

BEFORE THE ARBITRATOR

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

and

**WINNEBAGO COUNTY DEPUTIES' ASSOCIATION,
LOCAL 107, LAW, INC.**

Case 415
No. 69066
MA-14463

(Temporary Assignment Grievance)

Appearances:

Ms. Anna M. Pepelnjak, Weiss Berzowski Brady LLP, 700 North Water Street, Suite 400, Milwaukee, Wisconsin 53202, on behalf of Winnebago County.

Mr. Benjamin M. Barth, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin 53022, on behalf of Local 107.

ARBITRATION AWARD

Winnebago County, hereafter County or Employer, and Winnebago County Deputies' Association, Local 107, LAW, Inc., hereafter Association, are parties to a collective bargaining agreement that provides for final and binding arbitration of disputes arising there under. The parties selected the undersigned from a panel of staff members of the Wisconsin Employment Relations Commission to serve as arbitrator of the instant dispute. A hearing, which was not transcribed, was held on November 16, 2009 in Oshkosh, Wisconsin. The record was closed on February 8, 2010, following receipt of the parties' post-hearing written argument. Having considered the record as a whole, the undersigned makes and issues the following Award.

ISSUES

At hearing, the parties stipulated to the following statement of the issues:

Did the Employer violate the terms of the collective bargaining agreement when it temporarily assigned Sergeant Jesse Jensen to a Monday through Friday position in excess of ninety (90) calendar days in any twelve (12) month period without the mutual agreement with the Association's Board of Directors?

If so, what is the correct remedy?

RELEVANT CONTRACT LANGUAGE

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**Article 2
Management Rights**

Except to the extent expressly abridged by a specific provision of this Agreement, the County reserves and retains, solely and exclusively, all of its Common Law, statutory and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing herein contained shall divest the Association from any of its rights under Wisconsin Statutes, Section. 111.70.

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**Article 5
Grievance Procedure**

Grievances within the meaning of the Grievance Procedure shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and items concerning wages, hours and conditions of employment, and about alleged violations of this Agreement. The discharge of probationary employees shall not be subject to the grievance procedure. Demotions, suspensions and dismissals of non-probationary employees shall be processed under the provisions of Sec. 59.26(8), Stats.

All such grievances shall be processed as follows:

Step 1. If an employee or the Association has a grievance, he or the designated representative of the Association shall first present the grievance orally to the Chief Deputy or his designee within ten (10) workdays (holidays and weekends not to be construed as workdays) after the first date of the event or occurrence which gave rise to the grievance. If such grievance is not presented within the specified time period, it shall be deemed waived and abandoned and shall not, thereafter, form the basis of a grievance between the parties hereto.

The Chief Deputy, or his designee, shall respond orally within five (5) workdays (holidays and weekends not to be construed as workdays) after presentation of the grievance.

Step 2. If the grievance is not settled at Step 1, it shall be presented in writing to the Director of Human Resources within five (5) workdays (holidays and weekends not to be construed as workdays) after the presentation of the Step 1 response of the Chief Deputy or his designee. If the grievance is not presented within the specified time period, it shall be deemed abandoned and shall not, thereafter, form the basis of a grievance between the parties hereto.

The Director of Human Resources shall render a written response within fifteen (15) workdays (holidays and weekends not to be construed as workdays) after presentation of the grievance in writing.

Step 3. If the grievance is not settled at Step 2, the Association shall present a written notice of intent to arbitrate to the Director of Human Resources within ten (10) workdays (holidays and weekends not to be construed as workdays) after the issuance of the Director of Human Resources written response at Step 2.

If such notice is not presented within the specified time period, the grievance shall be waived and abandoned and shall not, thereafter, form the basis of a grievance between the parties hereto.

Upon receipt of the notice of intent to arbitrate, the parties shall arrange, by mutual agreement, to select an arbitrator to hear the grievance. In the event that an arbitrator cannot be selected by mutual agreement the following selection procedure shall apply: Prior to filing for arbitration, the parties shall each select three arbitrators from the WERC staff. From those six arbitrators, five names will be drawn. The parties shall then proceed to alternately strike from the panel until an arbitrator is selected. The striking order shall be determined by a coin toss.

The decision of the arbitrator shall be binding upon the parties except for judicial review.

The cost of the arbitrator and transcript, if any, shall be shared equally by the parties. Any other out-of-pocket expense incurred by the respective parties shall be paid by the party incurring the cost.

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Article 7
Work Week

The regular workweek for all employees shall consist of any average of 38.2 hours. The four least senior Corrections Officers and the Narcotics Investigator may be scheduled to work various shifts and days as needed.

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Variations of the regular work schedules of employees, or temporary job assignments in excess of ninety (90) calendar days in any twelve (12) month period shall only be made by agreement between the Department and the Association Board of Directors, and only so long as the regularly scheduled hours do not exceed an average of 38.2 hours per week.

BACKGROUND

In a "Grievance Form" dated May 4, 2009, the Association alleged that the County had violated Article 2-Management Rights and Article 7-Work Week of the parties' collective bargaining agreement, as well as any other applicable Articles or Sections, by temporarily assigning Sergeant Jesse Jensen to a Monday through Friday position in excess of ninety (90) calendar days without an agreement with the Association.

In this "Grievance Form," the Association presented the following "Facts":

1. That Winnebago County and the Winnebago County Deputies Association, Local 107 of the Labor Association of Wisconsin, Inc. have a collective bargaining agreement in full force and effect during all times pertinent to this grievance.
2. That from January 8, 2009 through February 6, 2009, the County temporarily assigned Sergeant Jesse Jensen to work 8:00 am to 4:00 pm Monday through Friday while Sergeant Blair was off on Family Medical Leave.
3. That prior to January 8, 2009, Sergeant Jensen was assigned to work a regular 6-3 rotation per the collective bargaining agreement.
4. That from February 8, 2009 through March 4, 2009, Sergeant Jensen was returned to his regular 6-3 rotation.
5. That from March 16, 2009 to present, the County has again temporarily assigned Sergeant Jensen to work 8:00 am to 4:00 pm Monday through Friday while Sergeant Blair is off.

6. That *Article 7- Work Week*, reads in pertinent part as follows:
“Variations of the regular work schedules of employees, or temporary job assignments in excess of ninety (90) calendar days in any twelve (12) month period shall only be made by agreement between the Department and the Association Board of Directors, and only so long as the regularly scheduled hours do not exceed an average of 38.2 hours per week.”
7. That there has not been an agreement made between the Department and the Association Board of Directors to extend Sergeant Jensen’s temporary assignment.
8. That the County is exercising its’ management rights in an unreasonable manner when it continues to temporarily assign Sergeant Jensen in excess of ninety (90) calendar day in a twelve (12) month period without the agreement of the Association’s Board of Directors.

In remedy of the alleged contract violation, the Association requested that the County cease and desist from violating the terms of the collective bargaining agreement. The Association further requested that the County end the temporary job assignment of Sergeant Jensen and immediately fill the opening per the guidelines of the collective bargaining agreement. The Association also stated that, if the grievance went to arbitration, then the Arbitrator would be requested to order any remedy deemed appropriate by the Arbitrator.

