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 423
No. 69469
MA-14617

(Grievance 2009-24; "Flex" Officers 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 September 21, 2010, in Oshkosh, Wisconsin. The hearing was transcribed. The parties submitted briefs on November 23, 2010, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

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

> Is the Employer violating the expressed or implied terms and conditions of the collective bargaining agreement when it failed to assign the four least senior Corrections Officers as the "Flex Officers"? If so, what is the correct remedy?

The County framed the issue as follows:

> Did the Winnebago County Sheriff's Office violate Article 7, Work Week, page 6, lines 8-10 of the 2007-2009 Agreement between Winnebago County and the Winnebago County Deputies Association, Local 107 by refusing to designate part-time officers as "flex" officers?

I have essentially adopted the County's proposed issue, but I have modified its wording to the following:

> Did the County violate Article 7 of the collective bargaining agreement when it did not designate any of the new part-time corrections officers as "flex" officers? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

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

ARTICLE 1
RECOGNITION AND UNIT OF REPRESENTATION

> The County hereby recognizes the Association as the sole and exclusive bargaining agent with respect to hours, wages, and other conditions of employment for all regular full-time and regular part-time employees employed by Winnebago County in its Sheriff's Department, including Sergeants, Detectives, Juvenile Officers, Corporals, Police Officers, and Corrections Officers, but, excluding from the unit of representation, the Chief Deputy, Assistant Chief Deputy, Captain, Lieutenants, and clerical employees. . .

. . .

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.

. . .

ARTICLE 7
WORK WEEK

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

. . .

CORRECTIONS DIVISION WORK SCHEDULE

a. There shall be a minimum of one (1) female and one (1) male officer on each shift in the jail. Beyond this minimum staffing ratio, other shifts will be filled on a male/female ratio as determined by management and then on the basis of seniority.

b. Effective January 1, 2008 four least senior corrections officers will be "flex" officers, so long as the minimum of one (1) female and one (1) male "flex" corrections officer is maintained. The regularly scheduled pay period for "flex" officers is identified as 76.4 flexible hours.

. . .

ARTICLE 28
LAYOFF

In the event that the County decides to reduce the work force, any seasonal, temporary and casual employees shall be laid off first, excluding any employees assigned to undercover work. Regular part-time employees shall be laid off next according to seniority with the last person hired the first person to be laid off. Thereafter, full-time employees will be laid off in the order of seniority with the person having the least amount of seniority laid off first. . .

FACTS

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for certain Sheriff's Department employees, including the corrections officers. Four of the corrections officers are designated as "flex" officers.

This case deals with the "flex" officers. It is a contract interpretation case.

Full-time corrections officers work a 6-3 schedule (meaning they work six days in a row and then are off work for three days in a row). This schedule is set out in the collective bargaining agreement. The regular workweek for full-time employees is 38.2 hours. A pay period contains two weeks or 14 calendar days. Thus, a pay period for full-time employees covers 76.4 hours.

As already noted, four of the corrections officers are designated as "flex" officers. The Employer has had "flex" officers since at least 1998. "Flex" officers do not work the 6-3 schedule just noted. Instead, they are scheduled by management as needed on the day of work as well as the shift that they're assigned to work. Essentially, they work a variable work schedule, because the Employer uses the "flex" officers to fill openings in the 6-3 work schedule. For example, if an employee is absent for some reason, the Employer can fill the vacancy with a "flex" officer. As the name indicates, the "flex" officers give the department flexibility in scheduling. The Employer uses the "flex" officers to reduce their overtime costs.

Since this is a contract interpretation case, the contract language pertinent to this case is going to be identified at this point in the decision in order to provide context for the facts which follow. The parties' collective bargaining agreement provides that the "four least senior corrections officers will be 'flex' officers,. . ."

Historically, the employees who have been designated as "flex" officers per the contract language just quoted have been full-time employees. When new full-time officers are hired, they are advised in writing that their ". . .schedule may vary depending on the needs of the department." New employees accept the job subject to that condition (i.e. that their schedules might be unpredictable). Historically, the employees designated as "flex" officers remain in that position until new full-time employees are hired, at which point those new employees take their turn as "flex" officers.

