

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petitions of	:	
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MANITOWOC COUNTY and	:	
WISCONSIN COUNCIL 40, AFSCME,	:	
AFL-CIO and its affiliated	:	Case CXIII
LOCAL 986B	:	No. 26183 ME-1840
	:	Decision No. 18351-A
Involving Certain Employees of	:	
	:	
MANITOWOC COUNTY	:	
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Appearances:

- Mr. Richard E. Garrow, Manitowoc County, Corporation Counsel, 1701 Washington Street, Manitowoc, Wisconsin 54220, on behalf of the County.
- Mr. Michael J. Wilson, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO and its affiliated Local 986B, P.O. Box 370, Manitowoc, Wisconsin 54220, on behalf of the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CLARIFYING BARGAINING UNIT

Manitowoc County having on December 8, 1981, filed a petition requesting the Wisconsin Employment Relations Commission to clarify a bargaining unit of its employes, represented by Manitowoc County Sheriff's Department Local 986B, AFSCME, AFL-CIO, by determining whether the positions of Patrol Sergeant, Court Officer, Training Officer and Clerical Coordinator should be excluded therefrom; and Manitowoc County Sheriff's Department Local 986B, AFSCME, AFL-CIO, having on February 15, 1982, filed a petition, and on April 26, 1982, filed an amendment thereto, requesting the Commission to clarify the same unit by including regular part-time Deputies, and a hearing on said petitions having been scheduled for March 30, 1982, and thereafter postponed by mutual consent of the parties to June 3, 1982; and Manitowoc County having on June 1, 1982, notified the Commission in writing that the parties had agreed to exclude the positions of Patrol Sergeant, Court Officer, Training Officer and Clerical Coordinator from said unit and, thereby, withdrew its petition for unit clarification; and a hearing on the petition of Local 986B, as amended, having been conducted in Manitowoc, Wisconsin on June 3, 1982 by Coleen A. Burns, an Examiner duly appointed by the Commission to conduct said hearing; and the record having been closed after the receipt of briefs on September 28, 1982; and the Commission, having considered the record and the arguments of the parties, and being fully advised in the premises makes and issues the following

FINDINGS OF FACT

1. That Manitowoc County, hereinafter referred to as the County, is a municipal employer having its offices at 1010 South 8th Street, Manitowoc, Wisconsin 54220.
2. That Manitowoc County Sheriff's Department Employees Local 986B, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization representing employes for the purpose of collective bargaining and has its offices at P.O. Box 370, Manitowoc, Wisconsin 54220.
3. That the Union and the County are parties to a 1981 collective bargaining agreement which contains among its provisions, the following voluntarily recognized bargaining unit description:

ARTICLE I - RECOGNITION AND BARGAINING UNIT

The Employer recognizes the Union as the exclusive bargaining agent for the employees of the County Sheriff

Department, excluding the positions of Sheriff, Chief Deputy, Food Service Manager/Matron, Support Division Director, Investigation Division Director, Patrol Division Director, Jail Division Director, Lieutenant, and temporary employees.

ARTICLE VIII - DEFINITIONS OF EMPLOYEES

- B. Regular Part-Time: A regular part-time employee is a person hired to fill a regular part-time position. Regular part-time employees shall be entitled to all fringe benefits under this contract (holiday, vacation and sick leave benefits shall be pro-rated).

Regular part-time employees shall not be used to replace, reduce or displace regular full-time employment.

. . .

- D. Temporary: A temporary employee is one hired for a specified period of time (not to exceed six (6) months) and who will be separated from the payroll at the end of such period. Temporary employees receive none of the benefits contained in this Agreement. Temporary employees shall not be used to replace, reduce or displace regular employment.

4. That the County on December 8, 1981, filed with the Commission a petition seeking the exclusion of the positions of Patrol Sergeant, Court Officer, Training Officer and Clerical Coordinator from the bargaining unit described in Paragraph 3 above; that on May 18, 1982, the parties entered into an agreement excluding said positions from the bargaining unit; and that as a result of said agreement, the County, on June 1, 1982, in writing, withdrew its request for a hearing on its petition.

