

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE COUNTY

and

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION

Case 668

No. 68208

MA-14156

(Shift Selection Grievance)

Appearances:

Timothy R. Schoewe, Deputy Corporation Counsel, 901 North 9th Street, Milwaukee, Wisconsin 53233, appeared on behalf of Milwaukee County.

Chelsie Allen, Attorney, Cermele & Associates, S.C., 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53213, appeared on behalf of the Milwaukee Deputy Sheriff's Association and Grievant Lisa Biro-Bauer.

ARBITRATION AWARD

Milwaukee County, herein the County, and the Milwaukee Deputy Sheriff's Association, herein the Association, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Association concerning a shift selection issue pertaining to one of its members, Lisa Biro-Bauer, herein Biro-Bauer or Grievant. The Commission designated Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter on November 5, 2008 in Milwaukee, Wisconsin. No transcript was prepared. The parties filed written briefs and reply briefs and the record was closed on January 9, 2009.

ISSUES

The parties did not stipulate to a statement of the issues. The Association states the issues as:

Did Milwaukee County violate the collective Bargaining Agreement when it failed to assign Deputy Lisa Biro-Bauer a shift based on seniority?

If yes, what is the appropriate remedy?

The County states the issues as:

Did Milwaukee County violate §3.28 of the collective bargaining agreement when it did not grant Lisa Biro-Bauer the start time she wanted?

If so, what remedy?

The Association's grievance as advanced and argued through the grievance process is based upon §3.27 and §3.28 of the collective bargaining agreement and on Grievant's seniority. The parties disagree on whether the case involves a start time or a shift. Start time and shift may have different meanings and ramifications in a particular case. Accordingly, the arbitrator frames the issues best reflected by the record as:

Did Milwaukee County violate §3.27 or §3.28 of the collective bargaining agreement when it did not assign Lisa Biro-Bauer the start time/shift she wanted based on her seniority?

If so, what remedy?

RELEVANT CONTRACT PROVISIONS

3.27 ASSIGNMENTS

When a Deputy is assigned from one bureau/division to another, all shift assignments shall be determined based on date of rank. This language shall not apply to employees who rotate for the eleven (11) week period as part of their initial orientation. For purposes of this section, the term "bureau/division" shall mean those work units between which assignments have been customarily approved as of January 1, 1984.

3.28 SHIFT SELECTION

Requests for assignment to a shift within a division shall be filed with the division head. Thereafter, as vacancies occur, they shall be filled by the employee in the division with the greatest seniority within classification having a request on file on the date that the vacancy occurred, provided he is qualified to perform all the duties and responsibilities of his assignment on that shift. If the most senior employee requesting such shift change is denied the request, the reason for denial shall be made known to the employee in writing.

BACKGROUND AND FACTS

Grievant is a Deputy Sheriff in the Sheriff's Department and is currently a bailiff in the Special Operations, Courts Bureau. She has been a Deputy for over 16 years and always worked first shift in the Detention Bureau before her reassignment to Courts in March, 2008. The case centers on Grievant seeking a certain starting time and position in Courts in view of her seniority.

In the Sheriff's Department when Deputies are reassigned or transferred to different bureaus/divisions, the transferred Deputy generally can select a shift based on their respective seniority. They are asked what shift they want to work and can bump Deputies with less seniority from shifts, even without there being vacancies. This process is generally reflected in the parties' collective bargaining agreement.

When reassigned to Courts, Grievant was told by management to put in a "matter of" indicating where she wanted to work within Courts. She wanted to work a 7:00 a.m. to 3:00 p.m. position that she understood at the time to be available in Courts. She called Lieutenant Kernan in Courts to request a 7:00 a.m. to 3:00 p.m. start, and she then put in a "matter of" to Lieutenant Kernan for that. She was not aware of any vacancies for that start time. She did know that Deputy Robinson was working 7:00 a.m. to 3:00 p.m. in Courts and was going to be transferred to the jail. That is why Grievant put in the "matter of". Deputy Robinson's transfer was made pursuant to the same reassignment of personnel whereby Grievant was transferred to Courts, both being contained in the Order of March 12, 2008 to be effective March 30, 2008. Deputy Robinson was transferred to a different bureau, but the position was never filled. At the time Deputy Robinson left Courts, a different security position already working in Courts was changed from 7:30 a.m. to 3:30 p.m., to 7:00 a.m. to 3:00 p.m. start and end times.

