

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

COUNTY OF LAKE and LAKE COUNTY SHERIFF'S  
DEPARTMENT

and

TEAMSTERS LOCAL 700

Case No. S-MA-13-248  
Lake County Corrections  
Lieutenants' Interest Arbitration

Appearances:

Clark, Baird, Smith, LLP, by Mr. R. Theodore Clark, Jr., on behalf of the Employer.  
Mr. Cass T. Casper, Teamsters Local 700, on behalf of the Union.

ARBITRATION AWARD

The above-entitled parties, herein "Employer" and "Union," engaged in negotiations over an initial collective bargaining agreement running from December 1, 2013 – November 30, 2015. They reached agreement on all but four economic issues relating to the initial placement on the longevity scale, rank differential, the percentage between step increases and retroactivity on economic issues, along with two language issues relating to shift preference and drug and alcohol testing.

Pursuant to Section 14 of the Illinois Public Labor Relations Act, herein "Act," the parties selected Amedeo Greco to serve as the arbitrator and they waived the three-member arbitration panel. A hearing was held on July 10, 2014, in Waukegan, Illinois, at which time it was transcribed. The parties subsequently filed briefs and other submissions which were received by September 13, 2014.

## BACKGROUND

The Union represents for collective bargaining purposes a collective bargaining unit consisting of five Corrections Lieutenants, herein "Lieutenants," employed in the Correctional Division of the Employer's Lake County Jail, herein "Jail." The bargaining unit was certified by the Illinois Labor Relations Board on February 14, 2013.

The Lieutenants oversee the day-to-day operations of the Jail and supervise about 15-18 Corrections Sergeants and about 190 Corrections Officers, and they report to two Deputy Chiefs and the Chief of Corrections.

The Employer recognizes five other uniformed bargaining units consisting of Law Enforcement Deputies,<sup>1</sup> Law Enforcement Sergeants, and Law Enforcement Lieutenants in the Patrol Division, and Corrections Officers and Corrections Sergeants in the Correctional Division. The Union represents all but the Deputies who are separately represented by the Illinois Council of Police.

The parties have agreed that all previously agreed-to tentative agreements, (Joint Exhibit 4), are to be incorporated in this Award. Those agreements include a 2.85% average wage increase effective December 8, 2013, which the Lieutenants have received.

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<sup>1</sup> The Deputies are negotiating their first contract with their current union.

## POSITIONS OF THE PARTIES<sup>2</sup>

The Employer maintains that its four wage offers result in an average hourly wage lift of about 9.25% and should be adopted because they are supported by the CPI and the Employment Cost Index, (ECI), for state and local government employees which are at about 2.9% and 1.3% and thus are lower than the estimated 15% cost of the Union's total wage package. The Employer states that the County's finances and the interest and welfare of the public support its Final Offers and that the Union's "catch-up" argument is unsupported. It also asserts that its Rank Differential Final Offer should be adopted because it is the same as the rank differential between Law Enforcement Sergeants and Law Enforcement Lieutenants, and that its 1.5% difference between steps should be adopted because it is the same as the 1.5% difference between the Lieutenants and Corrections Sergeants. The Employer also argues that granting the Union's Final Offers on the rank differential and 2% step increase would create "whipsawing" by other bargaining units wanting similar increases.

The Employer adds that its Final Offer regarding initial placement on the longevity scale should be awarded because it recognizes seniority and provides for step advancement on the date of promotion, and that its Final Offer on retroactivity for economic issues should be adopted

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<sup>2</sup> The parties agreed at the hearing that I should retain jurisdiction over the Union's Shift Preference Final Offer pending a determination on the Employer's July 9, 2014, Petition for a Declaratory Ruling before the General Counsel of the Illinois Labor Relations Board asking that the language be declared a permissive subject of bargaining. The Board ruled on August 19, 2014, that the language was a permissive subject of bargaining and it therefore is no longer in issue, Case No. S-DR-15-001.

because all Lieutenants have been receiving a 2.85% salary increase since December 2013. The Employer also contends that its Final Offer relating to random drug and alcohol testing should be adopted because it maintains the status quo.

