

BEFORE THE ARBITRATOR

In the Matter of the Petition of

AFSCME LOCAL 990J

To Initiate Arbitration Between
Said Petitioner and

KENOSHA COUNTY

Case 282
No. 69075
INT/ARB-11377
Decision No. 33025-A

Appearances:

Mr. Nick Kasmer, Staff Representative, Wisconsin Council 40, AFSCME, on behalf of the Union.

Mr. Frank Volpintesta, Kenosha County Corporation Counsel, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein “Union” and “County,” selected the undersigned to issue a final and binding award pursuant to Section 111.70(4)(cm)6 and 7 of the Municipal Employment Relations Act, herein “MERA.” A hearing was held on September 1 and 13, 2010, in Kenosha, Wisconsin which was transcribed. The parties subsequently filed briefs and reply briefs which were received by December 10, 2010.

Based upon the entire record and the arguments of the parties, I issue the following Award.

INTRODUCTION

The Union represents for collective bargaining purposes a bargaining unit consisting of Jail and Detention Center employees employed by the County.

The parties engaged in negotiations for a successor collective bargaining agreement, herein “agreement,” to follow the prior agreement which expired on December 31, 2008. The

Union filed the instant arbitration proceeding on July 21, 2009, with the Wisconsin Employment Relations Commission, herein “WERC,” which appointed Marshall L. Gratz to serve as the investigator and the investigation was closed on April 27, 2010. The WERC on January 25, 2011, issued an Order appointing the undersigned as the Arbitrator.

The parties agreed at the hearing that the word “wage” should be deleted and that the word “all” should be substituted in Item No. 6 of the parties’ Tentative Agreements so that it reads: “all cooks will be considered relief cooks for all purposes effective January 1, 2009” (Joint Exhibit 3). They also agreed that Appendix G of the expired agreement would come out of the new agreement if the Union’s Final Offer is accepted.

FINAL OFFERS

The Union’s Final Offer states:

AFSCME, AFL-CIO, LOCAL 990J
Kenosha County Jail Staff
To
Kenosha County
Final Offer for Interest Arbitration
02/08/10

The 2007-2008 collective bargaining agreement between Kenosha County Jail Staff Employees Local 990J, AFSCME, AFL-CIO, and Kenosha County shall be modified as follows:

1. Wages – Schedule A – the Union proposes the following wage increases:
 - (a) Effective 1/1/2009 – 2% across the board
 - (b) Effective 12/19/10 – 2% across the board

2. Overtime – Delete sections 9.3, 9.4 and 9.5 from the current bargaining agreement and change the existing section 9.5(a) to 9.7 and existing section 9.6 to 9.8. Create new sections to read as follows:

Section 9.3 Anticipated Overtime– Pretrial Facility-Full Time Employees Only.

Scheduled overtime (overtime known at least 72 hour (sic) in advance) shall be posted on individual day sign-up sheets with a four – (4) hour split available. Seniority shall prevail. If no one signs up, the shift is split 4 hours between the least senior eligible employee working on the previous shift and following shift, the next least senior eligible and so on until someone is assigned. Twenty-four (24) hour notice to be given to those assigned.

Section 9.4 Unanticipated/Involuntary Overtime- Pretrial Facility-Full Time Employees Only.

Every effort will be made to identify overtime assignments in advance and filling the assignments as described in Sec. 9.3. Any officer assigned involuntary overtime may obtain a replacement for all or part of the assignment. Any officer assigned two consecutive four hour shifts of overtime, may obtain replacement officers for all or part of the assignments. The replacement officer or officers must be qualified to perform the assignment and be approved by a Supervisor. The involuntary assignment will be credited to the officer working the assignment.

- 1) The County shall offer by seniority the unanticipated overtime hours to employees working the previous shift, by seniority. Said employees shall have the right to work four or eight hours of the unanticipated overtime. In the event that no employee on the previous shift volunteers to work, the County shall have the right to require the least senior eligible employee working the previous shift to work the unanticipated overtime with the option of working four or eight hours of overtime. If the least senior employee working is not eligible, then the next least senior eligible employee working, and so on, until someone is assigned. If the employee required to work accepts only 4 hours of unanticipated overtime, the County shall offer by seniority the remaining unanticipated overtime hours to employees working the following shift with the right to require the least senior eligible employee to work the remaining 4 hours of unanticipated overtime. If the overtime is known far enough in advance, the employee on the following shift will be asked and/or assigned during their working hours; any employee who is regularly scheduled for that shift but is not working shall also be contacted via phone regarding said overtime. Overtime shall be awarded on the basis of seniority. If no employee(s) working on the following shift volunteers, then the overtime will be assigned to the least senior eligible employee(s). If the overtime is not known far enough in advance to allow for

assignment during working hours, eligible employees on the following shift will be called regarding said overtime. Said calls shall be made based on seniority. If a supervisor connects with an answering machine when making a call, a message will be left informing the employee that they are being called about overtime. The supervisor will continue said calls until either 1) an employee is contacted (answers the phone) or 2) a previously called employee calls back to accept the overtime. The right for a more senior employee to bump a less senior employee out of overtime will cease once the overtime has been assigned. (Emphasis in original)

