

IN THE MATTER OF AN ARBITRATION BETWEEN

**DEPUTY SHERIFF'S ASSOCIATION §
OF BEXAR COUNTY §
(ASSOCIATION)**

and

**William L. McKee
Arbitrator**

**THE SHERIFF OF BEXAR COUNTY §
& THE COUNTY OF BEXAR, TEXAS §
(RESPONDENTS)**

A hearing in this matter was held on April 22, 2010, and October 27, 2010. Upon receipt of post-hearing briefs the hearing closed.

REPRESENTATIVES

For the Association:

Robert P. Leonard
Staff Attorney
Combined Law Enforcement Associations of Texas
San Antonio, Texas

For the Respondents:

Alberto J. Peña
Denton, Navarro, Rocha & Bernal,
A Professional Corporation
San Antonio, Texas

I. ISSUES

The parties **did not stipulate** to the issues to be decided in this arbitration. I find that the issues are as follows:

1. Is the grievance, or are particular parts of the grievance, properly before the Arbitrator?
2. Does the Arbitrator have jurisdiction to decide all of the matters raised by the Association?

3. Does the Collective Bargaining Agreement between the parties give the Sheriff's Office the right to make reasonable changes in the length and **number of shifts** that bargaining unit employees work each week, so long as the total number of hours worked per week remains the same?
4. Does the Collective Bargaining Agreement between the parties give the Sheriff's Office the right to impose unilaterally an unpaid meal period during each bargaining unit employee's shift, where those employees were not required to log out for meals at the time the Collective Bargaining Agreement took effect?

II. AUTHORITIES

The relevant authority in this case is the Collective Bargaining Agreement between The Deputy Sheriff's Association of Bexar County and The Sheriff of Bexar County and The County of Bexar, Texas, effective August 17, 2006, through September 30, 2009, (the "CBA"). Provisions of the CBA most relevant to this dispute are as follows:

ARTICLE 3

MANAGEMENT RIGHTS

Section 1.

The Association recognizes the traditional and existing prerogatives of the County and the Sheriff to operate and maintain their respective functions as authorized by law, including but not limited to the following rights, subject to the terms of this Agreement. The Sheriff shall retain all rights and authority to which, by law, is his responsibility to enforce.

A. Direct and schedule the work of its employees, to include the scheduling of overtime work in a manner most advantageous to the County. The Sheriff shall have the right to reschedule employees for required Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) annual training, which shall not be subject to this Article. A forty (40) hour block of in-service training may be provided annually to each employee.

D. Maintain the efficiency of governmental operations.

F. Determine the methods, processes, means, and personnel by which operations are to be carried out.

ARTICLE 4

MAINTENANCE OF STANDARDS

Section 1.

Established practices, standards, and conditions of employment; oral or written, existing on the date of this Agreement, concerning mandatory subjects of bargaining shall not be changed during the term of the Agreement whether or not they are specified in the Agreement.

ARTICLE 13

CONTRACT DISPUTE RESOLUTION

Section 1. Scope.

Only matters or disputes concerning the proper interpretation and application of the provisions of this Agreement, or alleged violations of this Agreement, shall be resolved by the provisions in this Article. All other matters, including discipline and personal Grievances, which currently fall within existing appeal and grievance procedures shall continue to be subject and processed under those existing procedures. Any alleged violation(s) of Article 5, of this Agreement shall not be the subject of a Grievance unless there is an Agreement between the parties hereto and the Deputy to submit such issue(s) to the grievance procedure.

Section 2. Time Limits.

The parties shall adhere to the time limits as set forth in this Article. In the event that a Deputy or the Association fails to meet the time limits at Step 1 or Step 2 of the procedure, the grievance shall be considered satisfied and no further action shall be taken. Failure by a Deputy, the Association, the Sheriff or the County to meet the time limits at any other Step shall be considered an unsatisfactory response and shall automatically allow the Grievance to proceed to the next step. Any time restrictions in this Article may be waived or extended by written mutual agreement of the parties. If the last day of any time period herein falls on a Saturday, Sunday, or County holiday the time period will be extended to the next business day.

Section 3. Process.

A dispute as defined in Section 1 above shall be handled as follows:

Step 1.