The Union contends that the Statutory Factors regarding overall compensation and ability to pay favor its four wage offers because Lieutenants will still lag the Law Enforcement Lieutenants even if all of the Union's offers are selected, and because the Employer has failed to meet its burden of proving inability to pay. The Union argues that its Final Offer regarding Rank Differential should be awarded because it is supported by internal comparability and bargaining history, and that its 2% step increase should be adopted because that is what the Law Enforcement Sergeants and Law Enforcement Lieutenants receive and because the latter received it in their first contract.

The Union adds that its Final Offer regarding initial placement of the Lieutenants on the longevity scale is supported by the "fairness" and "reasonableness" of its proposal, and that its Final Offer on retroactivity for economic issues is supported by comparability with what other Sheriff Department Officers have received in their last contracts. It also states that its Final Offer regarding Drug and Alcohol Testing should be selected because it is "overwhelmingly supported by comparability."

#### DISCUSSION

The statutory criteria in Section 14 (h) of the Act provides:

(h) Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:

- (1) The lawful authority of the employer.
- (2) Stipulations of the parties.
- (3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
- (4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
  - (A) In public employment in comparable communities.
  - (B) In private employment in comparable communities.
- (5) The average consumer prices for goods and services, commonly known as the cost of living.
- (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.
- (7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceeding.
- (8) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

Here there are no issues relating to the Factors relating to the lawful authority of the Employer; the stipulation of the parties; or the comparison of the wages, hours and conditions of these employees with employees in private employment in comparable communities.

The only external comparable involving public employment in comparable communities is Will County which the Employer relies upon in support of its Final Offer on random alcohol and drug testing.

The internal comparables consist of the Corrections Sergeants, the Corrections Officers, the Law Enforcement Lieutenants, the Law Enforcement Sergeants, and the Law Enforcement Deputies.

As for Factor 7 relating to changes arising during the pendency of this proceeding, the Employer by letter dated August 28, 2014, submitted the new three-year contract for the Corrections Sergeants and revised CPI-U data.

That revised data shows that the CPI-U nationally rose by 2.0% and locally by 1.9% for the 12-month period ending July 2014. The Employer also points to other data from the Federal Reserve Bank of Philadelphia showing that the projected cost of living for 2014 and 2015 will be about 1.9% and 2.1%, respectively.

The Employer maintains that Factor 5 relating to the cost of living supports its four wage offers because the Employer's total wage package results in an hourly wage lift of about 9.25% which is closer to the above CPI figures than the Union's total wage package which amounts to about 15%.

The Union argues that the cost of its package is nevertheless justified by the need to "catch up to the overall base hourly wages of the Road Side Lieutenants."

Union Exhibit 17 shows the following hourly wage disparity between the Lieutenants and the Law Enforcement Lieutenants:

Comparative Current Hourly Wages

<b>Road Side Lieutenants 12/2013</b>		<b>Corrections Side Lieutenants 12/2013</b>	
Promotion:	\$50.85	Lt. Kalfas	\$46.33 (compare to Step 2)
Step 1:	\$51.87	Lt. Fay	\$46.32 (compare to Step 4)
Step 2:	\$52.91	Lt. Alter	\$46.33 (compare to Step 5)
Step 3:	\$53.96	Lt. Kinville	\$46.33 (compare to Step 1)
Step 4:	\$55.04	Lt. Mercado	\$46.37 (compare to Step 5)
Step 5:	\$56.14		

Difference between hourly rates:

Step 1:	10.75
Step 2:	12.3%
Step 3:	?
Step 4:	15.9%
Step 5:	17.5%

This substantial disparity might justify wage increases well in excess of the CPI if these two lieutenant groups are similarly situated and thus are entitled to similar wages for doing similar work. The fact that they both have lieutenant job titles, however, does not necessarily mean they do the same work.

To the contrary, the Corrections Lieutenants work in the Jail where they primarily take care of inmates in a relatively secure environment, whereas the Law Enforcement Lieutenants work on the road in an insecure environment performing different tasks. That is why the training and certifications for the two groups are different; why their job skills and job duties are different; why their working conditions are different; and why their wages historically have been different.

That explains why top step Deputies receive about an 18.74% higher hourly rate than the top step Corrections Officers, and why top step Law Enforcement Sergeants receive about a 10.42% higher hourly rate than the top step Corrections Sergeants.

The Employer therefore correctly points out that the parties “through negotiations have recognized that the unionized classifications on the law enforcement side are paid significantly more than the corresponding unionized classifications on the corrections side.”