Grievant did not hear anything back from her "matter of" and continued to work her initial assignment in Courts. She filed the grievance herein on April 3, 2008. She started out in Courts as a runner, and did that until a rotation in August, 2008. She was then asked by Sergeant Coleman if she wanted an assignment as a bailiff in a felony court, and was then assigned to a particular courtroom as a bailiff, working 7:48 a.m. to 4:48 pm as she had since coming to Courts. After about a week, another Deputy who worked a position in Courts as traffic court liaison was put into the same courtroom as a bailiff. This Deputy told Grievant that she worked 7:00 a.m. to 3:00 p.m. in a position in traffic court that she and two other Deputies worked in. These three other Deputies had already been working in Courts before Grievant was reassigned to Courts. Grievant testified that this was the first that she knew there were Deputies with less seniority than her working 7:00 a.m. to 3:00 p.m. Her grievance, filed April 3, 2008, contained the statement in reference to the traffic liaison's position: I have more seniority than anyone in that position within the Courts Bureau, which I am also in. Grievant has more seniority than anyone working in the traffic liaison position by a significant number of years.

After some time, Sergeant Coleman called Grievant into his office to talk to her because he knew that she was not happy with her assignment. She was not happy with it. She explained that the hours she was working were not the hours she wanted to work, and she was upset because there were people with less seniority than her who were working 7:00 a.m. to 3:00 p.m. while she was working 7:48 a.m. to 3:48 p.m. She told Sergeant Coleman that she was not happy with the hours.

Grievant was trained in her duties as a runner while she did that job. She was not trained as a runner in Courts before being assigned there. Deputies placed in the traffic liaison position have been trained in that position. Grievant has no training or experience in working the traffic court or traffic liaison position, and really does not know what they do. Since going to Courts, Grievant has had temporary lunch time assignments at the traffic desk in the traffic liaison office, and has been trained while there working on different, specific tasks at the traffic desk. This included tasks like entering speeding tickets and accident reports, printing accident reports, dealing with the public and answering their questions, and service of papers. However, she has not functioned as a traffic liaison in Courts. She has had other training in the jail. Deputies are sometimes transferred to work in areas where they have not had previous training specific to the position.

In Courts there is a single day shift with different start times for different positions. 7:48 a.m. to 3:48 p.m. is considered first shift. Grievant is on that shift. The 7:00 a.m. to 3:00 p.m. position is also considered first shift. There are other start times in Courts as well. One of the issues in this case is whether or not the differing start times in Courts renders those different shifts. Deputies working in Courts have been bumped. There are different bureaus, such as patrol, that have different start times on the same shift, with those start times being selected by seniority. Some shifts in some bureaus of the Department have shifts based on set days off, such as weekends or every other weekend off. These differing off-days have resulted in these having been considered different shifts, even though the starting times have been the same. Patrol has a first shift with different starting times and different off-days. These selections have been dictated by seniority. Different time starts within a shift and shifts with different off rations have been considered different shifts for selections based on seniority in bureaus or divisions other than Courts.

Grievant was never offered a 7:00 a.m. to 3:00 p.m. assignment. On April 3, 2008 she filed a grievance over this. Her cause of the grievance stated:

I would like the shift of 7am – 3pm (M-F) in the traffic liason’s position. I have more seniority than anyone in that position within in the Courts Bureau, which I am also in.

She identified the contract provision alleged to be violated as 3.28 shift selection, and for the specific relief wanted wrote: I want that position.

The grievance was the subject of a Grievance meeting with management on April 23, 2008 wherein Grievant, an Association officer and their attorney discussed, among other things, §3.27 and its application to the grievance. The Grievance was denied in writing which referenced §3.28 but not §3.27 or any substantive application of the provisions of §3.27. The grievance was appealed and again denied in writing, which denial cited only §3.28 and its application, but referenced Grievant's request when she was transferred.

This arbitration followed. Further facts appear as are in the discussion.

