

IN THE MATTER OF THE ARBITRATION BETWEEN;

**Law Enforcement Labor Services, Inc.,
Local 157**

-and-

**ARBITRATION OPINION
AND AWARD**

Scott County

BMS Case No. 13-PA-0226

Arbitrator

Richard A. Beens

Appearances

For the Union:

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Date of Award

May 23, 2013

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)¹ between Law Enforcement Labor Services, Inc., Local 157 (“Union”) and Scott County, Minnesota (“County” or “Employer”). Marcus Hoffer (“Grievant”) is a member of the Union and employed as a Deputy Sheriff by the County.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render an arbitration award. The hearing was held in Shakopee, Minnesota on April 23, 2013. The parties stipulated that the matter was properly before the arbitrator. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Final, written briefs were filed simultaneously on May 20, 2013. The record was then closed and the matter deemed submitted.

ISSUE

It was left to the arbitrator to formulate the issue, which is found to be:

Was Article XXII, Section 2 of the collective bargaining agreement violated when Grievant, Deputy Marcus Hoffer, was the senior most deputy for a portion of an unsupervised overnight shift on July 16, 2012, but was not granted deputy-in-charge pay? If so, what is the proper remedy?

FACTUAL BACKGROUND

Grievant is a Deputy Sheriff with the Operations Division of the Scott County Sheriff’s Department. For a good portion of his seven years with the department, he has worked as a patrolman on the “Dog Shift,” the period from 8:00 PM to 6:00 AM the following day. While Sergeant’s supervise road deputies most of the time, none are ever assigned from 2:00 AM to 6:00 AM during the “Dog Shift.” On occasion, Grievant has

¹ Joint Exhibit 1.

spent his entire shift without a supervising Sergeant on duty. During the period from January 2, 2012 to March 25, 2013, Grievant worked 739 hours as the senior-most deputy and without an assigned shift Sergeant on the Dog Shift.² During these hours, Grievant asserts he was required to perform certain duties that would otherwise fall to a shift Sergeant. For instance, dispatch will call him to arrange for the transport of juveniles or prisoners from other jurisdictions who have outstanding Scott County arrest warrants. He sometimes had to authorize overtime for less senior deputies. Grievant believes he is entitled to an extra \$1.25 per hour as deputy-in-charge during these hours and filed a grievance base on these facts on July 18, 2012.³

Grievant and the Union rely on two provisions, one in the CBA and the other in the Sheriff's Policy Manual. The former states:

ARTICLE XXII
WORK OUT OF CLASSIFICATION

.....

Section 2.

*A Deputy Sheriff assigned to work as deputy-in-charge shall receive \$1.25 per hour for all hours worked in such capacity.*⁴

The Scott County Sheriff's Office Policy Manual provision in effect at the time stated:

SHIFT SERGEANTS

444.2 DESIGNATION AS ACTING SHIFT SERGEANT

*When a Sergeant is unavailable for duty as Shift Sergeant, in most instances the senior qualified deputy shall be designated as acting Shift Sergeant. This policy does not preclude designating a less senior deputy as an acting Shift Sergeant when operational needs require or training permits.*⁵

² Union Exhibit 4.

³ Joint Exhibit 2.

⁴ Joint Exhibit 1, p. 19.

⁵ Union Exhibit 1. Although this section of the Sheriff's Policy Manual was in effect during the period covering Grievant's claim, it has since expired.

Article XXII, Section 2 has long been a subject of collective bargaining between the Union and Employer. In the CBA between the parties covering 2001 and 2002,⁶

Article XXII, Section 2 read:

A Deputy Sheriff assigned to work as deputy-in-charge shall receive the same differential as a Sergeant.

This provision remained unchanged through three subsequent CBA's covering the time period from January 1, 2003 through December 31, 2009.⁷ However, the Union had proposed changes to Article XXII, Section 2 in the negotiations preceding each of the three contracts. In a 2003, the Union proposed changing the Article to read:

*A Deputy Sheriff assigned to work as deputy-in-charge, or the senior deputy working, shall receive the same differential as a Sergeant, whenever no sergeant is working.*⁸

The County rejected the change. Nevertheless, the Union made two different language change proposals during negotiations leading to the 2005 CBA. In the first meeting between the parties on March 2, 2005, they suggested the follow language for Article XXII, Section 2:

*If no sergeant is working on a shift, the senior deputy working will be considered the "Deputy-in-charge" and shall receive the same differential as a Sergeant.*⁹

In a fifth negotiating session on April 21, 2005, yet another change was proposed by the Union:

A Deputy Sheriff assigned to work as deputy-in-charge shall receive a \$2.00 per hour differential. In the absence of a sergeant, if no deputy is assigned, the senior

⁶ Employer Exhibit 3.

