**Before**

**Harvey A. Nathan**

**Arbitrator**

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| In the Matter of the Arbitration<br><br>between<br><br>EFFINGHAM COUNTY SHERIFF<br>(Effingham, IL)<br>Employer,<br><br>and<br><br>AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 3311<br>Union. | Hazardous Weather Shutdown<br><br>AAA No. 51 390 00448 11<br>AFSCME No. 2011-04-37078 |

Hearing Held: November 16, 2011

Briefs Filed: January 23, 2012

For the Employer: Hesse Marton, P.C.
by: Andrew Martone,
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For the Union: AFSCME Council 31
by: Helen L. Thornton,
Legal Counsel

A R B I T R A T I O N A W A R D

## I. The Issues

The issues in this case may be stated as follows:

1. Were the grievances in this case timely filed?

2. Did the Employer violate the Collective Bargaining Agreement ("CBA") when it refused to pay employees for days when the facilities were closed due to hazardous weather?

If so, what is the appropriate remedy?

## II. Applicable Contract Provisions

The applicable provisions of the Agreement are as follows:

ARTICLE 5 MANAGEMENT RIGHTS

Section 5.1 - Rights Residing in the Sheriff

It is recognized that the Sheriff retains the right and responsibility to direct its affairs in all its various aspects. Among the rights retained by the Sheriff is the right to plan, direct and control all operations and services of the Sheriff; *** to make and enforce reasonable rules and regulations; *** to determine the number of hours of work and shifts per workweek; to establish and change and change work schedules and assignments; *** except to the extent such actions of the Sheriff have been limited or changed by the expressed provisions of this Agreement.

Section 5.4 - Current Personnel Policy

The parties recognize and accept the Sheriff's current Personnel Policies and any reasonable modification, addition and/or deletion thereto, provided that said changes do not alter wages, hours, benefits or other terms and conditions of employment set forth in the agreement.

ARTICLE 7 HOURS OF WORK AND OVERTIME

Section 7.4 - Change in Work Schedule

Work schedules may be changed from time to time by the Sheriff to meet

varying conditions, provided however, that indiscriminate or unnecessary changes shall not be made in such schedules and provided further the changes deemed necessary shall be made known to the employee involved not less than five (5) calendar days prior to such change, except in emergency situations. ***

ARTICLE 8 HOLIDAYS

Section 8.1 - Entitlement

Employees not scheduled to work on the following enumerated holidays shall receive their regular salary for such days:

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| New Year's Day | Labor Day |
| Martin Luther King, Jr. Birthday | Columbus Day |
| Presidents' Day | Thanksgiving Day (Thursday) |
| Good Friday | Day after Thanksgiving (Friday) |
| Memorial Day | Christmas Eve |
| Independence Day | Christmas Day |
| | Veterans' Day |

And any additional days proclaimed by the County as holidays or non-work days except when the County Board agrees to change holidays for other bargaining units instead of increasing the total number of holidays offered to employees.

ARTICLE 15 GRIEVANCE PROCEDURE

Section 15.2 - Procedure

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No grievance shall be processed unless it is submitted within five (5) working days after the employee or the Union became aware of the occurrence of the event giving rise to the grievance.

Section 15.3 - Time Limits

If a grievance is not presented within the time limits set forth above, it shall be considered waived. ***

ARTICLE 21 GENERAL PROVISIONS

Section 21.1 - Personnel Policy in Effect

All provisions of the Effingham County Personnel Policy adopted by Resolution of the County Board approved June 29, 1984, as amended to the date hereof, shall, except as modified by the specific terms of this Agreement, remain in full force and effect for bargaining unit employees for the term of this Agreement.

PERSONNEL POLICIES

Employees who are unable to get to work because of extreme weather conditions are excused without pay or they uses a vacation day.

## III. The Facts

Effingham County is located in south central Illinois. Its 2010 population was about 34,000. The county seat is the City of Effingham. Although generally considered a rural county Interstates 57 and 70 and U.S. Routes 40 and 45 more or less intersect near the City. This case involves the Sheriff of Effingham County and a bargaining unit of non-sworn employees in the classifications of Correctional Officer, Bailiff, Process Server, Officer Deputy, Records Clerk and Telecommunicators. The unit is represented by Local 3311 of the American Federation of State, County and Municipal Employees.

Carolyn Willenburg is the Chairman of the Effingham County Board. She testified that on the morning of February 1, 2011, Effingham was hit by a severe snow storm. Willenburg called the County Sheriff to learn what was going on. He told her that the Judge of the Circuit Court had closed the courts.