5. That the positions of Sheriff, Chief Deputy, Food Service Manager/Matron, Support Division Director, Investigation Division Director, Patrol Division Director, Jail Division Director, Lieutenant, Patrol Sergeant, Training Officer, Court Officer and Clerical Coordinator have been excluded from the collective bargaining unit on the basis that such positions are managerial or supervisory and that the Food Service Manager/Matron and Clerical Coordinator do not have the power of arrest.

6. That the Union, on February 15, 1982, filed a petition which sought to include Reserve Deputies in the bargaining unit set forth in Paragraph 3, supra, on the grounds that they are regular part-time employees; that the Union sought said inclusion on the basis that the nature of the work performed by employees in the disputed position, i.e., Reserve Deputy, was such that said employees were not "temporary" employees to be excluded from the unit by the terms of the collective bargaining agreement, but rather, were "regular part-time employees" and, therefore, subject to the terms of the collective bargaining agreement; that the Union further contends that the positions of Reserve Administrative Lieutenant and Reserve Supervisory Sergeant are not supervisory and are, therefore, appropriately included in the bargaining unit; and that the County does not contend that the positions of Reserve Administrative Lieutenant and Reserve Supervisory Sergeant are supervisory employees, but opposes the inclusion of any Reserve Deputy position on the grounds that (1) said position is occupied by casual employees, who, by definition, lack sufficient community of interest with employees in the bargaining unit or (2) the differences between the wages, hours and working conditions of Reserve Deputies and bargaining unit employees establish a complete lack of community of interest between the two groups of employees.

7. That at the time the City voluntarily recognized the Union as the bargaining representative of the bargaining unit described in Article I of the Collective Bargaining Agreement, the County employed individuals in the Reserve Deputy position; that the position of Reserve Deputy has never been subject to the provisions of the collective bargaining agreement between the Union and the County; and that the exclusion of said employees from the voluntarily recognized unit was not based on any statutory grounds.

8. That in 1979, the Manitowoc County Traffic Department merged with the Sheriff's Department and, thereafter, Reserve Deputies were, for the first time, utilized in road patrol; that Reserve Deputies are used to replace full-time Deputies who become sick or are otherwise unavailable to work road patrol as scheduled; that as such work becomes available, Sheriff Department personnel telephone Reserve Deputies for the purpose of seeking volunteers; that there is an informal understanding that the calls to perform such work shall be distributed as equally as possible among qualified Reserve Deputies; that Reserve Deputies have the right to refuse such work when called; that several weeks prior to the hearing on June 3, 1982, the Sheriff posted a memo stating that Reserve Deputies would also be utilized for road patrol every Friday and Saturday evening, Memorial Day through Labor Day; and that it is the intent of the Sheriff that two Reserve Deputies work each Friday and Saturday evening, and that, in the event, Reserve Deputies are not available to work, the patrol will be adjusted accordingly.

9. That snowmobile patrol and small boat patrol, after several years absence, have been reinstated; that each patrol requires two men and operates on Saturday and Sunday during the appropriate season; that one park patrol operates every Friday and Saturday evening during the summer with a Sunday patrol on holiday weekends; that for each patrol, a sign-up list of one month's duty is posted approximately one month in advance of the duty; that Reserve Deputies and regular full-time Deputies are eligible to sign-up for each patrol; that there is an informal agreement among employees to sign up in a manner which distributes the available work equally among employees; and that such patrols are subject to cancellation in the event of inclement weather or insufficient volunteers.