- 2) In the event the County is unable to fill the remaining overtime because they are unable to make contact with any employee working the following shift, the County shall have the right to require the least senior eligible employee working the previous shift to work the remaining 4 hours of unanticipated overtime.
- 3) When overtime is known far enough in advance it is acceptable to fill the second 4 hours of said overtime first utilizing the procedure described in Section 9.4, subsection 1.

Section 9.5 Eligibility and Credits-Pretrial Facility-Full time Employees Only.

Eligibility:

Eligibility is determined by whether an employee is currently working on overtime, has worked 12 consecutive hours, is scheduled for a regular day off – or benefit time, by credits earned for previously worked overtime, and by seniority.

An employee may volunteer to work up to sixteen (16) consecutive hours, not including scheduled breaks, as provided by the Collective Bargaining Agreement. No employee may be required to work more than twelve (12) consecutive hours, not including scheduled breaks and no employee may be required to work involuntarily more than four overtime hours unless there is an insufficient amount of eligible staff or volunteers. In the event the County is unable to fill the remaining overtime due to insufficient eligible staff or volunteers the County shall have the right to require the least senior available employee to work the remaining 4 hours of overtime.

The most eligible to the least eligible is as follows

- a) the least senior to most senior employee scheduled to work overtime adjacent to his/her shift

- b) the least senior to most senior employee returning from or going into his/her day off
- c) the least senior to most senior employee working overtime on his/her day off

Employees participating in training shall be eligible for involuntary overtime. This excludes “Jailer Basic Training”.

Credits:

Pretrial employees shall receive one (1) credit for each position of overtime they work either four (4) or eight (8) hours. Credits will be recorded and apply by pay period beginning at 0600 hours on the first day of each pay period. Credits for all employees will reset back to zero (0) at the beginning of each pay period.

Section 9.6 Kenosha County Detention Center Procedure – Full Time Employees:

Cooks will not be involuntarily scheduled for overtime when they are using uninterrupted off time or benefit days connected to a vacation group. A Vacation Group is any group of connected days, which must contain at least two vacation days.

No overtime will be assigned to any employee on an approved leave of absence or disciplinary suspension.

Rotating lists shall be developed for both voluntary and involuntary overtime assignments. Voluntary and Involuntary overtime will be kept on separate continuing lists. The Voluntary list shall reset monthly and the Involuntary list shall reset annually.

Voluntary overtime assignments(s) shall be rotated by seniority among all volunteers on the list.

In the event there are insufficient volunteers for the assignments(s), involuntary overtime will be assigned on a rotating basis in inverse order of seniority.

No employee shall work more than two consecutive shifts unless an emergency has occurred. No employee shall be involuntarily required to work more than one overtime assignment in a 24 hour period i.e., two consecutive shifts.

1) Anticipated (Voluntary) Overtime Anticipated overtime is overtime known at least 72 hours in advance. This overtime shall be posted individually by date and shift. When possible the overtime assignment will be posted for 4 days before being assigned. Anticipated overtime will be scheduled by a Supervisor, but the anticipated overtime signup list shall come down on first shift.

2) Involuntary Overtime Every effort will be made to identify overtime assignment in advance, filling them by voluntary methods. In the event the assignment is not filled by volunteers, it will be assigned involuntary. No employee will be forced from home.

Any officer assigned involuntary overtime may obtain up to two replacements for all or part of the assignment. The replacement officer must be qualified to perform the assignment, and must be approved by a Supervisor. The involuntary assignment will be credited to the original officer.

If less than 24 hours and an assignment remains, or becomes vacant, the least senior employee (working between the notice of vacancy and the time of the assignment) will be assigned. The involuntary assignment will be made on a rotating basis in inverse order of seniority.

~~Section 9.5(a)~~ 9.7 No Employee may be assigned, voluntary or involuntarily, to work longer than 16 consecutive hours, except under unusual circumstances of as otherwise provided in this Agreement.

