

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

DOUGLAS COUNTY DEPUTY SHERIFFS'  
ASSOCIATION, LOCAL 41, LAW  
ENFORCEMENT EMPLOYEES DIVISION,  
WISCONSIN PROFESSIONAL POLICE  
ASSOCIATION

and

DOUGLAS COUNTY (SHERIFF'S  
DEPARTMENT)

Case 214  
No. 52111  
MA-8842

Appearances:

Mr. Gerald W. Gravesen, Bargaining Consultant, LEER Division, Wisconsin Professional Police Association, on behalf of the Douglas County Deputy Sheriff's Association.  
Mr. Frederic P. Felker, Corporation Counsel, on behalf of Douglas County.

ARBITRATION AWARD

Douglas County Deputy Sheriff's Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and Douglas County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on May 23, 1995, in Superior, Wisconsin. No stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by July 3, 1995. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues and to the following statement of the substantive issues:

Did the County violate the Labor Agreement or mutually accepted past practice when it passed over the Grievant for a sergeant promotion in the Sheriff's Department? If so, what is the appropriate remedy?

## CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

### ARTICLE 5.

VESTED RIGHT OF MANAGEMENT. The right to employ, promote, to transfer, discipline and discharge employees and the management of the property and equipment of the Law Enforcement Department is reserved by and shall be vested exclusively in the Douglas County Board of Supervisors through its duly appointed Committees. The Department Head, through authority vested in him, by either the Douglas County Board or the State Statutes, shall have the right to determine how many men there will be employed or retained together with the right to exercise full control and discipline in the proper conduct of the Law Enforcement Department operation.

The County Board through its Committees and the Law Enforcement Department shall have the sole right to contract for any work it chooses, direct employees to perform such work wherever located in its jurisdiction. The County shall have the exclusive right to determine the hour of employment and the length of the work week and to make changes in the detail of the employment of the various employees from time to time as it deems necessary for the efficient operation of the Law Enforcement Department, and the Union and the members agree to cooperate with the Board and/or its representatives in all respects to promote its efficient operation of the Law Enforcement Department.

The provisions of this Article are, however, subject to the rights of the employees as set forth in other Articles contained in this Agreement.

...

### ARTICLE 9.

CONDITIONS OF EMPLOYMENT: The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials, vacations and other benefits shall be

maintained at not less than the highest minimum standard in effect at the time of signing this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvements are made elsewhere in this Agreement.

...

ARTICLE 17.

SENIORITY: Section 1. The seniority of all employees covered by the terms of this Agreement shall begin with the employee's starting date of employment, provided, however, that no time prior to a discharge or quit shall be included. The employees' seniority shall not be diminished by temporary lay-off due to lack of work, shortage of funds or any other contingency beyond the control of either party to this Agreement.

...

Section 6. Where qualifications and ability are equal, then seniority shall prevail.

...

ARTICLE 19.

PROMOTIONS: Section 1. In making promotions and in filling job vacancies or new positions preference shall be given those employees oldest in point of service, provided, however, that the qualifications and physical fitness of the employees being considered for the job are relatively equal. In judging employees' qualifications for the job, the following factors shall be considered:

- (a) Ability to perform related work.
- (b) Attitude.
- (c) Aptitude.
- (d) Versatility.
- (e) Efficiency.

Section 2. All job vacancies or new positions shall be posted on the bulletin board ten (10) days prior to filling said vacancy or new position so that each interested employee may have an opportunity

to apply. Such notice shall state the prerequisites for the position to be filled and said prerequisites shall be consistent with the requirements of the job. Employees shall apply for the vacancy or new position in writing, and only those applicants who meet the prerequisites will be considered.

Section 3. The successful applicant shall have a ninety (90) day trial period in which to demonstrate his ability to perform the job. If during said period the employer considered the employee unqualified he shall be returned to his former position without loss of seniority rights.

Section 4. The Employer may make immediate temporary assignments to fill any vacancy or new position while the job posting procedures are being carried out.

. . .

