

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**DAVID GIBBS,
Grievant,**

HF No. 16 G, 2006/07

v.

DECISION

**CODINGTON COUNTY SHERIFF'S
DEPARTMENT,
Respondent.**

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**GENERAL DRIVERS & HELPERS
UNION LOCAL 749,
Petitioner,**

HF No. 9 U, 2006/07

v.

DECISION

**CODINGTON COUNTY SHERIFF'S
DEPARTMENT,
Respondent.**

This matter comes before the Department of Labor based on Grievant's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2 and Petitioner's Petition for Hearing on Unfair Labor Practice pursuant to SDCL 3-18-3.1. Dominic Pechota and MacDonald Smith appeared on behalf of Grievant and Petitioner. Dawn Elshere represented Respondent Codington County Sheriff's Department. The Department of Labor conducted a hearing on July 24, 2007, in Watertown, South Dakota. Upon consideration of the live testimony given at hearing and the evidence presented at hearing, Grievant/Petitioner's Petitions for Hearing and requests for relief are hereby denied.

Issues:

1. Did Respondent violate the Agreement in denying Deputy Gibbs' time off request on the basis of the General Order?
2. Did Respondent violate SDCL 3-18-3.1 by implementing the General Order without the agreement of the Union?
3. If Respondent did violate the Agreement and/or SDCL 3-18-3.1, what is the proper remedy?

Facts:

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

1. The Codrington County Sheriff's Department (County) and the General Drivers & Helpers union Local 749 (Union) are parties to a collective bargaining agreement (the Agreement).
2. The agreement represents "[a]ll regular full-time Deputies employed by the Codrington County Sheriff's Department, excluding the Sheriff, Chief Deputy, Chief Jailer, Jailer, Secretary, Cook and all other County employees."
3. The Agreement is effective for the period from January 1, 2007 through December 31, 2007.
4. In addition to the Sheriff and the Chief Deputy, the County employs five road deputies.
5. Two of the deputies work a shift from 8 a.m. to 5 p.m. Monday through Friday.
6. Two of the deputies work a shift from 5 p.m. to 2 a.m. Tuesday through Saturday.
7. The fifth deputy works 7 a.m. to 4 p.m. Tuesday through Friday and on Saturday, works 8 a.m. to 5 p.m.
8. The five road deputies rotate shifts every four weeks.
9. The Sheriff and the Chief Deputy work during the day, Monday through Friday, and are not part of the road deputy rotation.
10. Prior to May 2007, two road deputies made requests to take vacation time on two different weekends in May. Specifically, Deputy David Gibbs requested time off on May 11 and 12, 2007. Mike Day, another road deputy, requested time off for a weekend later in the month.
11. At the time he made his request, Deputy Gibbs was working one of the Tuesday through Saturday night shifts.
12. After receiving the requests, the Sheriff, Keith Olson, issued a General Order with an effective date of May 2, 2007.
13. The General Order established a procedure whereby deputies could get time off on a weekend by trading shifts with another deputy.
14. Deputy Gibbs and the other deputies received copies of the General Order at work.
15. Based on the General Order, Sheriff Olson denied the time off requests of both deputies. In response to the denial of his time off request, Deputy Gibbs filed a grievance.
16. Sheriff Olson has a policy to have two road deputies on duty at all times.
17. The weekends particularly presented the potential for increased workloads in Codrington County, requiring two deputies to be on duty.
18. Sheriff Olson did not notify either the Union or the employees of his intention to issue the General Order and did not discuss its contents with the Union prior to issuing the General Order and applying it.
19. Subsequent to the issuance of the General Order, Union's representative, Craig Hubner, had a short meeting and a telephone conversation with Sheriff Olson regarding the General Order and Deputy Gibbs' grievance.

20. Based upon constituent concerns, visibility, public and deputy safety issues, Sheriff Olson decided that Codington County needed to have two deputies on duty during the weekends.
21. No substantive discussions regarding the terms of the General Order or its application to Gibbs' grievance took place.
22. Mr. Hubner also made contact with Mr. Satterly, the County's collective bargaining representative, in an attempt to resolve the disputes concerning the General Order.
23. Other facts will be developed as necessary.