Accordingly, and because there is no evidence showing that Corrections Lieutenants earn the same as Law Enforcement Lieutenants in external comparable communities, I find that the Union’s catch-up argument is without merit and that Factor 5 relating to the cost of living supports the Employer’s wage offers.

The Union argues that Factors 3 and 6 relating to the Employer’s ability to pay and overall compensation favor adoption of its wage proposals because the Employer “failed to meet its burden of proving inability to pay” and because Lieutenants “will still be behind the Road Lieutenants if all the Union’s proposals are selected.” It adds that the County’s 2013 fiscal budget showed an increase of over 30.7 million dollars in overall asset growth from prior years,<sup>3</sup> and that the County in that year saved about 11.7 million dollars in salary savings and benefit savings due to vacancies.<sup>4</sup>

The Employer acknowledges it is not making a “pure inability to pay” argument. It, instead, points out that the County has faced very difficult fiscal problems coming out of the recent financial and economic crises which have caused it to take numerous cost-cutting measures which have included reducing overall employee head count by 269 full-time

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<sup>3</sup> Union Exhibit 18.

<sup>4</sup> Union Exhibit 19, p. 8.

employees; privatizing the County's nursing home; implementing early retirement plans to incentivize early retirements; reducing the number of County-owned vehicles which can be taken home; and reducing departmental budgets.

The record shows that while the Employer has finite dollars at its disposal, it is legitimately concerned over not overpaying when there is no need to do so. But the record also shows that the Employer has the ability to pay for the Union's four wage proposals and that the ability to pay Factor supports the Union's Final Offers regarding wages.

Turning to Factor 6 relating to overall compensation, the Union points out that Lieutenants with similar lengths of service earn between 12.3% - 17.5% less than Law Enforcement Lieutenants, and that they still would be behind at all five steps by between \$0.82 - \$5.05 an hour even if the Union's Final offers are implemented.<sup>5</sup>

As related above, however, the Lieutenants cannot be compared to the Law Enforcement Lieutenants for wage purposes given their different training; different certifications; different job skills; and different job duties. The overall compensation of the two different groups therefore is not a controlling factor.

Factor 3 relating to the interests and welfare of the public does not favor either party, as the relatively small amount of money in dispute here will not materially affect the Employer's finances if the Union can establish that its wage offers are justified.

It is within the above context that the parties' following Final Offers are considered.

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<sup>5</sup> Union Exhibit 1.

1. INITIAL PLACE ON THE LONGEVITY SCALE

The Employer's Final Offer provides:

**Initial Placement on Longevity Scale**

Correctional Lieutenants Kalfas and Kinville will (sic) placed on Step 1 of the longevity scale and Correctional Lieutenants Fay, Alter and Mercado will be placed on Step 2. Each fiscal year thereafter they will move to the next cell until they top out after five years of service as a correctional lieutenant.

The Employer's Longevity Scale is based upon all of its four wage proposals being adopted and provides: <sup>6</sup>

Date	Top Corr. Sergeant*	Promotion	Step 1	Step 2	Step 3	Step 4	Step 5
12/1/13	45.09	47.34	48.05	48.77	49.50	50.24	50.99
12/1/14	46.38	48.70	49.43	50.17	50.92	51.68	52.46

The Union's Final Offer provides:

**Placement Of Lieutenants In Steps.**

All lieutenants in the bargaining unit shall as of December 1, 2013 be placed in Step 1 of the longevity scale. All Lieutenants shall advance to the next step each June 1 of each subsequent year. Employees who join the unit after issuance of the Award shall receive their yearly step increases on the anniversary of their promotion to unit.

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<sup>6</sup> The Employer's August 28, 2014, submission states that these figures must be revised upwards to reflect the Corrections Sergeants' 2.85% across-the-board salary increases in their recently negotiated contract, and that the new promotional hourly rate for the Lieutenants should be "\$48.74 as of 12/1/14 (i.e. based on the Joint Employer's final offer of a 5% rank differential upon promotion), and that the new top step correctional lieutenant salary as of 12/1/14 should be \$52.50 (based on the Joint Employer's final offer of a 1.5% difference between steps on the longevity scale)."

