

IN THE MATTER OF ARBITRATION ) INTEREST ARBITRATION  
 )  
 between )  
 ) Detention Sergeants Unit  
 Olmsted County, Rochester, )  
 Minnesota )  
 -and - ) BMS Case No. 07-PN-0026  
 )  
 Law Enforcement Labor Services, )  
 Inc., Local Union No. 330 ) July 11, 2007  
 ))

**APPEARANCES**

**For Dodge County**

Frank J. Madden, Attorney, Frank Madden & Associates, Plymouth,  
Minnesota  
Dave Mueller, Director of Human Resources  
Dale Ignatius, Associate Director of Human Resources

**For Law Enforcement Labor Services, Inc., Local Union No. 330**

Dennis O. Kiesow, Business Agent  
Brooke Bass, Business Agent  
Doug Biehn, Business Agent  
Nick Wetschka, Business Agent  
Matt Wrubel, Detention Sergeant  
Macey Seide (Tesmer), Detention Sergeant

**JURISDICTION OF ARBITRATOR**

The County of Olmsted (hereinafter "County" or "Employer")  
is located in Southeastern Minnesota. Since 1990, the County's  
population has grown by over 25% to an estimated 137,000 citizens  
in 2005. The County ranks eighth in population among the 87  
counties in Minnesota. The County administrative offices  
are located in Rochester, Minnesota which is the third largest  
Minnesota city with a population of 95,700.

The County Sheriff's Department (hereinafter "Sheriff's Department") employs licensed Deputies, non-licensed Detention Officers and clerical staff. Law Enforcement Labor Services, Inc., Local Union No. 330 (hereinafter referred to as the "Union" or "LELS") is the certified bargaining representative for all essential non-licensed Detention Sergeants. This essential non-licensed bargaining unit consists of seven Detention Sergeants, representing 0.7% of the County's 991 employees in the workforce.

The Olmsted County Deputy Sheriff's Association (hereinafter referred to as the "Deputies Association") represents the Deputies, Detectives, Secretaries, Detention Deputies and Laborers of the Sheriff's Department. The Sheriff, Director of Law Enforcement Services, Director of Detention Services, Captains, Licensed Sergeants, Detention Supervisors, Plant Maintenance Worker and confidential employees are not represented.

This is the initial collective bargaining agreement between the Employer and Union (hereinafter "Parties") and it will establish the foundation for future bargaining between them. The Parties participated in several bargaining sessions and mediation, but were unable to resolve all of their outstanding issues. As a result, on January 4, 2007, the Bureau of Mediation

Services ("BMS") received a written request from the Union to submit the unresolved issues to conventional interest arbitration. On February 2, 2007, the BMS determined that the following issues were certified for arbitration pursuant to M.S. 179A.16, subd. 2 and Minn. Rule 5510.2930:

1. Duration - 1 or 2 Year Contract (2006; 2007) - Art. 31
2. Hours of Work - Work Schedules - Art. 7.1
3. Hours of Work - Normal Work Period - Art. 7.2
4. Hours of Work - Overtime Change of Shift - Art. 7.3
5. Hours of Work - Break Periods - Art. 7.4
6. Hours of Work - Assignment of Overtime Work - Art. 7.5
7. Hours of Work - Call-Backs - Art. 7.6
8. Hours of Work - Call-Back Cancellations - Art. 7.7
9. Hours of Work - Use of Compensatory Time - Art. 7.8
10. Holidays - Holidays Worked for Which Premium Pay is Paid - Art. 8.1
11. Insurance - Amount of Employer Contribution for 2006 - Art. 11
12. Insurance - Amount of Employer Contribution for 2007 (If Awarded) - Art. 11
13. Wages - Level of Wages for 2006 - Appendix A
14. Wages - Level of Wages for 2007 (If Awarded) - Appendix A
15. Wages - Level of Wage for Reclassification - Appendix A
16. Discipline - Criteria for Discipline - Art. 22.1