~~Section 9.6~~ 9.8 Call-in Pay An employee called to work outside of his/her regular work schedule shall receive a minimum of two (2) hours work or pay at the required overtime rate.

2. Side Letter of Agreement – Signing Bonus and Extra Vacation Days – the Union proposes the following changes:

~~Effective 4/4/06, provide \$400 signing bonus to each member of this unit.~~

Effective ~~4-4-06~~ 1/1/09, provide cash to each member of this unit in lieu of extra vacation days as follows:

4/4/06 1/1/09 - \$400 in lieu of extra vacation days

4/4/07 1/1/10 - \$400 in lieu of extra vacation days

3. The tentative agreements of the parties.

The County's Final Offer states:

FINAL OFFER OF KENOSHA COUNTY
TO
LOCAL 990 JAIL STAFF

1. All tentative agreements reached during negotiations as approved on July 14, 2009, attached.
2. Wages:
2% on January 1, 2009
2% on December 19, 2010
3. Amend overtime language as follows:

Delete sections 9.3, 9.4 and 9.5 from the current bargaining agreement.
Create new sections 9.3 and 9.4 to read as follows:

Section 9.3. All Bargaining Unit Full-Time Employees Overtime.
Employees will not be involuntarily scheduled for overtime when they are using uninterrupted off time or benefit days connected to a vacation group. A Vacation Group is any group of connected days, which must contain at least two vacation days.

No overtime will be assigned to any employee on an approved leave of absence or disciplinary suspension.

~~Rotating lists shall be developed for both voluntary and involuntary overtime assignments. Voluntary and involuntary overtime will be kept on separate continuing lists.~~

One continuous overtime list will be developed to record overtime assignments. One credit will (sic) recorded on this list for each voluntary or involuntary overtime assignment worked.

Voluntary overtime assignment(s) shall be rotated by seniority among all volunteers on the list.

In the event there are insufficient volunteers for the assignment(s), involuntary overtime will be assigned on a rotating basis in inverse order of seniority.

No employee shall work more than two consecutive shifts unless an emergency has occurred. No employee shall be involuntarily required to work more than one overtime assignment in a 24 hour period, i.e., two consecutive shifts.

- (a) Anticipated (Voluntary) Overtime. Anticipated overtime is overtime known at least 72 hours in advance. This overtime shall be posted individually by date and shift. When possible, the overtime assignment will be posted for 4 days before being assigned. Anticipated overtime will be scheduled by a Supervisor.
- (b) Involuntary Overtime. Every effort will be made to identify overtime assignments in advance, filling them by voluntary methods. In the event the assignment is not filled by volunteers, it will be assigned involuntary.

An officer assigned involuntary overtime may obtain a replacement for all or half of the assignment. The replacement officer must be qualified to perform the assignment, and must be approved by a Supervisor. The assignment may be divided equally by two replacement officers.

If less than 24 hours and an assignment remains, or becomes vacant, the least senior employee (working between the notice of vacancy and the time of the assignment) will be assigned. The involuntary assignment will be made on a rotating basis in inverse order of seniority.

Section 9.4. No employee may be assigned, voluntary or involuntarily, to work longer than 16 consecutive hours, except under unusual circumstances or as otherwise provided in this Agreement.

- 4. A one time payment of \$800 to each member to be paid within 60 days of agreement or Arbitrator's decision as a quid pro quo for the overtime language above, (Item 3).
- 5. The Side Letter Agreement on page 38 has sunset and the county makes no proposal for the agreement or a side letter and eliminates any reference to money in lieu of vacation.

POSITIONS OF THE PARTIES

The Union states that its Final Offer is in the best interests of the general public because it helps ensure that officers are not too fatigued from working extra long shifts; that it has made needed changes to the overtime policy at management's request; and that those changes have

addressed all of the County's legitimate needs. It also argues that the County has not met its burden for changing the status quo and that it has proposed a "radical change" that can only be achieved via the collective bargaining process and not via interest arbitration.

It also contends that its Final Offer should be adopted because it is "in line" with the status quo at the Jail and the Detention Center, and because it continues the vacation day Side Letter which almost all other internal units have. The Union adds that its proposal is supported by both external and internal comparables, and that they should be adopted because they are consistent with prior interest arbitration awards "and contain only other units performing like work."

The County maintains that its Final Offer is supported by the interests and welfare of the public because "The current protocol is not only difficult and burdensome to administer but also distracts from other supervisory responsibilities," and because absent employees must be replaced "as quickly and efficiently as possible" which the current protocols do not always accomplish.