Issue One

Did Respondent violate the Agreement in denying Deputy Gibbs' time off request on the basis of the General Order?

SDCL 3-18-1.1 defines a grievance:

The term "grievance" as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a "grievance" and is not subject to this section.

The Department's role in resolving a grievance is defined by SDCL 3-18-15.2.

SDCL 3-18-15.2 reads, in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the department of labor . . . The department of labor shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employees and the governmental agency.

The burden of proof is on the grievant. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423 (S.D. 1991).

Grievant alleges that Respondent violated the Agreement in denying Deputy Gibbs' time off request. Specifically, Grievant alleges that Respondent abused his discretion in exercising the management rights afforded the Codington County Sheriff by Sections 38 and 39 and Article 4 of the Agreement. Grievant argues that Sheriff Olson has restricted a deputy's use of vacation time on weekends to twenty weekends per year, or only when the deputy is not scheduled for a weekend shift. Grievant argues that the Sheriff has created a shift trading system that is "unreasonably restrictive and render[s] the actual trading of shifts virtually impossible." Finally, Grievant argues that the

General Order is “an unwarranted interference with the deputies’ use of their earned contract benefits.”

The Agreement, entitled Agreement by and Between General Drivers & Helpers Union Local 749 Affiliated with the International Brotherhood of Teamsters and Codington County Sheriff’s Department (Deputies) (January 1, 2007-December 31, 2007), provides the following management rights:

Except to the extent expressly modified by a specific provision of this Agreement, the Sheriff and the Codington County Commission reserve and retain solely and exclusively all of their statutory and common law rights to manage the operation of the Sheriff’s Department and the Detention Center, as such rights existed prior to the execution of this Agreement with the Union.

It is expressly recognized merely by way of illustration and not by way of limitation that such rights and functions include, but are not limited to:

1. To utilize personnel, methods and means in the most appropriate and efficient manner possible; to manage and direct the employees of the Sheriff’s Department or Jail; to hire, schedule, promote, transfer, assign, train, or retrain employees in positions with the Sheriff’s Department or Jail, and to suspend, discharge or take other appropriate action against employees for just cause;
2. To determine the size and composition of the work force to eliminate or discontinue any job or classification or change such classification(s) and to lay off employees for lack of work or lack of appropriate funds;
3. To determine the objectives of the Sheriff’s Department or Jail and the means and methods necessary to fulfill those objectives, including transfer, alteration, curtailment, or acceptable discontinuance of any service; the establishment of acceptable standards of job performance; the purchase and utilization of equipment; and the utilization of seasonal and part-time employees, as long as no full-time employees are laid off;
4. To provide reasonable standards and rules for employees; and
5. To require employees, where determined necessary by management, to take in-service training courses during working hours; and
6. To determine the method of fulfillment of the objectives of the Department, whether by it’s employees or by contracting or subcontracting with respect to all of the Department’s Services.

The Agreement also provides on page 10, at section 23, that “[t]he current work schedule shall continue subject to the Sheriff’s right to change in accordance with this Agreement.”

The Agreement provides the following under section 39, Vacation Schedules:

All vacation scheduling shall be approved by the Head of the appropriate Department. Every effort will be made to grant vacation during periods requested by the employees consistent with operational necessity. A denial is subject to the grievance procedure.

Employees requesting vacation leave shall be notified within two (2) days of application that their request has been granted or denied.

Vacation requests shall be submitted to the Department Head a number of days in advance of the date requested, equal to the number of days of time requested off.

Vacation leave can be taken during foul and dangerous weather, travel, during which is hazardous or not recommended by local authorities. This leave will be granted with the approval of the Department Head.

Holidays observed or periods of significant illness occurring during a vacation leave period are not charged against vacation leave, but shall be paid according to the appropriate cause for absence.

The Agreement provides on page 17 under Section 38 that "Department heads will approve all vacation time taken" and that "County shall allow up to two (2) deputies off on vacation per week with the understanding that the safety and welfare of the constituents served will not be jeopardized and this decision will be at the discretion of the Sheriff."

