

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN COUNTY

and

**SHEBOYGAN COUNTY SUPPORTIVE SERVICES
EMPLOYEES UNION LOCAL 110, AFSCME, AFL-CIO**

Case 423
No. 69761
MA-14728

Appearances:

Michael J. Collard, Human Resources Director, 508 New York Avenue, Room 336, Sheboygan, Wisconsin 53081, appearing on behalf of Sheboygan County.

Samuel Gieryn, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 187 Maple Drive, Plymouth, Wisconsin 53073, appearing on behalf of Sheboygan County Supportive Services Employees Union Local 110, AFSCME, AFL-CIO.

ARBITRATION AWARD

Sheboygan County (County) and Sheboygan County Supportive Services Employees Union Local 110, AFSCME, AFL-CIO (Union) are parties to a collective bargaining agreement dated January 1, 2009 through December 31, 2010 (Contract). The Contract provides for final and binding arbitration of grievances arising under the Contract. On April 7, 2010, the Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission (Commission) regarding the County's action in changing the schedules of certain employees and asking the Commission to appoint a commissioner or a member of the Commission's staff to serve as sole arbitrator over the grievance. The undersigned was appointed. Hearing was held on the grievance on August 9, 2010 in Sheboygan, Wisconsin. The hearing was not recorded or transcribed. The parties then submitted post-hearing written arguments in support of their positions, the last of which was received on September 27, 2010, closing the record in the matter.

Now, having considered the record as a whole, I make and issue the following award.

ISSUE

At the hearing, the Parties were not able to agree on the specific formulation of the issue.¹ The County submits that the issue to be decided is:

Did the County violate the collective bargaining agreement when it changed the schedule of hours for Secretary I and II's in the Sheriff's Department effective January 1, 2010?

The Union submits that the issue to be decided is:

Did the Employer violate the contract when it changed the schedule for various Sheriff's Department employees effective January 1, 2010? If so, what is the appropriate remedy?

I formulate the issues to be decided as follows:

Did the County violate the Contract when it changed the schedule of hours for employees holding the positions of Secretary I and Secretary II in the Sheriff's Department effective January 1, 2010? If so, what is the appropriate remedy?

The Parties agreed that I should retain jurisdiction if I find a Contract violation to resolve any issues of remedy.

RELEVANT CONTRACT PROVISIONS

ARTICLE 8

WORK WEEK

[Paragraphs are numbered by the arbitrator for ease of reference]

[Paragraph 1]

The work week shall consist of five (5) consecutive work days, Monday through Friday, in a pre-established work schedule. The work day for full-time employees shall be seven and one-half (7-1/2) hours per day, except for employees in the Building Services (except for cleaners, who will remain

¹ Although the Parties agree as to the central issue to be decided, they disagree as to the scope of classifications of employees that are included in the Grievance. The County views the Grievance as limited to employees classified as Secretary I and Secretary II, as is explicitly stated on the Grievance document. The Union's view is that equity requires other employees who are affected by the schedule change to also be included. These arguments will be addressed in the discussion below.

at 7-1/2 hours), Land & Water Conservation, Information Systems, Child Support Enforcement, and Clerk of Courts departments, and the Code Administrator, whose work day shall be eight (8) hours, except as may be otherwise specified by this Article. All full time employees shall be guaranteed the full work schedule.

[Paragraph 2]

For Secretary I's and Secretary II's and the Account Clerks in the Sheriff's Department and the Huber Law Officer the standard work week shall be forty (40) hours, consisting of five (5) consecutive work days. The work day shall be eight (8) hours.

[Paragraph 3]

For Correctional Officers a standard work week shall be 6-3, 6-2 at eight (8) hours per day and Dispatchers standard work week shall be 5-3, 5-2 at eight (8) hours per day. For Booking Clerks the standard schedule shall be 6-3, 6-3 at eight (8) hours per day.

[Paragraph 4]

Temporary changes for the Sheriff's Department employees can be made in the schedule by the Sheriff or his/her designee, which shall be limited to Inspector, Director and/or Jail Administrator when in his/her judgment it would be in the best interest of the operation of the Sheriff's Department.

[Paragraph 5]

Each office's work schedule shall be determined by the department head upon approval of the Personnel Committee. The employer shall have the greatest degree of flexibility in scheduling hours as it determines necessary.

[Paragraph 6]

The work schedule, for employees of the Sheriff's Department including the scheduling of overtime, for each department or work area shall continue as has been established by that department or work area.

