STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CRAWFORD COUNTY Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and CRAWFORD COUNTY SHERIFF'S DEPARTMENT LOCAL 1972, AFSCME, WCCME, AFL-CIO	Case XXVI No. 29503 DR(M)-222 Decision No. 20116

Appearances:

Melli, Shiels, Walker, & Pease, S.C., 119 Monona Ave., P.O. Box 1664, Madison, Wisconsin 53701, by Mr. Dennis M. White on behalf of Crawford County.

Lawton & Cates, Attorneys at Law, 110 East Main St., Madison, Wisconsin 53705, by Mr. Bruce F. Ehlke on behalf of Crawford County Sheriff's Department Local 1972, AFSCME, WCCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Crawford County having on March 22, 1982, filed a petition requesting the Wisconsin Employment Relations Commission to issue a declaratory ruling, pursuant to Sec. 111.70(4)(b) of the Municipal Employment Relations Act, or in the alternative, pursuant to Sec. 227.06, Stats., as to whether the County has the enforceable duty to bargain collectively with Crawford County Sheriff's Department Local 1972, AFSCME, WCCME, AFL-CIO, the collective bargaining representative of non-supervisory law enforcement personnel in the employ of the Sheriff's Department of the County, with respect to certain proposals submitted by said Union during the course of negotiations on a collective bargaining agreement covering said personnel for the year 1982; and the parties having waived hearing in the matter and having filed briefs in support of their respective positions on the issues involved; and the Commission having considered the proposals in issue, and the briefs of the parties, makes and issues the following

FINDINGS OF FACT

1. That Crawford County, hereinafter referred to as the County, is a municipal employer and has its principal offices at 220 North Beaumont Road, Prairie du Chien, Wisconsin; and that the County, among its governmental functions, maintains and operates a Sheriff's Department.

2. That Crawford County Sheriff's Department Local 1972, AFSCME, WCCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization having its offices at Route 1, Sparta, Wisconsin.

3. That at all times material herein, the Union has been, and is, the certified exclusive collective bargaining representative of non-supervisory law enforcement personnel in the employ of the County's Sheriff Department; that in said relationship the Union and the County have been parties to various collective bargining agreements covering wages, hours and working conditions of said law enforcement personnel, the last of such agreements being in effect from January 1, 1981 through December 31, 1981; that, during the course of negotiations on an agreement to succeed the aforementioned 1981 agreement, the Union submitted various proposals for inclusion in the 1982 agreement, including proposals which had been included in the 1981 agreement, or which related to practices not actually contained in the 1981 agreement; that during said negotiations the County

objected to various proposals submitted by the Union, on the claim that said proposals related to non-mandatory subjects of collective bargaining; that in the latter regard, the County on March 22, 1982 filed a petition with the Wisconsin Employment Relations Commission initiating the instant proceeding, wherein it requested the Commission to issue a declaratory ruling with respect to the mandatory or non-mandatory duty of the County to collectively bargain with the Union on said proposals; and that the proposals in issue, which the County contends, contrary to the Union, relate to permissive and/or prohibited subjects of collective bargaining, in part because certain of said proposals irreconcilably conflict with or limit the statutory or constitutional powers granted to Sheriffs, are as follows:

ARTICLE XI - DISCIPLINARY PROCEDURE

11.01 The following disciplinary procedure is intended as a legitimate management device to inform employees of work habits, etc., which are not consistent with the aims of the Employer public function, and thereby to correct these deficiencies.

11.02 Any employee may be demoted, suspended, or discharged or otherwise disciplined for just cause. The sequence of disciplinary action shall be oral reprimands, written reprimands, suspension, demotion, and discharge. A written reprimand or other disciplinary action sustained in the grievance procedure or not contested shall be considered a valid warning. No valid warning shall be considered effective for longer than a nine (9) month period.

11.03 The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or suspension pending discharge. Theft of personal or public property, drinking on the job, or being drunk on the job are hereby defined as cause for immediate suspension pending discharge.

11.04 Any suspended or suspension pending discharge employee may appeal such action through the grievance procedure and shall initiate grievance action by immediate recourse to the Law Enforcement Committee in accordance with Step One within ten (10) days of notice of suspension or suspension pending discharge.

11.05 Suspensions shall not be for less than two (2) days, but for serious offense of repeated violations suspension may be more severe. No suspensions shall exceed thirty (30) calendar days.

