BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE COUNTY DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 782
No. 71498
MA-15143

Appearances:

Graham P. Wiemer, Attorney, MacGillis Wiemer, LLC, 11040 West Bluemound Road, Suite 100, Wauwatosa, Wisconsin 53226, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Roy Williams, Milwaukee County Corporation Counsel, 901 North Ninth Street, Suite 303, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

Pursuant to the terms of a collective bargaining agreement ("CBA" or "the Agreement") between the Milwaukee Deputy Sheriffs' Association ("the Union") and Milwaukee County, the parties selected the undersigned from a panel of arbitrators provided by the Wisconsin Employment Relations Commission to hear and resolve a dispute between them. The dispute involves whether the County breached the CBA by denying Deputy James Villwock's request for light duty following an off-duty injury. In lieu of a hearing, the parties stipulated to the issues and facts. They also submitted briefs, which I received on December 7, 2012.

STIPULATED ISSUES

The parties stipulated in writing to two issues:

1) Did Milwaukee County violate the parties' Collective Bargaining Agreement when it denied Deputy James D. Villwock's request for a limited duty assignment?

2) If so, what remedy?

STIPULATED FACTS

Milwaukee County is a municipal employer, organized and existing under the laws of the State of Wisconsin, with offices located at 901 North 9th Street, Milwaukee, Wisconsin 53233. The MDSA is a labor organization within the meaning of Wis. Stat. § 111.70(h), and has offices at 821 West State Street, Room 408, Milwaukee, Wisconsin 53233. The MDSA is the sole and exclusive collective bargaining agent for all law enforcement employees of the Milwaukee County Sheriff's Office ("Sheriff's Office") holding the rank of Deputy Sheriff and Deputy Sheriff Sergeant, all of whom are municipal employees. Deputy Roy M. Felber ("Felber") is currently the President of the MDSA. James D. Villwock is a Deputy Sheriff in the Sheriff's Office, MDSA member, and current MDSA Trustee.

David A. Clarke, Jr. ("Sheriff Clarke") is the elected Sheriff of Milwaukee County and acts on behalf of Milwaukee County within the scope of his authority under Wis. Stat. §59.27, the Wisconsin Constitution, and the authority granted him by Milwaukee County. Sheriff Clarke has served as Milwaukee County Sheriff since 2002. Sheriff Clarke's offices are located at 821 West State Street, Room 107, Milwaukee, Wisconsin 53233.

The Sheriff's Office and its employees use the term "light duty" to refer to positions created specifically for the purpose of providing work for employees who are unable to perform all of their normal duties. Deputies on light duty typically work the traffic desk, answer telephones, organize filing, process information on computers, or any of the above. The light duty deputies wear business casual attire, are not dressed in their Sheriff's Office uniforms, and do not have their badges or guns.

Light duty has historically been given to deputies who have an on-the-job injury, are pregnant, or have an illness or injury that is not job-related. The Sheriff's Office intended to assign limited duties to deputies who have a medical/psychological condition that prohibits them from performing their regular, required duties. Under the policy in place for several years, a deputy could request restricted tasks or the Sheriff could order the deputy to perform restricted work. The work assigned was consistent with the temporary restrictions or limitations of the deputy.

Deputies have been given light duty assignments for various reasons throughout the last several years, but all of them were either on-the-job injuries, due to pregnancy, or illnesses or injuries not job-related. Although light duty assignments were offered prior to 1998, then Sheriff Leverett F. Baldwin established Directive No. 33-98 on March 25, 1998, putting into writing the Sheriff's Office light duty policy. Sheriff Baldwin's Directive No. 33-98 is attached as Exhibit A.[1] Sheriff Baldwin put into writing the policy of giving light duty assignments to employees who were temporarily restricted for medical reasons from performing their regularly assigned duties. Sheriff Baldwin's policy was in effect until September 20, 2011.

[1] Although I have reviewed the various exhibits referenced in the Stipulated Facts, I do not feel the need to attach them to this Award.

