

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of : Case 52
: No. 50136 ME-3370
SPECIAL INVESTIGATORS : Decision No. 19129-F
BENEVOLENT ASSOCIATION :
: Case 88
Involving Certain Employes of : No. 50135 ME-3369
: Decision No. 21815-A
MARATHON COUNTY :
:
- - - - -

Appearances:

Mr. Patrick M. Brady, Attorney at Law, P.O. Box 898, Wausau, Wisconsin
Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Dean R. Dietrich,
Mr. Philip Salamone, Staff Representative, AFSCME, AFL-CIO, 7111 Wall
Mr. Steve Rust, 500 Forest Street, Wausau, Wisconsin 54403, on behalf of
the Marathon County Deputy Sheriff's Association.

54403-
P.O. B
Street

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On November 17, 1993, the Special Investigators Benevolent Association filed a petition with the Wisconsin Employment Relations Commission seeking an election through which the Association would represent employes in a claimed appropriate bargaining unit described as law enforcement special investigators supervised by the Marathon County District Attorney. After extensive efforts at conciliation proved unsuccessful, hearing in the matter was scheduled on March 31, 1994, to be held before Examiner Stuart Levitan, a member of the Commission's staff, on May 16, 1994, in Wausau, Wisconsin. On May 3, 1994, AFSCME Council 40, on behalf of its Local 2492-D, the then-exclusive representative of the position within the claimed appropriate bargaining unit, filed a Motion to Dismiss Petition For Election, which Motion the Commission took under advisement. Hearing was held on May 16, 1994, with a stenographic transcript of the hearing being made available to the parties on June 3, 1994.

Written arguments were submitted by the Association, the County, and AFSCME. The Marathon County Deputy Sheriff's Association waived its right to file written argument. Being fully advised in the premises, the Commission hereby makes and issues the following

No. 19129-F
No. 21815-A

FINDINGS OF FACT

1. The Special Investigators Benevolent Association, Inc., hereafter the Petitioner, is an organization in which employees participate, which exists for the purposes of collective bargaining, and which has offices at 715 McIndoe Street, Wausau, Wisconsin.

2. Local 2492-D, AFSCME, AFL-CIO, hereafter AFSCME, is a labor organization representing "all regular full-time and regular part-time professional courthouse employees" of Marathon County, and has offices at 7111 Wall Street, Schofield, Wisconsin. AFSCME and Marathon County are parties to a January 1, 1993-December 31, 1994 contract with a date for reopening negotiations of August 1, 1994.

3. The Marathon County Deputy Sheriff's Association, affiliated with the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereafter DSA, is a labor organization representing "all regular full-time deputies" employed by Marathon County, and has offices at 500 Forest Street, Wausau, Wisconsin.

4. Marathon County, hereafter the Employer or the County, is a municipal employer with offices at 500 Forest Street, Wausau, Wisconsin.

5. At the time of the hearing, Marathon County employed 674 regular employees, with another thirteen positions being vacant. Of this workforce, 131 employees were not represented for the purposes of collective bargaining. The 556 remaining employees were represented in eleven separate bargaining units, with the indicated representation and number of employees, as follows: Sheriff Supervisory (WPPA; 21); Parks (AFSCME Local 1287; 30); Courthouse Professional (AFSCME Local 2492-D; 38); Airport (Teamsters; 13); Deputy Sheriff (Marathon County Deputy Sheriff's Association; 50); Social Services/Professional (AFSCME 2492-A; 34); Health (AFSCME 2492-B; 21); Highway (AFSCME Local 326; 75); Social Services/Office (AFSCME 2492; 57); Courthouse Office (AFSCME 2492-E; 189); Library (AFSCME 2492-C; 28).