Section 6. All grievances in connection with the filling of a job vacancy or new position shall be referred to the proper step of the grievance procedure of this Agreement.

Section 7. The provisions of this Article are, however, subject to the rights of the employees as set forth in other Articles contained in this Agreement.

## BACKGROUND

The Grievant, John McKenzie, has been employed by the Douglas County Law Enforcement Department, hereinafter the Department, since May of 1976, and since 1979 has held the position of Detective in the Department. The pay rates for Sergeants and the positions of Detective and Rural Juvenile Specialist are the same.

There are three divisions in the Department: Patrol, Detective and Jail. There are "special assignment" positions in the Department for which seniority is not utilized as the basis for selection. The Grievant's Detective position is a "special assignment" and has been since he has been in it. Rural Juvenile Specialist, Desk/Duty Sergeant, and School or D.A.R.E. Officer are also considered "special assignments".

On October 10, 1994, a "Patrol Sergeant Position" was posted. That posting indicated, in relevant part, that "2. At the present time, a vacancy exists in the position of 'Patrol Sergeant' on

the internal transfer of Sgt. Paul Johnson to the position of Desk/Duty Sergeant. . .and that, "3. Deputy Jerry Moe has been appointed to the position of Acting Patrol Sergeant until the permanent selection is made. . ." The duties of Patrol Sergeant differ from those of a Detective Sergeant and the positions are in different divisions. The Grievant posted for the position, as did a number of other Deputies, including Deputy Peterson. The Grievant had a discussion with the Sheriff about the position before it was filled. Although there is a dispute about what exactly was said, there is agreement that the Sheriff asked the Grievant if it was true that he wanted the Sergeant position, but did not want to leave the Detective Division, and that the Grievant acknowledged that was the case. The dispute is whether the Grievant stated he would not accept the position if it required leaving the Detective Division. The Grievant also testified that the Sheriff stated that the Grievant would have to leave the Detective position to get the Sergeant position, but that maybe he (the Sheriff) could talk to the Personnel Director, John Mulder, about it, as he had for Deputy Abrahamson who was allowed to take the promotion and remain in a specialty assignment. The Sheriff could not recall all of his conversation with the Grievant.

Deputy Peterson was selected for the Patrol Sergeant position. The Grievant was not considered for the position by the Sheriff, based upon their discussion. The Grievant is senior to Peterson.

When Peterson was awarded the Patrol Sergeant position, McKenzie filed the instant grievance, asserting that he should have been awarded the position based upon his seniority and qualifications, pursuant to the labor agreement and mutually-accepted past practice. The parties attempted to resolve the dispute, but were unsuccessful, and proceeded to arbitrate the matter before the undersigned.

## POSITIONS OF THE PARTIES

### Association

The Association takes the position that the Grievant was entitled to the Sergeant position. The record is clear that the Grievant was both the senior and the superior candidate and that he had done an outstanding job in his special assignment position of Detective. Article 17, Section 6, of the parties' Labor Agreement provides, "Where qualifications and ability are equal, then seniority shall prevail." The Association also asserts that the mutually accepted bilateral past practice, even though limited in numbers, has stood the test of time for a variety of positions within the Department, and that pursuant to that practice, the Deputy working in a special assignment position has been allowed to continue in the special assignment position subsequent to receiving a promotion. By its failure to award the Grievant a seniority date as a Sergeant, the County has engaged in disparate treatment, as relates to those instances involved in the past practice. The Association also asserts that there is absolutely no impact on the County, financial or otherwise, to give the Grievant the seniority date as a Sergeant, and that the individual who was the successful applicant for the position could be awarded Acting Sergeant, until another Sergeant vacancy

occurred.