On September 20, 2011, Sheriff Clarke changed the Sheriff's Office light duty policy in Directive No. 22-11, a copy of which is attached as Exhibit B. This directive also refers to light duty as "temporary modified duty." Directive No. 22-11 modified the existing light duty policy of the Sheriff's Office, limiting light duty assignments "only to employees who have been temporarily restricted for medical reasons from performing their regularly assigned duties if the need for the temporary accommodation is due to pregnancy or due to an accidental injury or occupation illness while performing duties within the course and scope of an employee's employment or appointment."

Villwock applied for light duty on September 30, 2011 after re-injuring his right wrist. He originally hurt his wrist in 2006. He was roller skating off duty and fell and broke every bone in his wrist. He had two surgeries on his wrist and worked light duty for six months as he recovered. In 2006, he worked at the traffic desk – filing traffic tickets, doing accident reports for the public, answered phones, filing Sheriff's Office Patrol Division paperwork.

He re-injured that same wrist in September, 2011. He slipped and fell at his home, fracturing his right wrist again. He had a hairline fracture in the bone on the same wrist and needed about two weeks to recover. At the point that he requested light duty, he could perform some of the duties of a deputy, but not all of them. He included with his request for light duty the September 28, 2011 letter from his doctor, Greg P. Watchmaker, M.D. Dr. Watchmaker's letter is attached as Exhibit C. He was told by Captain Meverden that same day that his request for light duty was denied due to the Sheriff's Office's new light duty policy (Directive No. 22-11) which did not allow for light duty for non-work-related injuries.

On October 3, 2011, Villwock filed Grievance Reference No. 63171, a copy of which is attached as Exhibit D. He believed the Sheriff's Office violated the Collective Bargaining Agreement ("Agreement") and the past practice of the parties. Villwock submitted this grievance pursuant to the requirements of Section 5.01 of the Agreement. His grievance properly describes the nature of his grievance and the Agreement provisions he alleges to have been violated.

When Villwock applied for light duty in September 2011, there were a number of other deputies on light duty due to injuries that were not work-related or due to pregnancy. There were light duty positions available that Villwock could have worked. Because Villwock's request for a light duty assignment was denied, he was forced to use sick time during his recovery from the injury. He used his sick time from September 28, 2011 until October 12, 2011.

RELEVANT CONTRACT LANGUAGE

Section 1.02 of the CBA contains language that controls the resolution of this dispute. That section states in pertinent part:

1.02 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is:

- The right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed;
- The right to determine the number of positions and the classifications thereof to perform such service;
- The right to direct the work force;
- The right to establish qualifications for hire, to test and to hire, promote and retain employees;
- The right to assign employees, subject to existing practices and the terms of this Agreement;
- The right, subject to civil service procedures and § 63.01 to 63.17, Stats., and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action;
- The right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy, procedures and practices and matters relating to working conditions giving due regard to the obligations imposed by this Agreement. . . .

ANALYSIS

The County's denial of the Grievant's request for an available, light-duty assignment following his off-duty injury was based on a unilateral change in light-duty policy asserted by Sheriff Clarke in his Directive No. 22-11. Nevertheless, my task herein is to determine not whether Sheriff Clarke's unilateral change in policy violated the CBA, but rather whether the denial of the Grievant's request for an available, light-duty assignment pursuant to that policy violated the Agreement.

While the parties agree that § 1.02 of the CBA applies to the dispute herein, each party relies on different portions of that section. The County selectively quotes portions of § 1.02 as follows:

> The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited to [sic] thereto, is the right to direct the work force. In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy, procedures and practices and matters relating to working conditions giving due regard to the obligations imposed by this Agreement.[2]

(County Br. 2). The Union, by contrast, relies on the contractual language establishing the County's "right to assign employees, *subject to existing practices* and the terms of this Agreement" (emphasis added). In addition, the Union argues that irrespective of any contract language, the County was required by past practice to allow Mr. Villwock to do available light-duty work following his off-duty injury.