⁷ Employer Exhibits 5, 8, and 10.

⁸ Employer Exhibit 4.

⁹ Employer Exhibit 6.

deputy will be considered the “Deputy-in-charge and shall receive a \$2.00 differential above his or her regular rate for all hours worked.”¹⁰

Both Union proposals were rejected by the County. Undaunted, the Union again proposed changes to the Article in bargaining sessions prior to both the 2008 and 2010 CBA’s. The proposal for the 2008 contract read:

If no sergeant is working on a shift, the senior deputy working will be considered the “Deputy-in-charge” and shall receive two dollars (\$2.00) per hour for all hours worked in such capacity.¹¹

The only change in the Union’s 2010 proposal was to raise the differential to \$2.25 per hour.¹² The County rejected both of the above Union proposals, but did consent to a slight change in the 2010 Article XXII, Section 2 due to a move from the a step-system compensation plan to one based on pay for performance policy.¹³ The provision, which has carried through to the current CBA reads:

A Deputy Sheriff assigned to work as deputy-in-charge shall received \$1.25 per hour for all hours worked in such capacity.

For the first time, the Union made no attempt to alter Article XXII, Section 2 in the negotiations leading to the current CBA covering the period from January 1, 2012 to December 31, 2013.¹⁴

The Scott County Sheriff Office Policy Manual has its own unique history. In 2008 the Minnesota Sheriffs Association determined it would be beneficial if all 87 county sheriffs had uniform policies. Experience taught that civil litigants would

¹⁰ Employer Exhibit 7.

¹¹ Employer Exhibit 9.

¹² Employer Exhibit 11.

¹³ Employer Exhibit 14.

¹⁴ Employer Exhibit 13 and Joint Exhibit 1.

otherwise play them one county against the other. For instance, existence of a particular policy in one county and its absence in another would be cited as a deficiency giving rise to potential liability in the second. In 2009 the Sheriffs Association partnered with Lexipol, a private risk management company, to develop a uniform policy manual. In 2011, Scott became one of the first two counties in Minnesota to adopt the Lexipol model. Section 444.2, cited by Grievant, was part of the new policy manual. Although it was in effect at the time of this grievance, it expired in February, 2013 and has not been re-adopted.

Despite the CBA presence of Article XXII, Section 2 in it's varied forms since 2001 and Policy provision 444.2, all agree that no deputy has ever been formally assigned or designated as a deputy-in-charge and no resulting differential has ever been paid. Further, all agree that Sergeants, while not physically on duty, are available by phone to answer questions or respond to concerns of road deputies during the unsupervised shifts. Pam Johnson, the County's Labor Relations Manager, testified that Article XXII, Sec. 2 only remains in the contract in the off chance some future elected sheriff wants to exercise that staffing option.

OPINION

The instant case involves a contract interpretation in which the arbitrator is called upon to determine the meaning of some portion of the collective bargaining agreement between the parties. The arbitrator may refer to sources other than the collective bargaining agreement for enlightenment as to the meaning of various provisions of the contract. The essential role of the arbitrator, however, is to interpret the language of the collective bargaining agreement with a view to determining what the parties intended

when they bargained for the disputed provisions of the agreement. Indeed, the validity of the award is dependent upon the arbitrator drawing the essence of the award from the plain language of the agreement. It is not for the arbitrator to fashion his or her own brand of workplace justice nor to add to or delete language from the agreement.

In undertaking this analysis, an arbitrator will first exam the language used by the parties. This objective approach "...holds that the "meaning" of the language is that meaning that would be attached to the integration by a reasonably intelligent person acquainted with all the operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration."¹⁵ If the language is clear and unambiguous, that is the end of the inquiry. A writing is ambiguous if, judged by its language alone and without resort to parol evidence, it is reasonably susceptible of more than one meaning.¹⁶ Parol evidence cannot be used to create an ambiguity.¹⁷ However, if the language is ambiguous, an arbitrator will assess comments made when the bargain was reached, assuming there is evidence on the subject. When direct evidence is not available, circumstantial evidence may be determinative. In either case, it is important to examine the context in which the language arose.

This grievance fails on a variety of levels. First, the Union points to provisions in the CBA's of two other Sheriff Department bargaining units, jail deputies¹⁸ and the Communications Division.¹⁹ Each contains a provision governing appointment of a shift lead or deputy-in-charge when usual supervisors are absent. Neither has any bearing on

¹⁵ Elkouri & Elkouri, *How Arbitration Works*, Seventh Edition, (2012), Chapter 9.1.B.i.