The Parties selected Richard John Miller to be the sole arbitrator from a panel submitted by the BMS. A hearing in the matter convened on May 22, 2007, at 10:00 a.m. in the County Government Center, 151 Fourth Street SE, Rochester, Minnesota. The Parties were afforded full opportunity to present evidence and arguments in support of their respective positions. The Parties agreed to keep the record open until May 29, 2007, in

order to resolve any discrepancies in the evidence submitted by the Parties during the hearing. Pursuant to the statute and the agreement of the Parties, post hearing briefs were timely submitted by the Parties on June 12, 2007, and received by the Arbitrator on June 14, 2007, after which the record was considered closed.

Issue 11, 2006 Insurance Contribution, Issue 12, 2007 Insurance Contribution, and Issue 13, 2006 Wage Increase, were resolved between the Parties prior to the hearing. Issue 1, Duration, was resolved at the hearing, such that the collective bargaining agreement will be effective March 7, 2006 through December 31, 2007. There will be, however, no retroactivity on any issue prior to January 1, 2007. The County resolved Issue 5, Break Periods, and Issue 10, Holidays, by agreeing to the Union's proposed language. As a result, Issues 2, 3, 4, 6, 7, 8, 9, 14, 15 and 16 remain unresolved.

**ISSUE TWO: HOURS OF WORK - WORK SCHEDULES - ART 7.1**

**POSITION OF THE PARTIES**

The Union proposes that the following language be placed in the new collective bargaining agreement:

- 7.1 Work Schedule. The Employer shall periodically establish and post a work schedule for all employees covered by this Agreement identifying days on which the employee is scheduled to work and the starting and

ending time of the employee's work shift. Such schedule shall be posted not less than two weeks prior to the beginning of the scheduling period.

The County proposed the same language with the exception of the last sentence that requires a posting of the schedule two weeks prior to the beginning of the scheduling period.

**AWARD**

The Union position is sustained.

**RATIONALE**

The County jail administration has a current schedule posted for the calendar year that was posted at the beginning of the year. The Detention Sergeants are required to work the designated hours set by administration except when they are directed to flex their time for staff meetings or training. The two week notice requirement will provide the Detention Sergeants with greater stability in their personal lives. This language also guarantees some measure of certainty in their work schedule. In addition, this language is consistent with contract language contained in the Deputies Association Agreement, pertaining to Detention Deputies which are supervised by the Detention Sergeants.

**ISSUE THREE: HOURS OF WORK - NORMAL WORK PERIOD - ART. 7.2**  
**ISSUE FOUR: HOURS OF WORK - OVERTIME CHANGE OF SHIFT - ART. 7.3**  
**ISSUE SIX: HOURS OF WORK - ASSIGNMENT OF OVERTIME WORK - ART. 7.5**  
**ISSUE NINE: HOURS OF WORK - USE OF COMPENSATORY TIME - ART. 7.8**

## POSITION OF THE PARTIES

The County requests the following language found in the Deputies Association Agreement be placed in the new agreement:

7.2 Normal Work Periods. The Employer, in its discretion, may establish the Normal Work Day and the Normal Work Week for the job classes governed by this Agreement provided that the Normal Work Day for full-time employees shall consist of at least eight (8) consecutive hours of work (which may be interrupted by an unpaid meal break) and the Normal Work Week shall include an average of at least two (2) days off in each seven day period. Nothing herein shall be construed as a guarantee of hours of work per day or per week. Should it be necessary in the judgment of the department to establish daily or weekly work schedules departing from the posted schedule or to change the "normal work day" or "normal work week", notice of such change shall be given to the Union as far in advance as is reasonably practicable.

The Union requests that the above language, with the exception that the Normal Work Week be based on an average of 40 hours per week, be placed in the new agreement in Section 7.2.