Resolving this dispute thus requires me to interpret and apply § 1.02 of the CBA. In so doing, I may apply principles of contract law. *See* Madison Teachers Inc. v. Madison Metropolitan School Dist., 2004 WI App 54, ¶ 17, 271 Wis. 2d 697, 711, 678 N.W.2d 311, 318 ("Arbitrators have the authority to use principles of contract law in resolving disputes under collective bargaining agreements.") Moreover, "[i]n the context of construing terms of a collective bargaining agreement, arbitrators have utilized rules, standards, and principles borrowed from the jurisprudence developed by courts to resolve disputes over the meaning of terms in contracts. *Id.*, 2004 WI App 54, ¶ 15, 271 Wis. 2d at 710, 678 N.W.2d at 317, *citing* Elkouri & Elkouri, *supra,* at 431. I first consider whether the County violated the CBA, and second, if so, what the appropriate remedy is.

I. WHETHER THE COUNTY VIOLATED § 1.02 OF THE CBA

If I were to ignore the express limitation in § 1.02 on management's "right to assign employees," namely, that such right of assignment is "subject to existing practices and the terms of this Agreement", this would be a closer case. For the management rights clause expressly establishes the "right to direct the work force"; "the right to make reasonable rules and regulations relating to personnel policy, procedures and practices . . ."; and the "right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted . . ." Absent the contractual language limiting the assignment of employees, at least a colorable argument could be made that the express management rights quoted above authorized the County to deny Deputy Villwock's request for light duty, *irrespective of past practice*.

[2] Although this passage is presented as a *verbatim* quote of § 1.02 in the County's brief, the County neglects to indicate omitted contract language with ellipses.

Nevertheless, the inclusion in § 1.02 of a more specific management right regarding the assignment of employees – and particularly, the express restriction of that right to "existing practices" – requires me to consider A) whether such language applies to the denial of the Grievant's request for a light-duty assignment; B) whether this language, if applicable, supersedes the other ostensibly conflicting and more general language in the management rights section; and C) whether management exceeded the scope of its right to "assign employees" by ignoring "existing practices" to which that right was subject.

A. Whether the Provision Regarding Assignment of Employees Applies

The Union assumes, and the County does not contest, that the "right to assign employees, subject to existing practices and the terms of this Agreement", includes management's right to assign employees to light duty. I agree. "The primary goal in contract interpretation is to 'give effect to the parties' intent, as expressed in the contractual language.'" Maryland Arms Ltd. Partnership v. Connell, 2010 WI 64, ¶ 22, 326 Wis. 2d 300, 311, 786 N.W.2d 15, 20, *citing* Seitzinger v. Cmty. Health Network, 2004 WI 28, ¶ 22, 270 Wis. 2d 1, 676 N.W.2d 426. "In ascertaining the intent of the parties, a court must adhere to the plain meaning of the contract if a contract is unambiguous." Town Bank v. City Real Estate Development, LLC, 2009 WI App 160, ¶ 11, 322 Wis. 2d 206, 217, 777 N.W.2d 98, 104, *citing* Hortman v. Otis Erecting Co., Inc*.,* 108 Wis. 2d 456, 461, 322 N.W.2d 482 (Ct.App.1982). Although the CBA does not define the word, "assign", neither the Union nor the County maintains that the term is ambiguous. "Terms used in contracts are to be given their plain or ordinary meaning, and it is appropriate to use the meaning set forth in a recognized dictionary." Waters v. Waters, 2007 WI App 40, ¶ 6, 300 Wis. 2d 224, 229, 730 N.W.2d 655, 658, *citing* Just v. Land Reclamation, Ltd*.,*155 Wis. 2d 737, 745, 456 N.W.2d 570 (1990). Merriam-Webster defines "assign" in relevant part, "to appoint to a post or duty", and gives as an express example of this definition, "*assigned* them to light duty"[3] – the very meaning implicated here.