Each Member who alleges that a dispute exists shall, within fourteen (14) calendar days of the date the Member knew or reasonably should have known of the existence of the dispute, submit a copy of the written grievance to the Association Grievance Committee. The Association Grievance Committee shall notify the Sheriff in writing of the grievance in order to establish the timeliness of the grievance. An Association Grievance Committee created for that purpose shall make a determination as to the validity of the grievance. The Association Grievance Committee shall meet and render its decision within fourteen (14) calendar days of receipt of the grievance. In the event that the Association Grievance Committee decides that a valid grievance exists, the Association (and Member, if applicable) shall proceed to Step 2. In the event that the Association Grievance Committee decides that no grievance exists, then there shall be no further action under this procedure.

The President of the Association, or his/her designee, may file a class action grievance with the Association on behalf of any Bargaining Unit Member(s) similarly situated or the bargaining unit within thirty (30) calendar days of the Association Presidents' actual or constructive knowledge of the occurrence or event causing the grievance. Members who are asserting claims for monetary relief for prior pay periods must opt in individually, in writing, within thirty (30) days of the initial filing of the grievance in order to receive any monetary award. The Association may seek and obtain prospective relief as to contract provisions or monetary claims without the joinder of individual members.

The grievance by an individual officer or by the President of the Association shall include: (1) a statement of the grievance and the known facts on which it is based; (2) any and all sections of the Agreement which have allegedly been violated; (3) if a past practice is alleged, a reasonably detailed description of the practice; (4) the remedy or adjustment, if any, sought and (5) the signature of the Deputy or Association President, as applicable.

Step 2.

If the Association Grievance Committee in Step 1 determines that a grievance exists, the Association (and. the Deputy, if applicable) shall submit the grievance in writing within fourteen (14) calendar days of the decision by the Association Grievance Committee to the Sheriff and to the Director of Planning

and Resource Management or his designee. The Sheriff or his/her designee shall provide a written response on operational issues within fourteen (14) calendar days after receipt of the grievance. The Planning and Resource Management or his designee shall provide a written response within fourteen (14) calendar days after receipt of the grievance in regards to any economic issues.

Step 3.

If the grievance has not been settled at Step 2, either the Association President, the Sheriff (or his/her designee) or the Director of Planning and Resource Management (or his/her designee) may request within thirty (30) calendar days after receipt of the decision of the Sheriff (or his/her designee) or the Director of Planning and Resource Management (or his/her designee) that the grievance be submitted to negotiation. Such request shall be submitted to the County Judge or his designee. If a request for negotiation is made the parties shall meet and confer concerning the grievance for a period- not to exceed thirty (30) calendar days from the date of the request in an effort to resolve the grievance.

If the parties cannot resolve the grievance within thirty (30) calendar days, then either party may certify in writing that no resolution has been made.

Step 4.

If the grievance has not been settled at Step 2, or no request has made by any party pursuant to Step 3 to submit the grievance to negotiation, then the Association shall have ten (10) calendar days from the date that the Sheriff and/or the Director of Planning and Resource Management, or his designee declined the grievance in Step 2 to give notice of its intention to submit the grievance to final, binding arbitration as hereinafter provided. If the grievance is submitted for resolution at Step 3, then the Association shall have ten (10) calendar days from the, date of certification that no resolution has been made to give notice of its intention to submit the grievance to final, binding arbitration is hereinafter provided.

ARTICLE 23

CIVIL SERVICE COMMISSION

Section 1.

In the event of any conflict between a provision of this Agreement and the Rules and Regulations of the Bexar County Sheriff's Civil Service Commission ("Civil Service Commission"), the provisions of this Agreement shall control.

ARTICLE 30

COLLECTIVE BARGAINING OBLIGATIONS

Section 2.

Except as otherwise provided in this Agreement, the County may not implement material changes in compensation, hours, or conditions of employment during the term of this Agreement without the Association's express written agreement, whether or not this Agreement is expressed or silent as to such matters. Subject to the provisions of Article 4 of this Agreement (maintenance of standards) nothing in this Article changes or impairs the authority of the County or the Sheriff as to matters that are not mandatory subjects of bargaining or not expressly covered in this Agreement.

III. BACKGROUND

The Deputy Sheriff's Association of Bexar County represents deputy sheriffs and other employees of the Bexar County Sheriff's Office. In 2005, the parties negotiated their first Collective Bargaining Agreement, which became effective August 17, 2006. That CBA was in effect when the events underlying this dispute occurred, although negotiations were underway during much of the grievance and arbitration process for the successor CBA.