The Union requests that the following language found, in part or in all, in the Deputies Association Agreement and Juvenile Corrections Officer unit be placed in the new agreement:

7.3 Overtime; Change in Shift. "Overtime" means work performed at times that deviate from an employee's posted work schedule, but does not include instances in which such deviation is initiated at the request of the employee. If an employee is required to work overtime, the employee will be compensated at the rate of one and one-half (1-1/2) times the employee's basic hourly rate or given compensatory time off at the rate of one and one-half (1-1/2) times the amount of time actually worked.

7.5 Assignment of Overtime Work. Employees may be assigned to overtime work at the discretion of the Sheriff. Employees shall be required to work overtime unless excused by the Sheriff. Employees who work overtime may receive either compensatory time or paid overtime, payable at the rates specified in section 7.3 above, at the discretion of the Employee. Under no circumstances may compensation be paid more than once for the same hours under any provisions of this Agreement.

7.8 Use of Compensatory Time. Whenever possible, compensatory time earned should be used within thirty (30) days. If compensatory time is not taken within sixty (60) days it shall be paid by the County at the employee's regular hourly rate in effect at the time such payment is made. Compensatory time off may be taken with the approval of the employee's supervisor.

The County is opposed to inclusion of the Union's proposed language in Sections 7.3, 7.5 and 7.8.

#### **AWARD**

The County's position is sustained.

#### **RATIONALE**

The Union has proposed the inclusion of overtime provisions in the new collective bargaining agreement related to the definition of overtime, entitlement to overtime compensation, assignment of overtime work and accrual and use of compensatory time. The County is opposed to any overtime provisions being included in the new collective bargaining agreement.

The majority of the Detention Sergeants are assigned to a shift consisting of 12.5 hours per day, 182 shifts per year or 2,275 hours a year. The average work week is 43.75 hours. In

addition to those hours, the Detention Sergeants rotate from nights to day or vice versa every six weeks and are required to flex their schedules to accommodate staff meetings and training. The remaining Detention Sergeants are working 8.5 hours per day, Monday through Friday.

The Fair Labor Standards Act ("FLSA") provides a partial overtime pay exemption in Section 7(k): "The Act provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis." 29 C.F.R. §553.201. Section 7(k) of the Act provides for payment of overtime after 171 hours during a 28 consecutive day period. The County does pay other non-exempt law enforcement employees overtime based on this maximum requirement. The Detention Sergeants work in excess of 171 hours in a 28 day period and are being denied overtime compensation by the County. In addition, they are forced to work 195 hours a year more than most other County employees at their straight time pay.

"The Fair Labor Standards Act provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply...with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act." 29

C.F.R. §541.4. The paramount issue thus become whether Detention Sergeants are exempt or non-exempt employees under the FLSA.

The Union claims that Detention Sergeant are not exempt from the overtime provisions of the FLSA pursuant to 29 CFR § 541, section 13(b)(1) which states:

The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, deputy sheriffs, state trooper, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or patrol; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

The Union claims that the County misstated the contents of sections 13(b)(2), (3) and (4) by asserting language exists that high level law enforcement officers will be exempt if they meet the requirements of one of the exemptions. The Union presented evidence that many of the duties listed in section 13(b)(1) are being performed by Detention Sergeants, with their primary duties being to supervise and direct the Detention Officers. The Union alleges that the County's argument that Detention Sergeants are exempt employees is not supported by their policy (Work Schedules

and Pay for Exempt Staff). Finally, both Parties recognized the counties in Stanton IV as the proper external comparison group. All Detention Sergeants in this comparison group are paid overtime and not considered exempt employees under the FLSA.

The County, on the other hand, claims that Detention Sergeants are designed as exempt employees under the FLSA. According to the County, these employees satisfy the four-part test for the executive employee exemption as follows: (1) compensated on a salary basis at a rate of not less than \$455 per week; (2) primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (3) customarily and regularly directs the work of two or more other employees; and (4) has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight. 29 C.F.R. § 541.100.