11.06 Notice of discharge or suspension shall be in writing and a copy shall be provided the employee and the Union at the time the action is taken.

ARTICLE XII - GRIEVANCE PROCEDURE

12.01 The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. Should a grievance arise whether in reference to a question of interpretation of the Agreement or to a question relating to safety and/or other matters, the grieving employee shall first bring the complaint to the steward or Grievance Committee of the Union. If it is determined after investigation by the Union that a grievance does exist, it shall be processed in the manner described below:

(A grievance must be filed in Step One within 30 days of the date from which the event occurred or from which the employee should have had knowledge of the occurrence.)

12.02 Step One. The Grievance Committee shall attempt to resolve the matter with the Sheriff. If the grievance is not resolved within five (5) working days, the grievance shall be reduced to writing and submitted to the Law Enforcement Committee. The parties shall meet within one (1) calendar week of receipt of the written appeal to hear the grievance. Within one (1) calendar week of the hearing, the Law Enforcement Committee shall give its response in writing.

12.03 Step Two. Arbitration. If the grievance is not resolved through Step One, either party may appeal the grievance to arbitration by giving written notice to the

other. Within five (5) days of such notice, the Employer and the Union shall attempt mutually to select an arbitrator, and should they be unable to agree within the above five (5) days to select an arbitrator, they may jointly or either individually, request the Wisconsin Employment Relations Commission to provide an impartial arbitrator.

12.04 The arbitrator, after hearing both sides of the controversy, shall hand down his decision in writing to the parties within ten (10) days of the last meeting and such decision shall be final and binding on both parties to this Agreement.

12.05 Time limits as set forth above may be extended by mutual agreement.

12.06 Expenses, if any, arising from the arbitration proceedings, will be shared equally by the parties.

12.07 Any employee shall have the right of the presence of a steward when his work performance or conduct or other matter affecting his status as an employee are subject of discussion for the record.

12.08 The Union shall determine the composition of the Grievance Committee.

ARTICLE X - SENIORITY

10.03 Whenever it becomes necessary to lay off employees, the employee(s) with the least seniority shall be first laid off, providing the remaining employees are capable of performing the work, and whenever so laid off, shall possess re-employment rights hereinafter defined.

10.04 Whenever it becomes necessary to employ additional personnel, either in vacancies or in new positions, subject to the provisions of the "Job Posting" clause in this Agreement, former employees of an Employer who have been laid off within two (2) years prior thereto, shall be entitled to be re-employed in such vacancies or new positions in preference to all other persons, provided the employee has the ability to do the available work.

ARTICLE XIV - WORKDAY & WORKWEEK - OVERTIME

Section 14.01

1. The work schedule in effect shall be six (6) days on and three (3) days off. Investigator shall not rotate shifts and shall work 8 a.m. until 12 noon; and 1 p.m. until 5 p.m.

2. The Investigator shall work 5 days on and 2 off.

3. The Employer agrees to retain sufficient personnel to maintain full coverage of shifts, including vacation and other leave periods.

Section 14.02

Standard Radio Operator/Jailor schedules shall be: 7 A.M. - 3 P.M.; 3 P.M. - 11 P.M.; and 11 P.M. - 7 A.M. Traffic Schedule: 8 A.M. - 5 P.M.; 3 P.M. - 12 Midnight; 7 P.M. - 3 A.M.; 6 A.M. - 2 P.M; and 5 P.M. to 1 A.M. Temporary employees may fill Radio Operator/Jailor short term vacancies only after regular employees have been given the opportunity, by seniority, to fill the position. Call-in of employees shall be by seniority and on an equal and rotating basis to the extent possible. Shifts shall be worked on a rotating schedule, except for the Sergeant, who shall work on either the first or second shift, according to past practice. Squad cars will be returned to the jail on the Traffic Officer's off days, if they live within the city limits. (In an emergency, cars could be requisitioned.) The work schedule for the Department Secretary shall be five days per week, Monday through Friday, with Saturdays and Sundays off. The work shift for the Department Secretary shall be 8 A.M. to 12 Noon and 1 P.M. to 4:30 P.M.

ARTICLE IV - RULES AND REGULATIONS

4.01 In keeping with the above, the Employer shall adopt and publish rules which may be amended from time to time provides, however, that such rules and regulations shall be first submitted to Union for its consideration and amendments prior to adoption.