6. Matt Triolo is the sole incumbent in the position of Special Investigator, one of the positions represented by AFSCME Local 2492-D in the courthouse professional unit. Section 978.047, Stats., provides as follows:

978.047 Investigators; police powers. The district attorney of any county having a population of 500,000 or more or containing a 2nd or 3rd class city may appoint such investigators as are authorized by the county board, and the county board may abolish the positions at its pleasure. The investigators when so appointed have general police powers within the county.

On March 8, 1993, the Marathon County Personnel Committee adopted a motion to "approve an amended class specification for Special Investigator to establish and confirm that the Special Investigator's position in the Marathon County

District Attorney's Office is an investigator's position pursuant to Section 978.047 of the Wisconsin State Statutes." On March 10, 1993, Marathon County District Attorney Greg Grau executed a "Confirmation of Appointment," as follows:

This document confirms and establishes that Matt Triolo is appointed to the position of Special Investigator in the Marathon County District Attorney's Office. The position of Special Investigator exists in accordance with Section 978.047 of the Wisconsin Statutes.

Effective March, 1993, the position has had the following position description:

SPECIAL INVESTIGATOR

Definition of Class

Work primarily involves investigation of criminal matters referred to the District Attorney's office. Work extends to investigation of consumer fraud, business practice, and other matters as time permits. Work requires application of specialized investigative techniques and knowledge. Work is performed in accordance with accepted policies and procedures, although considerable independent judgment is exercised. Work assignments are received directly from the District Attorney, Assistant District Attorneys, law enforcement agencies, and from citizen complainants. General supervision is received from the District Attorney through contact with the investigator, review of reports and conferences. Work involves considerable contact with local and state enforcement agencies, medical authorities, consumer protection agencies, witnesses and crime victims, various community organizations, and the general public.

This position is an investigator's position pursuant to Section 978.047, Wis. Stats.

Examples of Work Performed

Investigates criminal matters as assigned by the District Attorney; conducts interviews and takes statements from complainants, victims, witnesses and suspects. Investigations are supplementary to those conducted by local law enforcement agencies, with the emphasis being placed totally on follow-up investigations and on pretrial preparation and solving of pretrial problem areas. Reviews and investigates complaints concerning consumer

fraud and allegedly fraudulent business practices.
Maintains ongoing contact with complainants and victims regarding case status and restitution.
Assists in collection of physical evidence of cases through investigation of crime scenes, photographing evidence, etc.
Maintains files regarding all investigations; prepares reports for courtroom use.
Participates in criminal prosecution and trials of said prosecutions with the District Attorney's office.
Provides information to organizations and the public regarding sexual assault and consumer fraud through community programs, publication of related articles and brochures, etc.
Provides general support services to assault victims and families.
Carrying out of general police powers as contemplated in Section 978.047, Wis. Stats.
Performs related work as required.

Knowledges, Skills and Abilities

Thorough knowledge of techniques of criminal investigations.
Thorough knowledge of pertinent local, state and federal legislation.
Knowledge of community resources available for victims' assistance.
Knowledge of the techniques of criminal identification.
Ability to organize thoughts, gather and analyze information and to communicate effectively both orally and in writing.
Ability to establish and maintain effective working relationships with law enforcement agencies, appropriate community organizations and agencies and medical authorities.
Ability to establish positive relationships with victims and complainants.
Ability to maintain accurate records.
Ability to carry out general police powers contemplated under Section 978.047, Wis. Stats.
Ability to gain and/or maintain proper certification with the State of Wisconsin.

Qualifications

Bachelor's degree in criminal justice, police science, or related field and one year professional investigation experience; or equivalent combination of education and experience.

Necessary Special Qualifications

Possession of a valid Wisconsin driver's license or ability to obtain one within a reasonable (sic) time after date of hire.

7. The organizational chart for the Marathon County District Attorney's office indicates fifteen positions: the elected District Attorney; five assistant district attorneys (state employees), and nine represented positions (the special investigator; a victim/witness coordinator; two administrative specialists; three legal secretaries; and two clerical assistant II's).