At the time the CBA went into effect, the Sheriff's Office used various means to manage its workforce, two of which are relevant here. First, the Sheriff assigned bargaining unit members of the

Association, except for Detention officers (who have a workweek of 41.25 hours pursuant to Article 11), to work daily shifts of various lengths, all totaling a 40-hour work week. Some employees in some sections worked five 8-hour shifts with two days off, others worked four 10-hour shifts with three days off, while others worked three shifts of over 13 hours with four days off. According to the evidence presented, the Sheriff's Office often changed the shift assignments of sections before adoption of the CBA, and some were changed following adoption of the Agreement.

The second practice at issue is the Sheriff's Office's policy on meal breaks. Prior to 2004, the policy regarding meal breaks varied among different units, sections and departments of the Sheriff's Office. Employees in some of these were required to take unpaid meal breaks of 30 or 45 minutes, or even an hour, on each shift, while others were given paid meal periods. In November 2003 a federal District Judge ruled on a lawsuit brought by the Association, which complained that many employees who were required to take an unpaid meal break were actually asked to perform work duties during their breaks, or otherwise had their meal breaks cut short, without proper compensation. The court held that the meal break practice, as implemented, violated the employees' rights to be compensated for work.

In response to the court's order, in early 2004 the Sheriff's Office eliminated the policy of requiring bargaining unit members to take unpaid meal breaks entirely. The new 2004 policy essentially stated that employees were to take meals at their duty stations, time permitting. This policy was the status quo at the time the CBA went into effect.

Then, in a memorandum dated March 6, 2009, Amadeo Ortiz, Bexar County Sheriff, announced the following:

On the 14th of March, the duty hours of some of the employees of the Sheriff's Office will be adjusted. This is due to schedules of work that have evolved over time and which have seriously impacted the efficiency of the Sheriff's Office. The adjustment will insure that all employees will work a full forty hours each week; this is exclusive of the lunch period.

Subsequently, heads of several departments, sections, and units of the Sheriff's Office began notifying their employees that, going forward, their shifts would be 8 hours and 45 minutes, including a mandatory 45-minute unpaid meal break. Many employees were required to monitor their radios or otherwise be available to respond if needed during their meal breaks and were told they would receive compensatory time if their breaks were interrupted. By March 14, 2009, the Civil, Training and Mental Health sections of the Sheriff's Office had given such notifications to their employees.

On March 14, 2009, the Association filed a Class Action grievance, objecting to these changes in shift length. The Grievance states, in relevant part:

Article(s) Violated

Article 4	Maintenance Standards
Article 30, sec. 2	Collective Bargaining Obligations

Statement of Facts

Recently, the Deputy Sheriff's Association of Bexar County has received a memorandum from Sheriff Amadeo Ortiz changing the working hours and conditions of employment of certain bargaining unit employee's. [sic] This memorandum does not state which sections or units of the Sheriff's Office will be affected but the Association has learned that the Civil, Training and Mental Health sections have been included so far.

Prior to the Collective Bargaining Agreement being signed, the established practice for work hours of bargaining unit members in the sections listed above were either four day work weeks with three days off or three day work weeks with four days off. There was no specified lunch

period during their shifts. The memorandum from Sheriff Ortiz implies that the affected officers will have to work additional time to allow for a lunch period.

Article 4 of the Collective Bargaining Agreement states: “Established practices, standards, and conditions of employment, oral or written, existing on the date of this Agreement, concerning mandatory subjects of bargaining shall not be changed during the term of the Agreement whether or not they are specified in the Agreement.”

The current practice of having the three day on and four day off workweeks or the four day on and three day off workweeks and the established practice of not having additional time added to a shift for an officer to have a meal break during their shift has been in place prior to the signing of the Collective Bargaining Agreement. Changing this changes the conditions of employment and is therefore a mandatory subject of bargaining. Further, changing the work hours is a clear violation of Article 4 of the Collective Bargaining Agreement as these were established hours of operation and conditions of employment that were in effect prior to the signing of the Collective Bargaining Agreement.

.....

Article 30 is very clear that changes in duty hours or conditions of employment require the express written agreement of the Deputy Sheriff’s Association of Bexar County. The [Association] does not agree with the proposed changes and believes that the changes proposed create a clear and gross violation of this Article.