The County also argues in support of their position that Detention Sergeants are exempt employees based upon the additional language in the Preamble to the 2004 regulations to the FLSA indicating that high level law enforcement officers will be exempt if they meet the requirements of one of the exemptions. 29 CFR § 541.3(b)(2), (3) and (4). Finally, the County points

out that there are approximately 134 classifications designated as exempt from the requirements of the FLSA, including the similarly ranked law enforcement positions of Licensed Sergeant and Youth Counselor Supervisor.

The majority of the Union's arguments involves the proper interpretation of the FLSA as to whether Detention Sergeants are non-exempt. The same can be said for the Employer's arguments that Detention Sergeants are exempt employees under the FLSA. While both Parties have presented compelling arguments in support of their respective positions, the arbitrator does not have the authority to rule on the merits of their positions. The authority to determine whether Detention Sergeants are exempt or not under the FLSA lies solely with the Department of Labor ("DOL"). Thus, the Parties should proceed with obtaining a decision from the DOL as to whether Detention Sergeants are exempt or not from the FLSA.

The decision by the DOL should control the outcome of the overtime issues before the arbitrator. While this decision is pending from the DOL, the current practice of not granting overtime to Detention Sergeants based on their present work schedules shall continue. If the DOL finds in favor of the Union then Detention Sergeants are automatically eligible for overtime under the provisions of the FLSA. If the DOL decides in favor

of the County then the Union can attempt to negotiate the overtime provisions in subsequent negotiations or another interest arbitration, utilizing the arguments other than those related to the FLSA. In any event, the Parties will be in negotiations for a successor agreement shortly after the Parties receive the arbitrator's award where these overtime issues can be properly addressed.

**ISSUE SEVEN: HOURS OF WORK - CALL-BACKS - ART. 7.6**

**ISSUE EIGHT: HOURS OF WORK - CALL-BACK CANCELLATIONS - ART. 7.6**

#### **POSITION OF THE PARTIES**

The Union's proposed language in Article 7.6 is essentially word for word from the Deputies Association Agreement with slight modifications to address PTO rather than vacation and sick leave as follows:

7.6 Call-Back. Employees who are required to work during non-scheduled work time, shall be compensated for a minimum of three hours, except that the three hour minimum requirement shall not apply to instances where such call-back time continues into or extends from a normally scheduled shift. Compensation for the three-hour minimum and any additional non-scheduled work beyond the three hours shall be paid pursuant to the terms of Section 7.3, above. For the purpose of this Section, compensatory time, alternate holidays and Paid Time Off (PTO) that have already been approved shall be considered "non-scheduled work time."

The Union's proposed language in Section 7.7 is identical from the Deputies Association Agreement as follows:

7.7 Court Call-Back; Cancellation. When court call-back has been scheduled and the call-back is cancelled less than 24 hours before the designated hour of appearance, the employee will receive pay as indicated under the terms of Sections 7.3 and 7.6 of this Article. The policies and procedures concerning court call-back may be changed at the discretion of the Sheriff or persons outside the Sheriff's Department as deemed appropriate. However, for the duration of this contract, the economic consequences of court call-back policies and procedures shall be governed by Olmsted County Sheriff's Directive 19, entitled "Deputy in Court" effective March, 2000 and changes to the economic consequences shall be subject to negotiations.

The County is opposed to inclusion of the Union's proposed language in Sections 7.6 and 7.7.

**AWARD**

The Union's position is sustained.

**RATIONALE**

If a Detention Officer is called to work during a day off or after working a scheduled shift, the Officer receives pay at the overtime rate for three hours. The Detention Officer receives three hours overtime compensation, if the call back takes 10 minutes or three hours to complete. If a court appearance is cancelled within proper 24 hour notice, Detention Officers scheduled to testify receive the minimum of three hours overtime compensation while the Detention Sergeants receives nothing.

