

In the Matter of Arbitration Between

Law Enforcement Labor Services, Inc., Local No. 214)	
)	BMS Case No. 09-PA-0027
)	
“LELS” or “Union”)	Issue: After-Hour Assignments
)	
)	Hearing Site: Stillwater, MN
)	
and)	Hearing Date: 03-11-09
)	
)	Brief Submission Date: 04-10-09
)	
County of Washington, Minnesota)	Award Date: 05-26-09
)	
)	Mario F. Bognanno,
“County” or “Employer”)	Labor Arbitrator
)	

JURISDICTION

Pursuant to the relevant provisions in the parties’ 2007 – 2010 Collective Bargaining Agreement (“CBA”) this matter was heard on March 11, 2009 in Stillwater, Minnesota. (Union Exhibit 1) Through their designated representatives, the parties stipulated that the matter is properly before the undersigned for a “final and binding” determination. Further, the parties waived the 30-day decision period referenced in Article VII, section 7.5 in the CBA. Both sides were afforded a full and fair opportunity to present their case; witness testimony was sworn and cross-examined; and exhibits were introduced into the record.

Harry S. Crump (retired judge) attended the hearing under the auspices of the Minnesota Bureau of Mediation Service’s arbitrator-intern program. Judge Crump prepared a preliminary draft of this decision. However, as Arbitrator-of-Record, the undersigned drafted the final decision and he is solely responsible for same.

Timely post-hearing briefs were filed on or about April 10, 2009. On that date, the case record was closed and the matter was taken under advisement by the Arbitrator.

APPEARANCES

For the Union:

Isaac Kaufman	Attorney-at-Law
Michael M. Bonn	LELS, Local No. 214 President
Cheri Dexter	Commander (Appearance Subpoenaed)
Gary Randall	Correctional Officer-Sergeant
Matt O'Hara	Deputy Sheriff (Appearance Subpoenaed)
Wayne Johnson	Deputy Sheriff-Sergeant (Appearance Subpoenaed)
Larry Osterman	Deputy Sheriff-Sergeant (Appearance Subpoenaed)

For the Employer:

Pamala R. Galanter	Attorney-at-Law
James Schug	Administrator, County of Washington
William Hutton	Sheriff, County of Washington
Kay McAloney	Director, H.R. (Appearance Subpoenaed)
Victoria Deford	Deputy Director, Human Resources
Roger Heinen	Correctional Officer-Sergeant

I. FACTS AND BACKGROUND

Overview: On or about January 1 2002, the Employer, Washington County, began filling after-hours "monitoring and security" posts located in the Washington County Government Center in Stillwater, Minnesota and, subsequently, in the Washington County Service Centers in Cottage Grove and Forest Lake, Minnesota. The personnel assigned to these posts greet and direct after-hours members of the public who are visiting these facilities and provide after-hours security services. This practice continues to be in effect.

The fighting issue in this case turns on the fact that since 2002, the Employer has made and continues to make these after-hour or overtime shifts available exclusively to uniformed personnel classified as Bailiffs, Correctional

Officer-Sergeants and Correctional Officers II (hereafter referred to as the CO job classifications).¹ Neither of these classifications is licensed by the Peace Officer Standards and Training Board (“POST”) to carry firearms. (Union Exhibits 2 and 7)

In contrast, uniformed County personnel in the Deputy Sheriff-Sergeant and Deputy Sheriff (hereafter referred to as “peace officers”) classifications have never been offered the after-hour monitoring and security shifts.² (Union Exhibits 1 and 2) Yet, peace officers – unlike Bailiffs and COs – receive firearms training and they are POST-authorized to carry firearms. In addition, they are knowledgeable and skilled in the methods and means of protecting people and property in the County of Washington, which, the Union argues, are essential ingredients in the provision of after-hour monitoring and security services in the County’s public facilities. The County disagrees, asserting that the after-hours work in question does not routinely involve “law enforcement” issues.