¹⁶ See *Metro Office Parks Co. v. Control Data Corp.*, 205 N.W.2d 121 (1973).

¹⁷ See *Instrumentation Servs., Inc. v. Ben. Res. Corp.*, 283 N.W.2d 902 (Minn. 1979).

¹⁸ Union Exhibit 6.

¹⁹ Employer Exhibit 2.

the issue in this case. Although they are also divisions of the Sheriff's office, they have separate union representation and separate collective bargaining agreements. Even if they were similar provision (and they are not) Article VII, Section 1 of the CBA applicable here specifically states:

A grievance shall be defined as a dispute or disagreement raised by an employee against the EMPLOYER involving the interpretation or application of the specific provisions of this AGREEMENT. (Emphasis added)

Further the arbitrator's power is limited later in Article VII:

"The decision shall be based solely upon the arbitrator's interpretation or application of the express terms of this AGREEMENT, and on the facts of the grievance presented..."²⁰

Even absent these provisions, I would find the Jail and Communication Divisions CBA's irrelevant and inapplicable. The arbitrator's role is here limited to interpreting the meaning of Article XXII, Sec. 2 in the agreement between Scott County and LELS Local 157.

Second, to the extent there is a conflict between Article XXII, Sec. 2 and Sheriff Policy Manual Sec. 444.2, the CBA takes precedence.²¹ CBA provisions are negotiated and mutually agreed to by the Employer and Union. Handbooks and manuals are not contractually binding without agreement of the parties.²² The CBA language clearly retains the management right to "assign" a "deputy-in-charge." On the other hand, Section 444.2 would make the "designation" of a deputy-in-charge mandatory. Absent some history of past practice, the collective bargaining agreement supersedes the Policy

²⁰ Joint Exhibit 1, Article VII, Section 3, Step 4. ARBITRATION.

²¹ National Academy of Arbitrators, *The Common Law of the Workplace*, Theodore J. Antoine, Editor Second Edition (2005), § 2.18.

²² Ibid.

Manual provision. Policy provisions like Section 444.2 are, as in this case, usually imposed and implemented unilaterally by management. The fact the County allowed 444.2 to expire is a recognition that it's language proved to be improvidently written and in conflict with the CBA and long-standing Sheriff Operations division staffing practices. Despite the apparent mandatory language in the Policy Manual, no officer was ever been designated as "deputy-in-charge." While unilaterally imposed policies can be implemented so as to become Union enforceable "past practices," those are not the facts of this case. Had the County actually implemented the mandatory language of 444.2 and occasionally designated a deputy-in-charge, we might have a different result. That action, repeated often enough, might have created a past practice that could override Article XXII, Sec. 2. However, they did not implement it and, in the final analysis, only Article XXII, Sec. 2 is relevant.

This grievance ultimately fails based on the plain, unambiguous language of Article XXII, Section 2 that requires a deputy to be "*assigned*" as deputy-in-charge. . This is an action verb. It requires a decision to assign by a higher authority. It does not imply an automatic, self-executing action. The Sheriff's Department has never "*assigned*" anyone as a deputy-in-charge under this CBA provision. The County has never abandoned their clear management right to direct work schedules.²³

Last, and perhaps even more compelling, the bargaining history outlined above overwhelmingly supports the County's position. It is axiomatic in labor law that a party

²³ Joint Exhibit 1, Article V, Section 1.

cannot obtain through arbitration something that it could not get at the bargaining table.²⁴

The Union has repeatedly proposed language which would automatically give the senior-most deputy a pay differential when no Sergeant was physically on duty. The County has steadfastly rejected each proposed change. The very fact the Union felt the need to make repeated proposals demonstrates a continuing awareness that Article XXII, Section 2 was not self-executing. It requires a management action which, in fact, has never occurred.

Accepting the Union position under these facts would undermine the collective bargaining process and unfairly subvert the clear language of the CBA. The bargaining history clearly shows both parties have long understood that someone from management has to affirmatively assign a deputy-in-charge. If the Union wishes to change this policy, it must do so at the bargaining table.

Based on the plain meaning of the words in Article XXII, Sec. 2 and the facts before me, I must deny the grievance.

AWARD

The grievance is DENIED.

Dated: _____

Richard A. Beens, Arbitrator

²⁴ Elkouri & Elkouri, *How Arbitration Works*, Seventh Edition (2012), Chap. 9.3.A.ii.a.