The General Order in question, signed by Sheriff Olson, provides:

Codington County Sheriff's Office
General Order

Effective Date 5-2-07

Effective immediately there will be no time off granted for Deputies working weekend shifts. These shifts include Friday nights, Saturday days, and Saturday nights.

The only exception to this would be emergency situations. Any exception needs to be approved by the Sheriff.

A Deputy has the option of trading shifts with another Deputy to cover times off on the shifts mentioned above. The Deputies participating in the trade need to work a full shift for a full shift. The Deputy wanting a particular day/night off must work the shift for the Deputy agreeing to cover the day/night off. The traded days need to be approved, and documented by the Sheriff or Chief Deputy. The shift

trade will only be approved if it does not interfere with normal work activities, scheduled trainings or previously approved time off. No double shifting will be permitted. No overtime will be allowed for a traded shift (excluding emergency situations which call for a longer work shift). All traded shifts must be worked within normal shift schedule. Shift trading must be preapproved and can be changed or cancelled at the discretion of the Sheriff or Chief Deputy at any time due to unplanned/emergency circumstances.

The documentation for shift trading will be done on the annual leave/overtime slips, signed by both participating Deputy's and turned in to be approved/signed by a supervisor.

This order does not apply to time off previously approved for 2007.

Sheriff Olson explained at hearing that he felt it was necessary to issue the General Order to address several concerns. First, Sheriff Olson was concerned that sometimes only one deputy was on patrol on weekends and no written policy existed to reflect his policy that two deputies should be on patrol. Second, the deputies had expressed a desire for "back-up" coverage on weekend shifts. Third, the public was asking for more "coverage", especially because underage consumption of alcohol was "really being pushed to the front page." Visibility, officer safety, and public concern were the motivating factors behind the General Order. None of these explanations is contrary to the management rights retained by the Codington County Sheriff's Office in the Agreement. The Agreement allows the Sheriff, as department head, the discretion to consider the safety and welfare of constituents when scheduling vacation schedules. Sheriff Olson did not violate, misinterpret, or inequitably apply the Agreement in denying Deputy Gibbs' vacation request.

Issue Two

Did Respondent violate SDCL 3-18-3.1 by implementing the General Order without the agreement of the Union?

SDCL 3-18-3.1 provides:

It shall be an unfair practice for a public employer to:

- (1) Interfere with, restrain or coerce employees in the exercise of rights guaranteed by law;
- (2) Dominate, interfere or assist in the formation or administration of any employee organization, or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
- (3) Discriminate in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any employee organization;

- (4) Discharge or otherwise discriminate against an employee because he has filed a complaint, affidavit, petition or given any information or testimony under this chapter;
- (5) Refuse to negotiate collectively in good faith with a formal representative; and
- (6) Fail or refuse to comply with any provision of this chapter.

Petitioner alleges Respondent violated SDCL 3-18-3.1(5) when Sheriff Olson implemented the General Order without notifying or negotiating the terms of the General Order with the Union. Petitioner's argument begins with the premise that the General Order constitutes a "change in existing working conditions" required to be negotiated by SDCL 3-18-2 and SDCL 3-18-3. Petitioner's premise is not supported by the facts of this case. The "working conditions" or conditions of employment have already been negotiated by the parties and certain management rights were maintained by the Codington County Sheriff's Department. The Agreement in question is twenty-one pages long and is the result of contract negotiations between the parties.

The Agreement gives the Sheriff the management right to "[t]o utilize personnel, methods and means in the most appropriate and efficient manner possible" and "[t]o determine the objectives of the Sheriff's Department or Jail and the means and methods necessary to fulfill those objectives." Sheriff Olson had the discretion to approve or disprove vacation requests, considering "the safety and welfare of the constituents." The General Order does not preclude further negotiations regarding vacation requests or scheduling. Respondent retained in the Agreement the discretion Sheriff Olson exercised in the General Order and was not required to negotiate the terms of the General Order in question. Respondent did not commit an unfair labor practice in implementing the General Order without notifying or negotiating the terms of the General Order.

Given the Department's decisions on Issues One and Two, Issue Three will not be addressed.

Respondents shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Grievant/Petitioner shall have ten (10) days from the date of receipt of Respondent's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Respondent shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 3rd day of January, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge