

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**THE LABOR ASSOCIATION OF WISCONSIN, INC., (LAW)
WINNEBAGO COUNTY DEPUTIES ASSOCIATION, LOCAL 107**

and

WINNEBAGO COUNTY

Case 428
No. 69595
MA-14665

(Grievance 2009-52; Rippl Grievance)

Appearances:

Benjamin Barth, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin 53022, appearing on behalf of LAW.

Anna Pepelnjak, Attorney, Weiss, Berzowski, Brady, LLP, 700 North Water Street, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of Winnebago County.

ARBITRATION AWARD

The Labor Association of Wisconsin, Inc., Winnebago County Deputies Association, Local 107, hereinafter LAW or the Association, and Winnebago County, hereinafter the County, requested a list of five arbitrators from the Wisconsin Employment Relations Commission from which to select a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Raleigh Jones, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on June 30, 2010, in Oshkosh, Wisconsin. The hearing was transcribed. The parties submitted briefs and reply briefs, the last of which was received on October 5, 2010 whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to stipulate to the issue(s) to be decided in this case. The Association framed the issue as follows:

Did the Employer violate the expressed or implied terms of the collective bargaining agreement when it adjusted Deputy Jason Rippl's hours of work by more than two hours on December 14, 2009? If so, what is the correct remedy?

The County framed the issue as follows:

Did the Winnebago County Sheriff's Office violate Article 7 of the collective bargaining agreement by temporarily assigning Deputy Jason Rippl to perform a special assignment as a canine search operator on December 14, 2009, during which he worked from 8:00 a.m. to 7:00 p.m., instead of from 2:00 p.m. to 1:00 a.m.?

I have not adopted either side's proposed issue. Based on the entire record, I find that the issues which are going to be decided herein are as follows:

1. Did moving Deputy Rippl's start time on December 14, 2009 from 2:00 p.m. to 8:00 a.m. violate the collective bargaining agreement? If so, what is the appropriate remedy?
2. Is Deputy Rippl owed any overtime for any portion of the hours that he worked on December 14, 2009? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2007-09 collective bargaining agreement contained the following pertinent provisions:

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 7

Work Week

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

Personnel accepting a voluntary assignment to the DARE Program or the Community Programs shall work a flex schedule of consecutive hours. During the school year, DARE Program Officers shall work a 5-2 schedule, Monday through Friday. On non-teaching days, DARE personnel shall be assigned to work in other units of the Department as needed, provided they keep their 5-2 work schedule. On days when they are not performing Community Programs duties, Community Programs personnel shall be assigned to work in other units of the Department as needed, provided they keep their 5-2 work schedules.

The person assigned as Courthouse Security Officer shall work a 5-2 schedule Monday through Friday from 8:00 A.M. to 4:30 P.M. with a one hour unpaid lunch period.

Employees serving in the capacities listed below shall work on a duty schedule consisting of five (5) consecutive work days of seven (7) hours and forty (40) minutes including a thirty (30) minute unpaid lunch period Monday through Friday:

Jail Sergeant
Correctional Officer – Court Services
Corporal Corrections – Court Services

The number of personnel assigned in these capacities may vary from time to time depending upon the needs of the Department. Such employees who are required to work without a lunch break may be allowed to adjust their ending time at the discretion of their supervisor.

All other employees of the Department shall work a schedule consisting of six (6) consecutive duty days of eight (8) hours and ten (10) minutes each followed by three (3) consecutive days off. Provided however, detective sergeant, detectives, and juvenile officer shall work five (5) consecutive duty days followed by two (2) off days, followed by five (5) work days, followed by two (2) off days, followed by four (4) duty days, followed by three (3) off days, then repeating the cycle. A normal duty day shall consist of eight (8) hours and ten (10) minutes. Such employees shall be provided a paid lunch period within the duty shift as has been provided in the past.

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.

In the event that temporarily increased staffing is required during the E.A.A. Convention and other similar emergencies, for a period not to exceed two (2) weeks in duration, employees from other shifts may be temporarily assigned to such shifts provided that the affected employees are notified at least three (3) days prior to the first reassignment date. In these emergency situations, single day reassignments to special shifts may be made provided that the affected employees are notified at least eight (8) hours prior to the revised starting time.

Employees on duty when time changes occur to and from daylight savings time will not receive additional compensation if their workday is lengthened one (1) hour thereby, unless required by law, nor will there be any reduction in compensation if the day is shortened by one (1) hour.

