STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GERALD KEARN, JAMES McARDLE, EDWARD MONROE, RICHARD THELEN, HAROLD HOULE, PETER SCHILLER, ROBERT POPKE, RODDERICK WIGGINS, ROBERT MANTEY and DONALD DeBATTISTA, Complainants, vs. MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION and MILWAUKEE COUNTY, Respondents.	Case CXLIV No. 26787 MP-1152 Decision No. 18112-A

Appearances:

Perry, First, Reiher, Lerner & Quindel, S.C., 222 East Mason Street, Milwaukee, Wisconsin 53202, by Ms. Barbara Zack Quindel, appearing on behalf of Complainants.

Mr. Patrick J. Foster, Principal Assistant Corporation Counsel, Room 303, Courthouse, 901 N. 9th Street, Milwaukee, Wisconsin 53233, appearing on behalf of Respondent Milwaukee County.

Gimbel, Gimbel and Reilly, Attorneys, Suite 900, MGIC Plaza, 270 E. Kilbourn Avenue, Milwaukee, Wisconsin 53202 by Franklyn M. Gimbel, appearing on behalf of Respondent Milwaukee Deputy Sheriffs' Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Gerald Kearn, James McArdle, Edward Monroe, Richard Thelen, Harold Houle, Peter Schiller, Robert Popke, Rodderick Wiggins, Robert Mantey and Donald DeBattista having, on September 17, 1980, filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondent Milwaukee Deputy Sheriffs' Association had committed prohibited practices within the meaning of Section 111.70(3)(b)(1) and (3)(b)(2) of the Municipal Employment Relations Act, and also alleging that Respondent Milwaukee County had committed prohibited practices within the meaning of Section 111.70(3)(a)(1) and (3)(a)(3) of the Municipal Employment Relations Act; and the Commission having appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Milwaukee, Wisconsin on January 19 and January 21, 1981; and briefs having been filed with the Examiner by May 26, 1981; the Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Gerald Kearn, et al, hereinafter referred to as Complainants, are municipal employes as defined in Section 111.70(1)(b), Wisconsin Statutes, and are presently and at all times material hereto have been, employed by Respondent Milwaukee County.

2. That Respondent Milwaukee Deputy Sheriffs' Association (hereinafter the D.S.A. or Union) is a labor organization within the meaning of Section 111.70(1)(j), Wisconsin Statutes, has its principal offices at 821 West State Street, Milwaukee, Wisconsin, and is the exclusive bargaining representative of all deputy sheriffs employed by Respondent Milwaukee County.

3. That Milwaukee County is a municipal employer within the meaning of Section 111.70(1)(a), Wisconsin Statutes, and has its principal offices at Milwaukee County Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin.

4. That pursuant to an election held on October 9, 1979, the Wisconsin Employment Relations Commission certified on October 30, 1979 Respondent Union as the exclusive bargaining representative of all Institutions Protection Officers employed by Milwaukee County, a group then including Complainants.

5. That during the fall of 1979, the Milwaukee Deputy Sheriffs' Association was engaged in negotiating a new collective bargaining agreement with Respondent Milwaukee County; that said agreement was tentatively settled on or about November 29, 1979; and that members of Respondent Union voted to ratify the agreement on or about November 30, 1979.

6. That on December 11, 1979 Respondent County's Institutions Security Committee met and resolved that the Institutions Protection Officers would be transferred into the Sheriff's Department and that said Department would assume responsibility for security duties at the County's Institutions; and that on January 6, 1980 the former Institutions Protection Officers were formally sworn in as deputy sheriffs.

7. That one term of said agreement affected Complainants' seniority in that, for purposes of order of layoff, seniority was started from date of hire as a deputy sheriff, not from commencement of County service, which provision had the effect of placing the Complainants at the latter end of the deputy sheriffs' seniority list.