POSITIONS OF THE PARTIES

Association:

In summary, the Association argues that both §3.27 and §3.28 have properly been raised in the grievance procedure and both afford Grievant the relief she seeks. Grievant's request came after a reassignment from one bureau to another, so §3.27 would apply. This is enough notice to the County of the specifics of her grievance. Both sections were argued before Hearing Officer Knox even if Knox did not refer to both in the written denial. The grievance was stated with enough detail to give sufficient notice to the County as to the issues being raised, citing MILWAUKEE POLICE ASSOCIATION V. CITY OF MILWAUKEE, 250 WIS.2D 676, 641 N.W.2D AT 714 (CT APP. 2002).

The Association argues that the County violated the CBA when it failed to assign Grievant to a requested shift based on her date of rank or seniority. Soon after her reassignment to Courts she wrote a "matter of" requesting that she be assigned to the traffic liaison shift within the Courts bureau. She spoke to both Lieutenant Kernan and Sergeant Coleman about her request. She received no response and was never assigned to the traffic liaison shift. Under §3.27, "when a deputy is assigned from one bureau/division to another, all shift assignment shall be determined based on date of rank". It is common practice in the Sheriff's Department when reassigned, senior deputies are given their choice of shift assignment and can bump deputies with less seniority, regardless of how long the less senior deputy has been assigned to that shift. This included the Courts. Grievant had more seniority than the other Deputies working the traffic liaison shift, yet grievant was not given her choice of shift assignment and her verbal and written requests were denied. As to training for the traffic liaison position, Deputies are expected to learn as you go. Each must be able to perform the essential functions of a deputy, wherever they are assigned. They are often switched between bureaus and assignments without prior training, like a runner in Courts. Grievant has worked in the traffic liaison office when it was short staffed over lunch. She had no prior training for that, and performed many of the duties of a traffic liaison duty during lunch. And the County presented no evidence that the traffic liaison shift requires specialized training. The CBA does not say a senior cannot bump a junior because of lack of training.

Here the CBA is clear and unambiguous without need for interpretation. Section 3.27 does not contain language regarding shift assignments being based on training, and §3.28 merely mentions that an employee with the greatest seniority shall fill a vacancy provided they are qualified to perform all the duties and responsibilities of the shift. This refers to the general duties of a deputy, which all deputies must be qualified to perform. There is no reason to believe Grievant can't perform the duties of traffic liaison, and the CBA does not state she can't bump a less senior deputy from that shift without prior training.

The Association also argues that Grievant should have received the traffic liaison shift under §3.28 as well. This is the standard for vacancies, which was the situation when Deputy Robinson was reassigned. Deputy Robinson held the traffic liaison position prior to her reassignment, the same date Grievant was assigned to Courts. Robinson's position was not filled, leaving a vacancy. Shift assignments, as the County argues, under §3.28 are to be made as vacancies occur. Grievant should have been assigned to the traffic liaison shift she requested when Deputy Robinson left. The County violated both §3.27 and §3.28 when it failed to assign a shift to Grievant based on her seniority.

The Association further argues that it has made a claim under §3.27 and that does not state there must be a vacancy for a deputy to receive their requested shift assignment. It simply states that "all shift assignments shall be determined based on date of rank". Grievant should have received her requested shift assignment based on her seniority regardless of whether or not there was a vacancy. And even if it did state there must be a vacancy, the County stipulated that there was in fact a vacancy in the traffic liaison position at the time Grievant was transferred to the Courts. The County acknowledged that the vacant traffic liaison position has yet to be filled. Thus, even under §3.28 Grievant should have been given her requested shift assignment because there was a vacancy in the position and she was the most senior.

The Association argues that the County incorrectly relies on §3.28 to make its argument that Grievant's requested shift assignment is a specialized assignment she was not qualified to fulfill. No evidence was provided to show the traffic liaison position requires specialized training beyond that received by every deputy. Often there is no prior training, and deputies learn on the job. There is no evidence current traffic liaison Deputies had any training prior to placement in their assignments. Grievant has been a Deputy for over 16 years. There is no evidence Grievant is not capable of performing the assignment. She has done some of the duties there over lunch hour. She has proven she is more than qualified.

