special Events as defined in (e) above, employees shall have the opportunity to work overtime hours in accord with the above procedures when they are on vacation, on their normal off-days, or are using holiday or personal days only under the condition that the Sheriff's Department is under contract to be reimbursed for the non-tax levy overtime expense incurred for the Special Event.

(4) Employees shall have the option of accumulating one hundred twenty (120) hours of compensatory time, exclusive of holidays, in lieu of cash, within twenty-six (26) pay periods, provided that such compensatory time may be liquidated only with the consent of the department head and if the County determines staffing is adequate and if no overtime assignment will result employees will be allowed to liquidate their accrued compensatory time. If, because of the needs of the department, such compensatory time is not liquidated within the time limited, the unliquidated balance shall be compensated in cash.

(5) Any overtime in excess of thirty-two (32) additional hours worked in a pay period will require the advanced approval of the Sheriff or his designee.

3.15 PERSONAL HOURS – HOLIDAYS

(1) All regular full time employees shall receive twenty-four (24) hours leave per year known as "personal hours" in addition to earned leave by reason of vacation, accrued holidays, and compensatory time.

(2) Regular full time employees shall accrue personal hours during their first fractional calendar year of employment as follows:

<u>Date of Hire</u>	<u>Hours Accrued in Initial Fractional Calendar Year</u>
On or before April 30	24 Hours
May 1 to August 31	16 Hours
September 1 and thereafter	8 Hours

Such hours may be taken at any time during the calendar year in which they are accrued. Supervisory personnel shall make every reasonable effort to allow employees to make use of personal hours as the employee sees fit, it being understood that the purpose of such leave is to permit the employee to be absent

existing rules relating to leave with pay. Employees who have not scheduled their personal hours by November 1st will result in those hours being scheduled at the discretion of management.

(3) The following days of each year are holidays: January 1; the third Monday in January; the third Monday in February; the last Monday in May; July 4; November 11; the fourth Thursday in November; the fourth Friday in November, December 25; Labor Day; and the day of holding the general election in November in even-numbered years.

(4) Department holidays will be celebrated on the holiday. The present system of accruing and exhausting holidays shall remain in effect. A holiday falling on a Saturday shall be observed on the preceding scheduled workday and a holiday falling on a Sunday shall be observed on the following scheduled workday. The appointing authority shall have the right to require a sufficient number of employees in each required classification to work on such holidays. Employees so assigned shall accrue an equivalent amount of compensatory time for liquidation during the following thirteen (13) pay periods.

3.25 NOTICE OF ASSIGNMENT OR SHIFT CHANGE

Bargaining unit members assigned to a different division or a different shift in such division, shall be notified two (2) weeks in advance of the effective date of such assignment or shift change; provided, however, that such assignments or shift changes may be made with less notice or without notice in cases of emergency or to change the employee's work setting in order to improve his work performance or to increase departmental efficiency.

BACKGROUND

There are four Divisions in the Sheriff's Department and the deputies therein are covered by the Association's labor agreement: Patrol, Courts, Detention and Administration.² In 2007, approximately 70 deputies were employed as Bailiffs in the Courts Division whose regular shifts were 8 hours (from 7:30 to 4:30 p.m. including Roll Call), Monday through Friday with weekends off.³ In 2007, Bailiffs had overtime opportunities they could request and receive in the Jail (Detention Division) and in the Park (Patrol Division) based upon their

² The areas where Deputies work Monday through Friday on the Day Shift are: Trips and Transport (Jail); Liaison (Jail); some Truck Squad Deputies; C1B; Bailiffs (Courts). Trips and Transport week day assignments are often absorbed by Jail Deputies at straight time to reduce overtime; on the weekends, these assignments are offered as overtime.

³ An unknown number of deputies are assigned to "Intake Courts" where they work on the weekends assisting in processing prisoners.

Overtime opportunities are handled as follows. The Sheriff (or his designee) decides when to offer overtime opportunities based on his judgment that there will be a shortage of deputies working in a specific area or that there is a need for extra help. It is undisputed that the Sheriff has the right to determine the number of employees needed to cover the necessary work and where/when each employee will be assigned. In addition, there is no provision in the effective labor agreement which lists regular shift hours. Rather, Section 3.29 defines the work day as follows:

A day shall mean a period of twenty-four (24) hours measured from the employee's normal starting time. This provision shall not be applicable when an employee is assigned from one shift to another, pursuant to Section 3.25. The Association agrees that normal daily starting times that vary within an established shift shall not incur a liability for overtime. The Association further agrees that this Section shall have no application to the Drug Enforcement Unit.