10. That at all times material hereto Reserve Deputies have assisted in the jail, with prisoner transport, process serving, and investigative stakeouts; that regular full-time Deputies are eligible to perform and have performed all of the duties of Reserve Deputies, except regular full-time Deputies have not performed park patrol; that regular full-time Deputies do patrol parks as part of their road patrol duties; that as process serving, jail duty, investigative stakeouts, and prisoner transport work becomes available, Departmental personnel telephone Reserve Deputies to ask for volunteers; that said personnel attempt to distribute such work equally among qualified Reserve Deputies; that only three Reserve Deputies are trained as process servers; that Reserve Deputy Sydow, who for many years was the only Reserve Deputy trained in process serving, has in prior years, filled in for the full-time process server when he is on vacation and, for more than a year, has telephoned the Sheriff's Department every Friday afternoon to determine whether his services were needed that evening; that Reserve Deputy Sydow has acted as a process server almost every Friday for more than a year; and that Reserve Deputies, including Officer Sydow, have the right to refuse to work.

11. That in 1981, two or three Reserve Deputies worked undercover in narcotics investigations; that such investigations lasted no longer than six months; that the Officers worked whenever it was necessary to pursue the investigation; and that the participation in said investigation was voluntary.

12. That all Reserve Deputy work is on a volunteer basis; that the normal shift is eight hours; that except for Officer Sydow, no Reserve Deputy has had a regular schedule of work; and that the hours worked by each Reserve Deputy varies from month to month and season to season.

13. That in 1979, a study conducted at the Sheriff's Department resulted in a recommendation that during peak periods, Reserve Deputies be used to augment full-time personnel; that as a result of this study, Sheriff Kocourek made a decision to make greater use of Reserve Deputies; that, in 1979, twenty-eight Reserve Deputies worked an average of 2.63 hours per week; that in 1980, thirty-five Reserve Deputies worked an average of 4.66 hours per week; that in 1981, forty Reserve Deputies worked an average of 6.96 hours per week; that during the first quarter of 1982, thirty-two Reserve Deputies averaged 5.54 hours of work per week; and that the average hours worked includes hours paid out for attendance at mandatory police certification programs.

14. That there are forty Reserve Deputies in the Sheriff's Department; that approximately five Reserve Deputies do not have the power of arrest, but are to be enrolled in the 240 hour basic training as soon as possible; that upon said enrollment, said Deputies have the power of arrest; and that the power of arrest of all Reserve Deputies is limited to the time period in which the Reserve Deputy is performing work for the Sheriff's Department.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. That the existing voluntarily recognized unit does not contravene the provisions of Section 111.70, Wis. Stats. 1/
2. That the Commission will not, pursuant to the power vested in it by Sec. 111.70(4)(d)(2)(a) of the Municipal Employment Relations Act, accrete the Reserve Deputy position to the voluntarily recognized unit.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following

ORDER 2/

IT IS ORDERED that

1. The petition filed by the County of Manitowoc seeking to exclude the positions of Patrol Sergeant, Court Officer, Training Officer and Clerical

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- 1/ There is no evidence that employes within the unit are not "municipal employes" within the meaning of Sec. 111.70(1)(b), or that the unit commingles professionals and non-professional employes or craft and non-craft employes contrary to the provisions of Sec. 111.70(4)(d)(2)(a) or that all unit employes do not have the power of arrest.
  - 2/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all

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Coordinator from the voluntarily recognized unit be, and the same is hereby, dismissed.

2. That the petition filed by Manitowoc County Sheriff's Department Employees Local 986B, AFSCME, AFL-CIO, seeking the inclusion of the position of Reserve Deputy in the voluntarily recognized unit be, and the same is hereby dismissed.

Given under our hands and seal at the City of  
Madison, Wisconsin this 30th day of March, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/  
Herman Torosian, Chairman

Gary L. Covelli /s/  
Gary L. Covelli, Commissioner

Marshall L. Gratz /s/  
Marshall L. Gratz, Commissioner

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2/ (Continued)  
parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

MEMORANDUM ACCOMPANYING FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND ORDER CLARIFYING  
ORDER CLARIFYING BARGAINING UNIT

DISCUSSION

The Union petitioned the Commission to clarify an existing voluntarily recognized unit of Sheriff's Department employes by determining whether the position of Reserve Deputy is a regular part-time employe and, therefore, included in the unit within the meaning of the terms of the collective bargaining agreement.