8. The organizational chart for the Marathon County Sheriff's Department indicates 134 positions: the elected Sheriff; 129.5 represented positions, and 3.5 non-represented positions, arrayed across six functional areas, namely dispatch; patrol; crime prevention; corrections; investigation, and emergency government. Among the represented positions is that of Detective, with the following position description:

DETECTIVE

Definition of Class

This is specialized police work in the investigation of criminal offenses and the performance of related assignments in the Marathon County Sheriff's Department.

Work involves the investigation of all criminal matters through the application of specialized investigative techniques and knowledges. Work may involve conducting background investigations for purposes of hiring Sheriff applicants and certain other licensed personnel. Work assignments are generally received from a superior officer, and are based upon complaints from citizens, and information received regarding suspicious or wanted persons. Work is performed in accordance with accepted policies and procedures, although considerable independent judgment is exercised in the application of investigative techniques to the solution of particular problems. A superior officer is generally available for advice and assistance if necessary. Work involves considerable contact with both the public and other police agencies; work may, on

occasion, involve supervision of police personnel in emergency situations, or in the absence of a superior officer. Work may involve an element of personal danger.

Examples of Work Performed

Investigates crimes such as homicide, robbery, burglary and rape, as well as sudden deaths or suicides; protects and searches crime scenes to obtain physical evidence; locates and questions witnesses and informants; takes statements from witnesses, victims and suspects.

Works closely with district attorney in determining procedures to be followed in specific cases; prepares evidence, statements, and reports for presentation in criminal cases; testifies in court regarding results of investigations.

Serves civil and criminal process as directed by superior officer or court officer.

Works closely with other police agencies in transmitting and receiving information regarding persons or incidents under investigation .

Interviews and interrogates suspects and witnesses; photographs and fingerprints persons arrested in connection with crimes; performs undercover surveillance work of persons know (sic) or believed to have been involved in criminal activities, as necessary.

Prepares written reports on the results of investigation for both departmental and courtroom use.

Performs related work as required.

Knowledges, Skills and Abilities

Considerable knowledge of modern methods and techniques of criminal investigation, practices regarding interrogation, and identification and preservation of physical evidence.

Considerable knowledge of pertinent federal and state laws, as well as the laws of the area served, particularly those regarding methods of arrest and preservation of evidence.

Considerable knowledge of the geography and demography of Marathon County.

Thorough knowledge of departmental rules and regulations.

Knowledge of the techniques of criminal identification.

Knowledge of first aid techniques.

Skill in the use of firearms, operation of motor vehicles, and the maintenance and operation of all

departmental equipment.

Skill in conducting interviews and interrogations, ability to analyze the facts obtained through such procedures, as well as the ability to apply that information to the solution of particular problems.

Ability to deal firmly yet tactfully with the general public, as well as the ability to establish and maintain an effective working relationship with members of other police agencies throughout the state and country.

Ability to organize thoughts and information in a logical manner, and to present such information clearly, both orally and in writing.

Desirable Requirements

Graduation from a standard senior high school, and two years' experience as a Deputy Sheriff.

Necessary Special Qualification

Possession of a valid motor vehicle operator's license issued by the State of Wisconsin.

For calendar year 1994, the Sheriff's Department and the Marathon County Department of Social Services entered into a contract by which the Sheriff's Department provided "a full-time detective to be assigned" to the Social Services Department "to investigate and assist in prosecution" of a range of welfare fraud cases. That same year, the two departments also entered into a Cooperative Agreement, by which the Sheriff's Department provided services, for a specified budget, relating to child support activities. These assignments were covered by the terms of the respective collective bargaining agreements, and were performed by members of the bargaining unit represented by the DSA.

9. One of Triolo's predecessors as Investigator was Donna M. Seidl. On December 20, 1985, the County's labor negotiator, Dean M. Dietrich, sent the following correspondence to the President of Local 2492-D, Lori O'Brien:

Re: Compensation for Donna Seidl -
Investigator in District
Attorney's Office

Dear Ms. O'Brien:

This letter will confirm our telephone conversation of December 19, 1985, at which time I advised you that Marathon County is agreeable to extending payment of wages to Ms. Donna Seidl who serves in the capacity of Special Investigator in the District Attorney's office.