Deputies working overtime work side-by-side with deputies working straight time. Under Section 3.02(1) of the contract, overtime is paid to those working more than 8 hours in a day or 40 hours in a week. As a general rule, Sheriff-approved overtime opportunities are announced for the coming months by the Sergeants at each shift's Roll Call and by inter-office communications. Deputies may then request to be considered for open overtime slots by e-mailing, faxing or sending the Sergeants an inter-office memo. The Sergeants then keep the master lists of overtime openings and assignments in a binder which is maintained in the Department.⁴

In 2007, no overtime was offered for Memorial Day, Monday, May 28, 2007 to cover work in the County Parks but there were overtime opportunities offered in the Jail on that day which deputies (including the Grievants) could have applied for and received based on their seniority.⁵ None of the Grievants requested Jail overtime work on May 28, 2007. Nothing in the parties' labor agreement expressly requires the Sheriff to pay overtime for Parks work. There is an ordinance which can affect deputy pay and which requires the County to pay its deputies 8 hours of "back-to-back" pay, at straight time, whenever a deputy works two regular 8 hour shifts without at least 16 hours rest between shifts.

⁴ It is undisputed that in the Summer of 2006 (May through August), there were greater overtime opportunities approved by the Sheriff. Overtime notices, calendars and assignments are never posted on bulletin boards in the Divisions.

⁵ Grievant Conley stated herein that he was aware of these opportunities in the Jail on May 28, 2007 and that he would have received one based on his 18 years of seniority had he requested one.

FACTS

The facts surrounding these cases are not in dispute. On May 7, 2007, more than two weeks before May 28, 2007, Sergeant Coleman, acting on behalf of the Sheriff, issued the following inter-office memo changing five of the Grievants' regular shifts/assignments for May 28, 2007 as follows:⁶

. . .

The following deputies will be working straight time park assignments on Monday, May 28, 2007 from 1400 hours until 2200 hours:

Furlong	Karczewski
Domask *	Leatherwood
Conley *	Nedwek
Lehmann *	
R. Miller	
Haldemann	
Schroettner *	
Gottschalk	
Harrison	
Wheeler	
DuCharmo	
Murphy	
Albidress	
Eder	
Callahan	
Wage	
Kellner	
Prohaska	
Nazario	
Suszek	
Avila	
Joiner	
Butman	

*Grievants in these cases

The Sheriff did not decide overtime work was necessary in the Parks on Memorial Day, May 28, 2007. Instead, the Sheriff determined to use Bailiffs and other Court Division employees (normally employed Monday through Friday in the Courts) in the Parks on

⁶ All 12 grievance forms herein state one identical basis for the grievance and allege only violations of Sections 3.02(1)e and 3.15(4). No assertions were made in any of the grievances before me and no evidence was proffered herein to show that the Sheriff failed to timely notify any of the Grievants of their shift/assignment changes (under Section 3.25). Therefore, I find that the record evidence herein and the parties' Stipulation (above) show that all 12 Grievants were timely notified of the change in their shifts/assignments for May 28, 2007.

Memorial Day, 2007 as the Court system was closed on that holiday. Thus, no inter-office memo was issued offering overtime in the Parks on May 28, 2007.

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Conley (and the other Grievants) were assigned to work in the Parks on May 28, 2007, protecting the public, directing traffic, investigating and suppressing crime at straight time pay from 2 p.m. to 10 p.m. Conley worked in the Lakefront Parks. (County Parks include Veteran's, McKinley, Bradford, South Milwaukee, Cudahy and Lake Parks.) Conley (and the other Grievants) did not work more than 8 hours on May 28th or more than 40 hours that week. Conley received 8 hours holiday pay (accrued), 8 hours straight time pay and 8 hours of back-to-back pay for working from 2 p.m. to 10 p.m. on May 28, 2007. It is undisputed that no deputies were required to work mandatory overtime on May 28th.

On or about June 8, 2007, the Grievants filed grievances regarding the Sheriff's assignment that they were to work Parks on May 28, 2007. All 12 grievances stated the same substantive reasons for the grievances and cited the same provisions of the contract, as follows:

...

What happened to cause your Grievance? (Please give details as to Date, Where, Who was involved)

(MONDAY MAY 28TH, 2007)

I WAS ORDERED TO WORK A HOLIDAY/WITHOUT UTILIZATION OF THE OVERTIME POLICY WHICH SELECTS MANPOWER - BY SENIORITY FOR SPECIAL EVENTS. OTHER BUREAU PERSONNEL WERE NOT REQUIRED TO FOREGO THEIR HOLIDAYS TO FULL FILL THE MANPOWER NEED.