The Association also argues that the County is not persuasive in asserting there is only one shift in Courts and, thus, the traffic liaison position was not a shift assignment that can be requested under the CBA. While there are three general shifts within the Sheriff's Department, there are often several different shift assignments within each general shift grouping. There can be five different shifts within the general time period considered to be Shift One. These different shifts are determined by different start times and off days. These

shift assignments can be requested by Deputies based on seniority. A prior grievance found this to be so on shifts based on different off day schedules. Much like those shifts, the shifts in Courts have different start times making them all separate shifts for the purpose of shift selection and assignments. Grievant's request to be placed on a 7:00 a.m. to 3:00 p.m. shift within Courts was a shift assignment governed by §3.27. And, contrary to the County claim of no evidence of bumping in Courts, Deputy Felber testified that he was personally bumped by a more senior Deputy when he worked in the Courts division, and he has witnessed the practice in all areas of the Sheriff's Department. Shift bumping is a routine practice within the Sheriff's Department, giving deference to Deputies with the greatest experience and service. Grievant deserves to reap the benefit of her 16 years of seniority by receiving her shift assignment under §3.27 of the CBA.

The Association requests that Grievant be immediately assigned to her requested shift in her current department based on her seniority.

County:

In summary, the County argues that the Association failed to produce evidence of there being any practice or contractual provision for the argument that Grievant had a right or reasonable expectation of bumping deputies already assigned as traffic liaison officers. Deputies working as traffic court liaison are assignments, not a separate shift. At the time of Grievant's reassignment there were no vacancies for the liaison assignments. Deputies are not fungible. They are highly trained and form an integral part of the Sheriff performing his immemorial duties of attending the court. Everyone in Courts works the day shift, with many start times within minutes of one another. The Association presented only anecdotal claims that assignments within the day shift were ever vied for under §3.28. When Grievant was assigned to her position in Courts she was asked if she was interested in an assignment, but nothing demonstrates any selection process other than the exercise of management discretion in how the Sheriff carries out his immemorial duties of attending the court.

The County argues that Grievant had no right, contractual or otherwise, to a specific assignment. Nothing in the record or contract demonstrates that a deputy has a claim to a particular assignment, whether upon reassignment or otherwise. The Sheriff has broad management rights and Constitutional authority to assign deputies. There are generally three shifts in the Sheriff's Department. But in Courts there is only one, the day shift. That is the shift to which Grievant is assigned. While the Association presented only anecdotal evidence of using seniority for start times, it was still predicated on being able to perform all the duties off the shift assignment. No evidence was adduced that such a practice existed in Courts generally, or the traffic court liaison specifically. There was no claim to support the notion that any Deputy in Courts had ever been bumped, despite some anecdotal evidence of bumping. There was never any documentation introduced to the point she really had ever filed the requisite paperwork, as is her burden.

The County also argues that Grievant is not, and was not, qualified to perform all the duties and responsibilities of traffic court liaison on day shift. Even Grievant has to admit that she had never performed the traffic court liaison duties, had no special training and was not in a position to perform all the duties of that assignment. Even so, contract provisions trump her assertion. Per §3.28, Stats: “. . . provided he is qualified to perform all duties and responsibilities of his assignment on that shift. Graber never worked the shift, and acknowledged that deputies so assigned had a highly technical and specialized role for which they had been specially trained. Deputy Felber worked Courts and the traffic desk, and acknowledged that while deputies could work the traffic desk, those duties did not encompass all the traffic court liaison functions. Grievant wanted a special start time, not a particular assignment. She admitted she did not have the training or experience which incumbents required and possessed.

The County further argues that even if traffic court liaison is viewed as a shift, there were no vacancies. When Grievant was reassigned, one of four deputies with a 7:00 a.m. start time was reassigned and that start time was abolished. That left three assigned to day shift as traffic court liaison officers. No vacancies existed. The contract requires there be vacancies prior to seniority even being considered. Section 3.28 states “as vacancies occur, they shall be filled by the employee in the division with the greatest seniority within the classification having a request on file on the date that the vacancy occurred, provided he is qualified to perform all duties and responsibilities of his assignment on that shift”. The contract contemplates there would be no bumping.

The County argues assignments in the Courts is a Constitutionally protected power of the Sheriff and cannot be limited by the County’s collective bargaining agreement, citing *KOCKEN V. WISCONSIN COUNCIL 40*, 2005AP2742 (2007), and *WISCONSIN PROF’L POLICE ASS’N V. DANE COUNTY*, 106 WIS.2D 303, 305, 316 N.W.2D 656 (1982).