[Paragraph 7]

Work schedules for each office setting forth the work days and hours shall be established as above and assigned on the basis of seniority within the department with the most senior employee qualified to do the work being entitled to select the shift schedule desired. In the event of a change in the

schedule from the established schedule to a new regular schedule the shift preference again shall be awarded on the basis of seniority so long as the selecting employee is qualified to carry out the work responsibilities. The work schedule shall be posted in each office and shall not be changed, except for emergency situations, without three (3) working days prior notice to the employees affected thereby. Voluntary temporary exchanges of shifts that in the determination of the department head are not disruptive of office procedures may be permitted on an occasional basis to accommodate the personal needs of the employees. If a temporary shift exchange is requested it will be the employee's responsibility to seek approval, research and attempt to arrange.

[Paragraph 8]

Overtime may be scheduled at any time as deemed necessary by the Employer. Overtime shall be distributed as equitably as possible among the qualified employees within the department. The first consideration for overtime shall be given to those employees who are permanently assigned to the job involved. Employees assigned to work the overtime shall be required to carry out such assignments, except that an employee may upon request be released from an overtime assignment if a qualified replacement is available and willing to work.

ARTICLE 13

TIME AND ONE-HALF

Time and one-half (1-1/2) shall be paid:

(a) For all hours worked in excess of seven and one-half (7- 1/2) hours per day or in excess of thirty-seven and one-half (37-1/2) hours per week except for Maintenance Worker I, Maintenance Worker II, Electrician, Programmer/Analyst I, Programmer/Analyst II, Network Analyst I, Network Analyst II, Information Systems Clerk II, Information Systems Clerk III, PC Technician I, PC Technician II, Lead Printer, and Code Administrator, employees of the Child Support Office and the Clerk of Courts Department, when such maximums shall be eight (8) hours per day or forty (40) hours per week, except for the following:

(b) Technical employees of the Land Conservation Department may flex their schedule as determined by mutual agreement of the department head and staff. Employees flexing their hours will be paid overtime for hours worked over ten (10) hours per day or forty (40) hours per week.

- (c) Sheriff's department employees shall be paid time and one-half (1-1/2) for all hours worked in excess of the employees regularly scheduled eight (8) hour shift.
- (d) For all hours worked on the employee's day off.
- (e) Employees, at their option, may elect to take overtime payments as compensatory time off. Compensatory time off must be approved by the employee's supervisor before it is taken off. All unused compensatory time will be paid out on the last paycheck of the year in which it was earned.

BACKGROUND

A group of Sheriff's Department employees were accreted into the bargaining unit represented by the Union in 1993. As part of the accretion process, the County and Union negotiated an Addendum to the then existing collective bargaining agreement covering the unit. The Addendum, by its express terms, applied only to Sheriff's Department employees and further provided that "All provisions set forth in the preceding labor agreement shall apply to the [accreted Sheriff's Department positions] except as amended below."

The Addendum contained the heading titled "Shift Differential" that included the following provision preserving accreted employees' work schedules:

The work schedule, including the scheduling of overtime, for each department/work area shall continue as has been established by that department or work area.

This provision was subsequently incorporated as Paragraph 6 of Article 8 of the Contract with a minor revision to clarify that the provision applies only to Sheriff's Department employees. The provision has remained in the Contract unaltered through numerous negotiations and successor Contracts and is reproduced in its entirety above.

Secretary I and Secretary II employees in the Sheriff's Department were historically provided a paid ½ hour lunch break as part of their eight hour shift. During the paid lunch break, employees were not allowed to leave the building and were on-call to return to duty if needed. Beginning in 2001 and without notifying the Union, the County established an 8 ½ hour work day for newly hired employees that included an unpaid ½ hour lunch break. With this change, the Secretary I and Secretary II's in the bargaining unit were split into a two-tiered schedule structure, with employees hired prior to 2001 working an eight hour day including a ½ hour paid lunch and employees hired later working an 8 ½ hour day including a ½ hour unpaid lunch. In 2007, the Union filed a grievance regarding the disparate treatment that was denied as untimely. On April 1, 2008, the County Sheriff unilaterally extended the eight hour

shift with a paid ½ hour lunch to the newer employees. Although the Union voiced its objection to the unilateral action, it agreed to the change since it was a benefit to the employees. Therefore, as of January 1, 2009, the effective date of the current Contract, all Secretary I and Secretary II employees in the Sheriff's Department worked an eight hour shift including a ½ hour paid lunch.