4.02 Provided no action is taken by the Union to amend or alter said rules within fifteen (15) days of submission to the Union they shall become effective on the fifteenth (15th) day of submission to the Union. In the event of a dispute as to such proposed rules or regulations, the dispute shall be referred to the grievance procedure for settlement and shall be initiated at Step Three of said grievance procedure.

. . .

ARTICLE XXV - MISCELLANEOUS

25.04

Officers shall not be required to perform custodial duties or be required to shoot animals.

ARTICLE XXIX - DURATION

29.01 This Agreement shall be in full force and effect from January 1, 1982, to and including December 31, 1982. The Agreement shall be automatically renewed from year to year thereafter, unless the party desiring to modify, alter, or otherwise amend the Agreement or any of its provisions, gives to the other party written notice on or before August 15, 1982, or any anniversary thereof.

4. That Article VI of the Wisconsin Constitution provides, in material part, as follows:

> Section 4. Sheriffs . . . shall be chosen by the electors of the respective counties once in every two years . . . Sheriffs shall hold no other office. Sheriffs may be required by law to renew their security from time to time, and in default of giving such new security their office shall be deemed vacant.1/

5. That Chapter 59, Wisconsin Statutes, contains provisions applicable to Counties; and that the sections or portions thereof material to the issues in the instant proceeding are as follows:

> 59.025 County organization.
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> . . .
>
> (3) CREATION OF OFFICES. Except for the offices of supervisor, county executive and county assessor and those officers elected under section 4 of article VI of the constitution, the county board may:
>
> (a) Create any county office, department, committee, board, commission, position or employment it deems necessary to administer functions authorized by the legislature.
>
> (b) Consolidate, abolish or reestablish any county office, department, committee, board, commission, position or employment.
>
> (c) Transfer some or all functions, duties, responsibilities and privileges of any county office, department committee, board, commission, position or employment to any other agency including a committee of the board.

1/ Article VI, Section 4 of the Wisconsin Constitution formerly contained an additional sentence which stated ". . . the County shall never be made responsible for the acts of the sheriff."

. . .

59.15 Compensation, fees, salaries and traveling expenses of officials and employes.

. . .

(2) Appointive officials, deputy officers and employes . . .

(c) The board may provide, fix or change the salary or compensation of any . . . employe . . . and also establish the number of employes in any department or office . . . and may establish regulations of employment for any person paid from the county treasury . . .

59.21 Sheriff; undersheriff; deputies.

(1) Within 10 days after entering upon the duties of his office the sheriff shall appoint some proper person, resident of his county, undersheriff, provided that in selecting such undersheriff, in counties where the sheriff's department is under civil service the sheriff, in conformity with county ordinance, may grant a leave of absence to a deputy sheriff, and appoint him undersheriff, or to any other position in the sheriff's department, on request of such appointee, and upon acceptance of such new appointment and duties, and after completion thereof, such appointee shall immediately be returned to his deputy sheriff position and continue therein without loss of any rights under the civil service law; the sheriff, however, may not grant such leave of absence to a deptuy sheriff until he first secures the consent of the county board by resolution duly adopted by the county board, provided that in counties with a population of 500,000 or more the appointment of an undersheriff shall be optional; and within such time the sheriff shall appoint deputy sheriffs for his county as follows:

(a) One for each city and village therein having one thousand or more inhabitants.

(b) One for each assembly district therein, except the district in which the undersheriff resides, which contains an incorporated village having less than one thousand inhabitants and does not contain a city or incorporated village having more than one thousand inhabitants.

(c) Each deputy shall reside in the city or village for which he is appointed, or if appointed for an assembly district, shall reside in the village in such district.

(2) He may appoint as many other deputies as he may deem proper.

(3) He may fill vacancies in the office of any such appointee, and may appoint a person to take the place of any undersheriff or deputy who becomes incapable of executing the duties of his office.

(4) A person appointed undersheriff or deputy for a regular term or to fill a vacancy or otherwise shall hold office during the pleasure of the sheriff.

. . .

(8)(a) In counties having a population of less than 500,000, the county board may by ordinance fix the number of deputy sheriffs to be appointed in said county which number shall not be less than that required by sub. (1)(a) and (b), and fix the salary of such deputies; and may further provide by ordinance, that deputy sheriff positions shall be filled by appointment by the sheriff from a list of 3 persons for each position, such list to consist of the 3 candidates who shall receive the highest rating in a competitive examination of persons residing in this state for at least one full year prior to the date of such examination . . .