Moreover, even if the word "assign" were somehow deemed unclear, its object, "employees", supports the usage of "assign" in § 1.02 as referring to appointing employees to a post or duty. In both statutory and contract law, "[t]he maxim *noscitur a sociis*, that a word is known by the company it keeps," applies, such that "the meaning of unclear words may be gleaned by reference to other words associated with them". 11 Williston on Contracts § 32:6 (4th ed.). *See also* Hatheway v. Gannett Satellite Information Network, Inc., 157 Wis. 2d 395, 400-401, 459 N.W.2d 873, 876 (Ct. App. 1990) (clarifying and applying the maxim in the context of statutory construction); Thomas v. Columbia Phonograph Co., 129 N.W. 522, 523 (Wis. 1911), *citing* Park v. Locomotive Works*, 40 N. J. Eq. 114, 3 Atl. 162;* Welsh v. Canfield*, 60 Md. 469;* Wallace v. Beebe*, 12 Allen, 354* (observing that the "meaning [of a contract term] may be modified or affected by the context, by associated words, or by the subject-matter of the contract.") Accordingly, I find that both the plain meaning of the word

[3] Merriam-Webster Online Dictionary (visited January 12, 2012), http://www.merriam-webster.com/dictionary/assign

"assign" and other principles of contract interpretation support a construction of management's express "right to assign employees" to include assigning employees to light-duty.

B. Whether the Right to Assign Employees Supersedes Other Management Rights

Assuming for now that the express limitation of "existing practices" on management's "right to assign employees" supports the Union's position (see subsection C., below), I must consider whether the "existing practices" limitation supersedes the other ostensibly conflicting management rights noted above, namely, the "right to direct the work force"; "the right to make reasonable rules and regulations relating to personnel policy, procedures and practices . . ."; and the "right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted . . ." Although management's refusal of a request for light-duty by an employee injured while off duty arguably falls within these broad categories of management rights, such categories are far more general than the "right to assign employees, subject to existing practices and the terms of this Agreement". In such a situation, "[w]here there is an apparent conflict between a general and a specific provision, the latter controls. Isermann v. MBL Life Assur. Corp., 231 Wis. 2d 136, 153, 605 N.W.2d 210, 217 (Ct. App. 1999), *citing* Goldmann Trust v. Goldmann, 26 Wis. 2d 141, 148, 131 N.W.2d 902, 906 (1965). Accordingly, to the extent that the provision of the CBA herein regarding the assignment of employees conflicts with the more general management rights on which the County relies, the former controls.[4]

C. Whether Management Exceeded the Scope of Its Right to Assign Employees by Ignoring Existing Practices

To determine whether management exceeded the scope of its "right to assign employees" by ignoring "existing practices", I consider 1) whether the language, "subject to existing practices", includes the alleged past practice of giving available light-duty assignments to employees injured while off duty; and 2) if so, whether there was such a binding past practice when the Grievant was denied a light-duty assignment.

1. Whether the Language, "Subject to Existing Practices", Includes the Alleged Past Practice

The County's "right to assign employees" in § 1.02 is expressly limited by the clause, "subject to existing practices". The Union seems to assume, and the County does not dispute, that "existing practices" are synonymous with past practices. I agree with an interpretation of "existing practices" that includes past practices relating to the assignment of employees.

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[4] The Isermann Court further observed, "[i]f possible, contradictory statements in a contract must be harmonized; but where it is impossible to give meaning to both parts, the court must determine which is to be given effect." *Id.*, 231 Wis. 2d at 154, 605 N.W.2d at 217. Here, it may be argued that the provision regarding assigning employees does not conflict with, but merely qualifies or creates an exception to, the more general management rights. Regardless, to the extent any conflict exists, the more specific provision regarding assigning employees prevails.

Merriam-Webster defines "exist" in relevant part, "to continue to be", and provides, as an example, "racism still *exists* in society".[5] Consistent with this definition is an interpretation of "existing practices" relating to the assignment of employees to include past practices that "continue to be".