The issue of receiving a minimum of three hours overtime when a Detention Sergeant is called to work on a day off or

during off-duty hours and cancellation for court call-back is a matter of fundamental fairness. There is no difference between Detention Sergeants and Detention Officers in that they both work set schedules. However, the Detention Sergeants must respond to a call back and disrupt their personal life without any additional compensation unlike Detention Officers that they supervise. The three hours overtime pay compensates the employee for the disruption of personal time required by the Employer. The awarding of this language will provide an equitable internal benefit to the Detention Sergeants. The Detention Sergeants deserve the same consideration received by their subordinates.

**ISSUE FOURTEEN: WAGES - LEVEL OF WAGES FOR 2007 - APPENDIX A**  
**ISSUE FIFTEEN: WAGES - LEVEL OF WAGE FOR RECLASSIFICATION - APPENDIX A**

#### **POSITION OF THE PARTIES**

The Union is requesting for 2007 a general wage increase of 3.5% over the 2006 wage rates. The County's position for 2007 is a general wage increase of 2.0% over the 2006 wage rates.

The Union proposes the following reclassification language to be added to the new agreement:

Reclassification is the result of increased decision-making responsibilities and job complexity. An increase of 3% on current rate or entry level of the new classification (whichever is greater) is awarded at the time of reclassification. No evaluation period is required. The annual review date remains the same.

The County has proposed to include reclassification language in the new collective bargaining agreement which incorporates the non-union compensation plan by reference as follows:

Reclassification increases will be the same as non-contract employees. For noncontract employees for 2007 the increase is 3%. A reclassification does not change an employee's anniversary date.

#### **AWARD**

The County's position is sustained with respect to the general wage increase for 2007. Detention Sergeants for 2007 are entitled to a general wage increase of 2.0% over the 2006 wage rates.

The Union's position is sustained with respect to the adding of the following reclassification language to the new contract:

Reclassification is the result of increased decision-making responsibilities and job complexity. An increase of 3% on current rate or entry level of the new classification (whichever is greater) is awarded at the time of reclassification. No evaluation period is required. The annual review date remains the same.

#### **RATIONALE**

The County conceded that it was not raising an inability to pay argument but only that the arbitrator should exercise financial restraint in awarding any economic items, such as a general wage increase for 2007. In fact, the County conceded that they have the ability to pay the wage increase of 3.5% as proposed by the Union for 2007.

There has been a consistent history at the County since at least 2000 of essentially uniform general wage adjustments among all bargaining units and non-union employees. For example, in 2006, bargaining groups and non-union employees received a 3.0% general wage increase. Detention Sergeants received the same 3.0% increase consistent with other County employees and the Union agreed to settle the issue of the 2006 wage increase on that basis.

For 2007, bargaining groups and non-union employees within the County generally received a general wage increase in the amount of 2.0%. The only exceptions were market adjustments for Local 49 Waste-to-Energy Facility employees and nurses so that the County would be able to attract and retain those employees.

All other bargaining units at the County are settled for 2007, including the essential employees in the Deputies Association Agreement and the essential Teamsters 320 Juvenile Corrections Officers unit. Since there has been a consistent pattern internal wage settlement pattern among organized and non-union employees since at least 2000, this pattern should also apply to Detention Sergeants.

The Parties agree that the appropriate external comparison group for Olmsted County is DCA Stanton Group IV counties of Anoka, Carver, Dakota, St. Louis, Scott and Washington. These

counties are comparable to Olmsted County based on population, budget and proximity. The general wage increase award of 2.0% exceeds the average maximum wage of the comparable counties by \$2.21 per hour.

The Union claimed that another appropriate comparison group for Olmsted County Detention Sergeants is the "Big Jail" group set forth by Arbitrator Daly in LELS and Goodhue County, BMS Case No. 04-PN-22 (Daly, 2004). The "Big Jail" group of counties is clearly not an appropriate comparison group for Olmsted. There is not a new jail at Olmsted County and there has been no change in circumstances in the Detention Sergeants' job responsibilities in recent history, as was the case in Goodhue County.