The County has agreed to this payment of wages because the County and Deputy Sheriff Association have not, to

date, received the Arbitration Award in the Mediation/Arbitration proceedings between Marathon County and the Deputy Sheriff Association. Further, the County has agreed to tie the Investigator rate in the District Attorney's office to the Detective rate in the Sheriff's Department.

As a result of this agreement by Marathon County, Ms. Seidl will be paid back pay for all hours worked at the 1985 wage rate for the Detective position in the Marathon County Sheriff's Department as established under the final offer of Marathon County submitted to the Arbitrator. Thus, the rate for 1985 will be \$1,843 per month or \$22,116 per year. It is further understood that in the event the Deputy Sheriff Arbitration Award would result in the selection of the Deputy Sheriff Association final offer, there would be the further adjustment in the 1985 wage rate for this individual.

Marathon County is always willing to make provision for the benefit of its employees whenever possible but does not do so in this case with the understanding that this action would not be used by Local 2492-D as any precedent for action to be taken by Marathon County in the future.

For your information, I am enclosing a copy of the final offer of Marathon County which reflects the wage rates being used in this calculation. In the event you should have any questions, please feel free to contact me.

Very truly yours,

MULCAHY & WHERRY, S.C.

Dean R. Dietrich

On January 17, 1986, Dietrich sent to Seidl and O'Brien the following letter:

Re: 1986 Investigator Wage Rate

Dear Ms. O'Brien and Ms. Seidl:

Marathon County has received the Arbitration Award in the Arbitration between Marathon County and the Marathon County Deputy Sheriff Association. The Arbitrator has selected the final offer of Marathon County. Thus, the wage rate for the Detective position in the Marathon County Sheriff's Department will be \$22,116 in 1985 and

\$23,004 in 1986.

It is our understanding that Ms. Seidl is currently being paid the \$22,116 rate. Thus, we will proceed to adjust the 1986 wage rate to reflect the \$23,004 annual rate for this position.

In the event you should have any questions regarding this, please feel free to contact me.

Very truly yours,

MULCAHY & WHERRY, S.C.

Dean R. Dietrich

The collective bargaining agreement between AFSCME Local 2492-D and the County for 1993-94 included an "equity adjustment" for the Special Investigator of \$2,294 per year on its Schedule Step D, effective January 2, 1994. This equity adjustment, provided in addition to the across-the-board increase received along with all other members of the bargaining unit, was for the explicit purpose of bringing the position into wage parity with the Detective position in the deputy's bargaining unit. Effective January 1, 1993, July 1, 1993 and January 1, 1994, the top salaries for the Detective and Investigator positions, respectively, were \$32,204 and \$29,841; \$32,526 and \$30,139; \$33,664 and \$33,488.

10. According to a roster prepared for the Training and Standards Bureau of the Wisconsin Department of Justice, Triolo has the power of arrest. According to records kept by Marathon County Clerk of Courts Donna M. Seidl, Triolo is not a sworn officer, and has not signed and certified an oath as such. County District Attorney Grau has issued Triolo a badge reading "Investigator -District Attorney - Marathon County" but has not issued Triolo a gun or handcuffs, and has instructed him not to attempt an arrest without prior authorization. Unlike all other positions in the bargaining unit represented by AFSCME Local 2492-D, the Special Investigator has the power of arrest.

11. On January 12, 1994, Assistant Attorney General David H. Perlman, on behalf of the Division of Law Enforcement Services, Bureau of Training and Standards, Wisconsin Department of Justice, sent Triolo the following letter:

Re: Investigator as a law enforcement officer -
978.047

Dear Mr. Triolo:

This letter is in response to your telephone query of last week. Specifically, you asked if an investigator appointed by a district attorney under 978.047 is to be considered a law enforcement officer. My answer would

be yes, provided the investigator has received the 400 recruit training and has kept certification status through participation in the required 24 hour annual training, and provided the job description for the position is not inconsistent with the powers of a law enforcement officer.