In response to this interpretation, one might argue that when the County denied the Grievant's request for a light-duty assignment on September 30, 2011, any past practice of offering available light duty to employees injured while off duty was no longer an "existing practice", by virtue of Sheriff Clarke's directive issued ten days earlier. However, such an interpretation effectively would eviscerate the clause, "subject to existing practices". For if the Sheriff could, by the stroke of his pen during the term of the Agreement, instantaneously eliminate a past practice relating to assigning employees and thereby redefine the "existing practice" within the meaning of § 1.02, then management's right "to assign employees" would be unfettered, and the clause, "subject to existing practices", would be rendered meaningless surplusage. Yet "[a] contract is to be construed to give a reasonable meaning to each of its provisions, and a construction that would render any of its provisions meaningless, inexplicable, or mere surplusage is to be avoided." Arnold v. Shawano County Agr. Soc., 106 Wis. 2d 464, 473-474, 317 N.W.2d 161, 166 (Ct. App. 1982), *citing* Goebel v. First Federal Savings & Loan Ass'n, 83 Wis. 2d 668, 680, 266 N.W.2d 352, 358 (1978). *See also* Milwaukee Bd. of School Directors v. BITEC, Inc., 2009 WI App 155, 321 Wis. 2d 616, 630, 775 N.W.2d 127, 134, *quoting See* Goebel v. First Fed. Sav. & Loan Ass'n of Racine, 83 Wis. 2d 668, 680, 266 N.W.2d 352 (1978) (recognizing and applying same principle of contract interpretation); North Providence School Committee v. North Providence Federation of Teachers, Local 920, American Federation of Teachers, 945 A.2d 339, 342, n. 4, 345-346 (R.I., 2008) (affirming under "passably plausible" standard of review arbitrator's interpretation of clause in collective bargaining agreement referring to "*existing* benefits, practices and policies not covered by this agreement" as intending "to preserve past practices") (emphasis added).

My interpretation and conclusion would be different, had the "existing practices" language in § 1.02 been amended by mutual consent so as to allow the denial of Mr. Villwock's request prior to his making it. As the Wisconsin Supreme Court has observed, "[a] labor contract, like any other contract, may be amended during its term by mutual agreement of the parties." O'Donnell v. Pabst Brewing Co., 12 Wis. 2d 491, 495, 107 N.W.2d 484, 487 (1961). *See also* 51A *C.J.S. Labor Relations* § 418 (noting that once agreement is reached, the terms of a written bargaining agreement are preserved and cannot be unilaterally modified, but that "like any other contract, a collective bargaining agreement may be amended during its term by mutual agreement or consent of the parties.") That, however, is not what happened here; Sheriff Clarke *unilaterally* issued Directive No. 22-11 only ten days prior to the denial of the Grievant's request for a light-duty assignment, and the grievance at issue was then filed pursuant to the requirements of the Grievance Procedure in § 5.01.

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[5] Merriam-Webster Online Dictionary (visited January 16, 2012), http://www.merriam-webster.com/dictionary/existing

In sum, I interpret the clause in § 1.02, "subject to existing practices", to require that employee assignments be consistent with both past practices and those past practices that have been changed during the contract's term by mutual agreement of the parties. Because there was no mutual agreement to change the alleged past practice of giving available, light-duty work to employees injured while off duty, the County's denial of a light-duty assignment to Mr. Villwock breached this clause in the agreement, if such a past practice indeed existed.

2. Whether There Was a Binding Past Practice of Giving Available, Light-Duty Work to Employees Injured While Off Duty

The Union argues, and I agree, that prior to Sheriff Clarke's issuance of Directive No. 22-11, there was a past practice of giving available light-duty assignments to employees injured while off duty. The County appears to concede as much by disputing not the existence of such a past practice but rather the reasonableness of binding the County to it: "It is unreasonable to suggest that Sheriff Clarke or any other sheriffs (all constitutional officers), are bound by the practices of the past." (County's Br. 3). I address this argument and others made by the County below but first consider whether the past practice in question existed.

The stipulated facts establish that such a past practice existed, irrespective of whether the County concedes the point. According to the Elkouri treatise,

> many arbitrators have recognized that, "In the absence of a written agreement, 'past practice', to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties."

Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 608 (Alan Miles Ruben ed., 6th ed. 2003), *quoting* Celanese Corp. of Am., 24 LA 168, 172 (Justin, 1954), and *citing* other awards.