It asserts that there is a "compelling need" to change the overtime practices; that it has met the essential elements for changing the status quo; and that the total wage and benefits package and the continuity and stability of employment favor its proposal. The County also contends that its comparables are more appropriate because the Union's proposed external comparables are outdated.

DISCUSSION

The County operates a downtown Jail (or "Pretrial Facility") which has about 300 inmates and a Detention Center near the Kenosha Airport which has about 530 inmates.

In about 1998 the Detention Center employees were accreted to the then-existing Jail bargaining unit, and the then-existing separate overtime policies for the Jail and the Detention Center were kept in place and codified in the parties' subsequent collective bargaining agreements.

The Jail has different overtime protocols for anticipated and unanticipated overtime.

Anticipated overtime is known more than 72 hours in advance and is offered on the basis of strict seniority which enables more senior employees to receive almost all of the overtime they want subject to their seniority. Unanticipated overtime with less than 72 hours' advance notice is offered to the least senior employees in the inverse order of seniority, and is based on a credit system which rotates and enables senior employees to avoid such overtime if they have enough credits from working anticipated overtime. The one list for anticipated and unanticipated overtime is reset every two weeks.

There is a special procedure for assigning Jail overtime with less than 24 hours notice. Supervisors must ascertain and notify the least senior employee with the least credits and tentatively assign the forced overtime hours; then call the more senior employees to see if they want the overtime on a voluntary basis; and then, if they do, supervisors must call back the least senior employee and state that he or she has been bumped by a more senior employee who has accepted it.

This entails a 22-step process which is spelled out in County Exhibit 9 which states:

Steps to fill overtime at the Kenosha Pretrial Facility (i.e., Jail)

Step 5

When an employee calls in and it creates short notice overtime at the Kenosha County Pretrial Facility a Supervisor must complete the following steps.

- 1.) List employees by seniority working the shift preceding the overtime, on the unanticipated overtime sheet

- 2.) Ask each employee listed by seniority if they wish to work the OT (the employee may accept the first 4 hours or all 8 hours of unanticipated overtime)
- 3.) Identify personnel that are working their last regularly scheduled day – mark not eligible for involuntary OT on the overtime sheet (OT still must be offered, but they can not be involuntarily assigned)
- 4.) Identify all 12 Hours Caps (personnel already assigned OT) – mark not eligible for involuntary OT on the overtime sheet (OT still must be offered, but they can not be involuntarily assigned)
- 5.) Obtain the overtime credit binder and annotate appropriate number/credits for all OT worked in “OT#” column for each employee listed on the overtime sheet
- 6.) Rank each employee based on the number of overtime credits and seniority and eligibility
- 7.) In (sic) no one volunteers for the overtime assignment, order the employee with the least overtime credits to work the vacancy involuntarily
- 8.) Annotate the force (credit) in the overtime log

If the employee assigned to work the above overtime only accepts 4 hours the Supervisor must complete the following steps to fill the second 4 hours of the overtime.

- 1.) List all employee (sic) scheduled to work following the overtime assignment by seniority (shift following vacancy)
- 2.) Identify all 12 Hour Caps (personnel already assigned OT) – mark not eligible for involuntary OT. (OT still must be offered, but they can not be involuntarily assigned)
- 3.) Identify personnel that are schedule (sic) to work on their first day back (returning from day(s) off) (holiday, vacation day, casual day, ect (sic)) – mark not eligible for involuntary OT. (OT still must be offered, but they can not be involuntarily assigned)
- 4.) Obtain the overtime credit binder and annotate appropriate number/credits for all OT worked in “OT#” column for each employee listed on the overtime sheet
- 5.) Rank each employee based on the number of overtime credits and seniority and eligibility
- 6.) Call employees on the following shift, starting with the employee with the least number of overtime credits by seniority and so on, ending with the employee with the most number of overtime credits
- 7.) Document the results of each call on the overtime sheet
- 8.) Order the first **eligible** person you are able to make contact with
- 9.) If there are more senior employees scheduled to work the following shift who have not been contacted, inform the person ordered that you will be calling all more senior employees who will have the right to bump them out of the overtime

- 10.) Call all more senior employees working the following shift starting with the most senior and offer the remaining 4 hours of overtime
- 11.) If a more senior employee accepts the remaining 4 hours of overtime re-call the person ordered for the remaining 4 hours of overtime and inform them that they were bumped out of the overtime
- 12.) If you are not able to make contact with anyone working the following shift, refer back to employees listed on the first half of the overtime sheet.
- 13.) The least senior eligible employee working the previous shift with the least number of overtime credits will be ordered to work the remaining 4 hours of overtime
- 14.) Annotate the force (credit) in the overtime log

Any time in this procedure someone accepts the overtime offered, the process stops, with the exception of when a less senior employee is contacted first and accepts overtime, all most senior employees will have the opportunity to bump the less senior employee out of the overtime.