Accordingly, on June 6, 2008, the Union filed a Step 1 grievance. In that filing and/or subsequent thereto, the Union alleged that the above-described County practice violates Articles I (Purpose of Agreement), II, (Recognition) and XII (Compensation) of the CBA. (Union Exhibit 2) The Employer denied this grievance at Step 1 and Step 2. It did so again at Step 3 in a letter dated July 9, 2008. Therein, the County asserted that its after-hour assignments do not violate the CBA; that Bailiff and CO classified personnel possess the requisite training

¹ The Bailiff classification is in the AFSCME, Council No. 5 bargaining unit, and the CO classifications are in the IBT, Local No. 320 bargaining unit.

² The peace officer classifications are in the LELS, Local No. 214 bargaining unit.

and skills to provide a “professional security presence in County facilities;” that the services performed by the Bailiff and CO classified personnel is “satisfactory;” and that the challenged practice is a “long-standing past practice.” (Union Exhibit 2) Ultimately, the parties were unable to resolve the June 6, 2008 grievance and the matter was advanced to arbitration for a final and binding determination.³

Testimony Summaries: Nine witnesses testified at the hearing. The Union called the following witnesses to testify: Deputy Sheriff Michael Bonn, President, LELS, Local No. 214; Deputy Sheriff-Sergeant Larry Osterman; Commander Cheri Dexter; Correctional Officer-Sergeant Gary Randall; Deputy Sheriff-Sergeant Wayne Johnson; and Deputy Sheriff Matt O’Hara. Testifying at the County’s behest were Washington County Administrator James Schug, Washington County Sheriff William Hutton and Correctional Officer-Sergeant Roger Heinen. The testimonies of these witnesses are summarized below:

1. Deputy Bonn testified to the different types of training that peace officers, Bailiffs and COs receive, and that peace officers have long performed after-hour “security detail” work at both public and private events. He also testified that the differences in the uniforms these classifications wear are so nuanced that the public mistakenly believes that the after-hours posts are staffed by peace officers. Moreover, he testified that this matter was not discussed during 2007 – 2010 contract negotiations and that the Union’s first formal objection to the practice was the grievance it filed on June 6, 2008. He also pointed out that, if given the opportunity, the peace officers would have bid the overtime security shifts. Finally, Deputy Bonn testified that between January 1, 2004 and February 20, 2009, 1,681.5 overtime hours were logged at Washington County Government Center’s and at the Cottage Grove and Forest Lake Centers’

³ The Union argues that the practice of excluding licensed peace officers from bidding on the after-hour posts is a contract violation that has gone on for several years. Moreover, the Union argues, each time the County fails to offer the after-hours posts to peace officers their contractual rights are violated. That is, the instant grievance is “continuing” in nature. Under the continuing grievance doctrine, the Union acknowledges that any applicable remedy must be limited to occurrences after the date on which the grievance was filed or prospectively applicable. The Union is seeking a prospective remedy, namely, that, henceforth, after-hours monitoring and security shifts shall be offered to peace officers.

monitoring posts, costing the County at least \$57,919.85 in overtime pay. (Union Exhibit 10)

2. Sergeant Osterman, who is in charge of court security at the Washington County Government Center during regular business hours, testified that the County has never contacted him in regard to its after-hour monitoring and security function. Moreover, from 2000 – 2006, he was in charge of coordinating Sheriff-approved off-duty security events like parades, weddings, proms and so forth. The latter, he testified, are bid on a seniority basis by licensed peace officers. On the other hand, the monitoring and security posts in dispute are unavailable to peace officers and are bid on the basis of a separate seniority list made up of non-licensed personnel. (Union Exhibits 12 and 13) Further, he testified that the public does not distinguish peace officers and the non-licensed and unarmed personnel who work the after-hour posts because their uniforms are so similar. He fears is that the public may harbor a “false sense of security” and that anyone with an anti-peace officer predisposition could mistakenly assault a Bailiff or CO. In his words, the latter would be “sitting ducks.”