She and the Sheriff then agreed that closing the rest of the county buildings was absolutely necessary for reasons of safety. Thereafter employees were told not to report to work. Those who had already arrived were sent home. The county buildings remained closed on February 2nd and 3rd. The parties stipulated that the closure was proper and not illegal.

Willenburg sent an email to all department heads at 8:30 a.m. on Monday, February 7th, as follows:

> Department Heads
>
> Please pass this information on to your employees.
>
> Thanks to all employees who were on duty during this inclement weather. Your efforts are greatly appreciated. Since the County Building and Government Center were closed Feb 1,2, and 3, hourly employees who did not work can take these days as vacation, personal time, comp time or sick leave. Sick leave can be used only for these days, Feb 1, 2 and 3.
>
> Hopefully spring will arrive soon.
> Carolyn

John Loy, Chief Deputy Sheriff, testified that he received Willenburg's email on February 7th and distributed it to the different offices where AFSCME unit employees work. He also posted one on the squad room bulletin board next to the AFSCME and FOP bulletin board.[1]

Jeremy Kyle is the current president of Local 3311. He is employed as a Correctional Officer. Kyle testified that he did not see Willenburg's memo on February 7th, that thereafter he was off from work, and it was not until

[1] The Fraternal Order of Police represent a bargaining unit of sworn personnel working under the Sheriff

February10th, when he spoke with a Union committeeman, Jeremy Davis, that he learned about the posting.[2] He then sought advice from his AFSCME representative and filed the grievance on February 15th.

Kyle testified that the language of Section 8.1 of the CBA was changed in 1986 in response to a situation where courthouse employees were given a paid day off and while the Circuit Clerk's employees, who also were told to take the day off, were not paid. He also testified that he filed the grievance because there was a shutdown due to weather in 2008 and a grievance was filed. There was a settlement of that grievance and the employees were paid.

The grievance Kyle filed was as follows:

> Pursuant to the grievance procedure, on behalf of AFSCME Local 3311, I am grieving Effingham County's failure to pay employees for County declared non-working Hazardous Weather days. On Thursday February 10th, 2011, employees received notice in the form of an email memorandum that the County of Effingham (Sheriff) was informing employees that were not allowed to work due to the Effingham County Building and Government Center being closed February 1st, 2nd, and 3rd, that they could take earned time off instead of not being compensated. This violates Article 8 of the Collective Bargaining Agreement, other relevant contract articles, past practice of the County and other terms and conditions of employment.
>
> Our requested remedy is for the changes to be rescinded and our members to be made whole for all of their losses.

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[2] As a Correctional Officer Kyle works 12 hour shifts from 6:00 p.m. to 6:00 a.m. He testified that the notice was posted on a bulletin board but he did not see it because he does not go regularly past that board. Subsequently, he testified that he might have missed seeing the posting because he does go by the board each day. However, he also testified that at the time he did not know that that bulletin board was for official notices. He testified that did not actually see the memo until February 11th.

Later that day, Deputy Chief Loy rejected the grievance as untimely because it was not submitted within the five day period specified in the CBA. After receiving the rejection of the grievance Kyle consulted with Jeremy Davis. Upon learning that Davis was not at work on the 7th or 8th, Kyle wrote up the grievance a second time, for Davis to file. His thinking was that Davis could file the grievance because the five day limitation would start on February 9th for him.[3] Deputy Chief Loy denied the grievance anyway.

Sally Kyle a long time bargaining unit employee testified that she was the local union president for several years. While she was not part of the bargaining team that negotiated the language in Article 8 was negotiated, she understood the language to mean that if employees in another bargaining unit received an additional holiday that paid day off would be offered to the Local 3311 employees as well. No other employees were paid for being off during February 1st, 2nd, or 3rd.

## IV. Analysis and Conclusions

A. Timeliness

The Union argues that the grievance was timely because the CBA allows for five days from when the Union "became aware" of the contract violation. The Union argues that the CBA allows individual employees or the Union to file

[3] Davis testified he filed the second grievance within the five day period and did so in his capacity as a Union officer.

a grievance within five days of becoming aware of the violation. In this case, both Kyle and Davis did not become aware of the offending memo until they saw or heard about it after February10th. The posting on the 7th is irrelevant, the Union contends, unless the Sheriff can show that an authorized Union representative was "aware" of the memo. Inasmuch as the Sheriff is only considering the posting date he did not focus on who the authorized representatives were and whether any of them saw the posting on February 7th.[4]

The Union also argues that the grievance is timely in any event because the failure to pay employees for the three days in question is a "continuing violation" (citing Elkouri and Elkouri, How Arbitration Works, 5th ed., 1995).