8. That certain terms of said agreement affected Complainants' wages, in that Complainants received 1979 - to - 1980 wage increases varying between three and eighteen cents per hour while employes already classified as deputy sheriffs received wage increases of sixty-five cents per hour, and in that longevity and educational bonuses were specified in said agreement as being based on years of service as a deputy sheriff and not on overall length of employment by the County.

9. That there existed within the Union at the time of Complainants' transfer a general understanding that all new entrants to the Sheriff's Department had layoff seniority calculated from the start of continuous service as a deputy sheriff; that said understanding had applied to twenty-five deputy sheriffs who were previously employed in other County departments; and that Complainants received wages and monetary benefits, under the terms of said agreement, at least as favorable as those received by any prior transferee into the Sheriff's Department.

10. That in negotiating said terms of its 1980 collective bargaining agreement with Respondent County, Respondent Union did not act arbitrarily, discriminatorily, or in bad faith towards Complainants.

11. That in negotiating said terms of its 1980 collective bargaining agreement with Respondent Union, Respondent County did not discriminate against, interfere with, restrain or coerce Complainants because of, or in their exercise of, union or protected concerted activity.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSIONS OF LAW

1. That Respondent Milwaukee Deputy Sheriffs Association, by negotiating the 1980 collective bargaining agreement with Milwaukee County which affected certain wages, benefits, and conditions of employment of the Complainants, did not commit prohibited practices within the meaning of Section 111.70(3)(b)(1) or (3)(b)(2), Wisconsin Statutes.

2. That Respondent Milwaukee County, by agreeing to said provisions of the 1980 collective bargaining agreement, did not commit prohibited practices within the meaning of Section 111.70(3)(a)(1) or (3)(a)(3), Wisconsin Statutes.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER

That the Complaint filed in the matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 27th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

MILWAUKEE DEPUTY SHERIFFS ASSOCIATION AND MILWAUKEE COUNTY, Case CXLIV, Decision No. 18112-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complaint alleges that the Union failed its duty of fair representation towards Complainants, a group of ten deputy sheriffs formerly employed as Institutions Protection Officers, by negotiating a collective bargaining agreement which resulted in Complainants being placed at the end of the unit's seniority list and in their receiving lower wages, longevity and educational bonuses than was the case for certain others in the bargaining unit with similar lengths of overall service to the County; and that the County violated MERA essentially by complicity in the negotiation of the relevant provisions.

Background:

Sometime in or before the early nineteen-sixties Milwaukee County created a group of employes known as the Institutions Protection Officers (IPOs), whose duties encompassed fire and police protection at the County Institutions grounds. Unlike other protective service employes, the IPOs were all cross-trained to do both fire and law enforcement work, and worked consistently at a single site. Their work was in some respects similar to that of deputy sheriffs in the Sheriff's Department, in that they they were sworn law enforcement officers who made arrests, testified in court, kept prisoners in custody, served process, carried weapons, gathered evidence and kept similar kinds of records. The IPOs also wore uniforms similar to those of deputy sheriffs, signed reports as deputy sheriffs and were trained, at least in part, at the Sheriff's Department Academy.

Other factors distinguished the IPOs from deputy sheriffs. Among these were higher rates of pay for the IPOs, a different chain of command, and the fire protection work, which deputy sheriffs are not involved in. A 1966 Milwaukee County Corporation Counsel's opinion drew a distinction between IPOs and regular deputy sheriffs, stating "Since the duties of institutions protection officers relate principally to the protection of the private property of the County and do not include general law enforcement functions, such officers should be considered special deputies." In testimony at the hearing, Union and County witnesses elaborated, substantially without contradiction, on various day-to-day work differences between the IPOs and the deputy sheriffs. These included service of process and investigations in the inner city, work at the County airport, drug enforcement and welfare department work, all of which are regularly performed by deputy sheriffs but not by the IPOs, and a requirement that deputy sheriffs carry a weapon while off duty and perform "standby" functions. In addition, the IPOs had never constituted or/been part of an organized bargaining unit, and their economic benefits more closely resembled those of employes represented by Local 1055, AFSCME than those of deputy sheriffs.