3. Commander Dexter and Sergeant Randall testified about the differences in training and responsibilities of licensed and non-licensed personnel. The former are exclusively firearm trained; have the power to and do make arrests and otherwise taking people into custody; and they are trained in the use of and carry a Taser, as well as an expandable “ASP” baton.⁴ (Union Exhibit 8). Bailiffs and COs are trained to handle “courtroom” and “jail environment” contingencies, respectively. Further, both Bailiffs and COs receive training specifically related to after-hours monitoring and security work, including training on the County’s security expectations, how to deal with the public, what to do in an emergency, and how to solve problems. (Union Exhibit 9)

4. Sergeant Johnson testified regarding an incident where a member of the public mistook an after-hours Bailiff or CO as a peace officer. Sergeant Johnson also testified that he responded to an “emergency call” on October 2, 2008, at which time the after-hours CO on duty was unable to handle an “agitated” male. (Union Exhibit 16) The matter was amicably resolved. In this vein, Deputy O’Hara testified about a November 25, 2008 incident, involving a hold-up alarm that had been triggered in one of the Washington County Government Center’s court rooms. The on-duty after-hours CO proceeded to check out the courtroom in question. Soon thereafter, he and Deputy O’Hara proceed to further secure the neighboring area. (Union Exhibit 16) It was a false alarm. Sergeant Osterman

⁴ Bailiffs and COs are trained in “Defensive Tactics” and Taser-trained. In addition, the former have the power to effect arrests when ordered to do so by a courtroom judge. However, said power does not exist outside of the courtroom. Generally, Bailiffs and COs are not issued individual Tasers and neither classification has access to Tasers when working the after-hours shifts. Further, neither classification is trained in the use of firearms and the baton nor are they issued same. (Union Exhibit 8) Except that COs who are assigned to work on the Sheriff Department’s Emergency Response Team do receive firearms training.

opined that for safety reason Bailiff and CO room checks should be performed in the company of an armed peace officer.

5. Sergeant Heinen testified that since 2002, he has had responsibility for the County's after-hours monitoring and security function. He testified that the Bailiff and COs receive 40 hours of training, including training on such subjects as defensive tactics, cultural and interpersonal relations, ethics, juvenile justice needs, Taser operations, CPR and First Aid, restraints, "verbal judo" and so forth. Moreover, when on after-hours duty, these personnel (1) provide a uniformed presence and a "low level" of security at County facilities, (2) require visitors to sign-in/sign-out and provide them with directions and information; (3) secure building entrances/exits following the commencement of after-hour meetings (e.g., 4-H or Child Care meetings) and insure that the buildings are vacated at the conclusion of after-hour meetings, locking the buildings, and (4) provide "well being" walks through the facilities. Moreover, he opined that it is not unsafe for the after-hours personnel to patrol the facilities; that there is far more risk working the jail; and that Bailiffs and COs do not complain that their after-hour posts are unsafe. Sergeant Heinen also testified that members of the public may be unable to distinguish between a uniformed Bailiff or CO and a uniformed peace officer. However, he further observed that the after-hours function is expected to provide "public friendly" security – a job best performed by unarmed personnel. Finally, Sheriff Heinen testified that the after-hours work has been virtually free of dangerous occurrences and that, in any event, the Bailiffs and COs are trained to deal with disruptions; they are equipped with chemical restraints; and they can "detain" agitators and radio for "back-up" support.

6. Mr. Schug testified that sometime in the late 1990s, he established a Building and Employee Safety Committee that variously addressed concerns over (1) key card access to County facilities; (2) employee safety; and (3) after hours security coverage of County facilities. Up to that point in time building security has been lax and the County risked vandalism, theft, even personal security. This Committee, Mr. Schug testified, considered using senior citizens and/or college students who would wear sweat shirts bearing the County's logo, or to retain a security service vendor to staff the monitoring and security posts. For a variety of reasons these options were dismissed by James Frank, Washington County Sheriff at the time. Ultimately, Mr. Schug testified, the parties to these deliberations decided to recommend the use the County's Bailiffs and COs to perform the requisite after-hours security functions. He observed that these personnel provided a reliable source of labor, wore uniforms, were properly trained and they readily understood the nature of "customer service" that the County wished to provide. He also observed that Bailiffs and COs were at the "high end" of the level of monitoring and security the new posts demanded. Thus, Mr. Schug continued, in January 2002, the Washington County Board of Supervisory approved and funded this recommendation.