POSITIONS OF THE PARTIES

Association

Timeliness

Prior to hearing, the County did not object to the grievance on the basis that it was untimely and did not reserve the right to argue that the grievance was untimely or procedurally flawed. Rather, the County ambushed the Association by raising the timeliness issue for the first time at hearing. An overwhelming number of arbitrators have concluded that, under such circumstances, the County has waived its right to claim that the grievance is untimely. (cites omitted)

Merits

On January 8, 2009, the Sheriff temporarily assigned Sgt. Jensen to work as the Administrative Sergeant in the Jail, a Monday through Friday position. Sgt. Jensen continued in this temporary job assignment until February 6, 2009. On March 16, 2009, Sgt. Jensen was again temporarily assigned to this Administrative Sergeant position.

To determine whether a Sheriff derives his authority under the constitution, one must determine whether the Sheriff is performing a duty that is one of the “immemorial principal and important duties that characterized and distinguished the office of sheriff at common law.” WASHINGTON COUNTY V. WASHINGTON COUNTY DEPUTY SHERIFF’S ASS’N, 192 WIS.2D. 728, 531 N.W.2D 468 (CT. APP. 1995), hereafter WASHINGTON COUNTY I. More specifically, “it is the nature of the job assigned rather than the general power of job assignment which must be analyzed in the light of the sheriff’s constitutional powers.” WISCONSIN PROFESSIONAL POLICE ASS’N V. DANE COUNTY, 106 WIS.2D 303, 316 N.W.2D 656 (1982), hereafter WPPA I.

Sergeant Jensen was temporarily assigned to the Administrative Sergeant position in the Jail. In KOCKEN V. WISCONSIN COUNCIL 40, 301 WIS.2D. 266, 732 N.W.2D 828 (2007), the Wisconsin Supreme Court undertook a detailed analysis of prior case law concerning the duties of the Officer of Sheriff. In that case, the Court stated:

“The court also related those powers that are not constitutionally protected: “powers, rights, and duties of the office of sheriff that are ‘mundane and commonplace’, *internal management and administrative*’ duties, even if they are ever-present aspects of the constitutional office, *are not accorded constitutional status.*” Finally, the court stressed that “to ignore an analysis of whether the duty at issue is mundane and commonplace and whether it is an internal management and administrative duty is to ignore or misread our case law and to risk over-constitutionalizing the powers of the office of the sheriff, in contravention of the framers’ intentions.” (Emphasis added)

As the Court has stated, “internal management and administrative duties are not accorded constitutional status.” The position to which Sgt. Jensen was assigned to entails administrative duties.

The County waited until the day of hearing to raise the issue of the Sheriff’s constitutional authority. The actions of the Sheriff, in temporarily assigning Sgt. Jensen to the Administrative Sergeant’s position, go beyond the inherent constitutional powers, rights or duties of the sheriff found at common law and can be restricted by the Association’s collective bargaining agreement.

The clear contract language must be enforced even though the results may be harsh or contrary to the original expectations of one of the parties. (cites omitted) The clear contract language of Article 7 supports the Association’s position. The Sheriff exercised his management rights in an unreasonable manner.

Absent an agreement between the Department and the Association’s Board of Directors, the temporary job assignment shall end after ninety (90) days. Association Vice President Freeman testified that the 90-day rule was always followed previously and that he knew this because Sgt. Blair had sent a letter advising him that his temporary job assignment will not exceed ninety (90) days and it did not.

Based upon the understanding that the parties had prior to this instant case, the Association requests that the Arbitrator find that the County violated the collective bargaining agreement. The Association respectfully requests that the Arbitrator order the County to cease and desist and fill the opening pursuant to the guidelines of Article 7 – Work Week, Corrections Division Work Schedule, Subsection (g), of the collective bargaining agreement.

County

Timeliness

The contract does not permit the Grievant to raise the grievance when the Grievant acquires “knowledge” of the complaint. This contract expressly requires that the grievance must be brought within ten (10) days (excluding weekends and holidays) “after the first date of the event or occurrence which gave rise to the grievance.”

The Association asserts that a 90-day “clock” begins to run each time that the Sheriff assigns a Deputy to a temporary position. Sgt. Jensen’s first temporary job assignment began on January 8, 2009. Based upon the 90-day “clock” assertion of the Association, the grievance should have been filed no later than April 22, 2009. Inasmuch as the grievance was not filed until April 30, 2009, it is untimely.

The contract states that, if a grievance is not presented within the specified time period, then “it shall be deemed waived and abandoned and shall not, thereafter, form the basis of a grievance between the parties hereto.” This language, which is mandatory, is repeated at Step 2 and Step 3 of the grievance procedure. There is no provision for extending time limits; even in instances of emergency or inability to comply.

The contract does not impose any duty upon the County’s representatives to cite timeliness as grounds for rejecting the grievance. Nor does it authorize the parties to forego their duties under the contract.

The Association offers one challenge to the County’s assertion that the grievance is untimely, *i.e.*, waiver. By implication, the Association must agree that, unless the County waived its rise to challenge timeliness, this grievance is untimely and invalid under the contract.

Waiver is the “voluntary, intentional relinquishment of a known right.” (cites omitted) Until the County learned that the Association interpreted the contract provision as described above, a legally binding waiver could not occur.

It is only because the Association reads the provision to say that a temporary job assignment can run no more than 90 consecutive days, start to finish, (without Association Board acquiescence) that timeliness became an issue. The grievance’s untimeliness is not obvious on its face. Chief Deputy Tedlie, who received the Step 1 grievance, could not have known that the grievance was untimely.

During his 5-year tenure, Chief Deputy Tedlie has followed the practice of accepting grievances and determining timeliness later. Chief Deputy Tedlie stated that, until recently, he was unaware that he had authority to reject a grievance based upon timeliness.

The language of the grievance procedure reflects the parties' agreement that, unless a grievance is brought and prosecuted on a timely basis, the grievance is treated as if it had not been brought at all. The grievance is untimely and, under the agreed upon contract language, this grievance is void.

Merits

The Association asserts that "If no agreement is reached to extend the ninety (90) days, the Department must fill the vacancy pursuant to Article 7 – Work Week, Corrections Division Work Schedule, Subsection (g) . . ." This assertion finds no basis in the collective bargaining agreement. Nothing in the contract transforms a temporary job assignment into a "vacancy."

The contract does not preclude the Sheriff from assigning any individual employee to more than one temporary job, so long as the employee's total time on assignment does not exceed ninety calendar days. The term "calendar days" does not mean consecutive days and there is no reasonable basis to conclude that the ninety days are consecutive.

A proper reading of the contract provision enables the Sheriff to assign his Deputies temporarily as he sees fit, for as much as 90 full days in any 12-month period. In the present case, the Sheriff assigned Sgt. Jensen to the Corrections Administrative Sergeant (CAS) position for 31 days from January 8, 2009 to February 7, 2009. At the end of that assignment, the Sheriff retained the authority, under the contract, to re-assign Sgt. Jensen for an additional 59 calendar days. The Sheriff complied with the contract language when he reassigned Sgt. Jensen to the CAS job on March 5, 2009.