In early 1979, certain of the IPOs formed a labor organization called the Institutions Protection Officers Association (IPOA). On March 5, 1979, the IPOA petitioned the Wisconsin Employment Relations Commission for an election to establish status as certified exclusive bargaining representative of the IPOs. At the hearing on that petition Respondent Deputy Sheriffs Association and District Council 48, AFSCME both intervened, requesting to be put on the ballot. In its decision 1/ issued on August 10, 1979 the Commission found that a substantial community of interest existed between the IPOs and deputy sheriffs, and that in light of the anti-fragmentation policy expressed in MERA no new bargaining unit was appropriate for representation of the IPOs. The Commission accordingly disallowed both the IPOA's and District Council 48's participation in the election, and the IPOs were allowed to vote as to whether they wished to be represented by the Deputy Sheriffs Association or to remain unrepresented. On October 9, 1979 the election was held, and a majority of the IPOs voted in favor of representation by the Respondent Union; the Commission's Certification of Representative was issued on October 30, 1979.

In August of 1979, County Sheriff Wolke had proposed to the County Board that the Sheriff's Department assume responsibility for security at the County

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1/ No. 17199.

Institutions. 2/ Discussions concerning this proposal continued throughout the fall of 1979, and on December 11, the County Board's Institutions Security Committee voted to transfer the security duties at the Institutions to the Sheriff's Department and to reclassify the IPOs and transfer them into the Sheriff's Department. On January 6, 1980 the IPOs were formally sworn in as deputy sheriffs.

Negotiations Between the County and the Union:

Negotiations over the 1980 contract began about mid-August, 1979, and were well under way by the time the IPOs voted for representation by the Union. It is apparent from the testimony of all the witnesses that the manner in which the IPOs were to be treated was not one of the primary issues in the negotiations, and in the matter of their seniority ranking in particular the County, then and now, has expressed utter indifference. During a negotiation meeting held about October 9, 1979, the Union proposed that the IPOs be "endtailed", or added to the bottom of the unit's seniority list, for purposes of order of layoff; this proposal was accepted by the County.

There is no dispute that during the course of the negotiations, the Union and County also changed the contract language governing order of layoff. The 1977-1979 contract stated in Section 3.24 that "Seniority for layoff purposes is the relative status of an employe based on continuous service with Milwaukee County from the last date of hire;" its replacement reads "Seniority for layoff purposes is the relative status of an employe based on continuous service with Milwaukee County as a Deputy Sheriff."

Though Union President Gerald Rieder, in his testimony, stated that this did not change the intent of the language, it is apparent from the change on its face that, considered by itself, the change would have the effect of reducing the layoff seniority of every deputy sheriff who had at any time transferred into the Sheriff's Department from another County position. Complainants argue that this change was directed specifically at them and that it shows hostility and bad faith on the part of the Union. The Union, in turn, argues that measuring layoff seniority from date of hire as a deputy sheriff had always been the parties' understanding and intent and that the change in language was merely to clarify that. The record does not contain any objective evidence, such as a pre-1980 seniority list, which would buttress the Union's claim, and it is apparent from County Director of Labor Relations Robert Polasek's testimony that the County, at least, did not interpret the 1979 language as providing for departmental seniority. Rieder's testimony that pending Federal Court litigation concerning the County's hiring of minorities was the impetus behind the "clarification", meanwhile, was supported by another Union witness, Robert Nolan, and was not rebutted.

It would be enough, to satisfy the requirement of good-faith, nondiscriminatory action, for the Union to have honestly believed that the 1979 and earlier contracts' intent was to provide for departmental seniority, even if the County's belief and a fair reading of the language itself were to the contrary. From the language itself and the County's impression of it, Complainants' suspicions regarding the Union's motive would appear justified; but Rieder's explanation is also not improbable, and nothing else in the record sheds much light on the issue. Since the interpretation of this difficult question is central to the case, it must be resolved: a finding that Rieder could not be believed as to the reason for the change would eliminate the past practice the Union claims to have underpinned its demand for endtailing of the Complainants, and would also erode its claim to have acted in good faith. In this quandary, the Examiner has concluded that Rieder's account of the Union's motive cannot be discredited, essentially because of an extraneous fact: that there are only eleven Complainants in this case. The change in the seniority language, on its face, reduced the relative seniority ranking of twenty-five prior transferees from other County departments, none of whom has, apparently, complained about it. Though it is possible that such a change might escape their notice, that seems improbable, particularly in view of this litigation, and it is therefore logical to infer that the language change did not represent any real change in these individuals'