7. Both Mr. Schug and Sheriff Hutton testified that the after hours services that the Bailiff and CO classifications had provided over the previous seven years were satisfactory. Moreover, the after-hour shifts in question had worked to the satisfaction of the two previous Sheriffs, namely, Sheriffs James Frank, and Steven Pott. In addition, Sheriff Hutton testified that the after-hours monitoring posts should not to be viewed as “off-duty” jobs. Rather, these are regular county-sanctioned jobs in contrast to the off-duty parades, weddings and proms that are worked by peace officers. Sheriff Hutton also testified that Deputies’ are tasked with “maintaining the safety and security of the citizens of Washington County;” whereas, non-licensed Bailiffs provide courtroom security and COs provide for a safe and secure jail environment. (Union Exhibit 7) Next, Sheriff Hutton acknowledges that over the years there have been incidences – all minor – that have required back-up peace officer assistance. (Union Exhibit 15) However, to date the after-hours non-licenses program has functioned satisfactorily and that, fundamentally, the after-hours work in question “is not police work” and had it not been for the 9 – 11 terrorist attack, the tasks in question could have been handled with “signage.” Although, he also testified, if a breach of facility security was serious enough he would consider assigning peace officers to work the monitoring posts.

II. RELEVANT CONTRACT PROVISIONS

ARTICLE 1 PURPOSE OF AGREEMENT

This Agreement is entered into as of January 14, 2007, between the County of Washington, hereinafter called the EMPLOYER, and the Law Enforcement Labor Services, Inc, Local #214, hereinafter called the UNION. It is the intent and purpose of the Agreement to:

- 1.1 Assure sound and mutually beneficial working and economic relationships between the parties hereto;
- 1.2 Establish procedures for the resolution of disputes concerning the Agreement’s interpretation and/or application; and
- 1.3 Place in written form the parties’ agreement upon terms and conditions of employment for the duration of this Agreement. The EMPLOYER and the Union through this Agreement shall continue their dedication to the highest quality police service and protection to the residents of Washington County. Both parties recognize this Agreement as a pledge of this dedication.

ARTICLE II RECOGNITION

2.1 The EMPLOYER recognizes the UNION as the exclusive representative, under Minn. Stat. 179A.03, Subd. 8, for all Sheriff's Office personnel in the following job classifications:

Deputy Sheriff – Sergeant
Deputy Sheriff

2.2 In the event the EMPLOYER and UNION are unable to agree as to the inclusion or exclusion of a new or modified job class, the issue shall be submitted to the Bureau of Mediation Services for determination.

ARTICLE V EMPLOYER AUTHORITY

5.1 The EMPLOYER retains the sole right to operate and manage all manpower, facilities and equipment in accordance with applicable laws, and regulations of appropriate authority.

5.2 Any term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the EMPLOYER to modify, establish, or eliminate, in accordance with applicable laws, and regulations of appropriate authorities.

ARTICLE VII EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE

7.1 Definition of a Grievance. A grievance is defined as a dispute or disagreement as to the interpretation or specification of the specific terms and conditions of this Agreement.

7.4 ... Step 4: A grievance unresolved ... shall be submitted to arbitration ...

ARTICLE IX SENIORITY

9.6 The Sheriff shall establish assignments and shift schedules and employees shall bid on shifts upon the basis of seniority through the use of a posting and bidding system; bidding shall be for positions within the assigned work area. Such shifts shall be established for a period of one (1) year and then reposted and re-bid by eligible employees. Nothing in these provisions shall restrict the EMPLOYER from assigning shifts as needed to provide minimum staffing levels.

ARTICLE XI COMPENSATION

12. 6 Compensation: Overtime will be distributed as equally as practicable; overtime refused by employees will be considered as if it had been worked for record purposes in computing equality of distribution....

(Union Exhibit 1)

III. STATEMENT OF THE ISSUE⁵

The Arbitrator framed the issues as follows:

1. Is the grievance substantively arbitrable?
2. If “yes,” is the Employer’s utilization of non-licensed Bailiffs and Correctional Officers to provide a uniformed, after-hour monitoring and security services at the Washington County Government Center and other County service centers a violation of Article II, Recognition, or Article XII, Compensation, of any other provision of the CBA?
3. If so, what is an appropriate remedy?