The pertinent portion of 978.047 states that the investigator would have general police powers within the county. A law enforcement officer is defined by Wis. statute 165.85(2)(c) as a person who is employed for the purpose of detecting and preventing crime and who is authorized to make arrests. The power to prevent and detect crime and to make arrests are reasonably contained in the empowerment of general police powers. Thus an investigator appointed under 978.047 and statutorily granted police powers would have the powers consistent with their being defined as a law enforcement officer.

However, if the job description for the investigator appointed under 978.047 specifically limited the investigator's powers to less than would be statutorily permissible; such as prohibiting an investigator from ever making an arrest, my answer would be different. Moreover an investigator appointed under 978.047 is subject to the same training requirements as everyone else in order to preserve a law enforcement officer status.

Hopefully the above is of assistance to you in understanding the issue you raise.

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

CONCLUSIONS OF LAW

1. The bargaining unit described in Finding of Fact 2 and represented by Local 2492-B, AFSCME, AFL-CIO, is not an appropriate bargaining unit within the meaning of Sec. 111.70(4)(d)2.a. Stats, because it contains an employee who possesses the power of arrest.

2. The Special Investigators' Benevolent Association is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

3. The election petition filed by the Special Investigators' Benevolent Association is timely.

4. The Special Investigator shares a sufficient community of interest with employees in the bargaining unit described in Finding of Fact 3 and

represented by Marathon County Deputy Sheriff's Association to render inappropriate a separate Investigator bargaining unit given the statutory mandate against undue fragmentation.

5. The position of District Attorney Special Investigator is appropriately included in the bargaining unit described in Finding of Fact 3 and represented by the Marathon County Deputy Sheriff's Association.

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

ORDER 1/

1. The petition for election filed by the Special Investigator Benevolent Association is hereby dismissed.

2. The bargaining unit described above in Finding of Fact 3 is clarified by including therein the position of Special Investigator.

Given under our hands and seal at the City of
Madison, Wisconsin this 19th day of September,
1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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 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.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission;

and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MARATHON COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER DOING SOMETHING

POSITIONS OF THE PARTIES

In support of its position that an election be held to determine what, if any, representation is desired by the Special Investigator(s) employed by the Marathon County District Attorney, the Petitioner argues as follows:

The subject position is not properly represented by the courthouse professional unit because the incumbent has the power of arrest. Further, the petitioner is entitled to representation, and desires that representation be by the Special Investigators Benevolent Association. The anti-fragmentation rule should not force the incumbent to join the deputy's labor organization, because the investigator has little in common with deputies, other than power of arrest; because the deputy's association does not welcome the position, and, most especially, because the investigator may be called upon to investigate allegations of deputy misconduct.

In support of its position that the petition for election should be dismissed, AFSCME states as follows:

The petition for election should be dismissed because it was not timely filed, but rather was during the period of application of the contract bar. Further, the petition should be dismissed because there has been no evidence presented establishing the existence of a significant question the representation status of Local 2492-D; the record instead shows only one incumbent out of 38 who seeks to discontinue AFSCME representation. Further, the election petition should be dismissed because it was filed by an individual rather than a labor organization; the so-called "Special Investigators Benevolent Association" is a bogus facade that should not allow the contravention of ERB 11.02(1), which requires that election petitions be filed by either the employer or a labor organization, but not individual employees.

As to the merits, the petition should be dismissed because its granting would result in further, undue fragmentation of bargaining units in Marathon County, even beyond the high degree which already exists.