. . .

(b)1. The persons appointed shall hold the office of deputy sheriff on good behavior. In any county operating under this subsection, but not under s. 59.07(20), whenever

the sheriff or undersheriff or a majority of the members of a civil service commission for the selection of deputy sheriffs believes that a deputy has acted so as to show him to be incompetent to perform his duties or to have merited suspension, demotion or dismissal he shall report in writing to the grievance committee setting forth specifically his complaint, and, when the party filing the complaint is a sheriff or undersheriff, may suspend or demote the officer at the time such complaint is filed . . .

. . .

59.22 Liability for appointees' acts; bonds.

(1) Except as provided otherwise in subs. (3) and (4), the sheriff shall be responsible for every default or misconduct in office of his undersheriff, jailer and deputies during the term of his office, and after the death, resignation or removal from office of such sheriff as well as before; and an action for any such default or misconduct may be prosecuted against such sheriff and his sureties on his official bond or against the executors and administrators of such sheriff.

. . .

59.23 Sheriff; duties. The sheriff shall:

. . .

(11) Conduct operations within his county . . .

5. That at no time material herein has there existed any Sec. 59.21(8), Stats., civil service ordinance relating to deputy sheriffs in the employ of the County.

6. That the following proposals submitted by the Union, in negotiatons with the County for the purpose of inclusion in the 1982 collective bargaining agreement between the parties, covering the wages, hours and conditions of employment of the law enforcement personnel in the collective bargaining unit involved herein, primarily relate to wages, hours and conditions of employment of the employes in said bargaining unit:

Just cause and arbitration	- Article XI and XII
Layoff and recall	- Article X
Shift schedule	- Article XIV
Hours and work days of Investigator	- Article XIV
Duration	- Article XXIX

7. That the following proposals submitted by the Union in said negotiations with the County primarily relate to the formulation or management of public policy, rather than primarily relating to wages, hours and conditions of employment of the employes in the bargaining unit represented by the Union:

Full coverage of shift - Article XIV

8. That the following proposals submitted by the Union in said negotiations with the County infringe upon the constitutional powers of the Sheriff:

Implementation of work rules	- Article IV
Not requiring the shooting of animals	- Article XXV

9. That the Article XXV proposal submitted by the Union in said negotiations with respect to the requirement that employes in the bargaining unit not be assigned custodial duties is too indefinite for the Commission to make a determination as to whether the proposal primarily relates to duties normally performed by law enforcement personnel, or to duties not within those normally contemplated to be performed by such employes.

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

CONCLUSIONS OF LAW

1. That, since the following proposals submitted by Crawford County Sheriff's Department Local 1972, WCCME, AFSCME, AFL-CIO, in collective bargaining with Crawford County, primarily relate to wages, hours and conditions of employment of employes represented by said Union, said proposals relate to mandatory subjects of collective bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act:

Just cause and arbitration	- Articles XI and XII
Layoff and recall	- Article X
Shift schedule	- Article XIV
Hours and work days of Investigator	- Article XIV
Duration	- Article XXIX

2. That, since the following proposals submitted by Crawford County Sheriff's Department Local 1972, AFSCME, WCCME, AFL-CIO, in collective bargining with Crawford County primarily relate to the formulation or management of public policy rather than to wages, hours and conditions of employment of employes represented by said Union, said proposals relate to permissive, rather than mandatory, subjects of collective bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act.

Full coverage of shift	- Article XIV

3. That, since the following proposals submitted by Crawford County Sheriff's Department Local 1972, AFSCME, WCCME, AFL-CIO, in collective bargining with Crawford County, infringe upon the constitutional powers of the Sheriff, said proposals relate to prohibited subjects of collective bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act:

Implementation of work rules	- Article IV
Not requiring the shooting of animals	- Article XXV

4. That, since the proposal of Crawford County Sheriff's Department, Local 1972, AFSCME, WCCME, AFL-CIO, set forth in Article XXV, standing alone is too indefinite to permit the Commission to determine whether said proposal primarily relates to duties normally performed by law enforcement personnel, or to duties not within those normally contemplated to be performed by such employes, the Commission cannot determine whether said proposal relates to a permissive or mandatory subject of collective bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act.