The Employer contends that its language is more reasonable because “there is a logical dividing line between the more senior Correctional Lieutenants and less senior Correctional Lieutenants,” and that it would be better to pay subsequent movement on the longevity scale based upon their promotional dates rather than June 1 of the fiscal year.

The Union states that its Final Offer calling for placement on Step 1 as of December 1, 2013, and advancement to Step 2 on June 1 of each subsequent year is based on “fairness and common sense” because it would “be absurd to place them at the promotional rate” since everyone in the unit has served as a Lieutenant for at least two years and because the Union is not now seeking to place them in a higher step.

The record shows that Lieutenants Mercado, Alter and Fay have been Lieutenants since or before 2009, and that Lieutenants Kalfas and Kinville have been Lieutenants since 2011 and 2012, respectively.

Treating them the same as the Union proposes thus means that they all will be initially placed at Step 1 even though Lieutenant Mercado was hired in 2004 and Lieutenant Kinville was hired in 2012, an eight-year difference.<sup>7</sup>

The Employer’s Final Offer is more reasonable because it recognizes this eight-year disparity by placing more senior Lieutenants at Step 2 whereas less senior Lieutenants are placed at Step 1, thereby recognizing seniority, one of the cornerstones of a labor contract.

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<sup>7</sup> Union Exhibit 17.

2. STEP INCREASES

The Employer's Final Offer provides:

**Percentage Between Longevity Scale Salary Cells**

The remaining cells of the longevity scale will be one and one-half (1½) percent apart, topping out with five years of service as a correctional lieutenant. The parties realize that the Longevity Scale agreed upon in this Article will annually generate additional benefits to the employees covered by this Agreement and additional costs to the County as the employees covered by this Agreement move from one step to the next in the Longevity Scale. These step increases are intended as an annual benefit to those employees in each year of this Agreement.

The Union's Final Offer provides:

**Increase In Longevity Steps.**

The longevity scale shall have five (5) yearly steps after promotion, with a two (2) percent increase between each step.

The Employer contends that its Final Offer for a 1.5% step increase should be adopted because the Lieutenants' salaries "are based on the salaries of the Correctional Sergeants" and because "the percentage between steps "should likewise be based on the percentage between steps on the longevity scale" just as they have been since 2007. It also states that "it makes absolutely no sense" to do otherwise and that adoption of the Union's proposal would "widen the salary differential" between the Lieutenants and Correctional Sergeants which is unwarranted.

The Union states that "Comparability overwhelmingly supports" its requested two (2) percent increase between each step because the Law Enforcement Sergeants and Law Enforcement Lieutenants receive such a 2% increase, and because the latter have received it since their first contract unlike the Corrections Sergeants who receive a 1.5% step increase. The Union argues that the Corrections Sergeants are "an anomaly" because Corrections Officers

receive average step increases of up to 3-6% and that adopting its Final Offer would give the Lieutenants parity with or at step increases percentages “lower than every bargaining unit in the Sheriff’s Office with the exception of the Corrections Sergeants.”

The Union’s proposal is supported by internal comparability and thus weighs in the Union’s favor.

On the other hand, the Employer’s proposal is supported by the Corrections Sergeants’ bargaining history dating back to about 2007 which shows that they have received 1.5% step increases.

In addition, adopting the Union’s 2% proposal would result in an ever-growing salary differential between the Corrections Lieutenants who would receive 2% step increases and the Corrections Sergeants who would receive 1.5% step increases. The only way to prevent that ever-growing differential would be to also grant the Corrections Sergeants 2% step increases, thereby creating the whipsawing the Employer is legitimately concerned about.

Furthermore, since the salaries of the Corrections Lieutenants are pegged to what the Sergeants earn, there is no sound basis for establishing different step increases.

Based upon these latter considerations, I find that the Employer’s Final Offer is more reasonable.

### 3. RANK DIFFERENTIAL

The Employer’s Final Offer provides:

#### **Rank Differential**

The Longevity Scale will begin with a wage that is five (5) percent higher than the top correctional sergeant’s hourly wage as shown on the correctional sergeant’s wage scale. Beginning on December 1, 2014, newly promoted

correctional lieutenants will be placed in the entry wage cell. They will move to the next cell after one (1) year as a correctional lieutenant and will top out after five years of service as a correctional lieutenant.