Stipulated facts amply support the first element of unequivocalness. Prior to Sheriff Clarke's Directive 22-11, there was a practice "throughout the last several years" of giving available light-duty assignments to employees injured while off duty, a practice that eventually was put into writing by Sheriff Clarke's predecessor, Leverett Baldwin, through Directive No. 33-98. That Directive stated in relevant part:

> This policy covers Deputies who:
>
> A. Have an on-the-job injury;
> B. Are pregnant; and
> *C. Have an illness or injury which is not job-related.*

> It is the intention of the Sheriff to assign limited duties to Deputies who have a medical/psychological condition which prohibits them from performing their regular, required duties.

(Emphasis added). This undisputed practice over several years and Sheriff Baldwin's Directive articulating that practice as a written policy are sufficiently unequivocal to meet the first element of a past practice.[6]

Stipulated Facts also establish the second and third elements noted above of a past practice. Sheriff Baldwin's Directive No. 33-98, issued on March 25, 1998, "clearly enunciated" a light-duty policy that had been practiced prior to the Directive's issuance and that continued to be "acted upon" until Sheriff Clarke's unilateral change in policy on September 20, 2011, was applied to deny available light-duty work to the Grievant. Finally, offering available light-duty assignments to employees injured while off duty – a consistent practice and clearly enunciated policy for over a decade – was "readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." Thus, all three elements of a past practice have been met.

In conclusion, the express limitation in § 1.02 on the right to assign employees only to those assignments that accord with "existing practices" applies to the denial of the Grievant's request for a light-duty assignment and supersedes other ostensibly conflicting and more general management rights. Moreover, the clause in § 1.02, "subject to existing practices", requires that employee assignments be consistent with both past practices and past practices that have been changed during the contract's term by mutual agreement of the parties. Finally, because there was a past practice of offering available light duty to employees, such as Mr. Villwock, who had been injured while off duty, the County violated § 1.02 by denying his request for light duty.

The County offers various arguments in support of a contrary conclusion that are ultimately unavailing. It argues, for example, that the Sheriff can manage the affairs of the Office in a manner he deems appropriate, and that if the Union's arguments based on past practice were accepted, no sheriff would be able to change even "improper, corrupt, and unfair past practices." (County Br. 3). The County thus concludes that binding it to past practices would be unreasonable. Here, however, there is express contractual language that limits management's right to assign employees in a manner consistent with past practice and mutually agreed-upon modifications to past practice. While the Sheriff has considerable latitude under

[6] Sheriff Baldwin's Directive No. 33-98 further specifies, "Deputies who have an on-the-job injury will, whenever possible, be given a preference to be assigned responsibilities covered by this policy." However, this refinement is not implicated here, because the parties stipulated:

> When Villwock applied for light duty in September 2011, there were a number of other deputies on light duty due to injuries that were not work-related or due to pregnancy. There were light duty positions available that Villwock could have worked.

the CBA's management rights provisions to manage the Office and to effectuate new policy, management must do so in a manner consistent with the terms of the CBA. A bargained-for agreement, moreover, does not equate to an irreversible petrifaction of bad policy or practice. Bargained-for limitations on the Sheriff's authority while a particular contract has force and effect are not tantamount to an eternally insurmountable roadblock to policy change by management. And while Sheriff Clarke may deem the limiting language the County violated in § 1.02 and the past practice it no longer desires to be unreasonable, the restrictive language in question was either bargained, or at least subject to bargaining, during Sheriff Clarke's tenure. If the County now finds the "existing practices" language objectionable, it may negotiate with the Union to change it.[7]

II. THE APPROPRIATE REMEDY

The Union's requested relief has four components; *to wit*, it

requests that this Arbitrator issue an award requiring Milwaukee County to:

> (1) Replace all of Deputy Villwock's sick time used as a result of Sheriff Clarke's unilateral action in this case.
> (2) Replace all other deputy's [sic] sick time used as a result of Sheriff Clarke's unilateral action in this case.
> (3) Re-instate the practice of allowing deputies injured off-duty to work light duty.
> (4) Require Milwaukee County, if Sheriff Clarke still intends to modify the Sheriff's Office light duty policy after the issuance of the arbitration award in this matter, to sit down with the MDSA and collectively bargaining [sic] in good faith.