The Sheriff argues that the grievance is untimely because it was filed more than five days after the Union received actual notice of the event giving rise to the grievance. The Sheriff reasons that by posting the memorandum on a bulletin board and distributing it at the locations where bargaining unit employees worked, it went to "Union employees" and thus the Union had notice of the decision regarding payment during the snow days. It contends that the Union's witnesses did not dispute these facts.

The Sheriff argues, however, that the Union's proposition that notice can only be personal notice is not supported by the contract language and yields an

[4] In this regard Loy testified that he merely left copies of the memo in various places and did not hand them to specific people.

absurd result. Thus, the Sheriff points out, if personal notice were required an employee might be away from work for an extended period of time and yet be able to grieve upon his return. As an example for this case, if Kyle worked nights and notice was given during a day shift without his personal knowledge, Kyle could arguably have an open-ended time to grieve that notice Rather, the Sheriff stresses, that posting a notice generally among bargaining unit employees is sufficient for the Union to be charged with actual notice. In any event, the Sheriff suggests, Kyle's failure to look at the bulletin board cannot be a basis for the Union to argue that it did not have notice. Finally, if Kyle had notice, albeit indirectly, Davis had no right to revive the period in which to grieve.

The language at issue here is as follows:

> No grievance shall be processed unless it is submitted within five (5) working days after the employee or the Union became aware of the occurrence of the event giving rise to the grievance.

This is troublesome wording when placed against the facts of the case. First, the parties used the word "aware" as the test for notice. Is this personal awareness, awareness generally by the group, or merely awareness by any bargaining unit member? Is "awareness" a personal experience so that an experience by one person creating awareness might not have the same effect on another person. Is the other person now "aware" based on the understanding of the first? This is not just the issue of whether someone is not

"aware" because his habit is not to look at the bulletin board, but also the situation where two employees experience an action by the employer but one of them becomes aware that the action is grievable and the other has no notion that the action might be grieved. Is the notice as understood by the first employee binding on the second employee? What if this hypothetical action only affects the second employee but the first employee, although becoming aware of the detriment to the second employee, does not make the second employee "aware" of it?

A second problem with the language is the specification of who gets the notice, that is "the employee or the Union." Because of the use of the word "or" it is unknown whether awareness by the Union of an act affecting only a single employee is ascribed as awareness by the employee. Or the reverse: Is awareness of the "occurrence" by a single bargaining unit member "awareness" by the Union? Does the use of the word "or" in the context of who gets notice mean that each employee is interchangeable with the Union in terms of "awareness" of a right to grieve?

Based on the record in this case the following findings are made:

1. Awareness of an occurrence that might lead to a grievance must be shown by objective evidence demonstrating, or strongly implying, receipt, that is, actual notice by the employee. The employer must show that the employee had notice or that a situation was created where there is a strong assumption

that the employee got notice of the occurrence. Leaving a note on a bulletin board not physically located in the immediate area of an employee's work station is not satisfactory. Delivering information to an employee at a last known address or oral notice by telephone to a spouse or parent would be sufficient. There is an assumption that mail is received and that members of a family would share information coming from an employer. If the employer wants to give notice to all employees at work it must have the notice delivered to each employee, orally or in writing, as well as have it posted at numerous locations at the premises In this case, the posting that occurred was not sufficient to bind Kyle.[5]

2. "Awareness" by one employee is not interchangeable with awareness by the Union unless the parties have a demonstrable practice of conveying information to the Union in that fashion. In this case neither party showed how such information has been conveyed to the Union in the past. Unless the Union has an office or the parties otherwise have agreed to a method of notification, notice to employees generally is not notice to the Union. The Sheriff did not show that communication with a particular employee has been the accepted practice by the parties as notice to the Union, let alone that that notice was posted on a bulletin board.

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[5] Of course, had the Sheriff proven that important notices have always (or nearly always) been posted on that bulletin board and the Union or the individual concerned has shown awareness of that practice, the conclusion here might be different.

3. Awareness by the Union of an occurrence affecting, or that may affect, one or more employees is not notice to those employees because individual employees and the Union have separate interests and separate rights to grieve. It is not until Step 2 of the Grievance Procedure that the Union has the exclusive right to proceed with a grievance processed at Step 1.