The Union's Final Offer provides:

**Rank Differential.**

The longevity scale shall begin with a base wage that is eight and one-half (8.5) percent higher than the top sergeant's base wage.

The Employer asserts that its 5% rank differential should be awarded because "it is the same as the 5% rank differential between the law enforcement sergeants and law enforcement lieutenants," and because there is no merit to the Union's rationale for an 8.5% rank differential. The Employer also cites a prior interest award issued by Arbitrator Robert W. McAllister who ruled there is "no persuasive explanation why the rank differential of 5% between sergeants and lieutenants should be changed."<sup>8</sup>

The Union states that its proposal for a 8.5% differential is supported by comparability and bargaining history, and that it needs to achieve "parity with the road-side of the Sheriff's office" by having their "differential calculated using the same formula." It points out that the rank differential between the Law Enforcement Sergeants and a top-rated Deputy has been 10.25%, and that the rank differential between a starting Corrections Sergeant and top-rated Corrections Deputy is nearly 30%. Asserting that Lieutenants are entitled to ask for a 15% differential, the Union states that its 8.5% differential makes its Final Offer more reasonable.

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<sup>8</sup> County of Lake, Lake County Sheriff's Department and Teamsters Local 700, S-MA-11-011 (2012), p. 9-10.

This issue centers upon what rank differential the Lieutenants should receive for overseeing their subordinates, which is a different issue than what rank differential Sergeants should receive for overseeing their subordinates.

Arbitrator McAllister addressed this difference in ruling that the Law Enforcement Lieutenants were entitled to a 5% rank differential rather than the 8½% rank differential they were seeking. In doing so, he quoted the testimony of Human Resources Director Rodney Martin who explained the rationale for the different rank differentials by stating:

It was set up that way because when you go from deputy to sergeant there is an increased in supervisory responsibilities. So the level of responsibility is higher. In addition to that, there is less overtime that is available for the newly promoted sergeant.

From sergeant to lieutenant, basically that person is still a supervisor. So they continue to get the – they get a 5 percent increase versus a 10 percent because they have been in a supervisory position.

From the lieutenant to the deputy chief is 10 percent because at that point in time that deputy chief loses overtime. That is an exempt position from FLSA. That position is not eligible for overtime as well as the level of management has increased.<sup>9</sup>

The Union in this proceeding has not rebutted this rationale for treating the Lieutenants differently from the Sergeants. Based upon this rationale, I find that the Sergeants' higher rank differential is not a valid comparison.

Much more relevant is the direct comparison between the Lieutenants and the Law Enforcement Lieutenants which shows that they both receive a 5% rank differential for overseeing their subordinates.

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<sup>9</sup> Id., p. 7.

In addition, and absent any valid catch-up or parity argument, there is no valid basis for awarding the Lieutenants an additional 3½% pay increase when the Employer's wage offers result in an hourly wage lift of about 9.25%, which is well above the cost of living.

I therefore find that the Employer's Final Offer should be selected.

4. RETROACTIVITY

The Employer's Final Offer provides:

**Retroactivity of Economic Increases**

All correctional lieutenants shall continue to receive the same hourly rates that were effective December 8, 2013 (i.e., the first pay period of the 2013-14 fiscal years) until they are eligible to be placed in one of the steps of the longevity scale as provided immediately below.

The effective date of the step placement set forth in the Initial Placement on Longevity Scale shall be the date of Arbitrator Greco's interest arbitration award or their date of promotion if it is later in the 2013-14 fiscal year.

The Union's Final Offer provides:

**Retroactivity.**

All increases under this Agreement shall be effective December 1, 2013 for all hours worked or paid, except the Step 2 increase shall be effective June 1, 2014.

The Union states that the "bulk of the bargaining units have already agreed to effective dates of economic increases on December 1, 2013," and that comparability supports its position.

By letter dated August 28, 2014, the Employer's attorney stated that the Union at the hearing had proposed a different Final Offer on retroactivity and he objected to the Union's "apparent effort to change its final offer on retroactivity by way of its post-hearing brief" and thus requested that the Union's final offer on retroactivity "be as set forth by you at the hearing."

After extensive discussions on this issue at the hearing, I related my understanding of the Union's position by stating:

"All increases under this agreement shall be effective June 1, 2004 (sic)." <sup>10</sup> The next sentence then will read: "Furthermore, there shall not be any retroactivity on the longevity scale based upon what the correctional sergeants receive under their new contract. And any wage increase which the correctional sergeants receive shall be reflected prospectively in the longevity scale at that time."