PATROL DIVISION WORK SCHEDULE

- a. All officers in the Patrol Division shall work a fixed shift on a 6-3 rotation except up to four (4) positions may be assigned to work a 4-4 rotation.
- b. Persons working the 6-3 rotation will have a work day consisting of eight (8) hours and then (10) minutes including a paid lunch period.
- c. Persons working a 4-4 rotation will have a work day consisting of eleven (11) hours except that every tenth work day shall consist of nine and one-half (9.5) hours including a paid lunch period.
- d. Starting and ending times for the 5-2 rotation and the 4-4 rotation may be adjusted as needed up to two hours in either direction from the starting and ending times in effect on March 1, 1998.
- e. Employees assigned to FTO Training may have their hours temporarily adjusted to match the hours of their FTO Training Officer during the time of their FTO Training.

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Article 8

Extra Time

Time worked by employees in excess of the regularly scheduled workday or workweek shall be paid at the rate of time and one-half. . .

BACKGROUND

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for certain Sheriff's Department employees, including Deputy Jason Rippl.

The Sheriff's Department maintains a canine detail. The dogs in the canine detail are used for a variety of law enforcement functions, one of which is doing drug searches. With regard to the latter (i.e. drug searches), the dogs are used to search school buildings. Two patrol officers (i.e. deputies) in the Department are in the canine detail. These two officers applied for, and were assigned to, the canine detail. This assignment requires specialized training. These two officers attend 16 hours of school time a month and one week a year recertification training for canine handling. Their job description does not identify them as canine handlers; instead, it identifies them as patrol officers. When the officers in the canine detail are not doing canine work, they do patrol officer duties – just like all the other patrol officers.

Deputy Jason Rippl is one of the officers in the canine detail. He has been working with canines since 2007. He has taken part in past school searches. Some of these searches occurred outside his regular work shift. If these searches occurred while he was off duty, and he participated in same, he was paid overtime. If these searches occurred on a day that he was scheduled to work, and his scheduled work hours did not coincide with the search, he had his work hours changed so that he could participate in the search. When that happened, he was paid his regular pay – not overtime. Until the incident arose which will be referenced in the FACTS, neither Rippl nor the Association had challenged the Employer's right to temporarily change his hours to enable him to participate in these searches.

. . .

As of December 5, 2009, Deputy Rippl had moved to the so-called "power shift" working from 2:00 p.m. to 1:00 a.m., (i.e. an 11 hour shift) four days on-duty, four days off-duty (i.e. a 4-4 rotation).

FACTS

About December 7, 2009 (all dates hereinafter refer to 2009), Capt. Todd Christopherson received a phone call from the Oshkosh East High School Resource Officer,

who told him they were having suspected drug problems and that a drug search was warranted. He then requested a canine drug search of two school buildings. School officials dictated the date of the drug search. They wanted it conducted on December 14. They also dictated when the drug search would be conducted. They wanted it conducted while school was in session, and specifically between 8:00 a.m. and 12:00 Noon. Since this drug search involved two school buildings, Capt. Christopherson determined that two dogs were needed. Additionally, he knew that a search of this kind must be done in a compressed time frame, because the dogs get tired and their olfactory proficiency diminishes. After receiving the call from the Oshkosh East school official, Capt. Christopherson checked the work schedules for the two canine officers: Deputy Braman and Deputy Rippl. Deputy Braman was scheduled to work on December 14 on the day shift. Since Deputy Braman was scheduled to work the day and time of the proposed school drug search, Capt. Christopherson temporarily removed Deputy Braman from the December 14 patrol schedule for calls for service and assigned him to the school search. Deputy Rippl was also scheduled to work on December 14, but unlike Braman, he was not scheduled to work during the morning hours. Instead, Rippl was scheduled to start work that day at 2:00 p.m. Capt. Christopherson felt that a 2:00 p.m. start time that day was problematic because he wanted Deputy Rippl to start work at 8:00 a.m. for the school drug search. To address his concern, Capt. Christopherson first considered having Rippl start his work day on December 14 at 8:00 a.m. for the drug search, and then after the drug search was finished, have Rippl work until the end of his shift at 1:00 a.m. If Rippl had done that, he would have worked an extra-long workday, namely a 16 hour day. Additionally, Capt. Christopherson knew that the day following the school search, namely December 15, was a training day whereby Deputy Rippl needed to report to work at 8:00 a.m. in Fond du Lac. If Rippl worked until 1:00 a.m., his opportunity for rest prior to the 8:00 a.m. training class would be limited. After considering the foregoing, Capt. Christopherson spoke to Deputy Rippl and asked him if he would be interested in adjusting his work hours on December 14 so that he started at 8:00 a.m. and ended at 7:00 p.m. By doing that, Rippl could do the school search that morning. Capt. Christopherson tried to make it clear that he was not ordering Rippl to do the search and work from 8:00 a.m. to 7:00 p.m.; rather, he was asking him to do those two things. In response, Rippl asked what the alternatives were. Christopherson replied that if he did not participate in the school search, he would work his regular shift that day and perform his normal patrol duties. Rippl then said he would conduct the drug search (that day) and change his work hours (that day) to 8:00 a.m. to 7:00 p.m. Christopherson subsequently removed Rippl from the December 14 patrol schedule and assigned him to the school search. He also changed Rippl's work hours for that day to 8:00 a.m. to 7:00 p.m.