In support of its position that the subject position should be accreted to the

bargaining unit represented by the Deputy Sheriff's Association, the County argues as follows:

The procedural arguments raised by AFSCME are totally without merit, both as to the status of the Special Investigators Benevolent Association as a valid labor organization and to the claimed contract bar. To avoid significant inconvenience and duplication, the matter should be heard on its merits now.

As to the merits, the subject position has the power of arrest, and must be removed from its current bargaining unit. The position should then be accreted to the bargaining unit representing deputy sheriffs.

The Commission has consistently ruled it will not include employees possessing the power of arrest with a collective bargaining unit consisting of employees who do not possess such power. Here, AFSCME's claims to the contrary, there should be no dispute but that the subject position does have the power of arrest. Contrary to AFSCME's claims, the power of arrest criterion does not apply solely to deputized individuals, or to individuals who have already made arrests. Pursuant to statute, the opinion of the Wisconsin Attorney General, and other relevant evidence, the subject position has the power of arrest and as such must be removed from the courthouse professional unit.

The subject position is then properly included within the deputy's unit, in accord with the Commission's statutory mandate to avoid fragmentation, and because the position has sufficient community of interest with the positions already represented by that labor organization. Further, it has been the Commission's long-standing policy to include all employees vested with the power of arrest within a single unit. The argument that the position should not be so accreted because the investigator may have to investigate other personnel represented by that unit is not supported by the evidence.

Because the Special Investigator has the power of arrest, the position must be removed from the professional courthouse unit. Because the Investigator has a community of interest with positions represented by the WPPA unit, and because the Commission is to avoid fragmentation, the Investigator should then be

accreted into the bargaining unit represented by the
Marathon County Deputy Sheriff's Association.

The Marathon County Deputy Sheriff's Association, Inc., waived its right to
file written argument.

DISCUSSION

We first consider the AFSCME arguments that the Petitioner is not a labor
organization and that the petition is untimely.

AFSCME characterizes the Special Investigators Benevolent Association,
Inc., as a sham organization which is not entitled to file an election
petition. We disagree. The record evidence establishes that the Petitioner is
an organization in which employees participate, and which exists for the
purposes of collective bargaining. Thus, Petitioner is a "labor organization"
within the meaning of Sec. 111.70(1)(h), Stats. 2/ and thus an entity entitled
to file an election petition.

As to the timeliness of the petition, AFSCME correctly argues we have a
general rule that existence of a contract generally bars the filing of an
election petition except during the 60 day period prior to any reopening date
specified in the contract. 3/

The 1993-1994 contract between AFSCME and the County has a reopening date
of August 1, 1994. Thus, Petitioner's November, 1993 petition is premature
under the general contract bar rule. However, we have held that if an existing
unit is inappropriate, the timeliness of an election petition involving
employees inappropriately included in the existing unit is not an issue. 4/ As
is evident from Conclusion of Law 1, this petition does involve an employee
inappropriately included in an existing unit. Further, shortly after the May
16, 1994, hearing, Petitioner could have filed within the 60-day "window"
period. Thus, the petition is timely.

Appropriate Unit

2/ Section 111.70(1)(h), Stats., provides:

(h) "Labor organization" means any employee organization in which
employees participate and which exists for the purpose, in whole or in
part, of engaging in collective bargaining with municipal employers
concerning grievances, labor disputes, wages, hours or conditions of
employment.

3/ Menominee County, Dec. No. 23352 (WERC, 3/86).

4/ City of Appleton, Dec. No. 11784 (WERC, 4/73).