The grievance in this present case is timely. The Union as an entity did not receive proper notice until at least February 9th, as demonstrated by the actions of Kyle and Davis.[6]

B. The Merits

The Union argues that the Sheriff violated the CBA when he failed to pay employees for the additional days off caused by the February, 2011 snowstorm. It argues that the contract language is clear and unambiguous. It provides that additional non-work days proclaimed by the County Board are days that should be treated as holidays and that employees will be paid their regular salaries. Any bargaining history implying otherwise is trumped by the language itself. The language used by the parties is the document and the negotiations leading up to that language. (The Union relies on Denver Center for the Performing Arts, 118 LA 1615 (Goldstein, 2003.)

In this case, the Union points out, there was no discussion with the Union.

[6] The Union's argument that this is a "continuing grievance" is without merit. The loss of three days' pay was a finite situation, not a continuing one.

The Sheriff acting on his own, with the counsel of the County Board president, declared that all employees could not come to work for three days. This included employees already at work, who lost the rest of their pay for the day once they were told to go home. The Union argues that this forced layoff was tantamount to declaring three days of holiday. The Union argues that this was not a "change of schedule." This was an off-the-cuff reaction to bad weather that deprived employees of their salaries. These are not hourly employees who work day to day. These are permanent employees who have a right to rely on the Union's collective bargaining agreement and the weekly salaries therein provided.

However, should the arbitrator find the contract language ambiguous, the Union contends, there is past practice demonstrating that as recently as 2008 employees were paid when the County was closed due to weather. Additionally, the testimony by its witnesses, the Union argues, was that the purpose of the language in question was to guarantee that employees would receive fair compensation for days that they were willing and able to work, but where the County precluded the option to work.

The Sheriff argues that Union witnesses admitted that the language at issue does not mean what the Union is now arguing. The language was agreed to because the County was granting paid holidays to employees represented by the FOP and the Union wanted equal treatment. Thus the parties negotiated a

provision stating that except when days off are changed to match an alteration made for other bargaining units, the AFSCME employees will not be sent home without pay. The Union's argument conveniently leaves out the reference to other employees. But, in fact, the Sheriff argues, the reason for this language was to protect this bargaining unit from losing paid days off given to other employees. In this case no other employees were paid for the days off in question.

Relying on the Elkouri text, supra. (6th ed. 2003), the Sheriff argues that bargaining history is crucial in understanding what was the intent of the parties when they drafted their labor agreement. The "me too" protection given to the Union with this language comes only from the parties' agreement that this Union will not be treated differently when it comes to days off with pay.

Additionally, the Sheriff points out that there is no minimum pay guarantee in the CBA. Employees get paid their contract rate for work performed. The scheduling of work, however, is an inherent management right. If the Sheriff determines that employees' services are not needed because of emergency weather conditions, that decision is not subject to review through the grievance procedure, and the refusal to pay employees for the lost time is only reviewable if other similarly situated employees are paid. That did not occur in this case.

Finally, the Sheriff cites numerous published decisions where arbitrators

have found that controlling the work schedule is an exclusive management right. The arbitrator has reviewed those decisions and agrees with them.

While, again, the language at issue is not the model of clarity, there can be no question that the Sheriff (or County) can close its operations in an emergency. As argued by the Sheriff in his well-crafted brief, there is no guaranteed work week. Article 7 provides that "work schedules may be changed from time to time by the Sheriff to meet varying conditions," except that they cannot be made indiscriminately and except in an emergency must be made with five days notice. There was no question that there was an emergency here. The Union does not argue otherwise. It argues that no matter what the circumstances the employees must be paid for days previously scheduled as work days.

In addition to the clear language of Article 7, the County has a policy that employees unable to come to work because of extreme weather conditions will be excused and may use a vacation day as payment for the day. The Union does not challenge this policy. Pursuant to Section 5.4 of the CBA it has accepted the Sheriff''s right to shut down operations and allow the employees to draw upon vacation pay to offset the loss of salaries. In this case the Sheriff has expanded the right to draw upon earned benefits by allowing employees to use accrued personal time, comp time, and sick time.

There is little or no support for the Union's position in the record. We are advised that in 1968, pursuant to a grievance, employees were paid for a day when they were sent home. However, there are no facts in the record regarding this situation. It may

or may not have been very dissimilar to the facts in this current situation. Or there may have been other factors that were part of the bargain. In this case it has no standing as precedent.

**A W A R D**

1. The grievances in this case were timely.

2. The Employer did not violate the Collective Bargaining Agreement when it refused to pay employees for days when the facilities were closed due to hazardous weather.

Respectfully submitted,

HARVEY A. NATHAN

February 20, 2012