2/ In an earlier action, the County Board had removed responsibility for fire protection at the Institutions from the IPOs.

understanding of their rights. But if the twenty-five individuals most directly affected by this change in language believed that seniority was already based on service "as a Deputy Sheriff", presumably that expectation was general within the Union.

Among the twenty-five earlier transferees into the Sheriff's Department were five who were previously employed in the County's House of Corrections.

On November 27, 1979, the County's chief negotiator, Robert Polasek, at a negotiating session, proposed to the Union that the IPOs be treated "as if promoted" as to their wages. 3/ This proposal was accepted by the Union without any counter-proposals. Neither the County nor the Union made any proposal concerning longevity or educational benefits for the IPOs. On November 27, the Union and County signed a letter of understanding, which had the effect that the IPOs were governed by the parties' 1980 contract. Polasek testified without contradiction (as the letter itself confirms) that the letter of understanding was to clarify the status of the IPOs, in the event that the County reclassified them, in the manner already described, but that it also preserved the right of the Union to bargain for them separately if in fact they remained a separate group. On or about November 29, the contract was tentatively agreed upon. Ratification by the Union - with the IPOs, who were not then deputy sheriffs, not in attendance - followed on November 30, and the contract became effective on December 23, 1979.

The Effects of the Negotiated Agreement on the Former IPOs:

Two essential consequences flowed from the negotiations concerning the IPOs. The first, their seniority status, was clearly the choice of the Union, which had proposed that they be endtailed. This had the effect of placing the former IPOs at the bottom of the seniority list of the approximately four hundred deputy sheriffs; the amount of the ostensible reduction in security against possible layoffs varied according to individual, but at least four of the ten complainants had begun service as IPOs by 1970 and the least senior of them had been hired in 1977. Had they been "dovetailed", or fitted into the seniority list according to date of hire as IPOs, virtually all of them would have received greater protection against possible layoffs and some would have been in the top half of the seniority list.

The second consequence, or set of consequences, was economic. The result of the application of the County's "as if promoted" formula to the Complainants was that each was moved from his previous pay step in Pay Range 20 to that step in Pay Range 18A which represented the first higher rate than he was formerly receiving. The Range 18A steps involved, however, were 1980 rates, while the Complainants' Range 20 rates were 1979 rates. The upshot was that the Complainants received 1979 -to 1980 pay increases varying between three and eighteen cents per hour. Deputy sheriffs who were already in the Sheriff's Department in 1979, however, received pay increases of sixty-five cents per hour; and examination of the step placement of the Complainants shows that in all examples but one 4/ a former IPO found himself in 1980 at a pay step one step lower than another deputy sheriff whose entire service had been in that department.

But the record indicates that the County Board had already intended to reduce the pay level of the IPOs, apparently because their firefighting responsibilities had been removed, and in fact such a reduction was briefly in effect between its introduction by the County Board on December 23, 1979 and the IPOs' January 6, 1980 swearing - in as deputy sheriffs. It is therefore reasonable to infer that had the IPOs remained unrepresented, their 1980 wage rates would also not have represented a raise equivalent to that received by most employes.

Both longevity bonuses and educational bonuses, since well before the instant matter arose, had been specified in the Respondents' labor agreements as being tied to length of service as a deputy sheriff. This remained unchanged in the 1980 agreement, with the consequence that certain of the Complainants did not receive these benefits while deputy sheriffs with similar lengths of County service, but all within the Sheriff's Department, did.