The Grievance then demands several remedies, including the return to the three days on/four days off or four days on/three days off shift schedule, the elimination of the meal break requirement, collective bargaining over any future proposed changes in working hours of bargaining unit members, and monetary reimbursement for all officers whose duty times were extended under the new policies. It is signed by Perry L. Hyden, then President of the Association.

On March 18, 2009, the Association’s Grievance Committee met to review the Grievance and determine if a valid grievance existed. On March 20, 2009, Hyden sent by facsimile to the Sheriff’s

Office and the Director of Planning and Resources written notification that the Grievance Committee had determined that a grievance existed. Attached to his one-page notification was a copy of the Grievance itself. Apparently there was a problem with the fax transmission and the first page of the transmission – the Notice of Committee Action itself – did not go through. Neither party immediately noted this discrepancy.

On or about March 27, 2009, attorneys for the Sheriff's Office informed attorneys for the Association about the problem with the fax transmittal. The Association re-sent the Notice of Committee Action to the Sheriff's Office on March 27, 2009.

The Sheriff's Office issued its Response to the Grievance on April 13, 2009, and denied the Grievance on several bases. On April 20, 2009, the Association gave written notice that it was not satisfied with the Sheriff's Response and wished to move directly to Step 4 of the grievance procedure as set forth in Article 13--"binding arbitration". The Sheriff's Office and the Director of Planning and Resource Management responded on April 22, 2009, requesting that the parties pursue the procedures set forth in Step 3 – "meet and confer" – before moving on to arbitration.

The parties began the "meet and confer" process and agreed several times to extend that process beyond the 30-days set forth in Step 3. Subsequently, the parties agreed to hold the Grievance in abatement while they negotiated a new CBA. On October 19, 2009, the Association notified the Sheriff's Office in writing that it was withdrawing its consent to hold the matter in abatement and that it wished to move the matter to arbitration.

At the hearing the Association argued that unilateral changes in the shift structure and paid lunch periods violated Articles 4 and 30 of the CBA. First, it claimed that the shift structure as it existed at the time the CBA went into effect was an established practice and/or condition of

employment that could not be changed during the term of the Agreement pursuant to Article 4. Second, it argued that the changes implemented as of or after March 14, 2009, were unilateral, “material changes in compensation, hours, or conditions of employment” that are mandatory subjects of collective bargaining under Article 30.

The Association also urged that all bargaining unit employees who are required to work an additional 45 minutes under the new meal break policy should be compensated for that time in the form of overtime pay. The Association introduced evidence to show that some employees are required to monitor their radios and be available to return to work during their meal breaks and, thus, are not entirely free to do as they please on their uncompensated time. It claims such requirements are violations of the Fair Labor Standards Act as well as the CBA.

The Respondents challenge this Grievance first on procedural/jurisdictional grounds. They argue that the Association failed to comply with CBA Article 13 in terms of the timing of submitting, determining the existence of, and providing notice of the grievance. Further, they assert that the substance of the Grievance was defective under the requirements of Article 13. They also claim that the Association’s demand for monetary relief **must fail because the Association and its members did not comply with the CBA’s “opt in” requirements.** Finally, the Respondents make two objections to the proposed scope of the Grievance: (1) **the Grievance should not be expanded** to apply to any departments, sections, or units of the Sheriff’s Office not originally named in the Grievance (Civil, Training and Mental Health); and (2) the Grievance should not be expanded to include statutory claims, which Respondents assert are not covered by the grievance procedures set forth in the CBA.

Regarding the merits of the Grievance, Respondents assert that ordering changes in shift frequency and length (including the unpaid meal break) falls under the reserved rights set forth in CBA Article 3 (Management Rights), which permits the Sheriff's Office to "direct and schedule the work of its employees" and to "[d]etermine the methods, processes, means and personnel by which operations are to be carried out." Respondents deny that the existing shift structure and meal break policy were "established" or "past practices" that could not be unilaterally altered pursuant to CBA Article 4. Accordingly, they deny that any bargaining unit employees are entitled to compensation for time they were required to take for unpaid meal breaks.

IV. FINDINGS

A. Procedural/Jurisdictional Matters

The Respondents' objection to the Grievance under CBA Article 13 is multi-pronged. First, they argue that the Association failed to submit, determine, and give notice of the Grievance in a timely manner as required under Step 1.