In a memo dated November 17, 2009, the County communicated to all secretaries in the Sheriff's Department that their daily work schedules were being permanently changed as part of the County's plan to eliminate the practice of providing a ½ hour paid lunch break. At hearing the Parties stipulated that, with one exception, the change communicated by the memo resulted in each Secretary I and Secretary II having their 2010 schedule changed to incorporate a ½ hour unpaid lunch by adding ½ hour to either the start or end time of their 2009 schedule. The one exception was an employee whose schedule was changed so that she started her shift one hour later and ended her shift 1 ½ hours later than her 2009 schedule.

The Union filed a grievance over the schedule change on January 11, 2010 listing the affected employees as "Secretary I's and II's." The grievance form states that "Employees were informed that their work schedules would change and one-half hour paid lunch break would be eliminated and [sic] as of January 1, 2010." The grievance requests that the County "Return the grievants' paid one-half hour lunch to them, restore work schedules as established prior to January 1, 2010 and make the grievants whole." The County denied the grievance on March 4, 2010. The Union then filed a request for arbitration resulting in this proceeding.

DISCUSSION

I conclude that the grievance must be sustained because the plain language of Article 8, Paragraph 6 preserves Sheriff's Department employee work schedules and serves as a specific exception to the general scheduling provisions contained elsewhere in Article 8. Therefore, the County violated Paragraph 6 of Article 8 when it unilaterally changed the work schedule for Sheriff's Department employees. I further conclude that the grievance does not apply to Sheriff's Department positions other than Secretary I and Secretary II.

The County argues that the meaning I have given Paragraph 6 directly conflicts with Paragraph 2 of Article 8 of the Contract, which provides for an eight hour workday for Secretary I and Secretary II employees. However, the evidence establishes that the paid lunch eliminated by the County was actually a "working" lunch where employees were not allowed to leave the building and were required to work at their desk or be on-call. In his April 1, 2008 memo extending the eight hour shift with a ½ hour paid lunch to newer employees, the Sheriff explained his view of the paid lunch break:

Please note that your contract does not provide for a paid lunch break and that by working a straight eight hours you are not automatically entitled to a lunch break. Every effort will be made to allow your lunch break but in the event of an emergency or work load demands that may arise which may require you to work through lunch or eat your lunch at your desk while working. This would be no different then [sic] other employees within the department that have this schedule.

The Sheriff's view of the paid lunch was consistent with testimony presented at hearing. Thus, there is no conflict with Paragraph 2 because the secretaries were previously "working" eight hours.

Article 13 of the Contract also provides an indication that the eight hour work day was intended to include the paid lunch. Paragraph (c) of Article 13 provides that: "Sheriff's department employees shall be paid time and one-half (1-1/2) for all hours worked in excess of the employees regularly scheduled eight (8) hour shift." The reference here to an eight hour "shift" indicates that the Parties intended the eight hour "work day" referenced in Article 8 to include the lunch break. I find that it would be illogical to refer to an 8 ½ hour lapse of time as an eight hour "shift." Therefore, I conclude that the ½ hour paid lunch was a part of the eight hour work day provided for in Paragraph 2.

The County also argues that, if given the Union's interpretation, Paragraph 6 contradicts other provisions in Article 8 and is not consistent with the overall scheme of Article 8. Instead, the County interprets Paragraph 6 to preserve Sheriff's Department employees' established work schedules only until the County exercises its authority under other provisions of the Contract to change the work schedules. Specifically, the County does not believe that the Union's interpretation of Paragraph 6 can be read congruently with Paragraphs 4, 5, and 7.

Paragraph 5 contains the general rule setting forth the procedure for the County to establish work schedules and includes the standard that the County "shall have the greatest degree of flexibility in scheduling hours as it determines necessary." The County correctly contends that it is not possible to read this standard as being consistent with Paragraph 6. However, a rule of contract interpretation provides that a specific provision governs over a more general provision. When that rule is applied, the two paragraphs are not inconsistent. Paragraph 6 simply provides a specific exception to the general rule in paragraph 5 that only applies to Sheriff's Department employees.

The County argues that Paragraph 6 would "overrule" Paragraph 4 if given the Union's interpretation. Paragraph 4 provides the Sheriff with the authority to make temporary changes in Sheriff's Department employee schedules. Paragraph 4 presumes that a default schedule exists that is temporarily changed by the Sheriff. The default schedule is simply the established schedule that is provided for Sheriff's employees in Paragraph 6. Once the temporary change concludes, the default schedule resumes. It is unclear how Paragraph 6 could even arguably "overrule" Paragraph 4.