⁵ Article VII. EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE, section 7.5 provides in part:

The arbitrator shall have no right to amend, modify, ignore, add to, or subtract from the terms and conditions of this Agreement. Specifically, the arbitrator may not apply outside information to overrule the terms of the contract; may not ignore the language of the contract to pursue the intent of the parties and may not apply the common or accepted law of the shop to countermand or ignore the written terms of the Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the UNION, and shall have no authority to make a decision on any other issue not so submitted ... (Emphasis added; Union Exhibit 1)

The parties were unable to agree on the specific wording of the Statement of the Issue. Each side presented arguments in support of its proposed wording. Ultimately, the parties stipulated that the Arbitrator has the authority to set forth the final wording of the Statement of the Issue.

The emphasized language in section 7.5 directs the arbitrator to “consider and decide only the specific issue(s) submitted in writing” by the parties. At the hearing, only the County proffered a written submission. The Union offered its submission, but verbally. However, the only substantive difference between the parties’ submissions is that the Union alleged that the County violated Article I in addition to Articles II and XII, whereas, the County’s written submission only makes reference to Articles II and XII. Further, the County’s written submission does not make reference to the third question appearing in the Arbitrator-drafted Statement of the Issue.

The main issue in this case is whether the County’s practice of assigning after-hours shifts to uniformed, non-licensed employees somehow violates the CBA. Workplace justice dictates that the CBA should be broadly construed when addressing this issue. Too, as noted above, the Arbitrator added the third issue to make explicit the fact that if the main issue is answered in the affirmative, a remedy would be called for.

IV. Position of the Union

The Union urges that the instant grievance is substantively arbitrable. It contends that the grievance and arbitration provisions cover the instant dispute because it arose out of a disagreement over "...the interpretation or application of specific terms and conditions of this Agreement" – the CBA definition of a grievance. In addition, the Union points to established arbitral law, which holds that there is a "strong presumption of arbitrability" in case's like this. *AT & T Technologies v. Communication Workers*, 475 U.S. 643, 645 (1986) Further, it holds that "[D]oubts should be resolved in favor of coverage." *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-583 (1960)

Next, the Union argues that the disputed work belongs to the LELS, Local No. 214 bargaining unit, and that the County did not bargain for the right to assign it to non-licensed Bailiffs and COs. According to the position description of a Deputy Sheriff as set forth by the Sheriff, peace officers are "responsible for maintaining the security and safety of the citizens of Washington County." In contract, the Union points out, Bailiffs are responsible for "court security;" and COs are responsible for "security and operation of the Washington County Jail..." (Union Exhibit 7) *Neighborhood Housing Services of Duluth, Inc. and AFSCME, Local 3558*, BMS Case No. 05-PA-665 (Remington, Arb.) (bargaining unit work is defined by the employer's job description.) *City of Apple Valley, MN and LELS, Local No. 71* (2001) (Flagler, Arb.) (the common element in determining what constitutes bargaining unit work is such duties and tasks as have been historically performed routinely and primarily by members of a certified

bargaining unit.”) Clearly, the Union continues, the after-hours community events (e.g., parades, weddings and proms) that peace officers have a long and exclusive past practice of working are analogous to the monitoring and security work in question. (Union Exhibits 2, 9, 10 and 12)

Further, the Union contends, the County is obligated to negotiate prior to assigning LELS, Local No. 214’s work to personnel outside of the bargaining unit. The Union points out that the members of the bargaining unit perform security work, as their principal responsibility and the County cannot transfer this work to other bargaining units without having bargained for the right to do so. *Fiberboard Paper Products Corp. and NLRB*, 379 U.S. 203 (1964) (the transfer of bargaining unit work outside the unit is a mandatory subject of bargaining). The issue in dispute, the Union avers, has not been bargained to impasse and, therefore, the County is also violating the Public Employment Relations Act (“PELRA”).

Still further, the Union points to Article XII, section 12.6 of the CBA which provides that “[o]vertime will be distributed as equally as practicable.” The Union argues that the County should be compelled to conform to this clear and unambiguous language, because no evidence was presented to suggest that it is not “practicable” for the after-hours work to be performed by peace officers. Yet, 100 percent of the challenged worked is being performed by Bailiffs and COs in violation of contract language which states that overtime shall be distributed “as equally as practicable.”

Finally, for the above reasons, the Union requests that henceforth all after-hours security posts be assigned to licensed members of LELS, Local No. 214.