The County argues that the Association speaks to modifying the grievance at arbitration, conceding it cited the wrong portion of the contract. The Association cites a City of Milwaukee case to overlook its shortcoming. But the City contract is not at bar, and the contract at issue specifically rejects that notion of amending at various steps. And here, Grievant wanted a special start time, not a particular assignment. She could not point to any contract provision giving her that right. She admitted she did not have the training or experience required. She was assigned to the only shift for deputies in Courts, the day shift. She is looking for an assignment, not a shift. There was no vacancy, as the number of personnel and the classifications to carry out a mission are reserved management rights, as are staffing levels. And, both *KOCKEN* and *WPPA* — I preclude the Sheriff from being required to assign in an area where he executes his immemorial duties, such as attending the court in this instance traffic court.

The grievance should be denied.

DISCUSSION

The case concerns Grievant's attempt to apply her seniority for shift selection under the collective bargaining agreement to attain a certain position with a certain starting time, which she contends is a shift, when she was reassigned to the Courts bureau. There is a preliminary issue concerning the specific section or sections of the collective bargaining agreement which is raised by the grievance procedure.

Grievance Procedure

The parties' collective bargaining agreement sets out a grievance procedure which contains, among other things:

5.01 GRIEVANCE PROCEDURE

. . .

(6) (C) 1. The employee alone or with his/her Association Representative shall cite the precise rule, regulation or contract provision that was alleged to have been violated at the first step of the grievance procedure.

. . .

(11) At each successive step of the grievance procedure, the subject matter treated and the grievance disposition shall be limited to those precise issues arising out of the original grievance as filed.

. . .

When Grievant filed her written grievance she identified only §3.28 shift selection of the CBA. She also referred to a shift of 7:00 a.m. – 3:00 p.m. (M-F) in the traffic liaison position and that she had more seniority than anyone in that position. Her relief sought was she wanted that position. At the hearing in this grievance arbitration, and in the briefing submitted thereafter, Grievant and the Association argued the application of §3.28 and, in addition, §3.27 of the CBA. The County argues that the collective bargaining agreement rejects the notion that a grievance may be amended at various steps of the grievance process, that it is not a question of notice (though there was none), but is a question of compliance with the contract.

At the hearing in this matter the Association produced witness testimony that §3.27 and its application was discussed during the grievance meeting with management that resulted in the written denial by Knox. Knox did not testify. The undersigned has no reason to doubt or discredit the accuracy or credibility of the Association testimony on the point of §3.27 having

been discussed. The Association is not the party responsible for drafting the initial written dispositional form and its contents. On the basis of the evidence in the record the undersigned is persuaded that §3.27 was discussed at that meeting. The undersigned is also persuaded that the precise issue in the grievance is Grievant wanting the 7:00 a.m. to 3:00 p.m. position in traffic liaison and that she referred to it as a shift. Against that factual background, reference to §3.28 did raise the issue of assignment to a shift. Shift assignment is also referred to in §3.27. Shift assignment is an issue involved in the written grievance. Shift assignment was also referenced in the next step of the grievance procedure. There the written denial again did not mention §3.27, but did set the context of the grievance and shift selection as when Grievant transferred from the Jail to the Courts and verbally requested the position based on seniority when she was transferred. The County has not demonstrated that it has been misdirected or unable to respond meaningfully to the §3.27 issue. The undersigned is satisfied that the grievance procedure and claims made by Grievant were dealt with by both parties in the context of both §3.28 and §3.27 from the original filing, and stated with enough precision to properly raise §3.27 for purposes of pursuing this grievance in conformity with the contract.

The parties disagree over the applicability of the ruling in *MILWAUKEE POLICE ASS'N V. CITY OF MILWAUKEE*, 250 Wis.2d 676, 641 N.W.2d 709, 2002WI App. 43 concerning the proper notice to allow the arbitration of an issue raised in the grievance process. The Association argues that liberalized notice pleading used in the Court system is the standard, as in *MILWAUKEE POLICE ASS'N*. The County argues that the contract and its language in that case is not the contract or the same language as in this case. The undersigned is persuaded that the general standard applied by the Court in *MILWAUKEE POLICE ASS'N* provides guidance in this case, and is consistent with a determination that the issue of shift selection under both §3.27 and §3.38 have been raised throughout the grievance procedures in conformity with the contract.

Merits

Grievant claims she is entitled to receive the traffic liaison shift under §3.28 by virtue of her having more seniority. She does have more seniority. Grievant agrees with the County that the correct standard for shift assignments within divisions under §3.28 is that requests for assignments to a shift are filled as vacancies occur. The provision states:

Requests for assignment to a shift within a division shall be filed with the division head. Thereafter, as vacancies occur, they shall be filled by the employee in the division with the greatest seniority within classification having a request on file on the date that the vacancy occurred, provided he is qualified to perform all the duties and responsibilities of his assignment on that shift. If the most senior employee requesting such shift change is denied the request, the reason for denial shall be made known to the employee in writing.

The Association asserts that when Deputy Robinson was transferred from the 7:00 a.m. to 3:00 p.m. Courts position that created a vacancy for Grievant to seek to fill by virtue of her seniority.

The County asserts that Grievant did not produce at the hearing the written “matter of” to prove she filed a request. However, Grievant did testify that she did file a “matter of” after she had asked for those times while speaking with Lieutenant Kernan. The grievance denial letter of July 25, 2008 indicates that when Grievant was transferred she verbally requested the traffic liaison position. However, the drafter of that letter did not testify at this arbitration hearing and the Association is not responsible for the contents of the letter, which was not approved by the Association. There was no testimony to dispute Grievant’s testimony or undermine Grievant’s credibility in filing a request. The evidence is sufficient to establish that she did file a request.

The County also asserts there was no vacancy in the position Deputy Robinson had held in Courts because the County, exercising its management rights, did not fill the position, deciding rather to proceed with the three traffic court liaison positions that were already occupied before Grievant’s transfer. The Association’s brief asserts that the County stipulated that there was, in fact, a vacancy in the traffic liaison position at the time Grievant was transferred to Courts. This is incorrect. There was no such stipulation made in the proceedings in this grievance arbitration. The County did take the position that, as a matter of fact, the Deputy Robinson position was not filled. That is not the same as stipulating there was a vacancy. Leaving aside for the moment the issue of whether this is a separate shift, the issue of qualification, and the Constitutional issue all as raised by the County, the County does have the management right to determine the number of positions and the classifications thereof to perform such service under §1.02 of the collective bargaining agreement. Those management rights are subject to the other terms of CBA that might limit them, such as potentially §3.28. But the Association has not identified or suggested that there is any contractual limit on the County’s ability to determine the number of traffic court liaison positions it will have that limits the management right in this regard, or what, if anything, it must do with the position Deputy Robinson held before her transfer. More specifically, management normally maintains the right to determine if and when there is a vacancy.

It is generally recognized that in the absence of a contract provision limiting management’s rights in regard to filling vacancies, as, for example, a clear requirement to maintain a certain number of employees on a particular job, it is management’s right to determine whether a vacancy exists and whether and when it shall be filled. *ELKOURI & ELKOURI, HOW ARBITRATION WORKS*, 6th Ed., p. 720.

The same principle is recognized in *THE COMMON LAW OF THE WORKPLACE, ST. ANTOINE*, p. 121

§4.11 Posting and Filling of Vacancies

Absent limiting contract language, an employer retains the right to determine whether a vacancy exists and to post and fill only those positions it deems vacant.

There is no identified language in the CBA that limits the County's right to determine if a vacancy exists in traffic court liaison. The County has not determined that there is a vacancy. There is nothing in the record to suggest, and the Association does not argue, that the County is somehow diverting traffic court liaison duties to other positions or otherwise trying to circumvent any contractual provisions. They disagree whether the Deputy Robinson transfer created a vacancy. This is for the County to decide and the County has determined to operate with three traffic court liaison positions. The County determined not to fill or to declare the former Deputy Robinson position vacant. There is no vacancy. Without a vacancy, §3.28 does not provide Grievant with a right to the position by virtue of her seniority. It follows that the County was not required to provide any written reason of a denial under §3.28 of her request for a 7:00 a.m. to 3:00 p.m. position. There being no vacancy, the County did not violate §3.28. This being the case, it is not necessary to analyze §3.28 in terms of the other issues raised by the County as noted above.

Grievant also claims that §3.27 entitles her to a 7:00 a.m. to 3:00 p.m. position because that is a shift and shift assignments shall be determined based on date of rank when a deputy is assigned from one bureau/division to another. When she was reassigned from Jail to Courts she requested a 7:00 a.m. to 3:00 p.m. start and end time. She has more seniority than the Deputies who had been working in traffic court liaison positions. Her written grievance reiterated the times and days, and also referred to this being a shift in the traffic court liaison position. There are several different start times in the Courts bureau, all of which are worked during what would generally be considered a day shift.

The Association contends this is a shift like other start times are considered shifts in some other divisions or bureaus in the Department. The County contends, among other things, that it is not a shift separate from the single day shift in Courts, but only a different start time and that is all it is. Section 3.27 is written in terms of shift assignments, not start times. Section 3.27 does not define the term "shift". When there is no explicit definition of a word or phrase in a provision, arbitrators often look elsewhere in the collective bargaining agreement for a definition of the word or phrase.¹ In the CBA entered into evidence in this case there is no definition found for shift, start time or starting time. There is a provision, however, that does use both shift and starting time and provides some guidance:

3.29 DEFINITION OF A DAY

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.

¹ See, e.g., TURTLE LAKE SCHOOL DISTRICT, No.64371, MA-12870 (JONES, 7/7/2005).

This indicates one shift regardless of when starting times might be, not separate shifts depending on starting time. This is more consistent with the County's view of one shift in Courts than the Association's view as a separate shift. But the record is also clear that at least in some divisions or bureaus and in some circumstances different start times have been considered a separate shift. That needs to be examined.

The testimony indicates that there are other shifts in other divisions or bureaus that do have multiple start times, at least some of which are considered to be separate shifts for selection purposes. It also appears that these start time shifts are sometimes in divisions or bureaus that have more than one generalized shift. There is also testimony and a prior grievance disposition in the record which indicates that in a different division a different schedule of off-days can constitute a separate shift for shift selection purposes. The record does not show how many generalized shifts or how many different start times were involved in that case. As to the off-day situation as exemplified by the previous grievance disposition, the record here does not establish what, if any, difference there may be in off-day scheduling in Courts. Therefore, that basis does not establish a 7:00 a.m. to 3:00 p.m. shift in this case. The start and end time basis must be further examined.

There is no persuasive evidence to show that the 7:00 a.m. to 3:00 p.m. start time in Courts or any of the other several start times in Courts have previously been treated a separate shift apart from the generalized day shift. Similarly, the record does not establish that every start time in the entire Sheriff's Department which might be different than a generalized shift has universally been considered a separate shift, although some have. Here the difference in start times at issue is fairly small, less than an hour. Although there is some testimony as to Deputies having been bumped from assignments within Courts, such bumps have not been shown to have been a consequence of shift selection based on start time, or that the bump was in recognition of a different start time constituting a separate shift. While §3.27 and its application to some other divisions and bureaus may have recognized differing start times as a separate shift for that contract provision's application, the record does not establish that both parties recognized the start time at issue to be a separate shift. In terms of scope, it has not been shown that every start time within a shift, either universally throughout the Department or in Courts specifically, has been considered a shift as a binding past practice that is, for both parties, unequivocal, clearly enunciated and acted upon, and readily ascertainable. Grievant has not established that there is a binding past practice whereby the 7:00 a.m. to 3:00 p.m. start time in Courts is a separate shift. Neither contract provisions nor past practice application of the contract establishes a separate shift. Without a separate shift, §3.27 does not provide Grievant with a right to the 7:00 a.m. to 3:00 p.m. assignment. The County did not violate that provision of the contract.

The County invokes the Constitutional powers of the Sheriff to avoid the limitations of those powers which a finding in Grievant's favor might produce. It is not necessary to decide the County's Constitutional argument because the preceding analysis of §3.27 and §3.28

resolves the issues raised by Grievant in favor of the County. The 7:00 a.m. to 3:00 p.m. assignment sought by Grievant is not a separate shift available to her by virtue of her seniority. The County did not violate §3.27 or §3.28 of the collective bargaining agreement when it did not assign Lisa Biro-Bauer the start time/shift she wanted based on her seniority.

Accordingly, based on the evidence and arguments of the parties in this case I issue the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 23rd day of February, 2009.

Paul Gordon /s/

Paul Gordon, Arbitrator