Recently, the County Board authorized the creation and filling of eight part-time correction officer positions. The Association and the County did not bargain over the creation of these part-time positions. Instead, the Employer created the positions unilaterally. After the positions were created, the Employer asked the Association to open the collective bargaining agreement during its term to provide prorated benefits to the part-time officers, but the Association declined this request. Contract negotiations were ongoing at the time of this hearing (September 21, 2010).

As of the time of the hearing, three of the part-time corrections officers were fully trained; the rest were in training.

The part-time corrections officers do not have a set work schedule. Thus, they do not work the 6-3 schedule that the full-time corrections officers work. Instead, like the "flex" officers, the part-time corrections officers work a variable work schedule. Their work schedule is whatever management determines it is. Additionally, the part-time employees do not work the same number of hours as the full-time employees. As previously noted, the full-time employees work 38.2 hours per week. The part-time employees can work that number of hours by signing up for extra shifts, but they are not regularly scheduled to work 38.2 hours per week. Instead, the Employer only guarantees them 20 hours of work per week (or 40 hours in a two-week pay period). If the part-time employees work more than 20 hours in a week, they don't get overtime unless they work more than eight hours in a day or 76.4 hours in a two-week period. Like the "flex" officers, part-time employees accept the job knowing that their work schedule will vary depending on the needs of the department.

After the part-time corrections officers were hired, the question arose whether they would be designated as "flex" officers. The Employer took the position that the part-time corrections officers would not be designated as "flex" officers; rather, only full-time corrections officers would be so designated. The Association disagreed and filed the instant grievance which essentially challenged the Employer's position. The grievance seeks to have the part-time corrections officers designated as some (or all) of the "flex" officers.

The grievance was subsequently appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association contends that the County violated Article 7 when it did not assign any of the new part-time corrections officers as "flex" officers. It elaborates as follows.

First, before reviewing the contract language, the Association gives the following context to this dispute. It notes that when the Employer only had full-time corrections officers, there was never any question about who the "flex" officers would be – they were always the four least senior employees. That changed though after the Employer hired some part-time employees and decided they (i.e. the part-timers) would not be designated as "flex" officers. As the Association sees it, the Employer's decision to exempt the part-time employees from taking their turn as "flex" officers has "adversely" and "negatively" impacted the seniority rights of the full-time employees currently serving as "flex" officers. As the Association put it in their brief, theoretically, the four least senior full-time corrections officers could "remain in 'flex' officer status for their entire careers." Put another way, if the Employer continues to hire more part-timers to work in the jail, the existing (full-time) "flex" officers could "be frozen in seniority, and forced to maintain a flex schedule instead of being bumped up to a

fixed schedule." The Association views that as unreasonable and unfair. The Association further characterizes it as a "forfeiture" of the seniority rights of the full-time corrections officers. It cites Elkouri for the arbitral proposition that when a contract is susceptible to two interpretations – one which would work a forfeiture and one which would not – the arbitrator usually adopts the interpretation that prevents the forfeiture. The Association asks the arbitrator to follow that arbitral principle here.

Next, the Association addresses the contract language contained in Article 7. It emphasizes at the outset that the sentence in question (i.e. the one which says: "four least senior corrections officers will be flex officers. . .") does not say the "four least senior full-time corrections officers. . ." As the Association sees it, the omission of the phrase "full time" is very significant. According to the Association, the Employer is adding words to Article 7 that don't exist (namely, the phrase "full time"). Since Article 7 does not specifically say that the "flex" officers will be full-time officers, the Association believes that the phrase "four least senior corrections officers" applies to both full-time and part-time employees. The Association cites the following to support this interpretation. It notes that elsewhere in the collective bargaining agreement, specifically Article 28 (the layoff provision), the parties made specific reference to part-time and full-time employees. That provision says in pertinent part that part-time employees are to be laid off before full-time employees. The Association asserts that the language in Article 28 shows that the parties knew how to make distinctions between full-time and part-time employees. The Association maintains that in Article 7, though, they made no such reference to one category or the other. Building on that, it's the Association's view that this establishes that the parties meant for the "flex" officer language in Article 7 to apply to all employees (meaning both full-time and part-time employees). As the Association sees it, that's its plain meaning.