In the alternative, the Union implores that henceforth the licensed and non-licensed personnel in question equally share the after-hours monitoring and security work.

V. Position of the Employer

The County argues that its decision to assign the after-hours security work to non-licensed personnel is an inherent management right that is not limited by the CBA and, as such, the present issue is not substantively arbitrable. Specifically, the County observes that (1) the CBA does not define bargaining unit work; (2) job descriptions are not negotiated with the Union; and (3) the CBA does not require the County to assign the challenged work to licensed peace officers.

Next, the Employer points out that PELRA provides that public employers need not negotiate management rights:

A public employer is not required to meet and negotiate on matters of inherent managerial policy. Matters of inherent managerial policy include, ..., [the] selection of personnel, and direction and the number of personnel.

Minn. Stat. §179A.07, subd. 1. Further, the County calls attention to Article V, sections 5.1 and 5.2 in the CBA, which respectively state that the County reserves the right to manage “all manpower” and to establish or modify any term or condition of employment that is not “specifically established” in the CBA. (Union Exhibit 1) Moreover, the County points to Article IX, section 9 in the CBA, which expressly states that “[T]he Sheriff shall establish assignments and shift schedules ...” (Union Exhibit 1) Therefore, the County urges that it did and does

need to negotiate over the right to assign Bailiffs and COs to work the after-hours shifts.

Article I, section 1.3 states, in relevant part, that the parties will endeavor to provide the “highest quality *police service* and protection to the residents of Washington County.” (Union Exhibit 1) With reference to the italicized phrase in this quote, the County argues that the challenged after-hours work is not police work or services. Further, the County contends that Article II, section 2.1 merely identifies the Deputy Sheriff-Sergeant and Deputy Sheriff classifications as being in the LELS bargaining unit and nothing more. It does not reference job descriptions that, in the opinion of the County, are within the Sheriff’s authority to fashion. Still further, the Employer points out that: (1) while Article XII, section 12.2 addresses how overtime work is compensated, it does not identify who is entitled to perform the overtime work; and (2) while Article XII, section 12. 6 requires that the overtime work assigned to LELS, Local No. 214 members shall be “distributed as equally as practicable,” this section of the CBA has no applicability to the distribution of overtime assigned to Bailiffs and COs and it does not address the disputed after-hours work.

In addition, the Employer explains that the parade, prom and so forth off-duty overtime that peace officers have been assigned to work over the years results from “public” requests that the Sheriff provide armed security to these events. Because peace officers are licensed to carry firearms, it is they who have been given the overtime opportunity. In addition, the Employer continues, when

requests for an unarmed uniformed presence at kindred “public” or “private” events are received by the Sheriff, he fills these requests with Bailiffs and COs.

Finally, the County urges that the instant grievance be dismissed and that the Arbitrator not substitute his judgment for that of Sheriff Hutton and County Administrator Schug in the exercise of their inherent management rights.

VI. Discussion, Opinions and Conclusions

Initially, the Union argues that the instant matter is substantively arbitrable. The County disagrees. The Union’s argument is premised on the fact that the main issue in this case is controlled by contract language, whose interpretation or application is in dispute. Specifically, the Union contends that, by contract, the parties either agreed or clearly inferred: (1) that the bargaining unit, namely, LELS, Local No. 214, continue to provide Washington County “police service[s]” (Article 1, section 1.3); (2) that said police services are to be provided by the designated Deputy Sheriff-Sergeant and Deputy Sheriff classifications (Article II, section 2.1); (3) and that overtime policing opportunities shall be both compensated and equally distributed among unit members (Article XII).

After carefully considering the County’s opposing arguments, they are rejected. In the opinion of the Arbitrator, the above-referenced provisions of the CBA are open to multiple interpretations or applications, which leads, therefore, to the conclusion that the main issue in this case is a “grievance,” as this term is defined in Article VII, section 7.1, and that “grievance[s] unresolved” are the subject matter of arbitration, as provided in Article VII, section 7.4. Therefore, Issue 1 in this case, namely, “Is the grievance substantively arbitrable?” is

answered in the affirmative – a determination that conforms to the doctrine of “presumed arbitrability.”