The Association notes that the Grievant testified that he told the Sheriff that he did not want to leave his special assignment position, but desired the promotion so that he would have a seniority date as a Sergeant in the Department, and that he wanted to be treated the same as other employes who have been in special assignment positions. The Association also notes Sergeant Gulbrandson's testimony that the Sheriff indicated to him in their discussions that he (the Sheriff) held the Grievant in high regard and felt that the Detective Bureau would suffer if he left it. Gulbrandson also testified that the Sheriff stated that the Grievant deserved the promotion as a reward for his years of excellent service and that the Sheriff stated he never offered the Grievant the position, nor did the Grievant decline to accept it. Further, the Sheriff agreed that deputies in special assignment positions, regardless of rank or seniority status, were not subject to the bumping procedure. Gulbrandson testified that he did not know of even one occasion during his 20 years with the Department where deputies with more seniority in a classification could bump a deputy in the same classification who was working in a special assignment position.

The Association also cites Gulbrandson's testimony that there have been at least three occasions where deputies have been promoted while performing work in a special assignment position and allowed to stay in the special assignment after being promoted: (1) the promotion of then-Deputy Guenard to Sergeant while he was assigned the position of Rural Juvenile Specialist; (2) the promotion of Deputy Abrahamson to the position of Duty Desk Sergeant on a permanent basis while he had been performing on a special assignment as the Duty Desk Sergeant prior to receiving the Sergeant promotion, and (3) the promotion of Deputy Lear to Sergeant while he was in a special assignment as a "K-9 Handler" and was allowed to continue in that special assignment. Gulbrandson testified that Deputy Guenard was accepted into the Rural Juvenile Specialist position when it was created in 1976, and when a Sergeant vacancy arose in August of 1976, Guenard applied for, and received promotion to Sergeant and was allowed to remain in the Rural Juvenile Specialist position. Another member of the bargaining unit was promoted to Patrol Sergeant on an acting basis during the period Guenard was working as the Rural Juvenile Specialist. Gulbrandson testified that Abrahamson was given the special assignment as Temporary Duty Sergeant and was eventually promoted to Sergeant and allowed to remain in the Special Duty/Desk Sergeant assignment, even though there were Sergeants with greater seniority as Sergeant than Abrahamson. Gulbrandson testified that Lear was given the special assignment of "K-9 Handler" and subsequently promoted to Patrol Sergeant and allowed to remain in the "K-9 Handler" special assignment.

The Association also relies on Gulbrandson's testimony that both he and Trianowski were Sergeants at the respective times they applied for, and were subsequently accepted to, the Rural Juvenile Specialist position and that, in turn, the County named Acting Sergeants in the Patrol Division to replace them while they served as the Rural Juvenile Specialist. Those deputies named in the Acting Sergeant positions were subsequently confirmed as Sergeants, and given a seniority date as Sergeant retroactive to the date they accepted the Acting Sergeant positions. The

Association asserts that McKenzie should have been treated similarly to those bargaining unit members noted in the three occasions.

Guenard's testimony that when school is not in session, the Rural Juvenile Specialist was assigned work in the Patrol Division, and was under the exclusive supervision of the Patrol Division commander is consistent with the testimony of Gulbrandson, who had also held the position, nor with the table of organization for the Detective Division (County Exhibit 1), which clearly shows that the Rural Juvenile Specialist is under the supervisory control of the Detective Lieutenant.

The Sheriff testified that he preferred that the Grievant remain in the Detective Bureau for the good of the Department, and that he did not consider the Grievant for the promotion due to the Grievant's desire to remain in the Detective Bureau. The Sheriff also testified that the Grievant had the supervisory authority of a Sergeant, and on some occasions had direct supervision of other deputies in special assignment detective positions and that the Grievant had worked for the Detective Sergeant and Detective Lieutenant in their absence. The Sheriff testified that the Grievant was an excellent employe and that it would have no economic impact on the County if he were given a Sergeant seniority date and Deputy Peterson was named as an Acting Patrol Sergeant, since the Grievant is currently receiving Sergeant pay in his special assignment position.

The Association notes that for a past practice to survive and be enforceable, it must be demonstrated that the practice was mutually accepted and established and acted upon over a long period of time. It is undisputed that since 1976 deputies of the Department have been promoted while working in a special assignment position and allowed to remain in special assignment positions subsequent to the promotion, and this has occurred not less than three times over that period of time. It is reasonable that fewer instances would be required to establish a practice where the situation arises only infrequently, than would be required to establish a practice where the situation arises often. Citing, Elkouri and Elkouri, How Arbitration Works, (Fourth Edition, 1985), at p. 453.