In sum then, it's the Association's view that the Employer violated Article 7 when it exempted the part-time corrections officers from serving as "flex" officers. The Association therefore asks the arbitrator to find that the four least senior corrections officers are to be designated as the "flex" officers – whether they are full-time or part-time. In essence, the Association asks that the newly-hired part-time employees be placed in the "flex" officer position. If the arbitrator does not do that, the Association asks the arbitrator to craft a remedy "which does not forfeit the seniority rights" of the existing full-time officers currently serving as "flex" officers.

County

The County contends that it did not violate Article 7 of the collective bargaining agreement by refusing to designate part-time corrections officers as "flex" officers. According to the County, the contract language provides that full-time corrections officers are to be designated as "flex" officers. The County argues that the Association's contention to the contrary (i.e. that the collective bargaining agreement permits part-time corrections officers to be designated as "flex" officers) lacks a contractual basis. It elaborates as follows.

The County begins by referencing the contractual management rights clause which it characterizes as a broad management rights clause. It avers that "rather than containing an enumeration of rights retained by management, the management rights provision in this contract reserves to management all rights not specifically abridged by the Agreement." As the County sees it, that means that unless the contract specifically addresses a subject, management maintains the right to make the determination.

Next, building on that premise, the County acknowledges that Article 7 does address the topic of "flex" officers, but it emphasizes that the contract language in question does not say whether they are to be full-time or part-time officers – all it says is that the "four least senior corrections officers will be 'flex' officers. . ." It's the County's view that this language is silent on whether the "flex" officers are to be full-time or part-time officers. The County then applies the management rights clause to what it calls the "non-specific" language just referenced. After doing so, it's the County's view that it has retained to itself the discretion to assign either full-time or part-time officers as "flex" officers, and it decided to assign full-time officers to be the "flex" officers.

While the County believes that the management rights clause supplies a sufficient basis upon which to conclude that the authority to designate "flex" officers is reserved to the County, the County contends it is not the only contractual basis. According to the County, another basis is found in the next sentence wherein it says "the regularly scheduled pay period for 'flex' officers is identified as 76.4 flexible hours." The County argues that this sentence implies that "flex" officers must be full-time corrections officers because it expressly refers to full-time work. It notes in this regard that the only corrections officers who are regularly scheduled to work 76.4 hours per pay period are the full-time corrections officers. In contrast, part-time corrections officers are only guaranteed 20 hours per week, or 40 hours per two-week pay period. The County acknowledges that while part-timers may occasionally work more than those hours, it asserts that their "regularly scheduled" pay period is certainly not 76.4 hours. The County argues that if the arbitrator were to override the County's decision to designate only full-time corrections officers as "flex" officers, and permit the part-time corrections officers to become "flex" officers, he would have to ignore the contract's reference to 76.4 hours as mere surplusage. The County emphasizes that doing so would violate a well-settled tenet of contract interpretation that the parties intended to give effect to all of the language in the contract.

Finally, the County maintains that if the Association wants the part-time corrections officers to be designated as "flex" officers, the proper place to get this result is at the bargaining table – not via grievance arbitration.

In sum then, it's the County's view that it did not violate Article 7 by refusing to designate part-time corrections officers as "flex" officers. It asks that the grievance be denied.

DISCUSSION

At issue here is whether the County violated Article 7 of the collective bargaining agreement when it did not designate any of the new part-time corrections officers as "flex" officers. The Association contends that it did while the County disputes that assertion. Based on the following rationale, I answer that question in the negative, meaning that I find that the Employer did not violate the collective bargaining agreement by its actions herein.