The Union announced for the first time at the hearing that the "Big Jail Group" was an appropriate comparison with Olmsted County. The Union did not put the County on notice during negotiations that the Union was relying upon the "Big Group" as an appropriate comparison group, present any comparison data in negotiations from the "Big Jail" group, or seek the agreement of the County that the "Big Jail" group was an appropriate comparison group. Further, none of the other law enforcement groups within the County has used the "Big Jail" group for comparison purposes. Clearly, the "Big Jail" group is not an appropriate comparison group for the County. The only

appropriate comparison group for the County are those counties in Stanton Group IV and not those counties in the "Big Jail" group or contiguous counties. Clearly, the external comparison data supports an award of the County's position on wages.

The Union submitted data relative to the Consumer Price Index ("CPI"). This is another valid factor for consideration by an interest arbitrator. The CPI for 2006 was 2.4%, with a slight increase for the first four months of 2007 because of the increasing cost of fuel. While the award of 2% is slightly lower than the 2006 and 2007 CPI increases, other County employees are affected by cost of living increases similar to the seven Detention Sergeant in this unit. None of the other County employees received a general wage increase similar to that proposed by the Union. The 2.0% general wage increase pattern has been established with approximately 984 of the 991 employees at Olmsted County or 99.3% of the workforce based upon the CPI.

It is also important to note that the Olmsted County compensation system incorporates various types of increases including increases to the salary ranges, performance-based increases and the general wage increase. For 2007, the salary range for Detention Sergeants and other County employees evaluated at the C41 salary range increased by 7.35% at the maximum of the range, 5% at the midpoint and 1.5% at the minimum

of the range. In addition, Detention Deputies and other County employees are eligible for up to a 3.5% performance-based increase. These increases, when coupled with the 2.0% general wage increase in 2007, significantly exceed any increase in the CPI.

The Union's position with respect to level of wage for reclassification is sustained because their proposed language is identical from the 2006 Compensation Plan for Non-Contract Salaried and Hourly Employees policy they previously were under prior to organizing with LELS. Further, while the proposed reclassification language of both Parties basically provide the same level of benefit to Detention Sergeants, the County's proposed language basically takes away the Union's ability to negotiate this term and condition of employment and allows the County to implement unilateral changes to this benefit. The Union is unwilling to relinquish the ability to negotiate this issue or grieve a unilateral reduction in this benefit.

**ISSUE SIXTEEN: DISCIPLINE - CRITERIA FOR DISCIPLINE - ART. 22.1**  
**POSITION OF THE PARTIES**

The Union requests language providing any discipline imposed on an employee be based on just cause as follows:

- 22.1 The County will discipline an employee for just cause only.

The County proposes the following language in Section 22.1 as follows:

22.1 The County will discipline an employee for just cause only. The discharge of probationary employees shall be subject to the Olmsted County Civil Service Rules.

**AWARD**

The County's position is sustained.

**RATIONALE**

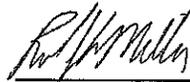
The only issue in dispute between the Parties in Section 22.1 is the second sentence of the discipline article. The County has proposed the additional sentence providing that the discharge of probationary employees will be subject to the Olmsted County Civil Service Rules.

Vacancies in the Detention Sergeant position are filled by internal promotions. In the past, when Detention Sergeants have not passed their probationary period, they have been demoted back into their former position of Detention Officer and not terminated from the County. The County's final position is consistent with this past procedure.

The Olmsted County Civil Service Rules provide that a probationary employee who is deemed incompetent or unqualified to perform the duties of the position may be returned to the employee's former position if the employee was promoted from the Service Register rather than the Eligible Register. The process

set forth in the Civil Service Rules is reasonable and fair to Detention Sergeants and should be included by reference in the new collective bargaining agreement.

As is always the case, the Parties' representatives are to be complimented on their professional and courteous conduct at the hearing and the comprehensiveness of their oral and written presentations.



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Richard John Miller

Dated July 11, 2007, at Maple Grove, Minnesota.