While the County attempted to show that there was something "magical or sacred" about how deputies for the Rural Juvenile Specialist position are selected, and that the practice of allowing a deputy in the Rural Juvenile Specialist position to remain in an assignment after being promoted could not be applied to other positions in the bargaining unit, it has been shown that on at least three occasions deputies performing work in special assignments have been promoted and allowed to stay in those special assignments. The Association also cites Arbitrator Dale Yoder as holding that the "predominant pattern of practice" is controlling, even though there had been scattered exceptions to the "clearly established pattern". Citing, Elkouri and Elkouri, at p. 453.

The Association notes that there are three pay grades in the bargaining unit. The top pay grade classification is Lieutenant's, the middle pay grade classification includes "all sergeants,

detectives and juvenile specialists" and the bottom pay grade is the Deputy classification. Thus, there is a limited amount of opportunity for promotion. The amount of times for a potential promotion to occur for a Deputy while in a special assignment is minimal, however, it has been shown that it is a mutually accepted, long-standing practice of the parties that when an opportunity for a promotion arose for a Deputy performing work in a special assignment position, the special assignment deputy has always been awarded the promotion and allowed to remain in the special assignment position. Neither party has notified the other that they do not desire to continue the practice on the rare occasions when promotion opportunities for special assignment deputies present itself.

As a remedy, the Association requests that the Grievant be given a seniority date of Sergeant as of November 13, 1994, and allowed to remain in his special assignment position as Detective.

### County

The County first asserts that the issue to be addressed must be considered in the context of the remedy sought by the Grievant. There is no dispute that the Grievant was passed over for the position of Patrol Sergeant in favor of the less senior deputy, however, that was not the focus of the Grievant's evidence presented at hearing. The remedy sought by the Grievant is not appointment to the position of Patrol Sergeant, the vacancy underlying the factual basis for the grievance. The Grievant informed the Sheriff on at least two occasions that he did not wish to leave the Detective Division and the focus of the Grievant's evidence was upon an alleged past practice of allowing individuals who were promoted to the rank of Sergeant to retain their current duties at the time of promotion. That is in fact the remedy the Grievant is currently seeking and has long sought. When asked during the hearing whether he would accept the position of Patrol Sergeant, if that meant wearing uniform and performing all the duties of Patrol Sergeant, the Grievant was unable to answer in the affirmative.

The County asserts that the remedy the Grievant seeks can be viewed in two different ways. If he in fact seeks the rank of Patrol Sergeant, then he is in effect requesting that the duties of one of the three Patrol Sergeants be changed to those of a Detective Sergeant. Thus, there would be two Patrol Sergeants actually performing the duties as defined in the Department's Policy and Procedures Manual, while one Patrol Sergeant assumes the duties of a Detective Sergeant; this in turn would have the effect of leaving a "vacancy" in the Detective Division while at the same time the duties of Patrol Sergeants/Shift Commanders would be reduced to two individuals. More likely, the Grievant is requesting that he simply be promoted to Sergeant within the Detective Division, leaving Peterson's promotion intact as the third Patrol Sergeant but adding a second Sergeant's position within the Detective Division. It is doubtful that the Grievant can ask for such a remedy within the factual context of the current grievance which involves filling a position the Grievant does not desire.