The following bullets will apply for employees who work at the Pretrial Facility and the Kenosha County Detention Center with the exception of all kitchen employees. An employee is not eligible for forced unanticipated overtime if:

- *The employee is currently working overtime*
- *The employee has worked 16 consecutive hours*

Most Jail employees cannot be assigned mandatory overtime on weekends or on any of their days off,¹ and employees who are forced to work overtime can find replacements to work for them.

The Detention Center also has different overtime protocols for anticipated and unanticipated overtime.

Detention Center overtime is based upon a rotating system whereby an employee who accepts an overtime assignment cannot accept another overtime assignment until the whole list is

¹ Cooks can be ordered to work on their days off in order to make sure enough of them are available to work in the kitchen.

exhausted. The list for anticipated overtime is rotated monthly and it starts at the top with the most senior employees. The list for unanticipated overtime starts at the bottom with the least senior employee and it is rotated once a year on January 1.

All overtime in the Detention Center is based upon eight-hour blocks, whereas involuntary overtime for non-emergency situations in the Jail is based upon four hour blocks unless employees agree to work eight hours. As a result of a prior grievance settlement, Detention Center employees cannot be called at home for overtime.

The parties several years ago entered into a Memorandum of Agreement stating that non-emergency, unanticipated overtime at the Jail has a maximum cap of four hours unless the employee agrees to work eight hours in addition to his or her regular shift.² Mandated, emergency overtime has an eight hours cap.

In determining whether this status quo should be changed, the proponent for a significant contract change ordinarily must establish:

(1) a compelling need for the change, (2) that the proposal reasonably addresses the need for the change, and (3) that a sufficient quid pro quo has been offered. In each case the sufficiency and weight to be given to each element must be balanced.³

The Union claims that the County has “not set forth any concrete examples of problems caused by the overtime policy, only speculative circumstances that may arise.”

² Union Exhibit 3 A.

³ Washington County (Social Services), Decision No. 29363-A (Torosian, 1998).

That is true for safety and staffing issues because the record fails to establish that any safety problems have been caused by the current overtime policy or that the policy has led to recent staffing shortages.

The Union also claims that the County's proposal is aimed at "lessening a supervisor's work" in assigning overtime while at the same time it fails "to discuss the hardship that its offer would put employees through," and that "mere inconvenience" to the County's supervisors is insufficient to change the status quo.

The issue here, however, does not merely center upon lessening a supervisor's work load and his or her "inconvenience." It also is against the public interest because it involves the needless waste of valuable management resources and the needless diversion of those resources from the other critical tasks that supervisors must perform such as properly supervising staff; dealing with disturbances; responding to medical emergencies; ensuring the physical safety of inmates; preventing escapes; preventing suicides; confiscating contraband; etc.⁴

Kenosha County Corporation Counsel Frank Volpintesta thus testified regarding County Exhibit 7 which details the amount of unanticipated overtime and how long it takes to fill vacant slots. He said it takes an average of 22 minutes to assign each overtime slot at the Jail and 6

⁴ The Union cites my prior decision in City of Wauwatosa and OPEIU Local 35, AFL-CIO, Decision No. 31613-A (2006), p. 14, wherein I stated that some "minor inconveniences" were insufficient to defeat a union's challenge to the status quo. This situation is materially different because the status quo here hinders management's ability to properly operate the Jail and hence constitutes much more than a "minor inconvenience."

minutes at the Detention Center.⁵ It therefore takes about an extra 16 minutes to fill each overtime slot at the Jail on each shift, thereby showing how much more cumbersome it is to follow the Jail's protocols.

Exhibit 7 also shows that the total yearly supervisory hours needed to fill unanticipated overtime at the Jail is about 400 hours versus 120 hours at the Detention Center. It thus takes about an additional 280 hours a year to fill the Jail overtime which is the equivalent of one supervisor working seven extra weeks on that task alone.

This waste of valuable management resources forces Kenosha County taxpayers to needlessly pay about seven weeks' salary to supervisors to maintain the Jail's current overtime system. Such a waste of tax dollars is against the public interest because taxpayers have the right to expect that their tax dollars are being spent on maintaining the Jail's essential services rather than on protecting the narrow interests of some of its employees.