My discussion begins with the following preliminary comments. This is a contract interpretation case involving language which will be addressed below. In some contract interpretation cases, I look at evidence external to the collective bargaining agreement to help me interpret the applicable contract language. I am referring, of course, to the parties' past practice and/or bargaining history. In this case, though, I am not going to do that. Here's why. The record herein does not contain evidence which will help me interpret the applicable contract language. In making that statement, I acknowledge that the record evidence does show that in the past, the employees who have been designated as "flex" officers have been full-time employees. However, I'm not going to characterize that as a past practice for this reason: not every pattern of conduct results in a binding past practice. That is particularly true where the pattern of conduct arises from the exercise of a management right. The Employer has the right, under the management rights clause, to decide whether it hires full-time or part-time corrections officers. Previously, it only hired full-time corrections officers, but recently it hired some part-time corrections officers. That was its contractual right. That means that the Employer's previous hiring of just full-time corrections officers was the product of the Employer's management prerogative. Accordingly, the outcome of this case is not going to be based on either the parties' past practice or their bargaining history. It follows from the foregoing that all I've got to work with, so to speak, is the language itself. Accordingly, the outcome in this case is going to be based exclusively on the applicable contract language.

. . .

Before I address that contract language though, I'm first going to review the following facts which, in my view, give some needed context to the contract language. For ease of reading, I've divided the facts into three paragraphs which deal, respectively, with the full-time corrections officers, the "flex" officers and the part-time corrections officers.

Full-time corrections officers work a 6-3 schedule. The regular workweek for full-time employees is 38.2 hours. A pay period contains two weeks or 14 calendar days. Thus, a pay period for full-time employees covers 76.4 hours.

Four of the corrections officers are designated as "flex" officers. "Flex" officers do not work the 6-3 schedule just noted. Instead, they are scheduled by management to work as needed. They work a variable work schedule because the Employer uses the "flex" officers to fill openings in the 6-3 work schedule. Historically, the employees who have been designated

as "flex" officers have been full-time employees. When new full-time officers are hired, they are advised in writing that their work schedule will vary. The employees designated as "flex" officers traditionally remain in that position until new full-time employees are hired, at which point those new employees take their turn as "flex" officers.

Recently, the County hired some part-time corrections officers. The part-time corrections officers do not have a set work schedule, so they do not work the 6-3 schedule that the full-time corrections officers work. Instead, like the "flex" officers, the part-time corrections officers work a variable work schedule (meaning their work schedule is whatever management determines it is). The part-time employees do not work the same number of hours as the full-time employees. As previously noted, the full-time employees work 38.2 hours per week. The part-time employees are not regularly scheduled to work 38.2 hours per week; instead, the Employer only guarantees them 20 hours of work per week (or 40 hours in a two-week pay period).

. . .

Having reviewed those facts, the focus now turns to the applicable contract language which is found in Article 7. That article, which is entitled "Work Week", is three pages long. In the context of this case though, just two sentences are involved. The two sentences are found in subsection b of the section dealing with the correctional officers' work schedule. The first sentence provides thus:

> Effective January 1, 2008 four least senior corrections officers will be "flex" officers, so long as the minimum of one (1) female and one (1) male "flex" corrections officer is maintained.

In the context of this case, the portion of this sentence dealing with the gender mix (i.e. everything after the comma), is inapplicable. That's also true of the beginning phrase (i.e. the phrase "Effective January 1, 2008. . ."). It's inapplicable too. That leaves just the phrase "four least senior corrections officers will be 'flex' officers. . ." as being involved here.

What's at issue about that phrase is this: when it says that the "four least senior corrections officers" will be designated as the "flex" officers, does that refer to both full-time and part-time employees, or does it just refer to full-time employees? The Association argues it's the former, while the Employer argues it's the latter. On its face, the language does not say whether the "flex" officers are to be full-time or part-time officers. Simply put, it doesn't say one way or the other. Specifically, it does not say the "four least senior full-time correctional officers" (will be designated as the "flex" officers), nor does it say the "four least senior part-time correctional officers" (will be designated as the "flex" officers).