As just noted, on December 14, Rippl did not work his normal work hours of 2:00 p.m. to 1:00 a.m. Instead, he worked that day from 8:00 a.m. to 7:00 p.m. He participated in the school drug search that morning. He was paid his regular pay for the day (i.e. not overtime).

On December 15, Rippl again did not work his normal work schedule of 2:00 p.m. to 1:00 a.m. That day, he attended a training session which started at 8:00 a.m. Although the

record does not indicate when he finished his work hours that day, it is inferred from the record that he worked until 7:00 p.m. (just as he did on December 14).

After Association President Roger Peters learned of Rippl's changed work hours for December 14, it was his view that the Employer had improperly adjusted Rippl's hours by more than two hours. He complained to Capt. Christopherson about it, and told Christopherson that Rippl's work hours should not have been adjusted the way they were. According to Peters, the drug search could have been done between 12:00 Noon and 2:00 p.m., or in the alternative, if the Employer wanted Rippl to start at 8:00 a.m., it should have paid him overtime. Christopherson responded that he felt overtime was not owed.

The Association grieved Rippl's changed work hours for December 14. When the grievance was appealed to the second step of the contractual grievance procedure, Chief Deputy William Tedlie told Peters that management can adjust work schedules based on the "90 day rule." When the grievance was appealed to the third step of the contractual grievance procedure, Human Resources Director Karon Kraft denied it. In doing so, she averred as follows: First, "let me remind you that per the current labor agreement, management can in fact adjust an employee's hours up to 90 days. Lastly, the Sheriff has the ability in managing his personnel to assign, on a temporary basis, the deputies to meet the needs of the department; per his constitutional powers." The grievance was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association's position is that the County exercised their management rights in an unreasonable manner on December 14, 2009, when it adjusted Deputy Rippl's starting time and ending time by more than two hours. As the Association sees it, that action violated Article 7(d). It elaborates on this contention as follows.

At the outset, the Association notes that when Human Resources Director Kraft denied the grievance, she averred that the Sheriff's constitutional authority allowed for the variance in the employee's work schedule. The Association submits that contention "may be outside the scope and authority of the arbitrator." However, if the arbitrator does address that contention, the Association's response is as follows. It submits that there have been many court cases in Wisconsin which have addressed the Sheriff's constitutional authority. The Association essentially summarizes those decisions by saying that some of those cases have found that certain duties of a sheriff are protected by the Wisconsin Constitution, while other cases have found that certain duties of a sheriff are not protected by the Wisconsin Constitution. With regard to the latter (i.e. duties that are excluded from constitutional protection), the Association submits that the applicable standard is "internal management and administrative duties" or "mundane and common administrative duties." As the Association sees it, the case which is most "on-point" to the instant arbitration is *DUNN COUNTY v. WERC*, 2006 WI App. 120. The Association summarizes that decision to say that "day-to-day scheduling of overtime

was excluded as a constitutional protection of a sheriff.” The Association argues that if the arbitrator does address the issue of the constitutional authority of the sheriff, the DUNN COUNTY decision “plainly contradicts the position of the Employer in this grievance.”

With regard to the merits, the Association begins by reviewing the following facts. It notes that Rippl works a 4-4 rotation where his normal hours are 2:00 p.m. to 1:00 a.m. On December 14, 2009 though, his hours were changed so that he worked from 8:00 a.m. to 7:00 p.m. that day. He was paid straight time. The Association believes he should have been paid overtime instead.