The Union argues that different overtime policies are warranted at the Jail and at the Detention Center because they operate differently regarding such matters as booking; the level of dangerous inmates each holds; dining arrangements; inmate visits; supervision; the use of canines; the location of nurses; uniforms; the presence of Huber inmates; laundry; vacation picks; postings; etc.

The County counters that while the Union has highlighted the differences between the Detention Center and Jail, the Union "has not shown why or how the differences impact the overtime protocols."

⁵ See September 13, 2010, Transcript, p. 317.

I agree. Those differences cannot justify Detention Center employees working 16-hour mandatory overtime shifts unlike Jail employees who usually have 12-hour mandatory overtime shifts; or the assignment of mandatory eight-hour overtime blocks at the Detention Center versus four-hour blocks at the Jail; or the use of monthly and yearly overtime lists at the Detention Center versus the bi-weekly list used at the Jail; or the Detention Center's overtime protocols which evenly spread voluntary and mandatory overtime versus what goes on at the Jail; or the Jail's cumbersome overtime protocols; or the 16-minute difference between filling vacant slots at the Detention Center and the Jail.

Those differences also cannot justify the unfairness of a system which places too heavy a burden on junior Jail employees to perform the great bulk of the mandatory overtime when senior Jail employees can avoid almost all of the overtime because they can accumulate and use the credits they receive from working anticipated overtime.

The Union claims that "Equality in overtime is not a legitimate problem for management" because "Seniority has its benefits and the employees at the Pretrial Facility have decided that one of those benefits is the ability to choose which overtime senior employees wish to work."

It is understandable why senior employees want to retain the current system, as County Exhibit 8 shows that some Correctional Officers in the Jail in 2009 received the following total overtime payments: \$10,570; \$19,923; \$28,128; \$12,833; \$10,377; \$9,161; \$16,852; \$23,084; \$16,707; \$22,930; \$16,645; \$32,372; \$12,288; \$16,909; \$23,202; \$35,178; \$12,104; \$27,084; \$17,551; \$19,259; and \$10,765.

But this right to chose is not unlimited when it interferes with the Jail's efficient and proper operation. For while seniority should be given some deference, its slavish adherence here

is unfair to less senior employees who are being forced to bear too much of the mandatory overtime burden and it has created gross inefficiencies which need to be corrected in order to better manage the Jail.

The County's proposal will greatly alleviate this unfairness by treating less senior and more senior employees in the same manner and thereby require all of them to equally share the unanticipated overtime burden. That now occurs at the Detention Center, as Union officer Fred Storz testified that the lowest senior person and the highest senior person at the Detention Center at the end of the year are "Very, very close" to the number of involuntary overtime shifts they have had over a year.

In this connection, Sergeant Ray Willstead testified that the "Worst case scenario" under the County's proposal for being assigned a sixteen (16) hour unanticipated overtime shift would be "once a week," and that "the way the overtime sits right now, it could be a very long stretch I think before you would have to work it." ⁶

While the County's written proposal does not specify that employees will not be assigned more than one 16-hour shift a week, it is only fair that the County be held to Sergeant Willstead's representation since the County is vouching that its proposal will be implemented in this manner. ⁷

⁶ He also testified that it normally takes him about 32 – 35 minutes to fill all of the overtime on his Jail shift.

⁷ See City of Wauwatosa, supra, p. 20, wherein I stated that a contract proposal had to be interpreted in accord with a party's representation at a hearing.

Arguing against further change, the Union states that it “has been willing to work with management regarding overtime issues at the . . .” Jail by entering into a Memorandum which helps alleviate the mandatory overtime burden on less senior employees and by agreeing to simplify the telephone overtime procedures.

While acknowledging that “some changes were made at the County’s request and both sides did negotiate in good faith,” the County asserts that it “cut the best deals it could under the duress of what might have been even more problematic grievance rulings . . .,” but that more change is needed.

The Union’s good intentions notwithstanding, I conclude that the current overtime system is so broken that it requires an immediate, wholesale fix in order to provide for better and more efficient supervision of the Jail rather than the kind of incremental change that has occurred in the past. For even if further changes eventually might result in bringing about all the change needed (which is highly problematical), there simply is no valid reason to waste so much of management’s valuable time in that interim until that final result is reached.

Contrary to the Union’s claim, this does not represent a “radical” change. It, instead, represents an essential, long overdue change which can only be resolved in an interest/arbitration proceeding because that is the statutory mechanism and the end-point established for disputes which cannot be otherwise resolved in collective bargaining negotiations.