What Rule, Regulation, Contract Provisions, etc., was violated?

3.02 OVERTIME (1)(E) SPECIAL EVENTS

3.15 HOLIDAYS (4)

What specific relief do you want?

TO BE REIMBURSED WITH 8 HOURS OF HOLIDAY TIME

TO FOLLOW THE SPECIAL EVENT CLAUSE AND FOLLOW SENIORITY

On March 7, 2008 the parties held a hearing on these grievances and on March 25, 2008, the County issued the following "Grievance Disposition Form" concerning all twelve grievances:

...

ISSUE:

The Union and the grievant, Deputy Sheriff, Dennis O'Donnell, assert that management violated sections 3.02(e) and 3.15(4) of the DSA Labor Agreement. The grievance indicated that employees were ordered to work a holiday on Monday, May 28th, 2007 without utilization of the overtime policy which selects manpower by seniority for special events. Other Bureau personnel

were not required to forego their holidays to fulfill the manpower need.

...

RELIEF SOUGHT:

To be made whole, the grievant is requesting an extra eight (8) hours of holiday time and is requesting that management follow the special events clause.

MANAGEMENT:

Management indicated that all Deputies within the Courts division are 5-day service employees. This means that Deputies assigned to the Courts division work Monday through Friday and are scheduled off on weekends. If a holiday occurs during the week and the Court System is closed, the Deputy must still work to complete the five (5) days of service. Therefore on Memorial Day, May 28th, the Court System was closed and all Deputies assigned to the Courts Division were assigned to other areas to fulfill their 5-day service or the Deputies attended in-Service Training. The only Deputies not assigned to other areas were those Deputies with previously scheduled vacation time.

Based on a review of all pertinent information, this hearing officer can find no violation of Section 3.02(e) and 3.15(4) of the DSA Labor Agreement as stated and presented in the grievance.

...

On May 9, 2008, the County issued the following summary of the April 30th grievance appeal hearing and its answer thereon:

...

Disposition: The Union alleges that employees were improperly assigned to work a different assignment on Monday, May 28, 2007, Memorial Day. The employees involved with this grievance are normally assigned to the Court system and work Monday through Friday. The initial grievance alleges that the Employer did not have the right to assign these employees to work a different assignment on the holiday. The initial grievance does not allege that the employees were not notified two (2) weeks prior to the change and therefore a violation of the contract occurred. The hearing officer can only issue a disposition based on facts presented in the initial grievance [5.01 (11)]. The Employer does have the right to assign employees to best meet the needs of the service.

Grievance Denied.

...

POSITIONS OF THE PARTIES

The parties' oral arguments herein can be summarized as follows.

Association:

The Association argued that because the Sheriff changed the Grievants' assignments for one day, a holiday, they should have been paid overtime for May 28, 2007. The Association also noted that in 2007, the Sheriff should have offered the Parks patrol work available on Memorial Day, May 28, 2007, as posted overtime, utilizing Section 3.02(1)(e) because Memorial Day was a "Special Event." Had the Sheriff applied and followed Section 3.02, the Association asserted, deputies would have been able to volunteer for overtime work to cover the Parks and any remaining work should have been covered by the least senior deputies who the Sheriff could have required to work the remaining shifts under Section 3.02(1)(f). Instead, the Association urged, senior Court Division Bailiffs, who should have had Memorial Day off because the Courts were closed that Monday, were forced to work in the Parks on Memorial Day, in violation of Sections 3.02(1)(e) and 3.15(4) of the contract.

The Association strongly disagreed with the County's assertion/implication in its oral argument that the Grievants had been "greedy" because they received 24 hours pay for working eight hours on May 28, 2007. In this regard, the Association noted that the Grievants would not have received 8 hours back-to-back pay had the Sheriff scheduled them to work in the Parks during their regular Monday day shift hours. Thus, the hours they worked on May 28, 2007, were up to the Sheriff and the back-to-back pay the Grievants received was beyond the Grievants' control.

In all the circumstances, the Union argued that the Arbitrator should sustain their grievances and make the Grievants whole by paying them .5 times (4 hours at straight time) for May 28, 2007.⁷

County:

The County asked the Arbitrator to take arbitral notice of Sections 1.02 and 3.25 of the labor agreement: The former, a broad management rights clause and the latter, a change of shift/assignments provision both of which, the County urged, should be applied to these grievances. The County urged that if properly applied, Sections 1.02 and 3.25 and 3.15 show that the Sheriff has the reserved authority and discretion to decide the number of deputies, the work to be done and where the deputies will be assigned. Section 3.15(4) also states that the Sheriff has the right to require employees to work on holidays and Section 3.25 states that the Sheriff has the right to change the shifts and/or assignments of deputies with two weeks' notice

⁷ In its opening statement, the Association argued that the Grievants should have received 1.5 pay (12 hours at straight time). However, in its closing argument, the Association changed its request to .5 time pay.

or with less than two weeks' notice if for reasons of efficiency/work setting/emergency.