3/ See below for discussion of the effects of these proposals.

4/ One, Wiggins, is a minority employe whose step placement and seniority, once in the Sheriff's Department, is altered by the terms of a Federal Court order relating to minority hiring in the Department.

The IPOs Relationship with the Union:

The Complainants contend that the actions of the Union were impelled by a long-standing animosity, and Complainant Kearn referred to a pre-1979 request by the IPOs for representation by the Union, which was apparently rebuffed. Though Rieder also mentioned this incident in his testimony, each witness was so vague with respect to it that no conclusion as to the Union's motive in refusing to "take on" the IPOs at that time can fairly be drawn.

The recent history of the IPOs' interaction with the Union began with the Union's intervention in the 1979 election proceeding initiated by the IPOA's petition. In that proceeding, the IPOA essentially contended that the nature and circumstances of the IPOs' work gave them little in common with other County employes and that in particular they could be distinguished from deputy sheriffs, while the DSA contended to the contrary.

Upon prevailing in the Commission's decision in the election case, the DSA informed the Complainants that a $100.00 initiation fee would be assessed if it won the election; at the hearing herein, DSA President Rieder asserted that this fee was primarily intended to recompense the Union for expenses which it had then anticipated would be incurred in changing its by-laws and negotiating a separate contract for the small group of IPOs. On the day of the election, however, the DSA waived the fee, allegedly on the ground that it had concluded that no separate round of bargaining would probably be involved.

The only formal meeting during the bargaining process between IPOs and the Union, according to Kearn's testimony, occurred on September 11, when Complainants Kearn and Schiller met with a group of officials of the Union. At that meeting, Kearn testified, there was discussion of "the fact that seniority would take - we would go to the bottom of the seniority list...", 5/ but a disagreement, the nature of which is not revealed in the record, ensued between Kearn and Schiller, and the discussion moved to other topics. Kearn also testified that in this meeting the Union's attorney stated that the IPOs would probably be "red-circled, which meant our wages would be froze (sic) at the current rate, and the Sheriff's Department members would eventually catch up to us and then we would proceed with any benefits or increases..." 6/ According to Kearn, the IPOs were told at this meeting that the IPOs were overpaid for the work they did and that the DSA would have to discuss these matters further. Kearn and Schiller indicated that they were not pleased by these proposals, and near the end of the meeting Rieder asked what the IPOs wanted. According to Kearn's testimony, Schiller then said "we want everything equal to what the deputy sheriffs get."

On September 25 Kearn sent Rieder a letter asking for specifics as to what the Union planned to negotiate for them; he testified that prior to December 7 he received no answer to this inquiry, and that on that date, when he attended a meeting of the County's Institutions Security Committee, he was surprised to find Rieder representing to the County that the IPOs agreed to the formula that had been adopted in the contract for their merger into the unit.

The Union introduced at the hearing two questionnaires, apparently distributed in preparation for negotiations to IPOs as well as members of the Union's bargaining unit sometime in the summer or early fall of 1979. These questionnaires, one signed by Complainant Popke and the other unsigned but apparently from an IPO, make no reference to their seniority as a matter of particular concern. Rieder also testified that meetings between Union officials and IPOs were held on occasions other than the September 11 meeting identified by Kearn and that at none of these was seniority identified by IPOs as a stumbling block. Rieder testified that, though he could not recall the date, a vote was taken at a membership meeting of the Union concerning how the IPOs were to be treated for layoff seniority purposes and that its bargaining proposal reflected that vote. Rieder further testified that the Union, based upon these meetings, assured the County's Institutions Security Committee that the Union and IPOs had reached agreement on seniority among themselves and supported the merger of the IPOs into the Sheriff's Department. According to Union and County witnesses'

5/ Tr. p. 32.