Having determined the substantive arbitrability question, the next question to be addressed is: “Are the after-hour services that are being performed by Bailiffs and COs “police services,” as these words are used in the CBA?” Based on his review of the record evidence, the undersigned concludes that they are not.

Bailiffs and COs are not prepared to offer high-end security service; whereas, peace officers are. Union Exhibit 7) Further, unlike peace officers, Bailiffs and COs do not carried firearms, Tasers or batons and they do not have after-hours arrest powers. Indeed, it is undisputed that Bailiffs and COs are neither trained nor equipped to provide police services.

The after-hours duties and tasks performed by Bailiffs and COs largely involve monitoring and the residual aspects of their work (i.e., the provision of security services) are unlikely to involve threatening situations, requiring the use of deadly force. These conclusions derive from the after-hour program’s seven year history, which is void of any incidences that may be construed as having compromised public safety. Further, the undersigned was struck by the professional and credible testimonies of Sergeant Heinen and Sheriff Hutton who opined that the after-hour function in question is properly staffed by trained, uniformed and non-licensed employees, who have satisfactorily met the County’s expectations since 2002 and, in so many words, they opined that “security services” are not “police services.”

It may be helpful to think of the “services” that are in dispute in this case as lying at different points on a continuum of services. At the continuum’s high end are “police services” and at its low end are monitoring and “security services.” In establishing the challenged after-hour shifts, the County considered the fact that peace officers are trained to provide high end police services; whereas, non-licensed Bailiffs and COs are trained to provide security services that would be at the lower end on the continuum. Albeit, higher on the continuum than the services provided by private security vendors and still higher than the security services that retirees and college students could be trained to provide. In the exercise of its inherent managerial rights, the County reasonably concluded that the security services uniformed, non-licensed Bailiffs and COs would provide was the level of services it required and, thus, it acted on this conclusion.

Lying as it does near the opposite end of the service continuum the challenged after-hours work is not equivalent to “police services” and, therefore, does not constitute bargaining unit work. Indeed, as a matter of record, peace officers have never performed the after-hours posts’ duties and tasks. See: *City of Apple Valley, MN and LELS, Local No. 71* (2001) (Flagler, Arb.) Further, the latter are not analogous to the duties and tasks that peace officers perform when on off-duty assignments. Off-duty assignments are dependent on requests from community groups who want an armed presence at their functions (where the consumption of liquor is often involved) and who are willing to pay for it. In contrast, the after-hours monitoring and security work is a regular County function that does not require an armed presence and it is tax-payer supported.

Merely because the Employer negotiated Articles I, II and Article XII in the CBA does not prove that it surrendered its inherent managerial right to create the after-hours monitoring posts and to staff the latter with non-licensed personnel. The undersigned was unable to identify language in either the CBA or the position descriptions of the peace officer, Bailiff and CO classifications that supports a conclusion that either the “security services” in question amount to “police services” or that the after-hour assignments must be given to peace officers. Three consecutive Sheriffs have independently agreed on the level of security needed for the after-hours function and they have implicitly agreed that the training received by Bailiffs and COs, plus the specific training they receive in the provision of after-hours monitoring and security services, is appropriate for the shifts in question.

The CBA does not begin to make “clear and unmistakable” that the County relinquished its inherent managerial rights to create the monitoring posts and to staff said posts with personnel and skill that it deems appropriate. See: *Arrowhead Public Service Unit v. City of Duluth*, 336 N.W. 2d 68 (Minn. 1983) and *Minnesota Arrowhead District Council 96 v. St. Louis County*, 290 N. W. 2d. 608 (Minn. 1980) Therefore, in summation, the County’s provision of the after-hour monitoring and security function does not constitute “police services;” are not proscribed by the CBA; and, the Union’s arguments notwithstanding, the County was not obligated to negotiate either the creation of the challenged shifts or how they should be staffed.

VII. The Award

For the reasons discussed above, the main matter brought to arbitration in this case is substantively arbitrable. However, on the merits, the Employer did not violate the CBA when it established the after-hours monitoring and security function and when it staffed that function with Bailiff and CO personnel.

Issued and ordered on this 26th day of
May 2009 from Tucson, Arizona.

Mario F. Bognanno, Labor Arbitrator