Sergeant Jensen's remaining "assignable" days expired on May 12, 2009. Therefore, the real question raised by this grievance is whether, as of May 12, 2009, the Sheriff violated the collective bargaining agreement by continuing Sgt. Jensen's assignment.

The provision does not define the start or the finish of "any given 12-month period." Therefore, under the Management Rights clause, the Sheriff retains the right to select the applicable 12-month period. Requiring Sgt. Jensen to perform 90 days of temporary job assignment in the 12-month period from May 13, 2008 to May 12, 2009 fully complies with the contract. On May 13, 2009, a new 12-month period began, and the Sheriff was permitted to assign Sgt. Jensen temporarily to another 90 days. When the temporary job assignment ended on July 13, 2009, Sgt. Jensen had not exceeded 90 days. Accordingly, there has been no violation of the collective bargaining agreement.

The Office of the Sheriff has constitutionally protected powers. STATE EX REL. KENNEDY V. BRUNST, 26 WIS. 412 (1870); STATE EX REL. MILWAUKEE COUNTY V BUECH, 171

Wis. 474, 177 N.W. 781 (1920); *MANITOWOC COUNTY v. LOCAL 986B*, 168 Wis. 2d 819, 484 N.W.2d 534 (1992). These powers cannot be limited or abridged by an act of a county board, the collective bargaining process or state legislation related to collective bargaining. WPPA I.

The Sheriff has three main duties; one of which is that the Sheriff is in charge of enforcing and protecting the peace in a community. Citing *WASHINGTON COUNTY I*, the County argues that the exercise of these duties merits constitutional protection when it comes to the assignment of deputies or selection of law enforcement personnel to carry out his duties, even in the face of challenges rooted in the MERA.

The Sheriff is also an officer of the court. Citing *WISCONSIN PROFESSIONAL POLICE ASS'N/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION v DANE COUNTY*, 149 Wis.2d 699, 439 N.W.2d 625 (Ct.App 1989), hereafter WPPA II, the County argues that duties that relate to the Sheriff's carrying out the orders of a court have been found to be protected duties. Thirdly, the Sheriff is the keeper of the jail and the inmates that reside therein. Citing *BRUNST*, the County argues that, in that capacity, actions that serve to fulfill the Sheriff's duty to take care of inmates are constitutionally protected and cannot be abridged.

Complementing the constitutional prerogative of the Sheriff, are the broad powers provided to the Sheriff under Chapter 59. The Attorney General for the State of Wisconsin, as well as Wisconsin Courts have recognized that the authority of the Sheriff under Chapter 59 must be interpreted consistent with, not usurping, the constitutional function of the Sheriff. (cites omitted)

As the Association argues, the Sheriff's constitutional powers permit him to act outside the contract only when the "nature of the job" assigned is constitutionally protected. The Association, however, fails to analyze the "nature of the job." The uncontroverted evidence shows that the CAS job involves the essential working of the jail and attendance upon the courts.

The Association relies almost entirely upon one case, *i.e.*, *KOCKEN*. The problem with relying upon *KOCKEN* is that the court (like the Association) failed to engage in the very analysis it claims is required. Additionally, the Association ignores an entire line of cases in which the court recognized that the Sheriff's constitutional authority allows the Sheriff to disregard the collective bargaining agreement. (cites omitted)

Contrary to the argument of the Union, the County has not waived any right to raise the issue of the constitutional authority of the Sheriff. The application of the above principles to the facts of this case requires the conclusion that the Sheriff is not bound by the collective bargaining agreement when assigning officers to temporary duties in the areas over which he has constitutional authority. The grievance should be denied and dismissed.

DISCUSSION

Sheriff's Assertion of Constitutional Powers, Rights and Duties

The instant dispute involves the right of the County to assign Sgt. Jensen to the temporary job assignment of filling in for the absent Corrections Administrative Sergeant (CAS), Sgt. Blair. Referring to County Exhibits 1 and 2, Sheriff Brooks states that he had several conversations with the County HR Director in which the Sheriff asserted his constitutional authority in this matter and advised the County that the County could not bargain away or waive his constitutional authority as Sheriff.

The County, contrary to the Association, argues that this assignment involves the exercise of the Sheriff's constitutional authority that may not be abridged by the terms of the parties' collective bargaining agreement. The County asserts, therefore, that the grievance must be dismissed.

Asserting that the County did not raise the issue of the constitutional authority of the Sheriff prior to hearing, the Association disputes the right of the County to rely upon the constitutional authority of the Sheriff in this proceeding. As the County argues, the record establishes that, prior to the hearing day; the County placed the Association on notice that this grievance involved the constitutional rights of the Sheriff. (County Exhibits 1 and 2) Assuming *arguendo* that the County had not provided the Association with such notice, such a fact would not preclude the County from asserting the Sheriff's claim that Sgt. Jensen's temporary job assignment involved the exercise of his constitutional authority. Neither the County, nor the Sheriff, has waived any right to assert that Sgt. Jensen's temporary job assignment involves the exercise of a constitutional authority of the office of sheriff that may not be abridged by the terms of the parties' collective bargaining agreement.

Pertinent case law

In WPPA I, the Wisconsin Supreme Court considered the issue of whether the sheriff is limited in his selection of a "court officer" by the terms of a collective bargaining agreement between a union and the county. The court stated that, under the Wisconsin Constitution, the sheriff has the power and prerogatives that that office had at common law. The court found that the question to be answered was whether duties performed by a court officer are among the principal and important duties that characterized the office of sheriff so that the sheriff may not be restricted as to whom he appoints to perform the functions. The court then stated that it is the nature of the job assigned rather than the general power of job assignment that must be analyzed in light of the sheriff's constitutional powers. The court found that "attendance on the Court" is an inherent constitutional power of the sheriff and, thus, the collective bargaining agreement cannot deprive the sheriff of his authority to select who among his deputies shall act in his stead in attendance on the court.

In WASHINGTON COUNTY I, the court considered the issue of whether the constitutional powers of the office of sheriff include the right to utilize non-bargaining unit law enforcement personnel from other municipalities to help maintain law and order and preserve the peace in anticipation of a public event expected to draw thousands of people to a county-wide area and concluded that such authority is within the sheriff's powers. Citing WPPA II, the court stated that, if the duty is one of those immemorial principal and important duties that characterized and distinguished the office of sheriff at common law, the sheriff chooses the ways and means of performing it. The court stated that, in MANITOWOC COUNTY, the court held that law enforcement and preserving the peace are duties that gave character and distinction to the office of sheriff at common law. The court reasoned, therefore, that the proper inquiry is whether the nature of the job assigned to the municipal officers was for the purpose of law enforcement and preserving the peace. Citing WPPA II, the court concluded that, if it was for this purpose, then the sheriff's actions were constitutionally protected and the collective bargaining agreement could not limit his authority to choose the ways and means of preserving the peace. The court in WASHINGTON COUNTY I found that the sheriff's assignment of municipal officers to patrol duty normally assigned to deputies was in reasonable anticipation of a possible emergency situation during Harleyfest and, in this case, was a proper exercise of a sheriff's duty to preserve the peace that could not be limited by the collective bargaining agreement.