With regard to the alleged past practice relied upon by the Grievant, the evidence presented consisted of three alleged examples where in the past an individual was appointed to a Sergeant's position, and allowed to continue performing the same duties he performed prior to the promotion. The first example involved now-Chief Deputy Guenard's appointment to Patrol Sergeant in 1976, while being allowed to continue performing his duties as Rural Juvenile Specialist. Guenard testified that the position Rural Juvenile Specialist is unique. It has been occupied by both Deputies and Sergeants and the officer in the position has been required to be a certified Juvenile Specialist and to receive two weeks of training. It would not have served the Department to secure a new individual to train and certify upon promoting the incumbent. The position is both seasonal, in that it coincides with the school year, and contingent upon contractual and funding matters. Thus, the occupant must be able to fit within the Department's command structure when not performing his contractual duties. Both Guenard and Gulbrandson testified that in the past the Rural Juvenile Specialist worked both within the Detective Division and the Patrol Division of the Department. Also, the promotion of Guenard to Sergeant did not result in an additional Sergeant's position within the Department. As to the promotion of Lear to Sergeant, Guenard testified that the position of "K-9 Officer" was already located within the Patrol Division and that Lear's promotion did not result in the creation of a new Sergeant position, or the alteration of job duties of a Patrol Sergeant. With regard to the promotion of Abrahamson to the position of Duty/Desk Sergeant, Guenard testified that Abrahamson had been filling in at that position for an injured employe for almost two years and his promotion did not result in the creation of a new position, or the alteration of job duties of the position.

For a past practice to be binding on both parties, it 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." Citing, Elkouri and Elkouri, How Arbitration Works, (Third Edition), at p. 391. The County asserts that the Grievant has neither established a practice which has been unequivocal or clearly enunciated and readily ascertainable, nor do the examples given announce a practice which would support the remedy the Grievant seeks. None of those examples involved the creation of an additional Sergeant position within any division of the Department, and only the example of then-Sergeant Guenard acting as Rural Juvenile Specialist resulted in altering the usual duties of a Patrol Sergeant. The position of Rural Juvenile Specialist is unique within the Department and cannot be equated with the current Detective position held by the Grievant.

Even if the Grievant has established a consistent past practice that supports the remedy he seeks, it is highly questionable whether the practice could be considered binding in this case. The County asserts that where management's rights are involved, arbitrators have been less likely to find a particular past practice as binding upon future actions, citing the following,

"The line between practices which are binding and those which are not may well be drawn on the basis of whether the matter involves methods of operation or direction of the working force, or whether

it involves a 'benefit' of peculiar personal value to the employes (also involving the employer's purse).

"Arbitrators are often hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of legitimate functions of management. . ." Elkouri and Elkouri, at p. 393.

Article 5 of the Labor Agreement provides that the Department is vested with the exclusive right to employ, promote or transfer employes, and that it shall have the sole right to "direct employes to perform such work wherever located in its jurisdiction" and shall further have the right to "make changes in the detail of the employment of the various employes from time to time as it deems necessary for the efficient operation of the Law Enforcement Department. . ." The County asserts that the remedy sought either requires the job description for the Patrol Sergeant position, for which the Grievant applied, to be altered to suit his desires, or in the alternative, the Grievant requests that an additional Sergeancy be created within the Detective Division and given to him. Clearly, such remedies infringe upon the vested right of management to direct the work to be performed and to determine the number of ranking officers. The remedy sought bears no relationship to the Grievant's wages, hours or conditions of employment, since he would be performing the same duties as before at the same rate of pay, and during the same hours. Only the Grievant's rank would change, and perhaps the division in which he works within the organizational framework of the Department.

The County also asserts that the remedy sought by the Grievant infringes upon the Sheriff's constitutional authority as recognized in Wisconsin Professional Police Association v. County of Dane, 106 Wis. 2d 303 (1982); State ex. rel. Milwaukee County v. Buech, 171 Wis. 474 (1920), and State ex. rel. Kennedy v. Brunst, 26 Wis. 412 (1870). Those cases stand for the proposition that those immemorial principles and important duties that characterize and distinguish the office of Sheriff are given constitutional dimension. They may not be infringed upon by the Legislature, much less a collective bargaining agreement. While the promotion process may be regulated by the Legislature or a collective bargaining agreement, certainly the work to be performed by the Department and the job duties assigned to individual positions fall within the constitutional authority of the Sheriff to assign, and the authority of the Sheriff to designate the number of ranking positions within the Department, cannot fall far behind.