The Association contends that the contract provision which is controlling here is Article 7(d). The Association points out that that provision says that “starting and ending times” for the “4-4 rotation” “may be adjusted as needed by up to two hours in either direction.” According to the Association, that language says in clear and unambiguous terms that the Employer can change the starting and ending times of deputies assigned to a 4-4 rotation by two hours in either direction. The Association argues that if the Employer changes or modifies the hours of an employee who works a 4-4 work schedule by more than two hours either from the starting time or ending time, then overtime has to be paid to the employee. The Association notes that in this case, the Employer changed Rippl’s start time by six hours. The Association submits that six hours is more than two hours. Building on that, the Association asserts that the Employer violated Article 7(d).

Next, the Association addresses the fact that Rippl voluntarily changed his hours on December 14, 2009 to do the school search. It points out that Rippl did not advise the Association that he agreed to adjust his hours at the request of the County on that date, nor had he ever advised the Association when he previously agreed to adjust his work hours to do other drug searches. The Association sees that as significant.

Next, as just noted, the Association believes that the contract provision which is controlling here is Article 7(d). The Association argues that the contract provision which the Employer relies on (namely, Article 7, lines 14 through 17) is “taken out of context” and muddies the water, so to speak. Here’s why. First, it’s the Association’s view that those lines in Article 7 (i.e. lines 14 through 17) do not give the Employer *carte blanche* authority to change an employee’s work hours simply by classifying the employee’s work as a “special assignment” or a “temporary work assignment”. Building on that premise, the Association asserts that the Employer’s reliance on that part of Article 7 is just a “misguided attempt to avoid paying overtime.” Second, the Association avers that “while the County does have the right, in certain circumstances, to assign employees to work outside their normal schedule, the contract requires that it pay time and one-half if it does so.” Third, the Association contends that even in those situations where the Employer can make variations in an employee’s work schedule (i.e. change an employee’s work schedule), the Association’s Board of Directors has to agree to the (proposed) change before it takes place. To support that premise, the Association cites lines 14 through 16 of Article 7 which says that “variations of the regular work schedule of employees. . . shall only be made by agreement between the Department and

the Association Board of Directors.” The Association notes that in this case though, there was no agreement between the parties to change Rippl’s hours. Additionally, the Association opines that “the command staff of the Sheriff’s Department regularly fails to adhere to [this] requirement” (i.e. that there be an agreement between the Department and the Association’s Board of Directors for variation of the work schedule and temporary job assignments). The Association then goes on to accuse the County of “constant and egregious” violations of Article 7 and asserts that it’s time for the Employer to stop “skirting” the mutual agreement requirement and comply with the contract language.

The Association therefore asks the arbitrator to sustain the grievance and find a contract violation. As a remedy, the Association seeks six hours of overtime pay for the time Rippl worked on December 14, 2009 between 8:00 a.m. and his normal start time of 2:00 p.m.

County

The County contends that it did not violate Article 7 of the collective bargaining agreement when it had Rippl work 8:00 a.m. to 7:00 p.m. rather than his normal hours of 2:00 p.m. to 1:00 a.m. on December 14, 2009. As the County sees it, overtime was not owed to Rippl under the circumstances. It argues that the grievance should be dismissed for the following reasons.

The County notes at the outset that when it denied the grievance, one basis for doing so was that the Sheriff’s constitutional authority allowed for a variance in an employee’s work schedule. It expounds on that contention as follows. First, it notes that the office of the Sheriff has constitutionally protected powers, citing Wisconsin Supreme Court cases going back to 1870. It also cites *WISCONSIN PROFESSIONAL POLICE ASSOCIATION V. DANE COUNTY*, 106 Wis. 2d 303, 317, 316 N.W. 2d 656 (1982) for the proposition that 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. Next, the County avers that the Sheriff has three main responsibilities. First, a Sheriff is in charge of enforcing the law and protecting the peace in a community. Citing *WASHINGTON COUNTY V. WASHINGTON COUNTY DEPUTY SHERIFF’S ASSOCIATION*, 192 Wis. 2d 728, 741, 532 N.W. 2d 468 (1995), the County asserts 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. Second, the Sheriff is also an officer of the court. Citing *WPPA V. DANE COUNTY*, 149 Wis. 2d 699, 707, 712, 439 N.W. 2d 625 (1989), the Court argues that duties that relate to the Sheriff’s carrying out the orders of a court have been found to be protected duties. Third, the Sheriff is the keeper of the jail and the inmates that reside therein. The County contends 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. Next, the County addresses the court decision which the Association relies on, namely *DUNN COUNTY V. WERC*, 2006 WI App. 120. The County contends that the Association has misinterpreted that decision. Finally, the County reviews a long line of court cases that involved the Sheriff’s authority as it relates to special assignments. After doing so, the County