Because this is a Class Action grievance, the President of the Association had 30 days after becoming (actually or constructively) aware of the facts underlying the dispute to submit a grievance to the Grievance Committee. There was some testimony presented at the hearing to show that the Association had heard "rumors" and rumblings about the Sheriff's intention to change the shift structure in certain units before March 6, 2009. Indeed, the Association confronted the Sheriff with its objections to any such changes and even initiated grievances. The Sheriff initially agreed to maintain the status quo but issued the March 6 memorandum in the face of the Association's challenge.

Other than the reference to an unpaid meal break of unspecified duration, the March 6 memorandum was not explicit as to how duty hours and the shift structure would be changed. It was not until March 14, 2009, when section heads began notifying their employees of different duty hours and shift days, that the Association was aware of the changes the Sheriff intended to make. Regardless of whether the “trigger date” was March 6 or March 14, 2009, the President of the Association had 30 days to submit a Class Action grievance to its Grievance Committee. Therefore, the March 14 grievance submission was timely.

The Association Grievance Committee then had fourteen (14) days to meet and determine whether a grievance existed, which it did on March 18, 2009. Although the problem with the fax transmission prevented the actual Notice of Determination from reaching the Respondents until March 27, that was still within 14 days of the Grievance Committee's earliest receipt of a grievance that originated on March 14, as provided in Step 1. Therefore, the Grievance was timely processed by the Association, and timely notice was provided to Respondents.

Next, Respondents claim that the Grievance did not sufficiently set forth the items required in Article 13: (1) a statement of the grievance and the known facts on which it is based; (2) any and all sections of the CBA which have allegedly been violated; (3) a reasonably detailed description of any past practices alleged; (4) the remedy or adjustment sought; and (5) the signature of the Association President.

In fact, Article 13 does not provide detailed stylistic requirements for the contents of the written notification of the Grievance Committee's determination. It states that "The Association Grievance Committee shall notify the Sheriff in writing of the Grievance ..." but does not require the

Grievance Committee Chairman to sign the notification. Indeed, nothing in the CBA restricts the Grievance Committee from transmitting its decision by way of the Association President.

I also find that the Association complied with the basic requirements set out in the CBA for the contents of the Grievance. It identified the underlying facts:

Recently, the Deputy Sheriff's Association of Bexar County has received a **memorandum from Sheriff Amadeo Ortiz changing the working hours and conditions of employment of certain bargaining unit employee's.** [sic] This memorandum does not state which sections or units of the Sheriff's Office will be affected but the Association has learned that the Civil, Training and Mental Health sections have been included so far. (Emphasis added)

The Grievance identified the sections of the CBA that were allegedly violated--Articles 4 and

30. In addition, the Grievance identified past practices as follows:

Prior to the Collective Bargaining Agreement being signed, the established practice for work hours of bargaining unit members in the sections listed above were either **four day work weeks with three days off or three day work weeks with four days off.** There was **no specified lunch period during their shifts.** The memorandum from Sheriff Ortiz implies that the affected officers will have to work additional time to allow for a lunch period.

The current practice of having the three day on and four day off workweeks or the four day on and three day off workweeks and the established practice of not having additional time added to a shift for an officer to have a meal break during their shift has been in place prior to the signing of the Collective Bargaining Agreement. Changing this changes the conditions of employment and is therefore a mandatory subject of bargaining. Further, changing the work hours is a clear violation of Article 4 of the Collective Bargaining Agreement as these were established hours of operation and conditions of employment that were in effect prior to the signing of the Collective Bargaining Agreement. (Emphasis added)

The Grievance specified the remedies sought: (1) a return to the previous three days on/four days off or four days on/three days off shift structure; (2) elimination of the unpaid meal break

requirement; (3) collective bargaining over any future proposals to change working hours of bargaining unit employees; and (4) reimbursement, in the form of overtime pay, for any bargaining unit employee who was “required to work additional time.” Finally, then-President of the Association Perry L. Hyden cited the Grievance Committee's determination and signed the document. **These contents satisfy the requirements of Article 13.**

Next, Respondents raise issues regarding the scope of the Grievance, first asserting that the Grievance **should not be expanded to cover bargaining unit employees in any department, unit, or section other than those expressly named in the Grievance – Civil, Training and Mental Health.** On its face, the Grievance states that those three sections are the only ones known on March 14 and that the Sheriff’s memorandum did not identify which units would be affected. Although the Grievance does not explicitly state that it is intended to apply to all bargaining unit employees affected by the changes identified in the Sheriff’s memorandum, it is reasonable to infer from the document that the Grievance is intended to cover all bargaining unit employees whose three days on/four days off or four days on/three days off shifts are changed, and/or employees who are required to take an unpaid meal break.