6/ Tr. p. 32.

uncontradicted testimony, the lateral entry of the IPOs into the Sheriff's Department was done with the intent of protecting their job security; it is apparent from the record that this disposition had the effect of insulating the IPOs from competition against some two hundred other applicants for deputy sheriffs' jobs. The record also shows that the former IPOs are the only employes ever classified as deputy sheriffs without going through the competitive examination process for that position. 7/

Discussion:

Complainants argue strenuously that the leadership of the Respondent Union exhibited hostility toward the IPOs and that this was the cornerstone of an attitude of discrimination and bad faith in the Union's representation of the Complainants. There is some indication in the record of an ancestral rivalry between the two groups, (Kearn's testimony to the effect that some of those present at the September 11 meeting repeated an old assertion that the IPOs were overpaid was not rebutted), but it does not amount to clear and convincing evidence of an overall attitude of hostility; as noted above, the evidence that the Union had, years earlier, rejected overtures from the IPOs is so conclusionary as to be inconsequential and the recent attitude of the Union toward representing the IPOs was obviously one of willingness - else why would the Union intervene in the election proceeding, requesting to be put on the ballot? Furthermore, even if all of the discrepancies between witnesses are resolved in favor of Complainants, it is apparent from Kearn's testimony that on September 11 the Union indicated its general intentions in representing the Complainants, in the sense of specifying endtailing as to seniority and "red-circling" as to wages, prior to the election. Such an open stance, taken at such a time, is hardly in keeping with an aura of bad faith. Moreover, at least the Union's action in endtailing the Complainants is consistent with the approach which the Examiner has concluded was taken concerning every prior entrant into the Sheriff's Department, including others with arguably related experience working for the same employer, such as the five who had worked at the House of Corrections. The Complainants in this respect are arguing that because of the alleged close similarity of their past employment to deputies' work, they deserved better treatment as to seniority than anyone else entering the unit. The work differences detailed above indicate that such a similarity is, at best, debatable (as, indeed, the Complainants/IPOA and the DSA have "debated" the question, each side reversing its position between the election hearing and the present one, according, one might surmise, to the weather.)

Complainants argue that IPOs' close similarity to deputy sheriffs is shown by the County's action in effecting a lateral transfer without requiring them to stand competition with new entrants, and that the Commission implied that IPOs were essentially the same as deputy sheriffs when it found that a "substantial community of interest" existed and excluded other unions from the election. In deciding questions of appropriateness of a bargaining unit, however, the Commission is guided by a statutory prohibition of unnecessary fragmentation of bargaining units, and to find a "substantial community of interest", particularly under that statutory rule, is by no means the same thing as to find an identity. And in electing to transfer the IPOs laterally the County, according to its witnesses, was motivated by a wish to protect the IPOs' jobs rather than by any feeling that the jobs were identical.

The essential parameters of a union's duty of fair representation are that a union has broad discretion as to how to pursue its aims so long as actions taken affecting a given employe or group of employes whom it represents are not arbitrary, discriminatory or in bad faith; 8/ and that a union "must be free to take a position on the not so frivolous disputes. . ."(between competing groups of

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7/ County Personnel Assistant Chief Examiner Mundy testified that though in his view the law enforcement functions of the IPOs were similar to deputy sheriffs', different examinations had been given for these positions until 1977.

8/ Vaca v. Sipes, 386 U.S. 171, 190 (1967), Mahnke v. WERC, 66 Wis. 2d 524 (1974); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

employes). 9/ The allocation of seniority rights among groups of employes newly joined is rarely frivolous and frequently in dispute, and if case law clearly held that endtailing was as such a violation of the duty of fair representation it would avail the Union little that a consistent history of such endtailing has been shown here. Such a clear line of cases, however, does not exist. It is necessary to draw fine distinctions in order to separate those cases where endtailing of seniority lists has been found violative from those where it has not. In two cases 10/ cited by Complainants as having found endtailing to be violative of the duty of fair representation, the Seventh Circuit Court held that the violation 11/ consisted in the unions' having decided to endtail employes solely or essentially on "political" grounds: in each case there was persuasive evidence that the union had acted as it did because of the self-interest of the larger group of employes, manifested by a vote in Alvey and canvassing in Barton. Complainants argue that the fact that Rieder, according to his own testimony, conducted a membership vote on the IPOs' - seniority issue and admitted concern that other employes were against dovetailing, shows that the decision was essentially political. The Examiner cannot accept this argument: it is apparent from a close reading of Alvey and Barton that that Court does not expect a union's decisions to be perfectly free of internal political considerations and that a violation will not be found where other factors also heavily influenced the union's decision. Here, the Union has claimed that its endtailing proposal was but a continuation of a standing practice, and that deviation from that practice would be adverse to the fair representation of prior transferees. This is not inevitably so; but the lack of an identity between IPOs' and deputy sheriffs' jobs prior to their transfer must be held at least to muddy the Complainants' claim to be treated unlike other transferees sufficiently to propel it within the Union's "broad range of discretion." 12/