In KOCKEN, the court stated that the Wisconsin Constitution does not delineate the powers, rights and duties of the office of sheriff; but rather, it is case law that gives meaning to the powers, rights and duties of the office of sheriff that are protected by the state constitution. The court went on to review this case law; stating that the court in BRUNST had concluded that the framers of the constitution intended the office of sheriff to have "those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted" and explained that Sheriff's "duties from time immemorial" are constitutionally protected. The court stated that the court in BUECH limited the constitutional powers, rights and duties of the sheriff to only those "immemorial principal and important duties that characterized and distinguished the office."

In KOCKEN, the court explained that, in BUECH, the court found that, although "at common law the sheriff possessed the powers to appoint deputies," the civil service law applied to the sheriff's hiring of deputies because the power to hire does not give character and distinction to the office; it is not a power "peculiar" to the office of sheriff and the state constitution does not prohibit any legislative change in the powers, duties, functions and liabilities of a sheriff as they existed at common law. The court in KOCKEN found the court in HEITKEMPER V. WIRSING, 194 Wis.2d 182, 533 N.W.2d 770 (1995) had concluded that the court in BUECH had "rejected any interpretations of BRUNST which tried to include within the constitutionally protected functions of the sheriff all powers held by the sheriff at the common law" and had "indicated that the test for determining which functions were constitutionally protected was more exacting."

In *KOCKEN*, the court explained that the *HEITKEMPER* court found that “internal management and administrative duties,” while important, fall within the “mundane and commonplace” duties not protected by the constitution. The *KOCKEN* court stated that “Cases addressing the constitutional dimensions of the office of sheriff establish the following criteria for identifying a sheriff’s constitutional powers, rights and duties: certain immemorial, principal, and important duties of the sheriff at common law that are peculiar to the office of sheriff and that characterize and distinguish the office are constitutionally protected from legislative interference” and that “. . . internal management and administrative duties. . . [that] neither gave ‘character’ nor ‘distinction’ to the office of sheriff...fall within the mundane and common administrative duties of a sheriff which may be regulated by the legislature.”

The *KOCKEN* court found that, where courts have previously considered whether the sheriff has a constitutional right to appoint an individual to perform functions, the courts have not focused inquiry on the sheriff’s power of appointment, or the sheriff’s ability to assign a task generally, but rather have focused inquiry on the nature of the task assigned. The *KOCKEN* court recognized that, when the assigned task involves the “principal and important duties that characterize the office of sheriff, then the sheriff may not be restricted.”

The court in *KOCKEN* began its analysis by stating “the operation of the jail and the custody and care of jail inmates are part and parcel of the duties from time immemorial belonging to the office of sheriff and are distinctive to the office.” Citing *WPPA I*, the court in *KOCKEN* found that another constitutionally protected power and prerogative of the office of sheriff recognized by the courts is the sheriff’s special relationship with the courts; that ‘Attendance on the Court’ is in the same category of powers inherent in the sheriff running the jail; and that legislative enactments, including those authorizing collective bargaining agreements, cannot deprive the sheriff of his authority to select who among his deputies shall act in his stead in attendance on the court.

The *KOCKEN* court recognized that attendance upon the court includes providing sufficient deputies to carry out the court’s orders, including executing arrest warrants by the court to bring a prisoner before the court. The *KOCKEN* court found that the sheriff’s special relationship with the courts was reinforced in *DUNN COUNTY V. WERC*, 293 WIS.2D 637, 718 N.W.2D 138 (CT. APP. 2006) and *WPPA II*. In the former, the court held that a collective bargaining agreement could not delegate power to the clerk of courts, with priority over the sheriff, in the scheduling, directing and supervising of deputies serving as court security officers because such delegation interferes with the sheriff’s constitutional authority in attending on the courts. In the latter, the court concluded that the sheriff’s right to enlist the services of the US Marshal for interstate conveyance of prisoners “may not be limited by a collective bargaining agreement” because the sheriff’s duty “to execute court-issued arrest warrants to bring before the court a prisoner” was a cardinal and traditional responsibility of the sheriff, giving character to the officer of the sheriff.

In *KOCKEN*, the court stated there are two other powers, rights, and duties that have been recognized and clearly accepted by the courts as within the constitutional prerogative of

the office of sheriff, *i.e.*, maintaining law and order and preserving the peace. One of the referenced cases is MANITOWOC COUNTY, wherein the court concluded that a sheriff had the constitutional right to assign a specially qualified deputy from patrol duty to fill a unique undercover position because “law enforcement and preserving the peace were duties which ‘gave character and distinction’ to the office of sheriff” and “undercover detective work is a contemporary method of the exercise of the sheriff’s historical duties of maintaining law and order and preserving the peace.”

The KOCKEN court recognized that the court in MANITOWOC COUNTY declared that its ruling was narrow and limited to the facts of the case; with the focus on the special “nature of the job assigned rather than the general power of job assignment.” The KOCKEN court stated that, in DUNN, the court explained the limited applicability of MANITOWOC COUNTY to “very specific assignments, not day-to-day routine scheduling requirements.”

Based upon its review of prior cases, the KOCKEN court concluded that the appointment and dismissal of deputies are non-distinctive internal management and administrative tasks because the power to appoint deputies “was not a power or authority that gave character or distinction to the office;” that the power to dismiss falls within the mundane and common administrative duties of a sheriff which may be regulated by the legislature; and the working environment of the sheriff’s office may be regulated by the legislature or may be subject to collective bargaining agreements, including the control of wages, hours and conditions of the sheriff’s employees.

In KOCKEN, the court stated that the hiring and firing of a food service provider is, at best, ancillary to the constitutional powers, rights, and duties of the office of the sheriff and concluded that “just as the legislature can prescribe limitations on the sheriff’s power to hire or terminate deputies who maintain law and order and preserve the peace, so too can the legislature regulate the employment decisions for food service workers at the county jail.” The Court went on to state:

We are persuaded our conclusion is correct by examining the consequences of adopting Sheriff Kocken’s position. If we determined that hiring and firing personnel to provide food for the county jail is in fact a constitutional power of the office of sheriff merely because it is related to the sheriffs constitutional power and duty to operate the jail and care for inmates, then all mundane and commonplace internal management and administrative aspects of the operation of the jail and care of the inmates would similarly become constitutionally protected prerogatives of the sheriff, such that any changes the legislature might want to make to mundane and commonplace internal management or administrative aspects of the operation of the jail and care of inmates might require a constitutional amendment.