It is well settled that the Commission rejects any commingling of positions with and without the power of arrest in the same bargaining unit. As we explained in a case involving several of these same parties, in a proceeding by which WPPA sought inclusion into the unit described in Finding of Fact 3 of certain positions which did not have the power of arrest:

. . .the Commission has long held that only those employees who perform duties related to the law enforcement function and who have the power of arrest will be found to be "law enforcement personnel" properly included in a law enforcement unit governed by Sec. 111.77, Stats. 3/ As we have also indicated in prior cases, that interpretation is based in part on the definition of law enforcement officer found elsewhere in the statutes. 4/

Those employees who possess the power of arrest play a critical role in maintaining the public peace and because of same, the Legislature failed to provide that said employees in their attempt to settle disputes under Sec. 111.77, Stats., have the right to strike. On the other hand, employees in law enforcement departments who do not possess the power of arrest do not have the same critical role in maintaining the public peace. Consequently, the Legislature has provided these employees with a different statutory scheme under which to attempt to settle disputes, and said employees are afforded the right to strike under the limited circumstances set forth in Sec. 111.70(4)(cm), Stats. Because law enforcement personnel and other municipal employees are subject to different statutory provisions regarding their respective rights to strike or pursue interest arbitration, it is inappropriate to include the civilian employees who do not possess the power of arrest in the same bargaining unit with law enforcement personnel. To combine law enforcement personnel with non-law enforcement personnel would create an untenable situation when implementing the interest arbitration and limited right to strike provisions of Secs. 111.77 and 111.70(4)(cm), Stats.

In summary, the Commission is not persuaded that there is any substantial basis to alter its long-standing policy of relying on the power of arrest as the determinative factor in establishing the composition of law enforcement bargaining units. We further note that the Legislature has amended the Municipal Employment Relations Act several times during

years we have been applying this policy and has not seen fit to modify the law in a manner which would produce a different result. Furthermore, if we were to adopt the WPPA position, the department employees who do not possess the power of arrest would be deprived of the limited right to strike they have been statutorily granted. As certain of the employees of the Sheriff's Department do not possess the power of arrest, we must dismiss the WPPA request for a department-wide unit. However, the record does reveal that several Sheriff's Department employees currently included in the AFSCME Courthouse unit do possess the power of arrest and perform duties related to the law enforcement function. Thus, said employees are appropriately included in the WPPA Sheriff's Department unit and said unit has been accordingly clarified. 5/

(Footnote numbering as in original)

- 3/ Waukesha County, Dec. No. 14830 (WERC, 8/76); Waukesha County, Dec. No. 14534-A (WERC, 11/76); LaCrosse County, Dec. No. 19539 (WERC, 4/82); Vernon County, Dec. No. 21082 (WERC, 10/83); Kenosha County, Dec. No. 21910 (WERC, 8/84).
- 4/ In addition to the definition in Sec. 165.85(2)(c), Stats., see also Sec. 102.475(8)(c), Stats., which defines a law enforcement officer for purpose of death benefits; and Sec. 967.02(5), Stats., which defines a law enforcement officer in the criminal procedure code; and Sec. 40.02(48)(b)(1) and (3) Stats., which defines a police officer and deputy sheriff for purposes of retirement benefits.
- 5/ Marathon County; Marathon County (Sheriff's Department), Decs. No. 24467, 20999-A (WERC, 5/87).

Thus, if the subject position has the power of arrest, it must be removed from the AFSCME Local 2492-D bargaining unit. The County and the Petitioner contend the position does have such power; AFSCME disagrees.

In March, 1993, the County took explicit and specific actions to formally amend the Investigator's position description to include reference to Sec. 978.047, Stats., which provides for such position to "have general police

powers within the county." The District Attorney took the explicit and specific action to formally execute a "Confirmation of Appointment," referencing said statute. Based upon the power given the Investigator by Sec. 978.047, Stats., we are satisfied he has the power of arrest even though the incumbent District Attorney has instructed the incumbent Investigator not to exercise his police power without prior authorization. Thus, the Investigator must be removed from the AFSCME Local 2492-D bargaining unit.

We turn now to the appropriate alternative placement of the subject position.

When evaluating the propriety of the Investigator unit sought by Petitioner, we look first to Sec. 111.70(4)(d)2.a., Stats., which provides in pertinent part:

The commission shall determine the appropriate bargaining unit for purposes of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a unit. . . .