I then twice asked the Union's attorney whether my understanding was correct and he twice answered "yes." <sup>11</sup>

Given the Union's representation, I find that the Union cannot now amend its Final Offer when there was no understanding at the hearing that it could do so. Accordingly, I only will consider the Union's aforementioned retroactivity Final Offer made at the hearing.

The resolution of this issue hinges upon what other internal bargaining units have received since there is no sound basis for treating the Lieutenants differently.

As for that, the record shows that both the Corrections Officers and Corrections Sergeants are receiving their economic increases effective December 1, 2013. That being so, the economic increases for the Lieutenants should happen sooner rather than later.

Since the Union's Final Offer at the hearing called for a retroactive date of June 1, 2014, which is earlier than the Employer's retroactive date pegged to when the Award is issued, I find that the Union's Final Offer on retroactivity should be adopted and that the Lieutenants' initial placement on the longevity scale shall be June 1, 2014.

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<sup>10</sup> The Transcript refers to 2004 but it was clear that I was talking about 2014.

<sup>11</sup> Transcript, pp. 100-101.

5. DRUG AND ALCOHOL TESTING

The Employer's Final Offer provides:

*Section 25.3 Drug and Alcohol Testing Permitted*

**Random Testing**

Notwithstanding anything to the contrary, all correctional lieutenants shall continue to be covered by the Sheriff's General Order No. 8.26 (Drug and Alcohol Policy), supplemented with the following:

- a) Random Selection: The selection of members may be witnessed by a person designed by the Union.
- b) Union Representation: If a bargaining unit member is selected for a random test, the member shall have the right to have a Union Steward present during such test so long as it does not unreasonably delay the test. If the union member waives the right to a Union Steward, such waiver shall be in writing.
- c) Handling of Samples: If a bargaining unit member is randomly tested, the sample shall be transported, mailed, or delivered to a certified courier of the NIDA Laboratory by the Union Steward and a Representative of the Sheriff.

The random drug testing selection provisions set forth above do not apply to the other random drug testing provisions set forth below, i.e., random drug testing for employees voluntarily assigned to a departmental drug enforcement unit as provided in last paragraph of Section 25.3 (Drug and Alcohol Testing Permitted) and random drug testing during the period of "after-care" as provided in Section 25.7 (Voluntary Requests for Assistance and Discipline).

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[NOTE: The balance of the Joint Employers' final offer on Section 25.3 tracks verbatim the Union's final offer; the full text of the Joint Employer's final offer is attached as Appendix D.]

The Union's Final Offer provides:

**Drug and Alcohol Testing**

Language as reflected in the appended Exhibit A.<sup>12</sup>

The Employer states that its Final Offer should be adopted because it maintains the status quo while at the same time otherwise agreeing to the Union's proposal. It also argues that the Union has failed to meet its burden for changing the status quo; that repeated random testing of the same employee is akin to someone winning a "big lotto prize" more than once and should not be dispositive over whether the Employer's past random testing warrants setting it aside; and that its proposal for random testing is similar to Will County's which is the only nearby county with a contract with its lieutenants.

The Union counters that its Final Offer is the same as the contract language for the Corrections Officers, the Corrections Sergeants, the Law Enforcement Sergeants, and the Law Enforcement Lieutenants and is thus supported by all the internal comparables. It adds that "As there was no showing by the Employer that this language is not working in the other units, the Union's proposal should be selected on the basis of comparability."

This issue turns upon whether the Union has met its burden of proving there is a need to change the status quo.

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<sup>12</sup> Union Exhibit A is appended to the Award.

Lieutenant Nick Kalfas testified that all Lieutenants were initially tested when the Employer instituted random testing and that since then, “There’s one lieutenant who’s been repeatedly called for random testing.”<sup>13</sup>

If the record established that a Lieutenant has been singled out for random testing without a valid basis for doing so, I would find that the Union has proven the need for change because it is imperative that “random” testing be just that – i.e., not aimed at only particular individuals who, for whatever reason, have been singled out for disparate treatment.

The record, however, fails to show what “repeatedly” means. It thus can mean only twice or many more times than that.