The Union also asserts that the County’s proposal is “contradictory” and flawed because it provides that “employees are only protected [from involuntary overtime assignments] if they use benefit time or uninterrupted time off connected to a vacation group.” (Emphasis in original).

The County's proposal states in pertinent part:

...

Employees will not be involuntarily scheduled for overtime when they are using uninterrupted off time or benefit days connected to a vacation group. A Vacation Group is any group of connected days, which must contain at least two vacation days.

...

This language seems to contradict Section 5.2 of the parties' Settlement Agreement which protects all employees except cooks from working on their scheduled days off and which states:

Except for the kitchen staff, no employee may be required to work involuntarily on his or her scheduled days off: "Days off" are defined as days when an employee previously has been scheduled not to work, regardless of whether the scheduled off days are paid or unpaid, which days off are understood to commence as of the end of the employee's last regularly scheduled shift and end as of the commencement of the employee's next regularly scheduled shift, without regard to overtime that may be worked by the employee.

An individual who is not working his/her normal hours due to a trade will be treated the same as if they were on a regular day off. The person working the trade will be treated as working a regular work day and therefore available for overtime.

The County explained at the hearing, however, that cooks now can be assigned involuntary overtime before or after their vacation and other benefit time, and that its proposal is aimed at stopping that practice. Indeed, the Union itself has made the same proposal in Section 9.6, albeit in clearer language.

When read together, these two proposals are not contradictory since one gives a new benefit to cooks and the other merely reflects the status quo for everyone else.

The Union also argues that "based on the negotiations between the parties," it is "not clear that the County knows exactly what problems exist or how to solve them."

It is true that the County in negotiations made a number of different proposals and that some of its witnesses did not know the full details of its current proposal. But parties are free to change their positions in negotiations, particularly when they are dealing with the kind of difficult issues found here. That is why final offers are called “final offers.”

The Union also argues that the County’s proposal is flawed because the overtime list negates seniority and never resets; because junior employees may be repeatedly forced to work overtime; and because it may bring about other unknown consequences.

I share some of these concerns because the County’s proposal does not have any reset dates which would be desirable and because there has not been an adequate explanation as to why all reset dates need to be abolished.

The choice here thus turns upon either adopting the County’s proposal with its possible flaws or maintaining the status quo with its proven flaws. Since the status quo is so unworkable, I find that the County’s proposal is more reasonable in spite of whatever shortcomings it may have.⁸

Given the above, I find that the County has established a compelling need for the overtime change it seeks and that its proposal reasonably addresses the need for that change.

That, then, raises the question of whether the County has offered an appropriate quid pro quo.

The County claims that it has because it agreed in the last round of contract negotiations to establish a new permanent 72-month step which no other union received in order to eliminate

⁸ The parties in future negotiations can, of course, tweak the County’s proposal to provide for reset dates.

the County's payment for unused vacation days, and that the County's payment of \$800 under the 2009-2010 agreement presents the quid pro quo for changing the overtime policies. The Union claims that the \$800 has been given to all of the County's other bargaining units and thus does not represent a quid pro quo, and that the 72-month step also did not represent a quid pro quo.

Since the 72-month step provides about an additional \$522 step increase for each of the 106 or so employees at that step, it well may have been granted in exchange for something else. On the other hand, the Union correctly points out that none of the bargaining materials at that time references any such quid pro quo.⁹

The record therefore is too murky to determine whether the 72 month step then represented a quid pro quo and whether the \$800 payment now represents a quid pro quo.

But even if no quid pro quo is being offered in exchange for now changing the overtime policy, it is unnecessary to offer a quid pro quo to all bargaining unit members since not all of them will be adversely affected under the County's proposal. To the contrary, the County's proposal basically incorporates the Detention Center's current protocols and less senior Jail employees will significantly benefit under that proposal.

More senior Jail employees thus will be mainly affected by the change in the status quo. But it is difficult to see what more can, or should, be done for them when the current Jail protocols are so unfair to other bargaining unit members and when they result in such a senseless waste of management's valuable time.

⁹ Union Exhibits 10 – 13.