In this case, the County asserted, the 12 Grievants received more than two weeks' notice of their shift and assignment changes for their regular work day, a Monday, per Section 3.25. None of the Grievants worked more than 8 hours on May 28, 2007 or more than 40 hours that week.

Here, the Sheriff decided to move the Grievants from their regular assignments in the Courts to Parks where they also performed the "immemorial" law enforcement duties of protecting the public, suppressing and investigating crime, directing traffic and patrolling the Parks. The County noted that nothing in the parties' labor agreement guaranties overtime or requires that the Sheriff pay overtime pay to deputies assigned to work in the Parks. Also, there was no overtime offered or worked on May 28, 2007, in the Parks. For their Parks work, the County noted that the Grievants received 24 hours pay for 8 hours work on a Monday, one of their regular work days, essentially receiving triple time for May 28, 2007. In all of these circumstances, the County urged the Arbitrator to deny and dismiss the grievances in their entirety.

DISCUSSION

I have taken arbitral notice of Sections 1.02 and 3.25 in these cases. The former provision is a very broad management rights clause which clearly states that the Sheriff has the discretion to decide

. . . the kinds and number of services to be performed . . . the number of positions and the classifications . . . to perform such services . . . to assign employees, subject to existing practices and the terms of this Agreement . . . to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and division.

In addition, Section 3.02(2) clearly states that "overtime needs and staffing levels shall be determined by the Sheriff" (emphasis supplied). Also, Section 3.15(4) states that the Sheriff shall have "the right to require a sufficient number of employees in each required classification to work on such holidays." Finally, it is significant that no express shift hours are stated in this agreement (Sec. 3.29) and that the Sheriff has the authority to re-assign deputies if he notifies them two weeks in advance (or less in emergencies or for efficiency and work setting reasons) of a changed work assignment or shift change. The above provisions describe the broad powers and discretion of the Sheriff here, subject to "existing practices," reason, necessity and State law, as stated in Sections 1.02.

The Association has argued that Memorial Day, 2007 was a “Special Event” and that the Sheriff should have offered/posted the overtime to fill the Parks patrol openings available on that day.⁸ The problem with this argument is that there is no contractual provision which requires the Sheriff to designate a day or days a “Special Event.” Thus, in my view Section 3.02(1)(e) never became applicable to the Sheriff’s May 28, 2007 re-assignments of the twelve Grievants.

It is also significant that Section 3.02(2) allows the Sheriff to determine overtime needs and that he decided not to post/offer any overtime in the Parks on May 28, 2007. Rather, the Sheriff chose to re-assign the Grievants, all Court Division Bailiffs who would have worked only 4 days during the week of May 28, 2007 because the County courts were closed on Memorial Day. Notably, the Sheriff made these re-assignments in accord with the requirements of Section 3.25 by giving the Grievants at least two weeks’ notice thereof. In addition, there is no record evidence to show that any of the Grievants was contractually unavailable to work on May 28, 2007, that the Grievants were assigned to do work they were unqualified to perform or that they worked more than 8 hours on May 28, 2007 or more than 40 hours in that week.⁹

Based on the record evidence in these cases, the Association failed to prove that the County violated Sections 3.02 and 3.15(4) as alleged and I therefore issue the following

AWARD

Milwaukee County did not violate Sections 3.02(1)(e) and 3.15(4) when it assigned the Grievants to work straight time on Monday, May 28, 2007, Memorial Day. Therefore, in accord with the parties’ agreement in these cases, these twelve grievances are denied and dismissed in their entirety.

Dated and signed at Oshkosh, Wisconsin, this 14th day of October, 2008.

Sharon A. Gallagher /s/

⁸ Although the Association asserted that in prior years more overtime was posted and offered by the County, it failed to submit evidence to show prior overtime levels constituted an “existing practice.”

⁹ The Association took exception to the County’s implication that the Grievants showed their avarice by accepting 24 hours of pay for their 8 hours of work on May 28, 2007. However, the record facts in these cases showed that the Grievants’ were entitled to 8 hours of holiday pay, 8 hours pay for the work done and 8 hours of back-to-back pay because of the Sheriff’s decision to re-assign them outside their regular day shifts. Greed played no role in these cases.

Sharon A. Gallagher, Arbitrator