Given this ambiguity, I find that the Union has not proven there is a need for change since it is possible that being tested twice is just the luck of the draw. Furthermore, if someone believes they are being singled out for testing and that it is not truly random, he or she can file a grievance.

I therefore select the Employer’s Final Offer.

Based upon all of the above, I issue the following

AWARD

1. The Employer’s Final Offer regarding initial placement on the longevity scale is selected and shall be incorporated in the agreement.
2. The Employer’s Final Offer regarding Step increases is selected and shall be incorporated in the agreement.

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<sup>13</sup> Transcript, p. 66.

3. The Employer's Final Offer regarding Rank Differential is selected and shall be incorporated in the agreement.

4. The Union's Final Offer regarding retroactivity for initial placement on the longevity scale is selected and shall be incorporated in the agreement.

5. The Employer's Final Offer on Drug and Alcohol Testing is selected and shall be incorporated in the agreement.

6. All of the parties' Tentative Agreements, (Joint Exhibit 4), shall be incorporated in the agreement.

Dated at Madison, Wisconsin, this 29<sup>th</sup> day of September, 2014.

Amedeo Greco /s/  
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Amedeo Greco, Arbitrator

## **Article 25 - Employee Testing**

### Section 25.1 Statement of Policy

It is the policy of the Employer that the public has a reasonable right to expect the employees of the County to be free from the effects of drugs and alcohol. The Employer has the right to expect its employees to report for work fit and able for duty. The purposes of this policy shall be achieved in such manner as not to violate any rights of the employees established in this Agreement.

### Section 25.2 Prohibitions

Employees shall be prohibited from:

- a) Being under the influence of alcohol or illegal drugs during the course of their workday;
- b) Consuming or possessing alcohol, except as may be necessary in the performance of duty, at any time during or just prior to the beginning of the work day, or anywhere on the Employer's premises or work sites, building or properties or any vehicle owned by the Employer or any vehicle not owned by the Employer but used in service to the Employer;
- c) The unlawful manufacture, possession, use, sale, purchase, dispensation, or delivery of any illegal drug at any time and at any place except as may be necessary in the performance of duty;

- d) Failing to report to their supervisor any known adverse side effects of medication or prescription drugs, which they are taking;
- e) Intentionally tampering with, substituting for, or causing another person to tamper with, substitute for a urine and/or blood specimen.

#### Section 25.3 Drug and Alcohol Testing Permitted

Where the Employer has reasonable suspicion to believe:

- a) That an employee is under the influence of alcohol or illegal drugs during the course of the workday;
- b) Has abused prescribed drugs; or
- c) Has used illegal drugs.

The Employer shall have the right to require the employee to submit to alcohol or drug testing as set forth in this Agreement. The Employer may also require an employee to randomly submit to alcohol or drug testing where the employee is voluntarily assigned to a departmental drug enforcement group for a period of at least thirty (30) days and where such employee's duties are primarily related to drug enforcement. The employer may require any employee voluntarily accepting an assignment requiring a commercial driver's license to submit to alcohol or drug testing as may be permitted by law. At least two supervisory personnel in the Sheriff's Office must state their reasonable suspicions concerning an affected employee prior to any direction to submit the employee to the testing authorized herein. The foregoing shall not limit the right of the Employer to conduct any tests it may deem appropriate for persons seeking employment with the Sheriff's Office or upon promotion to another position within the Office. There shall be no random or unit wide testing of employees, except random testing of individuals as authorized in this Article.

#### Section 25.4 Order to Submit to Testing

At the time an employee is directed to submit to testing as authorized by this Agreement, the Employer shall provide the employee with oral notice briefly outlining the reasonable suspicion leading to the request. Within seventy-two (72) hours of the time an employee is ordered to submit to testing authorized by this Agreement, the Employer shall provide to the employee and the Union with a written notice setting forth the facts and inferences which form the basis of the order to test. Refusal to submit to such test may subject the employee to discipline, but the employee's taking of the test shall not be construed as a waiver of any objection or rights that he may possess.