After the KOCKEN decision, the court in OZAUKEE COUNTY V. LABOR ASS’N OF WISCONSIN, 315 WIS.2D 102 (2008), 763 N.W.2D 140 (CT. APP. 2008) considered the union’s

argument that the sheriff may not disregard the collective bargaining agreement when appointing Court Service Unit deputies who transport U.S. Marshal and/or State of Wisconsin prisoners via a rental agreement for bed space. In OZAUKEE COUNTY, the court held that the assignment of deputies to transport federal and state prisoners to and from the Ozaukee county jail pursuant to a contract for the rental of bed space is not a constitutionally protected duty of the sheriff's office and, thus, is subject to the restrictions of the collective bargaining agreement. In reaching this conclusion, the court noted that the contract was between the county and the U.S. Marshal and/or State of Wisconsin; that, under the statutes, the county is solely responsible for the costs of operating and maintaining the county jail and maintaining the prisoners in the county jail and, thus, it is hard for the court to imagine how this type of prisoner transport, done as a revenue-generating task, is "peculiar to the office of sheriff" or can be said to "characterize and distinguish the office;" and, under prior case law, it is the particular duty of transporting and housing county prisoners that has been held to be among those that gave character and distinction to the office of sheriff at common law.

In OZAUKEE COUNTY, the court found that, inasmuch as these non-county prisoners are not held at the behest of the Ozaukee court and would have no occasion to go before the Ozaukee court, in assigning this transport duty, the sheriff is not acting for the court. Thus, the OZAUKEE COUNTY court distinguished WPPA II on the basis that WPPA II involved the transportation of prisoners who had business before the county courts. The OZAUKEE COUNTY court stated that it adhered to KOCKEN because, like the money-saving actions in KOCKEN, the money-generating actions do not hold up as "certain immemorial, principal, and important duties of the sheriff at common law that are peculiar to the office of sheriff and that characterize and distinguish the office." The OZAUKEE COUNTY court found that, in rejecting the County's attempt to lump all types of transport into one, the court heeded the supreme court's caution in KOCKEN to avoid "over-constitutionalizing the powers of the office of the sheriff, in contravention of the framer's intentions."

After the KOCKEN and OZAUKEE COUNTY decisions, the court in BROWN COUNTY SHERIFF'S DEPT. NON-SUPERVISORY LABOR ASS'N V BROWN COUNTY, 318 Wis.2D 774, 767 N.W.2D 600 (CT. APP. 2009), addressed the issue of whether transporting prisoners pursuant to court orders, writs, warrants and judgments of conviction is a constitutionally protected duty of the sheriff. The court recognized that the legislature may regulate internal management and administrative duties that are "mundane and commonplace." The court further recognized that the courts have found that "attending on the courts" is one of the duties preserved for the sheriff by the state constitution. This court concluded that the duties in dispute involved attending on the court and, therefore, are constitutionally protected.

After BROWN COUNTY, the court in MILWAUKEE DEPUTY SHERIFF'S ASS'N V. CLARKE, 320 Wis.2D 486, 772 N.W.2D 216 (CT. APP. 2009) was asked to review the trial court's decision that Sheriff Clarke does not have authority to determine how to effectuate WIS. STAT. Sec. 59.27(4) duties and, thus, could not privatize those duties. The court defined the issue before it as whether the service or execution of all processes, writs, precepts and orders issued or made by lawful authority and delivered to the sheriff falls within the sheriff's

constitutional powers, rights and duties. The court concluded that these are immemorial, principal and important duties that characterize and distinguish the office of sheriff; as such, they fall within the sheriff's constitutional powers; and that the trial court erred when it concluded that Sheriff Clarke could not privatize these duties. The court rejected the union's argument that this case centered on the hiring and firing of personnel because such categorization loses sight of the nature of the job in question, which is not hiring and firing personnel, but rather, is the carrying out of duties set forth under Sec. 59.27(4), Stats.

After MILWAUKEE COUNTY, the court, in WASHINGTON COUNTY V. WASHINGTON COUNTY DEPUTY SHERIFFS ASS'N, 320 WIS.2D. 570, 772 N.W.2D 697 (CT. APP. 2009), (WASHINGTON COUNTY II), considered the appeal of a trial court's decision that a grievance was not substantively arbitrable because the decision to staff a security station with part-time special deputies, who were non-union, was part of the sheriff's constitutionally protected duties. Concluding that staffing the x-ray and metal security screening station at the Washington County Justice Center was not one of those "certain immemorial, principal, and important duties of the sheriff at common law that are peculiar to the office of sheriff and that characterize and distinguish the office," the court of appeals reversed the trial court.

The court dismissed the County's argument that manning the security screening station machines is similar to "attendance upon the court." In doing so, the court noted that the screeners were at the entrance to a building that housed offices other than the courts; that the screeners did not patrol or monitor the courtrooms; the screeners had no function related to executing judges' orders; and that individuals other than visitors to the court were screened. Recognizing that Wisconsin courts have determined that maintaining law and order and preserving the peace are constitutionally protected duties of the sheriff, the court concluded that waiving the metal-detecting wand or listening for the buzzer to ring at a combined-use office building are not similar to duties that have been found to be constitutionally protected. (*e.g.*, assignment to undercover drug operations or the assignment of municipal officers to augment countywide law enforcement duty for Harleyfest.) Noting that operating machines involved in screening is a mundane task that is done in many places by security officers; has not traditionally been the sheriff's tasks to perform; and is too far removed from the courtroom itself and the orders of the judges, the court found a similarity to duties that have been found to be administrative. (*e.g.*, preparing food for inmates; hiring and firing procedures of deputy-sheriffs; day-to-day scheduling of overtime and emergency coverage and limited-term employee coverage other than court officers; and money-generating transport of federal prisoners under a rental contract with the federal government.) The court concluded that the security screening duties at issue were not tasks that lend character and distinction to the office of the sheriff, but rather, are the type of "mundane and commonplace" and "internal management and administrative" that have been excluded from constitutional protection.

Discussion

The issue to be determined is whether the temporary job assignment of Sgt. Jensen involves a constitutional prerogative of the Sheriff that cannot be limited by the terms of the

collective bargaining agreement between the County and the Association. As both parties recognize, under relevant case law, the focus of the analysis is upon the “nature of the job assigned rather than the general power of assignment.”

Other than stating that the CAS position entails administrative duties, the Association has not identified or analyzed the specific duties or functions of the disputed assignment. At hearing, Captain Mark Habeck testified that he has been the Jail Administrator for approximately two years. According to Captain Habeck, the CAS ensures that time sheets are timely and appropriate; approves overtime of Corrections employees; schedules flex officers by determining which open shifts are staffed by flex officers or regular Deputies working overtime; works with jail management records; assists in internal investigations; and contacts vendors when systems fail. Captain Habeck states that the CAS has knowledge of specialized forms and computer programs used in Corrections, as well as the information needed to maintain records, such as spread sheets for meals served and charged. Captain Habeck states that the Court Services Unit, which is comprised of six (6) Deputies and one (1) Corporal, attends the Courts; transports inmates; picks up inmates on writs; and is involved in all external movements of inmates. Captain Habeck states that the CAS is the immediate supervisor of the Corporal in Court Services; is the first point of contact if there are issues that have not been resolved by a Court Officer; and, approximately twice a month, fills in for a Court Officer. According to Captain Habeck, the Administrative Sergeant is right hand to administrative staff in Corrections and that, when the Captain and Lieutenant are both absent, the Administrative Sergeant is in charge of the jail.