maintains that these cases held that the duties in question were within the prerogative of the Sheriff's law enforcement responsibilities and thus deserved constitutional protection. The County argues that based on those cases, the Sheriff was constitutionally authorized to permit Capt. Christopherson to temporarily assign Deputy Rippl to perform canine handling duties in connection with a search of school premises for drugs on December 14, 2009. The County believes the grievance should be denied and dismissed for this reason alone.

With regard to the merits, the Employer contends that the contract provision which the Association relies on – namely Article 7(d) – does not apply here for the following reasons. First, the County notes that that provision says that, for officers on a 4-4 rotation, “starting and ending times may be adjusted as needed by two hours in either direction from the starting and ending times in effect on March 1, 1998.” The Association only addresses the first part of this sentence; it is silent on the second part. The County emphasizes that the record contains no evidence indicating what the starting and ending times of the 4-4 rotation were on March 1, 1998. The County believes that the fact that Deputy Rippl's current 4-4 hours are 2:00 p.m. to 1:00 a.m. is irrelevant to the analysis because of the contract's specific reference to March 1, 1998. As the County sees it, lacking evidence of the starting and ending times in effect on March 1, 1998, this provision cannot be meaningfully applied to this situation. Second, the County maintains that the Association's argument is premised on the false assumption that Deputy Rippl is a “canine officer”. According to the Employer, he is not a canine officer; rather he is a patrol officer. His job description does not include the designation “canine officer”, since there is no such designation. Instead, the job description includes a catch-all provision that requires patrol officers to “perform related duties *as assigned*”. That is, patrol officers are required to put aside their regular duties when they are assigned to different tasks by management. In Deputy Rippl's case, being occasionally assigned to perform law enforcement tasks using a trained dog does not change the fundamental nature and undertakings of his job. Third, the County anticipates that the Association may claim that the search could have been performed at a different time or day, in order to be consistent with their interpretation of the contract. In response, the County notes that the date and timing of the drug search were dictated by the school. Capt. Christopherson chose not to decline a legitimate request for law enforcement services on that date and time. Finally, the County points out that Deputy Rippl consented to this change in his hours. As the County sees it, that is not surprising when one considers the fact that he was scheduled to attend training the next day at 8:00 a.m. Had he worked his regular hours on December 14, he would have gotten off duty at 1:00 a.m. With regard to this contention, the County anticipates that the Association will argue that Deputy Rippl had no authority to change his hours, because a bargaining unit member cannot unilaterally alter the union contract. The Employer responds that this situation involved a one-time event, so it cannot reasonably be argued to establish a past practice.

Since Article 7(d) is not applicable here, that leaves the question of what contract provision is applicable here. As the County sees it, the provision that is applicable here is Article 7, lines 14-17 (i.e. the “temporary job assignment” provision). The County reads that language to unilaterally allow it to make short-term “variations” in the “regular work schedules” of employees or “temporary job assignments”, not to exceed 90 days in a calendar

year absent Association Board approval. Said another way, the Employer believes this language permits it to temporarily assign deputies for periods up to 90 days without Association agreement. The County contends that on December 14, 2009, when Capt. Christopherson assigned Deputy Rippl to perform a drug search of two school buildings using a trained dog, that was a “temporary job assignment” permitted by that language in Article 7.