If the Respondents’ argument were to prevail, **it would allow the Sheriff to create confusion** and vast inefficiency by implementing controversial changes in a piecemeal fashion, forcing the Association to monitor and file separate grievances on a rolling basis. It would also undermine the need for consistent outcomes to common questions if such separate grievances were determined by different decision-makers. Therefore, it is appropriate to deem the Grievance sufficient to cover all bargaining unit employees whose three days on/four days off or four days on/three days off shifts

changed, and/or those who were required to take an unpaid meal break as a result of the changes implemented on or after March 14, 2009.

Respondents also object to the scope of the Grievance insofar as the Association seeks to obtain monetary damages. On this point I find in part for the Respondents and in part for the Association. CBA Article 13, Section 3, Step 1 expressly requires that, for a Class Action grievance, “[m]embers who are asserting claims for monetary relief for prior pay periods must opt in individually, in writing, within thirty (30) days of the initial filing of the grievance in order to receive any monetary award.” The Association presented no evidence to show that individual bargaining unit employees opted-in within the contractually required period for prior relief. In law and labor arbitration the defining point for prior (past) and prospective (future) relief (damages) is commonly recognized as the date of adjudication. For this reason, no prior monetary relief will be granted to individual bargaining unit members for any.

The CBA provides that “[t]he Association may seek and obtain prospective relief as to contract provisions or monetary claims without the joinder of individual members.” Accordingly, prospective relief is granted, beginning on the date of this award shown on page 22.

Finally, Respondents object on jurisdictional grounds to the Association’s raising “statutory” claims under the Fair Labor Standards Act or other authorities, claiming that the CBA does not provide for such claims to proceed to arbitration through Article 13’s grievance procedure. The Association’s position in this proceeding did not seek to pursue statutory claims. Instead, the Association invoked the FLSA and other authorities only as context in

support of its contractual claims. In any event, **no findings as to statutory claims** are made in this Award.

B. Resolution of the Merits of the Dispute

Based on the foregoing findings, it is left to determine whether the Sheriff's Office violated CBA Article 4 and/or Article 30 when it unilaterally changed the shift structure of bargaining unit employees from the four days on/three days off or three days on/four days off workweek to a straight eight-hour, five-day workweek, and whether the Sheriff's Office violated CBA Article 4 and/or Article 30 when it unilaterally implemented a policy requiring that bargaining unit employees take an unpaid 45-minute meal break during each shift. Each change will be examined separately under both Article 4 and Article 30.

1. Length and Frequency of Shifts

The Association's position with respect to the length and frequency of shifts is that the four days on/three days off or three days on/four days off shift structure is an "established" standard, or "past practice" because it was the shift structure in place as of the date the first CBA went into effect. **When considering whether a past practice has been established, arbitrators generally consider whether the practice is clear and consistent, repeated for a long period of time, accepted by both sides, and mutually acknowledged by the parties. Mittenthal, Richard, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1017 (1961).**

Here, the evidence showed that, prior to the implementation of the CBA, the Sheriff often changed the shift structure in terms of days on/days off for bargaining unit employees. The Association's own witnesses testified that they had their days on and/or days off adjusted several

times during their employment, and some shifts changed following implementation of the CBA. The fact that a unit's shift schedule was the status quo as of the date of the first CBA does not make it an established "past practice." As discussed immediately below, a change in shift length or frequency is not a mandatory subject of bargaining under this CBA. Thus, the Association failed to prove a violation of Article 4 with respect to the shift length and frequency.