Captain Habeck states that Sgt. Jensen received training from Sgt. Blair prior to the start of Sgt. Blair’s administrative leave on January 8, 2009. Captain Habeck further states that, after March 16, 2009, when Sgt. Blair left on his second administrative leave, Sgt. Blair did not return. According to Captain Habeck, if the County could not assign Sgt. Jensen to the CAS position it would hamper the ability of the Department to run the jail.

Sheriff Brooks states that he does not take issue with Captain Habeck’s testimony regarding the duties of the CAS. According to Sheriff Brooks, the performance of CAS duties is important to the efficiency of Jail Operations and Court Transport and the security of attendance on the courts. Sheriff Brooks states that the CAS represents the Sheriff in fulfilling the Sheriff’s constitutional duties of attending upon courts and operating the jail. According to Sheriff Brooks, if he had to terminate Sgt. Jensen’s temporary appointment and retrain another individual to perform the duties of the CAS, then the Sheriff would fail in his constitutional duties to attend the courts and jails.

Attendance upon the court and transport of inmates are duties that the courts have found to be constitutionally protected prerogatives of the office of the sheriff. While the CAS performs these duties when he fills in for Court Officers, his performance of these duties does not involve a significant portion of the CAS workload.

Captain Habeck testified that the CAS supervised the Corporal in the Court Services Unit. Captain Habeck does not describe the nature of the supervision provided by the CAS. Captain Habeck testified that the CAS is the first point of contact if the Court Services Unit has an issue that it cannot resolve. Captain Habeck does not state what, if any, authority the CAS has to resolve such issues.

In summary, it is evident that the CAS performs duties that assist the Sheriff in performing his constitutional duties to operate the jail and attend upon the courts. As the court recognized in *KOCKEN*, however, the fact that a duty relates to the sheriff's constitutional powers and duties is not sufficient to invoke constitutional protection where the nature of the described duties fall within the "mundane and commonplace internal management or administrative aspects" of the constitutionally protected prerogatives of the sheriff.

The record fails to establish that the duties performed by Sgt. Jensen, in his temporary assignment as CAS, are the type of duties that the courts have found to be "immemorial principal and important duties that characterized and distinguished the office of sheriff at common law." The most reasonable conclusion to be drawn from the record evidence is that the duties performed by Sgt. Jensen, in his temporary assignment as CAS, are the type of duties that fall within the "mundane and commonplace internal management and administrative aspects" of the Sheriff's department that are not accorded constitutional status.

The work performed by the CAS could be disrupted if the Sheriff had to train another employee to replace Sgt. Jensen in his temporary job assignment as CAS. The record, however, provides no reasonable basis to conclude that such a disruption would have a significant impact upon the powers, rights and duties of the office of sheriff that are protected by the state constitution. The undersigned notes that, while the record establishes that Sgt. Jensen received training from Sgt. Blair, the record fails to establish the nature, extent or duration of this training.

The record fails to establish that, in temporarily assigning Sgt. Jensen to fill in for the absent CAS Sergeant Blair, the Sheriff invokes a constitutional power, right or duty of the office of sheriff that cannot be limited by terms of the collective bargaining agreement between the County and the Association. Accordingly, the undersigned rejects the County's argument that this grievance must be dismissed on the basis that the temporary assignment of Sgt. Jensen involves the exercise of the Sheriff's constitutional authority that may not be abridged by the terms of the parties' collective bargaining agreement.

Timeliness

During the course of the hearing, it became evident to the Arbitrator that the County intended to argue that the grievance had been untimely filed. The Arbitrator and each party's representative then had a discussion regarding timeliness.

The Association's representative contested the right of the County to raise the timeliness issue. The Association did not request a continuation of the hearing to provide the Association with an opportunity to respond to the County's timeliness issue.

It is undisputed that the County did not raise a timeliness objection prior to hearing. The Association has cited a number of cases in which arbitrators have concluded that an employer has a duty to raise a timeliness issue prior to hearing and that failure to do so acts as a waiver of an employer's right to raise a timeliness objection before the grievance arbitrator.

One of the cases cited by the Association is WINNEBAGO COUNTY, Case 184, No. 43883, MA-6098 (Gratz, 8/90). That Award did not involve the Association's bargaining unit or the grievance procedure language that is contained in the Association's collective bargaining agreement. Nonetheless, it is useful in that it provides an overview of arbitral opinion on the issue of an employer's right to raise an initial objection of timeliness at hearing.

In his Award, Arbitrator Gratz concluded that the parties' contractual grievance procedure time limits must be applied where they have not been waived. Arbitrator Gratz also concluded that the "overwhelming and better-reasoned view of arbitrators holds that such procedural requirements are ordinarily to be deemed waived not only by express agreement but also in other circumstances including where, as here, pre-arbitral grievance processing is engaged in without any reference to procedural noncompliance."

Arbitrators have concluded that the primary purpose of the contractual grievance procedure is to foster the settlement of disputes prior to arbitration. To such arbitrators, a failure to share relevant information is unfair and inequitable because it inhibits settlement discussion and has the tendency to foster an atmosphere of distrust that adversely affects the parties' future relationship.

An employer's timeliness defense is relevant information because it may persuade the union that it cannot prevail in arbitration. Conversely, information provided by the union in response to a timeliness defense may persuade the employer that the employer cannot prevail in arbitration. Under the assumption that a prompt discussion of a timeliness defense may save the parties the time and expense of arbitration, arbitrators have found an employer's delay in raising a timeliness defense to be unfair and inequitable.

According to the County, Wisconsin courts have defined waiver as the "voluntary, intentional relinquishment of a known right." Arbitrator Gratz' overview of arbitral opinion reveals that, in determining whether an employer has waived a right to raise a timeliness defense, arbitrators have not applied the law of waiver as established by Wisconsin courts. Rather, the arbitrators have applied their own view of equity and fairness.

Article 5 of the parties' collective bargaining agreement, unlike the grievance procedure provisions of many other collective bargaining agreements, expressly addresses the consequences of failing to "present the grievance within the specified time period." This

stated “consequence” is that the grievance “shall be deemed abandoned and shall not, thereafter, form the basis of a grievance between the parties hereto.” The “consequence” of failing to “present the grievance within the specified time period” is applicable at all three Steps of the grievance procedure.

As the County argues the “consequence” language is mandatory. As the County further argues, Article 5 does not state that the County has a duty to raise the defense of timeliness in its responses to the grievance and Article V does not provide for any extension of timelines.

In summary, Article 5 provides a penalty for an Association failure to present the grievance “within the specified time period.” This clearly expressed penalty is the forfeiture of the Association’s right to pursue the grievance to arbitration. Given the language of Article 5, including the parties’ clear agreement to not submit an untimely grievance to arbitration, the undersigned concludes that it is “fair and equitable,” in the present case, to define waiver as a “voluntary, intentional relinquishment of a known right.”