The County maintains that the Association has an improper reading of the “temporary job assignment” provision. The Association wrongly construes the provision to require the Employer to notify the union every time an assignment is made, regardless of the duration of that assignment. On that basis, the Association asserts that the Employer’s authority to temporarily assign Officer Rippl to conduct the canine-assisted school drug search was nullified absent Board agreement. The County points out that agreement from the Association’s Board of Directors must be obtained “only” for those temporary assignments that exceed 90 days in any twelve month period. The County contends that Association agreement is not required for short-term, day-to-day assignments made by the Employer, such as the one involved here. To support that reading, it notes that Capt. Christopherson testified he does not notify the Association for “temporary, day-to-day assignments” but only for “a long term situation.” The Employer further notes that both Chief Deputy Tedlie and Human Resources Director Kraft echoed Capt. Christopherson’s position. The County also anticipates that the Association may argue that management violated this provision by failing to notify Deputy Rippl about this temporary job assignment in writing. In response, the County points out that lines 14-17 contains no requirement that an assignment order must be reduced to writing. In any event, Capt. Christopherson testified, without opposition, that he provides written notification for long-term assignments only. For temporary day-to-day assignments, Capt. Christopherson notifies deputies using e-mail, a phone call, or a face-to-face conversation and then documents it in the patrol schedule. In this case, Deputy Rippl and Capt. Christopherson had a face-to-face conversation during which notification of the temporary job assignment was provided. That being so, the County sees the Association’s anticipated lack of written notification argument as irrelevant to this case.

Finally, the County addresses the Association’s claim that the County’s true purpose in changing Rippl’s shift on December 14, 2009 was to avoid its “obligation” to pay him overtime. It disputes that contention. The County maintains that Deputy Rippl did not work overtime on December 14, 2009, so no overtime was owed. According to the County, nothing in the contract requires premium payment (i.e. overtime) when no extra work is performed.

In sum then, it’s the County’s position that it did not violate the collective bargaining agreement by its actions herein. It asks that the grievance be denied.

DISCUSSION

The Sheriff's Constitutional Power

Since the County invoked the Sheriff's constitutional power as a basis for both changing Rippl's work hours and denying the grievance, that contention will be addressed first. As noted in the **POSITIONS OF THE PARTIES** section, the parties made numerous arguments and claims about the various court cases dealing with the Sheriff's constitutional authority to run the Sheriff's Department. It suffices to say that they disagree about the scope and application of those cases to the grievance involved here. In a recent arbitration award between these parties, Arbitrator Burns addressed and analyzed some of those court decisions. WINNEBAGO COUNTY, Case 415, No. 69066, MA-14463 (Burns, 2010). After doing so, she rejected the County's contention that the grievance in that case had to be dismissed "on the basis. . . of the Sheriff's constitutional authority". (page 17). A review of her decision indicates that the parties made the same arguments to her about the constitutional power of the Sheriff as they made in this case. By doing that, the parties invited me to engage in the same type of analysis of those court cases as Arbitrator Burns engaged in. I'm not going to do that. Instead, I've decided to simply treat the topic of the Sheriff's constitutional authority as a jurisdictional claim – specifically, a claim that the grievance is not arbitrable. Additionally, I've decided to deny that defense. My reason for doing so (i.e. ducking that issue) and deciding the case on the merits will become apparent at the end of my discussion.

Merits

The focus now turns to the merits of the grievance.

The following background information is pertinent to the discussion which follows. Rippl works a 4-4 schedule as a patrol officer. Per the parties' labor agreement – specifically Article 7 (c) – officers on a 4-4 schedule work an 11 hour day. When this case arose, Rippl had just begun working different hours. (Note: his old hours are not in the record). His new hours were 2:00 p.m. to 1:00 a.m. (the so-called "power shift"). Also, per the parties' labor agreement – specifically the first sentence in Article 8 (Extra Time) – only time worked "in excess of the regularly scheduled workday" is paid of the rate of time and one-half (i.e. overtime). When Rippl works an 11 hour shift, he's paid at straight time for the entire shift. December 14, 2009 was a regularly-scheduled workday for Rippl. As just noted, he was supposed to start his workday that day at 2:00 p.m. However, his start time was moved up to 8:00 a.m. that day so that he could participate in a school drug search that morning. He worked until 7:00 p.m. Thus, he worked an 11 hour shift that day, just as he normally does. What changed though was that he started working at 8:00 a.m. rather than 2:00 p.m. He was paid straight time for those 11 hours. The Association believes that the start time of Rippl's shift could not be moved up by six hours the way it was. The Employer disagrees. The Association also believes that Rippl is owed overtime for the time that he worked between 8:00 a.m. and 2:00 p.m. (when his shift normally started). Once again, the Employer disagrees.