When exercising our statutory discretion to determine whether a proposed bargaining unit is appropriate, we consistently consider the following factors:

1. Whether the employees in the unit sought share a "community of interest" distinct from that of other employees.
2. The duties and skills of employees in the unit sought as compared with the duties and skills of other employees.
3. The similarity of wages, hours and working conditions of employees in the unit sought as compared to wages, hours and working conditions of other employees.
4. Whether the employees in the unit sought share separate or common supervision with all other employees.
5. The degree to which the employees in the unit sought have a common or exclusive workplace.

6. Whether the unit sought will result in undue fragmentation of bargaining units.
7. Bargaining history.

We have used the phrase "community of interest" as it appears in Factor 1 as a means of assessing whether the employees participate in a shared purpose through their employment. We have also used the phrase "community of interest" as a means of determining whether employees share similar interests, usually -- though not necessarily -- limited to those interests reflected in Factors 2-5.

This definitional duality is of long-standing, and has received the approval of the Wisconsin Supreme Court. 5/

The fragmentation criterion reflects our statutory obligation to "avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal workforce." 6/

The bargaining history criterion involves an analysis of the way in which the workforce has bargained with the employer or, if the employees have been unrepresented, an analysis of the development and operation of the employee/employer relationship. 7/ Although listed as a separate component, under some circumstances, analysis of bargaining history can provide helpful insights as to how the parties, themselves, have viewed the positions in question in the past from the standpoint of both similar interests and shared purpose.

Based upon long standing Commission precedent, we believe it is well understood by the parties that within the unique factual context of each case, not all criteria deserve the same weight 8/ and thus a single criterion or a combination of criteria listed above may be determinative. 9/

5/ Arrowhead United Teachers v. WERC, 116 Wis.2d 580, 592 (1984):

. . .when reviewing the commission's decisions, it appears that the concept (community of interest) involves similar interests among employees who also participate in a shared purpose through their employment.
(Emphasis supplied.)

6/ Section 111.70(4)(d)2.a., Stats.

7/ Marinette School District, Dec. No. 27000 (WERC, 9/91).

8/ Shawano-Gresham School District, Dec. No. 21265 (WERC, 12/83); Green County, Dec. No. 21453 (WERC, 2/84); Marinette County, Dec. No. 26675 (WERC, 11/90).

9/ Common purpose Madison Metropolitan School District, Dec. Nos. 20836-A and 21200 (WERC, 11/83); similar interests, Marinette School District,

Applying the foregoing, we find there is substantial similarity as regards the wages, hours, and benefits of the Investigator and the Detective position in the deputy's unit. There is also a shared purpose of law enforcement and a reasonable amount of similarity between the duties and skills of the Investigator and those of the Detectives. Given that the positions work for two different elected officials, and at two different job sites, the Investigator has supervision and workplace distinct from employees in the deputy's unit. As evidenced by Finding of Fact 9, there has been an historical linkage of the Investigator's wages to wages of employees in the deputy unit and thus the bargaining history criterion does not support establishment of a separate Investigator unit.

supra; fragmentation, Columbus School District, Dec. No. 17259 (WERC, 9/79); bargaining history, Lodi Joint School District, Dec. No. 16667 (WERC, 11/78).

Although criteria 1-5 and 7 present a mixed picture, they best support a conclusion that a separate Investigator unit is inappropriate. Criterion 6 definitively establishes this conclusion. We have generally held that only one "power of arrest" unit is appropriate for each municipal employer. 10/ Further, creation of a twelfth unit of County employes obviously further fragments the workforce. Thus, we conclude the Investigator unit sought by Petitioner is inappropriate.

Given the foregoing, we further conclude that there is sufficient community of interest between the Investigator and employes in the deputy unit to warrant inclusion of the Investigator in said unit.

Dated at Madison, Wisconsin this 19th day of September, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

10/ City of Marshfield, Dec. No. 25700-A (WERC, 10/92).