It is undisputed that Association President Peters presented the Step 1 oral grievance to Chief Deputy Tedlie on April 30, 2009. At hearing, Association President Roger Peters and Association Vice President Jason Freeman agreed that the Association was asserting that the 90-day time limit for temporary job assignments began with Sgt. Jensen’s initial assignment on January 8, 2009 and continued to April 8, 2009. It is not evident that, prior to this testimony, the County knew, or should have known, that the Association did not share the County’s view that, on April 30, 2009, the County had not yet exceeded the ninety (90) day limitation provided for in Article 7.

Neither the written grievance, nor the evidence of the parties’ conduct in processing this grievance to arbitration, provides a reasonable basis to conclude that, prior to the day of arbitration, the County knew, or should have known, that it had a timeliness defense based upon the Association’s grievance claim. Under the facts of this case, the Association has not been “ambushed” by the County’s claim that the grievance is untimely.

The undersigned concludes that the County did not “voluntarily or intentionally” relinquish its right to assert its claim that the grievance is untimely. Under the circumstances of this case, the County has not waived its right to raise the claim that the Association’s grievance is untimely.

The Association, contrary to the County, argues that the County’s temporary job assignment of Sergeant Jensen violated the following language of Article 7 of the parties’ collective bargaining agreement:

Variations of the regular work schedules of employees, or temporary job assignments in excess of ninety (90) calendar days in any twelve (12) month period shall only be made by agreement between the Department and the

Association Board of Directors, and only so long as the regularly scheduled hours do not exceed an average of 38.2 hours per week.

Under the Association's interpretation of this contract language, the referenced ninety (90) calendar days starts on January 8, 2009; regardless of the number of days that Sgt. Jensen is temporarily assigned within that ninety (90) day period. The County asserts, therefore, that the "first date of the event or occurrence which gave rise to the grievance" occurred, at the latest, on April 9, 2009. Inasmuch as the Step 1 oral grievance was presented on April 30, 2009, the County asserts that the grievance is untimely under the language of Article 5.

Under the relevant contract language, any temporary job assignment that exceeds the ninety (90) day limitation without the agreement of the Association's Board of Directors is a contract violation. Contrary to the argument of the County, "the first date of the event or occurrence which gave rise to the grievance" is not limited to one discrete date, but rather, each day that a temporary job assignment exceeds the ninety (90) day limitation gives rise to a grievance.

As set forth in the written grievance, the Association is claiming that "the County is exercising its' management rights in an unreasonable manner when it continues to temporarily assign Sergeant Jensen in excess of ninety (90) calendar days in a twelve (12) month period without the agreement of the Association's Board of Directors." (emphasis supplied) At the time that the oral grievance was presented on April 30, 2009, Sgt. Jensen continued in the temporary job assignment that was the subject of this grievance. By filing its oral grievance within ten (10) workdays of a date in which Sgt. Jensen continued in his temporary job assignment, the Association has complied with time limits set forth in Step 1 of the grievance procedure. Accordingly, the undersigned rejects the County's argument that the grievance was not timely filed under Article 7.

Merits of the grievance

The following facts are not in dispute:

1. On January 8, 2009, Sergeant Jensen assumed a temporary job assignment of filling in for the absent Sgt. Blair;
2. Sgt. Jensen continued in this temporary job assignment until he left this assignment on February 7, 2009;
3. Sgt. Jensen returned to the temporary job assignment of filling in for the absent Sgt. Blair on March 15, 2009; and
4. Sgt. Jensen remained in this temporary job assignment until Sgt. Blair left County employment in July 2009.

The Association argues that Sgt. Jensen's temporary job assignments have violated the following language of Article 7:

Variations of the regular work schedules of employees, or temporary job assignments in excess of ninety (90) calendar days in any twelve (12) month period shall only be made by agreement between the Department and the Association Board of Directors, and only so long as the regularly scheduled hours do not exceed an average of 38.2 hours per week.

This grievance does not present any claim that the County assigned Sgt. Jensen to work an average that exceeded 38.2 hours per week. Rather, this grievance presents the claim that the County violated Article 7 of the parties' collective bargaining agreement by continuing to assign Sgt. Jensen to temporary job assignments in excess of ninety (90) calendar days without the agreement of the Department and the Association's Board of Directors.

Contrary to the argument of the County, it is immaterial whether Sgt. Jensen was involved in the grievance; objected to his temporary job assignments; testified at hearing or voluntarily accepted the fulltime Corrections Administrative Sergeant position. Article 5 of the labor contract expressly recognizes that the Association has a right to file grievances.

The Association argues that, in the instant case, the ninety (90) calendar day limitation begins on the first date that Sgt. Jensen was placed in the temporary job assignment and ends ninety calendar days later; regardless of the number of days worked in the temporary job assignment. The plain language of the labor contract does not support this argument.

Under the most reasonable construction of the plain language of this contract provision, the term "in excess of ninety (90) calendar days" is a limitation upon the days that may be worked in the temporary job assignment. As the County argues, the plain language of the provision neither expresses, nor implies, that these ninety (90) calendar days must be consecutive.

The Association further argues that the term "in any twelve (12) month period" refers to a calendar year. It is reasonable to conclude, however, that, if the parties had intended to limit the twelve-month period to a calendar year then they would have used the term "in any calendar year," rather than the more expansive term of "any twelve (12) month period."

The County argues that, inasmuch as the provision does not define when "any twelve (12) month period" begins or ends, then the County has the management right to establish May 12, 2009 to May 13, 2009 as one "twelve month period" and May 13, 2009 to May 13, 2010 as a second twelve-month period. The plain language of the provision, however, neither expresses, nor implies, that the County, in the exercise of its management discretion, may determine the applicable twelve-month period.

While the language of Article 7 is not clear and unambiguous, it is evident that the parties intended to limit the County's right to vary the work schedules of bargaining unit employees and to make temporary job assignments to such employees. Thus, the most reasonable construction of the plain language of Article 7 is that "any twelve (12) month period" begins with the variation of the regular work schedule or temporary job assignment.

The undersigned turns to the evidence of past practice and bargaining history to determine whether such evidence provides a reasonable basis to conclude that the parties mutually intended the disputed Article 7 language to be given a construction other than that warranted by its plain language.

Sheriff Brooks, who has been Sheriff since 1995, testified that he has been with the Department since 1972; that he has more experience bargaining as a bargaining unit member, than as management; and that he was a member of the union bargaining team that negotiated the language of Article 7. Sheriff Brooks recalls that this language was bargained into the contract to permit the County to vary schedules so that the County could provide temporary coverage for events such as the EAA and St. Patrick's Day. Sheriff Brooks recalls that, over the years, Deputies have been scheduled to multiple temporary job assignments and variations in regular schedules due to such factors as pregnancy, training, schools, EAA, and County USA without a grievance. Sheriff Brooks states that this is the first grievance challenging a temporary job assignment.

At hearing, Association Vice-President Jason Freeman recalled that he received a memo that included the following: (Assoc. Ex. #1)

...