Since this sentence does not say whether the corrections officers who are to be designated as the "flex" officers are to be full-time employees, or whether part-time employees qualify for that designation as well, I find that this sentence is ambiguous on that point.

Having just found that the first sentence quoted above is ambiguous on that point, the very next sentence goes on to resolve this ambiguity. I'm referring to this sentence: "The regularly scheduled pay period for 'flex' officers is identified as 76.4 flexible hours." The reference in this sentence to 76.4 hours is significant for two reasons. First, as previously noted, the regular work week for full-time employees is 38.2 hours and a pay period covers two weeks. Thus, a pay period for full-time employees covers 76.4 hours. Second, the only corrections officers who are "regularly scheduled" to work 76.4 hours per pay period are the full-time corrections officers. In contrast, part-time corrections officers are only guaranteed 20 hours per week, or 40 hours per two-week pay period. While the part-timers occasionally work more than those hours (i.e. 20 hours per week or 40 hours in a two-week pay period), their "regularly scheduled" pay period is not 76.4 hours. Putting all the foregoing together, it follows that this sentence expressly refers to full-time work. When this sentence is read in conjunction with the first sentence, it establishes that the "four least senior corrections officers" who are designated as "flex" officers must be full-time corrections officers. Part-time corrections officers can't be designated as "flex" officers for this simple reason: they aren't "regularly scheduled" to work 76.4 hours in a two-week pay period. In essence, this second sentence exempts the part-time corrections officers from being designated as "flex" officers.

It would be one thing if the first sentence referenced above was the only contract language applicable to this case. If it were, then the Association's reading of the sentence to apply to all employees (meaning full-time and part-time employees) would certainly be plausible. However, as already noted, the first sentence is not the only sentence applicable here. The second sentence is applicable too. When several contract provisions apply to a given situation – as is the case here – my job as arbitrator is to reconcile them in a way that gives meaning to them all. Were I to just hang my hat, so to speak, exclusively on the first sentence and interpret/apply it herein so that part-time corrections officers could be designated as "flex" officers, I would essentially be treating the reference in the second sentence to full-time employment as surplusage. Said another way, I'd be reading the second sentence out of existence. I'm not going to do that. Doing so would result in a contractual interpretation that fails to give full effect to all the relevant contract language. Consequently, it is held that the first sentence referenced above does not apply to all employees (meaning both full-time and part-time employees). Instead, because of the existence of the very next sentence which follows, only full-time corrections officers can be designated as "flex" officers. Once again, part-time corrections officers can't be designated as "flex" officers because they don't regularly work the requisite number of hours specified in the second sentence (i.e. 76.4 hours in a two-week pay period).

Having made that contractual interpretation, it's my view that I don't need to address the County's alternative theory that another reason it should win is because the management rights clause allows it to make the determination it made here (i.e. to assign full-time officers to be "flex" officers). Accordingly, no further comments will be made about that contention.

Finally, the focus turns to the Association's contention that if the Employer continues to hire more part-timers to work in the jail, then the existing "flex" officers (who are full-time employees) could be forced to remain in that schedule (rather than getting a fixed schedule). The Association views that as unreasonable and asks me to remedy same by crafting a remedy "which does not forfeit the seniority rights" of those full-time officers currently serving as "flex" officers. I decline to do that. Here's why. If the Association wants to remedy the perceived injustice of the least senior full-time employees serving as "flex" officers while the part-timers don't have to serve in that capacity, then the place to address it is at the bargaining table.

In light of the above, I find that the County's decision to designate just full-time corrections officers as "flex" officers has a contractual basis. Consequently, the County did not violate Article 7 by its actions here.

Accordingly, I issue the following

AWARD

That the County did not violate Article 7 of the collective bargaining agreement when it did not designate any of the new part-time corrections officers as "flex" officers. The grievance is therefore denied.

Dated at Madison, Wisconsin, this 27th day of January, 2011.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
7682