As I see it, the disagreements just noted raise two contractual issues. First, did moving Rippl's start time on December 14, 2009 from 2:00 p.m. to 8:00 a.m. violate the collective bargaining agreement? Second, was Rippl owed overtime for any portion of the hours that he worked that day? Based on the analysis which follows, I answer both those questions in the negative. These two issues will be addressed in the order just listed.

First, the Association argues that moving Rippl's start time on December 14, 2009 from 2:00 p.m. to 8:00 a.m. violated Article 7(d). Broadly speaking, that clause deals with calling deputies in early and holding them over after their shift ends. It provides thus:

- d. Starting and ending times for the 5-2 rotation and the 4-4 rotation may be adjusted as needed up to two hours in either direction from the starting and ending times in effect on March 1, 1998.

According to the Association, this sentence allows management to change the start and end times of officers working a 5-2 or 4-4 rotation by "up to two hours" in either direction. The Association sees two hours as being the maximum cutoff figure. Building on that, the Association contends that since Rippl's start time was moved up six hours, that made it a *per se* violation of this provision. I find otherwise for the following reasons. First, I'm going to address the first part of the sentence which references ". . .up to two hours. . ." It's apparent that the parties meant two hours to be a limit of some sort, but does that mean that the Employer is absolutely prohibited from exceeding that number? While that's certainly a possible interpretation, it's not the only interpretation. Maybe it means that if the Employer adjusts an employee's start/end time by more than two hours, it has to pay a penalty (i.e. overtime) for doing so. While I could offer my opinion, I've decided not to do so because of the finding which I'm making next. Second, I'm going to address the last part of Article 7(d) which says ". . .from the starting and ending times in effect on March 1, 1998." The Association essentially ignores this part of Article 7(d) and treats it as if it doesn't exist. That's problematic because obviously the parties meant for this phrase to have meaning. Otherwise, they would not have included it in the sentence. Since the Association is hanging its proverbial hat on this provision to establish a contract violation, it needed to prove that the change to Rippl's hours on December 14, 2009 exceeded, by more than two hours, the "starting and ending times in effect on March 1, 1998". It didn't do that. The starting and ending times in effect on March 1, 1998 are not included in this record. That being so, for all I know, the start/end times in effect back in 1998 were 8:00 a.m. to 7:00 p.m. (i.e. the hours that Deputy Rippl actually worked on December 14, 2009). While Deputy Rippl's current 4-4 hours are 2:00 p.m. to 1:00 a.m., those hours are irrelevant to the analysis because of the contract's specific reference to the hours that were in effect on March 1, 1998. Lacking evidence of the starting and ending times in effect on March 1, 1998, this provision cannot meaningfully be applied to this situation. Consequently, the outcome of this decision will not be based on Article 7(d).

Even if my interpretation of Article 7(d) is wrong, and that section applies to Rippl's current hours (notwithstanding the reference to the hours that existed in 1998), moving Rippl's

start time up by two hours would not have worked in this instance. Here's why. If Rippl's start time of 2:00 p.m. had been moved up two hours, that would have resulted in a start time of 12:00 Noon. The problem with that was that the school wanted the drug search done by Noon – not starting at Noon. Thus, changing Rippl's start time by just two hours would not have addressed the Employer's objective of having two canines ready to do the drug search at 8:00 a.m. The only way that objective could be accomplished was to change Rippl's start time by six hours so that he started work that day at 8:00 a.m.

Before I leave the topic of the Association's reliance on Article 7(d), I've decided to comment on the fact that Rippl had his hours changed on December 14 and 15, 2009. On both those days, he worked from 8:00 a.m. to 7:00 p.m. – not 2:00 p.m. to 1:00 a.m. (i.e. his regular hours). On the first day, he was doing the drug search and on the second day, he attended training. The Association is just challenging Rippl's changed work hours for the first day – not the second. The Association never explained why it was contractually permissible for the Employer to have Rippl work 8:00 a.m. to 7:00 p.m. on December 15, but contractually impermissible for him to work those same hours on December 14. While the Association never said so, the arbitrator infers from the record that the reason the Association is not challenging Rippl's changed work hours for the second day is because the Employer apparently changes employees' work hours for training. If that is so, that means that the parties have recognized training as an exception to Article 7(d). It further appears that there may be other exceptions as well. If so, that undercuts the Association's claim of a contract violation herein.

Having so found, the focus turns to the contract provision which, in the Employer's view, gave it the contractual right to change Rippl's start time to 8:00 a.m. The Employer relies on Article 7, lines 14-17. It provides thus:

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.