It must also be noted that in both the Barton and Alvey cases the employes endtailed had previously enjoyed dovetailed seniority while represented by the same union in the same bargaining unit - a situation considerably different from that obtaining here. By contrast, in Bruen v. IUE 13/ the Court went so far as to hold, in finding no violation upon the endtailing of a formerly unrepresented group of employes, that "Seniority is not an incident of employment. Seniority rights arise solely from the contractual arrangements of the parties" and therefore that formerly unrepresented employes have no seniority rights to violate. While this view, expressed also in NLRB v. Whiting Milk Corp., 14/ might not survive a suitably "unsympathetic" case (it is difficult to conceive of a Court enunciating this theory where the evidence showed that the union deliberately endtailed minority employes), the undersigned has not found it expressly disavowed in any appellate decision. And without going to such lengths, numerous Courts have found endtailing provisions not violative in various cases. 15/ Complainants contend that a general dinstinction can be drawn in the prevalent Teamster cases between those where one company acquired another outright, in which case endtailing was found appropriate, and merger situations, where it was not.

9/ Humphrey v. Moore, 375 U.S. 335, 349 (1964).

10/ Alvey v. General Electric Co. 622 F. 2d 1279, 104 LRRM 2838 (7th Cir., 1980); Barton Brands, Ltd. v. NLRB, 529 F. 2d 793 (7th Cir., 1976).

11/ Speculative in the case of Barton, which was remanded in the cited decision to the NLRB.

12/ Masullo v. General Motors Corp. 398 F. Supp. 188 (1975), Vaca v. Sipes, supra; Ford Motor Co. v. Huffman, supra.

13/ 313 F. Supp. 387 (D.C.N.J., 1969, affirmed 425 F. 2d 190)

14/ 342 F. 2d 8 (1st Cir., 1965)

15/ Bruen, supra; Brown v. Truck Drivers and Helpers Local Union, No. 355 ,292 F. Supp. 125 (D.C. Md. 1968); Morris v. Werner - Continental, Inc., 466 F.2d 1185 (6th Cir. 1972); Schick v. NLRB, 409 F.2d 395 (7th Cir., 1969); Whiting, supra.; Brady v. Consolidaed Freightways Corp., 82 LRRM 2245 (D.C.S. Ohio, 1972); Keeley v. Refiners Transport and Terminal Corp., 71 LRRM 2627 (E.D. Mich., 1969).

While this theory has its attractions, the parallel between the cases and the theory is not perfect; moreover, it would be equally difficult to align the facts of this case with either a corporate merger or an acquisition. On the one hand, the IPOs' work continued to be done, mostly by the same employes, after their transfer into the Sheriff's Department; on the other, the Institutions Security department ceased to exist, and at least from the County's point of view the former IPOs' jobs changed considerably during this overall period, with their admixture in part into other Sheriff's Department functions and the total loss of their firefighting duties.

In view of all of the facts, the Examiner must ultimately conclude that the Union's equating of the IPOs with prior transferees rather than with career-length members of the Sheriffs' Department was not marked by convincing evidence of hostility and was grounded at least arguably in the historical differences between the jobs. Thus, even granting Complainants' claim that the trend in the Courts has been toward requiring a greater affirmative showing of fairness by a union facing such a complaint as this one, the facts would still not warrant a finding that the Union failed to meet that burden. The endtailing of the Complainants must therefore be found to have fallen within the Union's permissible range of discretion rather than being arbitrary, discriminatory or in bad faith.