The County contends that such an inclusion is inappropriate in that the employes occupying the position of Reserve Deputy are casual employes and/or lack a sufficient community of interest with employes in the bargaining unit.

The Commission will not, through a petition for unit clarification, accrete employes to a voluntarily recognized unit without an election in the unit deemed appropriate if the following conditions are present: 3/

1. The positions at issue were in existence at the time of the voluntary recognition.
2. The description of the voluntarily recognized unit implicitly or explicitly excludes the positions at issue.
3. Either the Employer or the Union opposes the proposed expansion.
4. The original exclusion was not based upon statutory grounds.
5. The unit is not repugnant to the provisions of the Municipal Relations Act.
6. There has not been any intervening events which would materially affect the status of the affected employes.

In the present case, the Reserve Deputy positions desired to be accreted to the instant unit were in existence at the time the County granted voluntary recognition; the Reserve Deputy position was not included in said unit; the County opposes the accretion; the original exclusion of the Reserve Deputy position was not based upon any statutory ground; and the existing unit is not repugnant to the provisions of the MERA. The remaining issue to be decided, therefore, is whether intervening events have materially affected the status of the Reserve Deputies.

The Union argues that the role of the Reserve Deputy has evolved over the years to the point that Reserve Deputies have become regular part-time employes. Since regular part-time employes are covered by the terms of the 1981 collective bargaining agreement, the Union contends that Reserve Deputies must, therefore, be accreted to the unit.

In determining whether or not employes are regular part-time, the Commission is primarily concerned with regularity of employment. 4/ Although there are regularly scheduled duties which are available to the Reserve Deputies, i.e., snowmobile patrol, small boat patrol, park patrol and Friday/Saturday evening road patrol, there is no evidence that any Reserve Deputy performs such work on a regular basis.

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3/ City of Cudahy, (19451-A; 19452-A) 12/15/82; City of Cudahy, (18502) 3/81; Madison Vocational, Technical and Adult School, (8382-A) 1/29/80.

4/ Milwaukee County, (17224-A) 4/22/80; Village of Mount Horeb (Police Department), (19188) 12/7/81.

On the contrary, the hours worked by the Reserve Deputies vary from month to month and season to season. The Friday evening process serving of Reserve Deputy Sydow can be distinguished from regular part-time employment on the basis that such work is dependent upon Officer Sydow calling the Sheriff's Department every Friday afternoon to determine whether or not work is available and his willingness to perform same. His work is, therefore, "on call." Although the Commission has found "on call" employes to be regular part-time employes, such employes, unlike the Reserve Deputies herein, regularly worked as much as two or three days a week on previously assigned shifts. 5/ The fact that the instant Reserve Deputies work only if they wish to do so constitutes further evidence that they lack a sufficient amount of interest to be included in the bargaining unit with regular full-time and regular part-time employes. 6/ As a result, the Commission rejects the Union argument that Reserve Deputies are regular part-time employes.

Although the kind and quantity of work available to Reserve Deputies has increased since 1978, Reserve Deputy work continues to be "on call," voluntary and performed on an irregular basis. The Commission, therefore, does not find that there have been any changes which have materially affected the status of the Reserve Deputy.

The Commission will not accrete the Reserve Deputy positions into the voluntarily recognized unit given the circumstances herein and, therefore, dismisses the petition of the Union.

Dated at Madison, Wisconsin this 30th day of March, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/  
Herman Torosian, Chairman

Gary L. Covelli /s/  
Gary L. Covelli, Commissioner

Marshall L. Gratz /s/  
Marshall L. Gratz, Commissioner

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5/ Douglas County (Sheriff's Department), (18209-A, 18210-A) 9/11/81.

6/ Sawyer County (Sheriff's Department), (19219) 12/28/81.