(Union Br. 5). I agree with the Union's first request: the County must restore all of Deputy Villwock's sick time used from September 28, 2011, until October 12, 2011, as a result of management's denial of his request for light duty. However, I deny the Union's requested relief set forth in items (2) - (4) above.

Regarding the first item of requested relief, the Grievant is entitled to be made whole from management's breach of the CBA, because but for management's denial of his request for available light duty in violation of § 1.02, he would not have had to use sick time during the period in question. As one arbitrator quoted by Elkouri explained, "[t]he ordinary rule at common law and in the developing law of labor relations is that an award of damages should be limited to the amount necessary to make the injured whole." Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 1201 (Alan Miles Ruben ed., 6th ed. 2003), *quoting*

[7] The County points out that Sheriff Clarke's predecessor, Sheriff Baldwin, also issued a policy Directive regarding light duty. However, the content and context of these Sheriffs' Directives are distinguishable. While Sheriff Baldwin merely articulated in writing an existing practice, Sheriff Clarke unilaterally demanded in writing a change to an existing practice protected by contractual language during the term of the contract.

International Harvester Co., 15 LA 1, 1 (Seward, 1950).8 Moreover, a "[m]ake-whole recovery may extend beyond proven out-of-pocket costs and money losses, often relying on an assumption that an employee would have done something or reached some status if the opportunity had been available." Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 1205 (Alan Miles Ruben ed., 6th ed. 2003). Here, I reasonably assume that the Grievant would have availed himself of the opportunity for light duty, had his request for it been granted, and that therefore, he would not have used sick time from September 28, 2011 until October 12, 2011. He is thus entitled to a restoration of sick time for that period.

By contrast, remedial items (2) – (4) above are denied, because they exceed the scope of my authority as Arbitrator. Section 5.01 of the CBA states in pertinent part, "The Arbitrator shall confine himself to the precise issue submitted." (CBA 48). The first issue to which the parties stipulated is whether Milwaukee County violated the CBA when it denied *Deputy Villwock's* request for a limited duty assignment. In my view, just as the stipulated first issue limits the scope of the alleged breach to management's denial of *Deputy Villwock's* request for light duty, so, too, must the remedy be limited to making the Grievant whole. Items (2) – (4) seek relief for other unspecified deputies who allegedly lost sick time during unspecified periods of time; a reinstatement of the light-duty practice of granting available light duty to deputies injured while off duty; and a requirement that Sheriff Clarke bargain in good faith, if he refuses to reinstate that practice. These entrees are simply not available on the remedial menu, given the limitations imposed by the stipulated framing of the issues and the express language of the Agreement.

AWARD

For all of the foregoing reasons, I find that the County breached § 1.02 of the CBA by denying the Grievant's request for available light duty and must therefore restore all sick time that he used from September 28, 2011, until October 12, 2011, as a result of the County's denial of his request. Moreover, I am retaining jurisdiction of this Grievance regarding any remedial issues that may arise for sixty (60) days from the date of this Award's issuance, noted below.

Dated at Madison, Wisconsin, this 22nd day of January, 2013.

John C. Carlson, Jr. /s/

John C. Carlson, Jr., Arbitrator

[8] Elkouri and the cited arbitration Award are consistent in this respect with Wisconsin cases for breach of contract, which "long have conformed to [the expectation interest] standard of contract remedy . . .: 'The fundamental idea in allowing damages for breach of contract is to put the plaintiff in as good a position financially as he would have been in but for the breach.'" Thorp Sales Corp. v. Gyuro Grading Co., Inc., 111 Wis. 2d 431, 438, 331 N.W.2d 342, 346 (1983), *quoting* Schubert v. Midwest Broadcasting Co., 1 Wis. 2d 497, 502, 85 N.W.2d 449 (1957).

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