I therefore conclude that the County does not need to offer a quid pro quo in order to abolish the gross inefficiencies which now permeate the assignment of overtime.¹⁰

Turning now to the issue of comparability, the Union claims that the 16 comparables found by Arbitrator Frank Zeidler in a prior arbitration proceeding between the County and another AFSCME unit are appropriate - i.e., Brown, Dane, Fond du Lac, Jefferson, Kenosha, LaCrosse, Marathon, Milwaukee, Outagamie, Racine, Rock, Sheboygan, Walworth, Washington, Waukesha and Winnebago counties.¹¹ The Union also argues that the County seeks “varying comparables” by advocating comparables here which it did not advocate earlier, and that the Kenosha County Sheriff Department’s Deputies’ bargaining unit is the best internal comparable because it uses seniority to award overtime.

The County contends that “Only 1/3 of the comps submitted by the Union have a 12 hour cap” and that the comparables in the Zeidler Award are no longer valid because that case is 24 years old and because the six year old Weisberger Award used only five comparables which are more appropriate. The County adds that the appropriate external comparables should consist of the five found by Arbitrator Weisberger – i.e. Brown, Dane, Racine, Rock and Waukesha counties, along with the Kenosha Police Department, the Kenosha Sheriff’s Deputies, and the Joint Services Unit which is a combined City/County operation.¹²

¹⁰ Arbitrator June Weisberger in a prior arbitration proceeding involving the parties also found that it was “unclear what, if any, quid pro quo was needed to support the County’s proposal to change the Jail’s 6/2 work schedule to match the Detention Center’s work schedule. See Kenosha County and AFSCME 900, Jail Staff, Decision No. 30797-C (Weisberger, 2004), herein “Weisberger Award.”

¹¹ Kenosha County and AFSCME 990, Social Services, Decision No. 22784-A (Zeidler, 1986).

¹² County Exhibit 10.

I find that the external comparables referenced in the Zeidler Award are too unwieldy and too outdated to be used here. Indeed, Arbitrator Zeidler acknowledged that not all of them could be treated equally because he emphasized that he was placing primary emphasis on the County's immediate neighbor Racine County.¹³

Furthermore, the data among the Union's external comparables in any event is mixed because none of them have four different overtime protocols or the mandatory overtime protocol found in the Jail which requires that about 22 minutes be spent for filling each overtime slot. It also is unknown whether there are any hourly overtime caps in five of these 16 comparables and four of them permit 16-hour shifts. There also is no information on the County's closest neighbor Racine County, which Arbitrator Zeidler relied upon so heavily.

The statutory factor regarding external comparability thus does not favor either party's overtime proposal.

As for the internal comparables, seniority is used in assigning overtime to the Sheriff's Deputies which supports the Union's proposal. However, there is no evidence that that system is as deeply flawed as the one found here, which is why it is not a valid comparable.

The statutory factor regarding internal comparability thus does not favor either party's overtime proposal.

The second issue in dispute here centers on paying employees for not taking extra vacation days. The Union wants to keep the prior Side Letter providing for it while the County wants to delete it.

¹³ Arbitrator Weisberger also did not find a set of fixed comparables and stated: "A future discussion of this issue by the parties seems called for." Weisberger Award, p. 15, N. 6.

Both parties agree, though, that all employees are to receive \$800 which represents the \$400 they would receive in 2009 and 2010 under the Side Letter. The amount of money now in issue therefore is not in dispute, but rather, that principle of whether the Side Letter should carry over to their next agreement.

Since all other County bargaining units except the Nurse's bargaining unit have side letters, the internal comparables support the Union. The Deputy Sheriffs also have a side letter in their contract which is on the same bargaining cycle as the Union, thereby showing that the County is not offering the same benefit here.

But, the Union is free to bargain over this issue in its next round of contract negotiations which is what the Nurses' unit did in its last negotiations. Furthermore, this issue is not as important as the overtime issue which is determinative of which party's Final Offer will be adopted.

The County also contends that its Final Offer should be adopted because of the total package of wages, benefits, and job security provided for in its Final Offer. While this factor favors the County, it has relatively little weight.¹⁴

Conclusion

Having found that the County has met its burden for changing the status quo and that adopting the County's Final Offer is in the public interest, and that this statutory criteria is the

¹⁴ Both parties agree that the greatest weight and the greater weight factors do not apply to this proceeding.

most important in this proceeding, I conclude that the County's Final Offer, along with all Tentative Agreements, shall be incorporated in the parties' agreement.¹⁵

I therefore issue the following

AWARD

The County's Final Offer, along with all Tentative Agreements, shall be incorporated in the parties' 2009-2010 agreement.

Dated at Madison, Wisconsin, this 31st day of January, 2011.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

¹⁵ As related above, the County's overtime proposal cannot require any employees to work more than one mandatory 16-hour shift a week.