Lastly, the County questions whether the remedy sought is obtainable within the context of the present fact situation, which involves a promotion to a specific Sergeant's position that is inextricably intertwined with the job description applicable to that position. The Grievant expressed a desire not to assume the duties that go with that position, and in fact requests a remedy that falls outside the scope of the facts giving rise to his alleged grievance. The Grievant essentially alleges that he was unjustly passed over for one position and requests an entirely different position as a remedy. The County submits that on that basis, and for the aforementioned reasons, the remedy sought by the Grievant is not available.

## DISCUSSION

As the County notes, what the Grievant is seeking is not the promotion to Patrol Sergeant, but rather that he be promoted to Sergeant and remain in his position in the Detective Division. The Association seeks to support the Grievant's claim by establishing that other individuals holding special assignments have been promoted to Sergeant and allowed to remain in their special assignment positions. For the following reasons, the Arbitrator is not persuaded that there has been an established past practice in that regard, as would apply to the instant situation. First, with respect to Deputy Abrahamson's promotion to Duty/Desk Sergeant, it appears that he held the position in an acting capacity for approximately two years and then was awarded it as a permanent position. Abrahamson stayed in the same assignment because the vacancy for which he applied, and was awarded, was that same position in which he had been working in an acting capacity. That is unlike the instant situation where the Grievant is asserting that he should have been awarded the promotion for one position and then allowed to stay in his present position. Also, as to the third situation cited by the Association involving the promotion of Deputy Lear to Patrol Sergeant while holding the special assignment of "K-9 Officer", it is not clear that special assignment position functions on a full-time basis. Further, the "K-9 Officer" position is within the Patrol Division. What appears to have occurred with regard to Sergeant Lear, is that he was promoted to the Patrol Sergeant position, while being permitted to retain the special duties of "K-9 Officer", in addition to the duties of Patrol Sergeant. Again, this is unlike the situation involved in the instant case. That leaves only the instance where Guenard was promoted while in the Rural Juvenile Specialist position as being similar. Further, it also appears from Guenard's testimony that there have been situations where individuals in special assignment positions were required to choose between taking the promotion and remaining within the special assignment position, e.g., in a similar situation, Anderson was required to choose between the promotion to Patrol Sergeant or remaining in the Detective Division. Therefore, it does not appear that there is a well-established past practice of permitting an individual in a special assignment position to accept a promotion and still remain in the special assignment position and not perform the duties of the position that was posted.

It is also noted, that there is a distinction between management exercising its discretion in a similar manner over a period of time as to its operating method or direction of its workforce, and a mutually accepted and binding past practice. Elkouri and Elkouri (Third Ed.) at pp. 394-395, citing Arbitrator Harry Shulman. It appears from the evidence that management has retained its authority contractually, i.e., Article 5, Vested Right of Management, to determine the number of positions and to direct the work of the Department. In essence, the Grievant is seeking that the County be directed to create a second Sergeant position in the Detective Division and award it to him. Thus, what is being sought is where there is a posting of a Sergeant position, that it be treated as a "generic" Sergeant position, at least as to those individuals who are in special assignments. There does not appear to be any basis in the parties' Labor Agreement for what is being sought. In other words, there is no contractual requirement that when the County posts a

Patrol Sergeant position, individuals holding special assignment positions be given the right to post for the rank alone and leave the duties of the position behind to be performed by someone else in an acting capacity. Even if it were shown that management had at times agreed to do that, it has not been shown that management had ceded its right to make that decision.

Given the Grievant's indications to the Sheriff that while he desired the rank of Sergeant, he did not want to be a Patrol Sergeant and leave his Detective position and duties, along with the Grievant's testimony that he is not sure he would have accepted the Patrol Sergeant position if it was offered, as well as all of the evidence noted above as to what the Grievant was really seeking in this case, it is concluded that the Sheriff and the County did not violate the parties' Labor Agreement by not promoting the Grievant to the Patrol Sergeant position in this case.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 31st day of October, 1995.

By David E. Shaw /s/  
David E. Shaw, Arbitrator