A similiar logic applies to the Union's agreement to the County's first proposal on wages. For the same factual reasons, the Union could reasonably take the position that IPOs did not have an entirely equivalent background to career sheriff's deputies, and nothing in the record shows that IPOs were treated less favorably as to wages than prior transferees. Moreover, Complainants have not cited any case law for the dubious proposition that a union must somehow extract a given level of wages for certain employes in negotiations in order not to violate the duty of fair representation: employers, both in this case and historically, have been noticeably more loath to leave wages to a union's choice than seniority. Even the speed of a union's assent to an employer's proposal is a slim reed against which to lean a charge of unfair representation: it could as easily reflect pragmatism as lack of due care.

With respect to the Union's failure to negotiate for the IPOs full or partial educational bonuses or longevity the principal thesis is the same as for wages, with one difference: Rieder admitted that the Union's bargaining committee never thought to try to get these benefits, and also admitted (in his earlier testimony, which he later unconvincingly recanted) that it would not have adversely affected other employes had the Union negotiated some such benefits. Complainants argue that this amounts to arbitrary conduct by inaction. Cases exist 16/ where inaction consisting essentially of negligence was considered to be so extreme as to be arbitrary, and violations of the unions' duty of fair representation were therefore found. 17/ All of these cases, however, refer to situations where the employe(s) involved could be said to have essentially fixed rights, as is the case in a grievance. Because of the fluid, give-and-take nature of negotiations it would be a remarkable extension of the law to hold that in that arena there is such a thing as negligence amounting to a violation of the duty of fair representation.

The last substantial contention of the Complainants is that the Union failed its duty of fair representation in failing to discuss proposals with Complainants or to let them vote in the ratification, citing Steele v. Louisville and Nashville Railroad 18/ to the effect that "The union is required to consider requests of non-union members of the craft and expression of their views with respect to collective bargaining with the employer and to give them notice of an opportunity for hearing upon its proposed action." 19/ Complainants' treatment of the

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16/ See Ruzicka v. General Motors Corp., 523 F. 2d 306 (6th Cir., 1975); Vaca v.Sipes, supra at p. 194; DeArroyo v. Sindicato De Trabajadores Packinghouse, 425 F. 2d 281 (1st Cir., 1970)

17/ Or postulated, as in the Vaca case.

18/ 323 U.S. 192 (1944).

19/ At p. 203; Complainant's emphasis.

underlined portion as a "cookbook" requirement is inappropriate, given that the cited formula from this early case has not reappeared; furthermore, the Union met the essence of this requirement in its meeting with Kearn and Schiller on September 11, 1979. Given the solidarity and prior organization among IPOs shown by the existence of the IPOA, moreover, Complainants' argument that the Union was required to call a meeting of all IPOs is insubstantial. By the same token, the Union's failure to inform the IPOs of the negotiated agreement, particularly since it contained more or less what Kearn and Schiller had been told to anticipate, is not momentous enough to warrant a finding of bad-faith action; and as to its failure to invite the IPOs to vote in the ratification of the contract, it must be observed that no case exists holding that unions have any obligation to allow non-members to participate in ratification votes, 20/ that according to uncontradicted testimony the IPOs were not eligible for membership under the Union's by-laws, and that no evidence exists that any IPO sought to vote in the ratification of the contract.

For the reasons explained above, the Examiner has concluded that the complaint with respect to the Union is without merit in each of its particulars. As the County is Respondent here not independently but only by virtue of its participation in the negotiations and agreement involved, it follows that the County likewise has not violated the statute.

Dated at Madison, Wisconsin this 27th day of January, 1982.

By _____
Christopher Honeyman, Examiner

20/ But see Alvey vs. General Electric Co., supra at 104 LRRM 2841.