The Association also contends that the CBA in Article 30 prevents the Sheriff's Office from unilaterally changing the length and frequency of work shifts, because Article 30 obligates the Sheriff to obtain the Association's consent before making any "material changes in compensation, hours, or conditions of employment." Association witnesses testified that they believe the term "hours" is intended to mean starting and ending times of shifts, length of shifts, and frequency of shifts, not just total hours each bargaining unit employee works. Respondents contend that Article 3 of the CBA reserves to the Sheriff's the right to unilaterally make changes such as the one at issue here, because it permits the Sheriff to "[d]irect and schedule the work of [] employees" and to "[d]etermine the methods, processes, means and personnel by which operations are to be carried out."

Thus, the determination of this issue turns on whether the adjustment of the length and frequency of shifts in a given workweek is a material change in "hours" or "conditions of employment," or whether it is a "method, process, means" by which the Sheriff has unilateral authority to "direct and schedule the work of employees." In other words, is this a matter of work hours or work scheduling, or both?

Neither party provided any helpful authority for making the above distinction, and the research I did into the subject did not yield any results that could clarify the matter. In order

to give effect to all of the terms of the CBA, which I am required to do if possible, I must assume that the parties intended for Article 3 to reserve the right to the Sheriff's Office with respect to "scheduling" the work of its employees. The Association's proposed interpretation of the terms "hours" and "conditions of employment" in Article 30 – that those terms encompass the length and frequency of shifts – would relegate the Sheriff's right to "schedule employees" relatively meaningless. Therefore, the Association's proposed interpretation is untenable. I find that Article 3 of the CBA gives the Sheriff's Office the right to adjust the frequency and length of the shifts of bargaining unit employees.

2. Unpaid Meal Breaks

I next turn to whether the Sheriff's unilateral imposition of an unpaid meal break violated either Article 4 or Article 30 of the CBA. In determining whether the policy of not requiring employees to clock out for meals was an established practice, I again consider whether that practice was "clear and consistent, repeated for a long period of time, accepted by both sides, and mutually acknowledged by the parties."

The meal break policy had long been irregular amongst various sections and units of the Sheriff's Office. Bargaining unit employees in certain sections were provided a paid lunch break, while others were not required to clock out but, rather, permitted or required to eat meals at their duty stations, and other employees were required to take meal breaks of 30 minutes or an hour on each shift. It was only after the 2003 District Court ruling (holding that the Sheriff's Office had improperly implemented its meal break policy) that the Sheriff's Office decided to eliminate the meal break policy altogether, and, instead, instructed all bargaining unit employees to eat, on the

clock, at their duty stations. That new policy took effect in March 2004, approximately two and one-half years before the CBA went into effect.

A policy in place for almost two and one-half years, implemented in response to a court ruling that threatened to cause administrative headaches for the Sheriff's Office as it attempted to determine whether and how to compensate employees for the ten-minutes here, three-minutes there interruptions to their meal breaks, does not constitute a policy that was "repeated for a long period of time" or "accepted by both sides." Instead, it appears to have been a stop-gap measure that became the status quo up to the time the CBA went into effect. Therefore, the Sheriff's change to the meal break policy did not violate Article 4 of the CBA.

The question of whether the meal break policy was a "material change to the hours, compensation or conditions of employment" contemplated under Article 30 is another matter. In this regard, I am more inclined to believe that not being required to log out for a lengthy meal break is considered a benefit by most employees, and, thus, it becomes involved in the parties' understanding of "hours, compensation or conditions of employment." I also believe that 45 minutes is "material" for the shift periods under consideration.

Under the terms of Article 30, which requires that the Sheriff's Office obtain the Association's agreement before making any "material changes," a policy affecting "hours, compensation or conditions of employment" does not have to be an established past practice but, rather, is relative to the status quo as of the date the CBA went into effect. As such, the Sheriff's Office violated Article 30 of the CBA when it unilaterally imposed the change to an unpaid lunch break without obtaining the Association's express written consent.

V. AWARD

For the foregoing reasons, I find as follows:

1. The grievance is properly at arbitration, and I have jurisdiction to decide the issues before me.
2. The Grievance is denied with regard to the change in shift scheduling from three days on/four days off or four days on/three days off to five eight-hour shifts.
3. The Grievance is granted with regard to the imposition of a required unpaid meal break. Those meal break periods in place on March 14, 2009, and subject to the Association's grievance will be reinstated immediately.
4. The Association's request for monetary reimbursement to bargaining unit members affected by the imposition of an unpaid meal break is granted for the prospective period beginning the date of this award, as shown below.



January 25, 2011

William L. McKee, Ph.D.
Arbitrator