#### Section 25.5 Tests to be Conducted

In Conducting the testing authorized by this Agreement, the Employer shall:

- a) Use only a clinical laboratory or hospital facility that is licensed pursuant to the Illinois Clinical Laboratory Act that has or is capable of being accredited by the National Institute of Drug Abuse (NIDA);
- b) Select a laboratory or facility that conforms to all NIDA standards;
- c) Establish a chain of custody procedure for both the sample collection and testing that will insure the integrity of the identity of each sample and test result;
- d) Collect a sufficient sample of the bodily fluid or material from an employee to allow for initial screening, a confirmatory test and a sufficient amount to be set aside reserved for latter testing if requested by the employee;
- e) Collect samples in such a manner as to preserve the individual employee's right to privacy, insure a high degree of security for the sample and its freedom from adulteration;
- f) Confirm any sample that tests positive in the initial screening for drugs by retesting the second portion of the same sample by gas chromatography mass spectrometry (GCMS) or an equivalent or better scientifically accurate and

accepted method that provides quantitative data about the detected drug or drug metabolites;

- g) Provide the tested employee with the opportunity to have the additional sample tested by a clinical laboratory or hospital facility of the employee's own choosing, at the employee's own expense; provided the employee notifies the Employer within seventy-two (72) hours of receiving the results of the tests;
- h) Require that the laboratory or hospital facility report to the Employer that a blood or urine sample is positive only if both the initial screening and the confirmation tests are positive for a particular drug. The parties agree that should any information concerning such testing or the results thereof be obtained by the Employer inconsistent with the understandings expressed herein (e.g., billings for testing that reveal the nature or number of the tests administered), the Employer will not use such information in any manner or forum adverse to the employee's interests;
- i) Require that with regard to alcohol testing, for the purpose of determining whether the employee is under the influence of alcohol, test results showing an alcohol concentration of .07 or more based upon the grams of alcohol per 100 milliliters of blood be considered positive (Note: the foregoing standard shall not preclude the Employer from attempting to show that test results between .01 and .07 demonstrate that the employee was under the influence, but the Employer shall bear the burden of proof in such cases);
- j) Provide the employee tested with a copy of all information and reports received by the Employer in connection with the testing and the results;
- k) Insure that no employee is the subject of any adverse employment action except emergency temporary assignment or relief of duty during the pending of any testing procedure. Any such emergency reassignment or relief from duty shall be immediately discontinued in the event of a negative test result.

#### Section 25.6 Right to Contest

The Union and/or the employee, with or without the Union, shall have the right to file a grievance concerning any testing permitted by this Agreement, contesting the basis for the notice to submit to the tests, the right to test, the administration of the tests, significance and accuracy of the tests, the results or any other alleged violation of this Agreement. Such grievances shall be commenced at Step 2 of the Grievance Procedure. It is agreed that the parties in no way intend or have in any manner restricted,

diminished or otherwise impair any legal rights that employees may have with regard to such testing. Employees retain such rights as may exist and may pursue the same in their own discretion, with or without the assistance of the Union.

#### Section 25.7 Voluntary Requests for Assistance and Discipline

The Employer shall take no adverse employment action against an employee who voluntarily seeks treatment, counseling or other support for an alcohol or drug related problem, other than the Employer may require reassignment of the employee with pay if he is then unfit for duty in his current assignment. The Employer shall make available through its Employee Assistance Program (EAP) a means by which the employee may obtain short-term counseling and/or referrals to treatment. All such requests for EAP assistance and/or referral to treatment shall remain confidential and any information received by the Employer concerning counseling, referral, and/or treatment shall not be used in any manner adverse to the employee's interest, except as described in this Agreement.

The foregoing is contingent upon:

- a) The employee agreeing to the appropriate treatment as determined by the physician(s) involved; and
- b) The employee discontinues his use of illegal drugs or abuse of alcohol; and
- c) The employee completes the course of treatment prescribed, including an "after-care" group for a period up to twelve months; and
- d) The employee agrees to submit to random testing during hours of work during the period of "after-care".

Employees who do not agree to or who do not act in accordance with the foregoing or test positive a second or subsequent time for the presence of illegal drugs or alcohol, during hours of work shall be subject to discipline, up to and including discharge.

The foregoing shall not be construed as an obligation on the part of the Employer to retain an employee on active status throughout the period of rehabilitation if it is appropriately determined that the employee's current use of alcohol or drugs prevents such individual from performing his duties or whose continuance on active status would constitute a direct threat to the property or safety of others. Such employees shall use accumulated paid leave or take unpaid leave of absence, pending treatment.