DATE: November 17, 2008

RE: 90-Day Temporary Assignment

Beginning January 5, 2009 you will be temporarily assigned to the Court Services Unit of the Corrections Division. Your schedule during this time will be Monday-Friday from 7:50 am — 4:00 pm. You will work a 7 1/2 hour day with a half hour unpaid lunch. This assignment will tentatively end on March 13, 2009 at which point you will return to your current 6/3 rotation on 1st shift. If the temporary assignment is extended beyond March 13, 2009, you will be notified but the assignment will not exceed 90 days.

As a result of the schedule change you will be owed 8 hours of compensatory time. Upon your return to your 6/3 rotation, submit an MPF for the 8 hours using the 719 work code.

Please contact me if you have any questions.

CC: Capt. Habeck
Lt. Mack
Cpl. Binder

Deputy Freeman further recalls that he worked this temporary job assignment continuously from January 5, 2009 to March 13, 2009. According to Deputy Freeman, his temporary job assignment evidences a “past practice” in which the referenced ninety days begins on the first day of the temporary job assignment and ends ninety consecutive calendar days later.

The incident that is the subject to the November 17, 2008 memo represents one instance in which a bargaining unit employee was provided with notice that he could be temporarily assigned for a period of ninety days. Neither the language of this memo, nor any testimony of Deputy Freeman, provides a reasonable basis to conclude that management has accepted the Association’s position that the “ninety (90) calendar days” are consecutive calendar days.

Deputy Freeman states that, under the “past practice,” the twelve (12) month period” is a calendar year. Captain Habeck states that, based upon his experience in the Department, the term “any twelve (12) month period” has not been interpreted as a calendar year. Captain Habeck states his understanding that continuing to assign Sgt. Jensen after May 13th is not a violation of the contract because the collective bargaining agreement refers to “any twelve (12) month period.” Sheriff Brooks states that, in his experience, the 90 days is a cumulative 90 days within a rolling calendar year. Deputy Freeman, Capt. Habeck and Sheriff Brooks do not identify specific instances in which the Association and the County, by word or conduct, gave definition to the term “any twelve (12) month period” beyond that which is reasonably implied by the plain language of the contract provision.

Deputy Peters testified that, if a Deputy on a temporary job assignment would be removed from a temporary job assignment within the ninety-day period, then the Deputy could not be reassigned. Sheriff Brooks recalls that, since he became Sheriff, the Association has asserted that the ninety days begins on day one and that, when the temporary job assignment ends, the employee is no longer available for temporary assignment. Sheriff Brooks does not state, and the record does not establish, that Sheriff Brooks, or any other representative of management, has ever agreed that, if a Deputy on a temporary job assignment would be removed from a temporary job assignment within the ninety-day period, then the Deputy could not be reassigned.

Captain Habeck testified that Deputy Peters’ testimony is inconsistent with the fact that the Association has never grieved when the County has sent Deputies to training multiple times within a year, resulting in multiple variations in work schedules. Captain Habeck stated that, if Deputy Peters were correct, then after the first incident of training, the Deputy would be unavailable for any further training or temporary job assignment.

In summary, the majority of the testimony with respect to “past practice” and “bargaining history” is long on opinion and short on fact. The evidence of “past practice” and “bargaining history” does not establish that the parties mutually intended to: (1) define the term “any twelve month period” as a calendar year; (2) provide the County with discretion to determine the applicable twelve month period; or (3) calculate the ninety-day restriction as ninety consecutive calendar days from the first day of the temporary job assignment, regardless of days worked in the temporary job assignment. Nor does such evidence provide a reasonable basis to conclude that the parties mutually understood, or agreed, that, if a Deputy on a temporary job assignment were to be removed from a temporary job assignment within the ninety-day period, then the Deputy could not be reassigned. Notwithstanding any argument to the contrary, the only reliable evidence of the parties’ mutual intent is the plain language of the disputed Article 7 provision.

The first day of Sgt. Jensen’s temporary job assignment was January 8, 2009. Sgt. Jensen did not have a temporary job assignment in the previous twelve (12) month period. Thus, under the plain language, the applicable “twelve-month period” begins on January 8, 2009 and the County violates Article 7 if the County gives Sgt. Jensen temporary job assignments in which he works more than ninety-(90) calendar days between January 8, 2009 and January 7, 2010.

As discussed above, in the present case, the County gave Sgt. Jensen temporary job assignments from January 8, 2009 through February 7, 2009 and from March 15, 2009 until Sgt. Blair left County employment in July 2009. In making these temporary job assignments, the County caused Sgt. Jensen to work more than ninety (90) calendar days in a temporary job assignment between January 8, 2009 and January 7, 2010.

Under the plain language of Article 7, the County did not have the right to assign Sgt. Jensen to work more than ninety (90) calendar days in a temporary job assignment between January 8, 2009 and January 7, 2010, unless the Department had an agreement with the Association’s Board of Directors to allow such an assignment. It is undisputed that the Department neither sought, nor obtained, such an agreement from the Association’s Board of Directors.

Conclusion

The County violated Article 7 of the collective bargaining agreement by making temporary job assignments to Sergeant Jesse Jensen in excess of ninety (90) calendar days in any twelve (12) month period without the mutual agreement of the Association’s Board of Directors. In remedy of the County’s contract violation, the Association seeks a cease and desist order, as well an order requiring that the County end the temporary job assignment of Sgt. Jensen and immediately fill the opening pursuant to the guidelines of Article 7-Work Week.

If Sgt. Jensen had continued in a temporary job assignment in violation of the contract, then the appropriate remedy would be to issue a cease and desist order to end Sgt. Jensen's temporary job assignment. Inasmuch as Sergeant Jensen's temporary job assignments ended in July 2009, which was prior to the arbitration hearing in this matter, a cease and desist order would serve no purpose.

As the County argues, the arbitrator does not have authority to convert a temporary job assignment into a permanent assigning by declaring a vacancy in Sgt. Blair's position. It is evident, however, that, in July of 2009, the County declared a vacancy in the position held by Sgt. Blair and filled this vacancy by placing Sgt. Jensen in this vacancy.

The County's conduct in declaring a vacancy in the CAS position and then placing Sgt. Jensen in this vacancy is beyond the scope of this grievance. Assuming *arguendo*, that such conduct were within the scope of the grievance, the record evidence would be insufficient to reach any conclusion as to whether the County's conduct in declaring a vacancy in the CAS position and then placing Sgt. Jensen in this vacancy contravened any provision of the parties' collective bargaining agreement.¹

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer violated the terms of the collective bargaining agreement when it temporarily assigned Sergeant Jesse Jensen to a Monday through Friday position in excess of ninety (90) calendar days in any twelve (12) month period without the mutual agreement with the Association's Board of Directors.

2. The facts of this case do not require the imposition of any remedy.

Dated at Madison, Wisconsin, this 17th day of November, 2010.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

¹ The only evidence regarding this conduct is the testimony of Captain Habeck. Captain Habeck's testimony is that, when Sgt. Blair's position opened up, the Department contacted those eligible for the position and Sgt. Jensen received the position because he was the most senior employee who wanted this position.