The County also contends that the provision in Paragraph 7 dealing with changes in schedules cannot be read consistently with the Union's interpretation of Paragraph 6. As with Paragraph 4, Paragraph 7 presumes the existence of a default schedule that is being changed. The first sentence of Paragraph 7 defines the default schedule as one that is "established as above." For Sheriff's Department employees, the schedule that is "established as above" is provided for in Paragraph 6. Although admittedly it is more difficult for the County to change the schedule for Sheriff's Department employees than for other employees who are governed by Paragraph 5, it is not inconceivable that the schedule for Sheriff's Department employees could be changed after negotiating with the Union. Once the change is made, the relevant provisions of Paragraph 7 would then govern.

The County's interpretation of Paragraph 6 - that it only preserves employees' schedules until the County unilaterally decides that it does not - essentially strips the paragraph of any meaning. The paragraph could be removed completely and not change the County's view of its rights under Article 8 in any significant way. A central tenet of contract interpretation is that the contract should not be interpreted so as to leave a provision void of any meaning. The County's interpretation flies in the face of the history of Paragraph 6 as well as general contract interpretation principles. In contrast, giving Paragraph 6 the meaning ascribed by the Union does fit within the overall structure of Article 8. Article 8 lays out the general scheduling principles. Sheriff's Department employees are carved out as a distinct group of employees. They are governed by the general provisions of Article 8, except for the paragraphs of Article 8 that provide that Sheriff's Department employees are governed by a specific provision. Paragraph 6 is such a specific provision.

In another line of argument, the County contends that Paragraph 6 was primarily transitional in nature and important only during the accretion of the Sheriff's Department employees into the larger bargaining unit covered by the Contract. This argument is unconvincing for a couple reasons. First, Paragraph 6 was included as an Addendum to the Contract for nearly a decade after the accretion of the Sheriff's Department employees into the bargaining unit, surviving subsequent negotiations for successor contracts. Second, even if Paragraph 6 survived in the Addendum as an afterthought, the fact that it was slightly modified and incorporated into the Contract nearly a decade after it was originally drafted demonstrates that the Parties continued to see meaning in Paragraph 6. The argument that now, after approximately 18 years, Paragraph 6 only had meaning during the accretion process in 1993 is unpersuasive.

Given the foregoing, I have found that the County violated the Contract by unilaterally enacting the January 1, 2010 schedule change. However, there remains the issue of how broad the remedy should be applied. The Union argues that equity requires that any remedy pursuant to this award should apply to positions other than Secretary I and Secretary II even though the face of the grievance indicates that it was only filed on behalf of the secretary positions. The Union raised this issue for the first time at the hearing. The Union argues that these other

positions are similarly situated to the secretary positions and were treated similarly by the County when it implemented the schedule change. The Union further argues that, since the County enacted the change, they knew which employees were affected by the change and that the County failed to comply with a Union request to provide a list of affected employees at an early stage in the grievance process. As such, the Union argues that the County is not prejudiced by the last minute expansion in the scope of the grievance and is at least partially responsible for the last minute change.

I find these arguments unpersuasive. If the Union intended to litigate issues that were not apparent on the face of the grievance form, or brought up during the grievance procedure, it should have communicated that intention to the County prior to the day of the hearing. To hold otherwise would be contrary to the purpose of the grievance procedure which allows the Parties to fully discuss all relevant issues related to the grievance. Although the Union may have been unaware that the schedule change affected non-secretarial positions at the time the grievance was filed, the Union could have inquired directly with employees to verify whether they were affected. Thus, I conclude the remedy is limited to the employees holding the position of Secretary I and Secretary II as is listed on the grievance form.

AWARD

The County violated the Contract when it unilaterally altered the work schedules of Secretary 1 and Secretary 2 employees in the Sheriff's Department on January 1, 2010. As a remedy, the County shall make the affected Secretary I and Secretary II employees whole, including restoring the schedules as they existed at the end of 2009. Per the Parties' stipulation, the undersigned shall retain jurisdiction for the purpose of determining the appropriate remedy.

Dated at Madison, Wisconsin, this 3rd day of January, 2011.

Matthew Greer /s/

Matthew Greer, Arbitrator