In my analysis of this language, I'm going to break it down into two parts. In the first part, I'll deal with the beginning phrase of "variations of the regular work schedules of employees, or temporary job assignments. . ."

The phrase just noted says that there can be "variations" to either "the regular work schedule" or "temporary job assignments".

In this case, the Employer contends it made a "variation" of the latter type (as opposed to the former). Specifically, it avers that it made a "temporary job assignment" on that day. In its view, Rippl's assignment to the canine drug search on December 14, 2009 qualifies as a "temporary job assignment" within the meaning of that phrase. I find that contention passes

muster for the following reasons. First, normally Rippl works on patrol as a patrol officer and responds to calls for service. On December 14, 2009, though, Rippl put aside his normal patrol duties and participated in a drug search with a canine. Second, the Employer needed two canines to do the drug search because of the size of the buildings to be searched. Since the Employer has just two officers in its canine detail, that meant that both of them had to participate along with their canines. Third, as previously noted, the timing of the drug search was dictated by the school – not by the Department. The school wanted it performed that day in the morning hours when school was in session. In order for Rippl to participate in the drug search, his start time had to be moved up to 8:00 a.m. If his hours had not been moved up, he would not have been able to participate in the drug search along with his canine.

The Association argues that the County cannot rely on the “temporary job assignment” provision just noted because the Association was not notified of this particular “temporary job assignment”. I find that contention is based on a misreading of the contract language. As the Association reads it, Article 7, lines 14-17 requires the Employer to notify the Association every time a “temporary job assignment” is made, regardless of the duration of that assignment. On that basis, the Association asserts that the Employer’s authority to temporarily assign Rippl to participate in the school drug search was nullified absent Board agreement. The problem with that contention is that the language says that agreement of the Association’s Board of Directors must be obtained “only” for those “variations” of the “regular work schedules” or “temporary job assignments” that exceed 90 days in any twelve month period. That means that Board agreement is not required for short-term, day-to-day assignments made by the Employer, such as the one involved in this case. Instead, the provision specifically authorizes management to unilaterally order short term “variations” in the “regular work schedules” of employees or “temporary job assignments”, not to exceed 90 days. If a “variation” exceeds 90 days, then the Employer has to get agreement from the Association’s Board.

As part of its argument on this point, the Association relies on the arbitration award issued by Arbitrator Michelstetter in RICHLAND COUNTY, Case 166, No. 68715, MA-14324 (Michelstetter, 2009). According to the Association, that case proves that the Employer here “clearly violated the contract when it admittedly employed a consistent practice of adjusting hours without the agreement of the Association’s Board of Directors. . .” After reviewing that award, I find it inapplicable to this case. Here’s why. The Richland County collective bargaining agreement required the Sheriff to consult with the Union each and every time “a change in the schedules and hours of work is necessary. . .” Unlike the “temporary job assignment” clause of the contract at issue here (i.e. Article 7, lines 14-17), nothing in Richland County’s contract identified a durational ceiling below which union consultation was not required. Under this contract though, there is a durational ceiling below which Association agreement is not necessary (i.e. 90 days).

. . .

Having found that moving Rippl's start time on December 14, 2009 to 8:00 a.m. did not violate the collective bargaining agreement, the final question to be answered is whether Rippl is owed any overtime for any portion of the hours that he worked that day. I find he is not. As previously noted, while Rippl worked an 11 hour day on December 14, 2009, that was not unusual. That's the same number of hours that he regularly worked on the 4-4 schedule. The first sentence in Article 8 (Extra Time) says that only time worked in excess of the "regularly scheduled workday" is paid at the rate of time and one-half. Rippl did not work in excess of his "regularly scheduled workday" of 11 hours on December 14, 2009, so no additional compensation (i.e. overtime) was owed him.

. . .

In reaching the conclusions referenced above, I did not rely on the fact that Rippl had previously had his hours changed so that he could participate in other drug searches. Additionally, I did not rely on the fact that Rippl consented to the change in his hours on December 14, 2009.

In light of the above, it is my

AWARD

1. That moving Deputy Rippl's start time on December 14, 2009 from 2:00 p.m. to 8:00 a.m. did not violate the collective bargaining agreement; and

2. That Rippl is not owed any overtime for any portion of the hours that he worked on December 14, 2009. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 19th day of November, 2010.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc

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