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

DECLARATORY RULING 2/

1. That Crawford County has the duty to bargain collectively with Crawford County Sheriff's Department Local 1972, AFSCME, WCCME, AFL-CIO, within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act, with respect to:

a. The Union's proposals relating to

(1) Just cause and arbitration - Articles XI and XII
(2) Layoff and recall - Article X
(3) Shift schedule - Article XIV
(4) Hours and work days of Investigator - Article XIV
(5) Duration of agreement - Article XXIX

2. That Crawford County has no duty to bargain collectively with Crawford County Sheriff's Department Local 1972, AFSCME, WCCME, AFL-CIO, within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act with respect to:

2/ See next page for footnote.

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 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.

a. The Union's proposals relating to

(1) Full coverage of shift - Article XIV
(2) Implementation of work rules - Article IV
(3) Not requiring the shooting of animals - Article XXV

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of December, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

_____
Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

During the course of negotiations on a new collective bargining agreement covering non-supervisory law enforcement personnel in the employ of the Sheriff's Department of the County, the Union submitted a number of proposals which it desired to include in said agreement. Among such proposals were provisions which had been included in the most recent agreement, as well as proposals relating to the "status quo" of certain matters not previously included in the most recent agreement. Before entering into specific consideration of each proposal, it is useful to set forth the general legal framework within which the issues herein must be resolved.

A municipal employer has no enforceable duty to collectively bargain on matters relating to permissive subjects of bargaining, and of course, it cannot bargain on prohibited subjects of bargaining. The inclusion of a permissive subject of bargaining in the prior agreement does not bar a challenge by a party to the inclusion thereof in the successor agreement. Greenfield School District (14026-B), 11/77. Similarly, the fact that a proposal may mirror a current practice does not render same a mandatory subject of bargaining.

In Beloit Education Association v. WERC 73 Wis. 2d 43 (1976), Unified School District No. 1 of Racine County v. WERC 81 Wis. 2d 89 (1977) and City of Brookfield v. WERC 87 Wis. 2d 819 (1979) the court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy", respectively. When it is claimed that a proposal is a prohibited subject of bargaining because it runs counter to express statutory command, Board of Education v. WERB 52 Wis. 2d 625 (1971); WERC v. Teamsters Local No. 563 75 Wis. 2d 602 (1977), the court has held that proposals made under the auspices of the Municipal Employment Relations Act (MERA) should be harmonized with existing statutes "whenever possible" and that only where a proposal "explicitly contradicts" statutory powers will it be found to be a prohibited subject of bargaining. Otherwise mandatory proposals which limit but do not eliminate statutory powers remain mandatory subjects. Glendale Professional Policeman's Association v. City of Glendale 83 Wis. 2d 90 (1978); Professional Police Association v. Dane County 106 Wis. 2d 303 (1982); Fortney v. School District of West Salem 108 Wis. 2d 169 (1982). However, where it is alleged that a proposal is a prohibited subject of bargaining because it limits or infringes upon the Sheriff's constitutional powers or duties, an explicit contradiction is not required and any infringement renders the proposal prohibited. As to the constitutional duties of a sheriff, the court has limited the scope of the matters which cannot be subjected to bargaining to those "principal and important duties" which characterize and distinguish the office. Dane County, supra ; see also State ex rel Kennedy v. Brunst 26 Wis. 412 (1870); State ex rel Milwaukee County v. Buech 171 Wis. 474 (1920).

Just Cause and Arbitration Proposals - ARTICLES XI and XII

The County argues that Articles XI and XII, which regulate discipline and discharge of unit employes and give said employes the right to seek arbitral review of disciplinary action, relate to prohibited subjects of bargaining inasmuch as they are in irreconcilable conflict with Sec. 59.21(4), Stats. The County alleges that the above cited statutory provision vests the Sheriff with total discretion to terminate the employment of the deputies he appoints. It contends that the Sheriff's discretion can only be limited by a civil service ordinance adopted under Sec. 59.21(8), Stats, Cross v. Soderbeck 94 Wis. 2d 331 (1980). While no such ordinance exists herein, it argues that if an ordinance were present, bargaining would be prohibited under the Commission's rationale in Milwaukee County (17832) 1980. As a collective bargaining agreement cannot contradict or eliminate statutory discretion or power, the County argues that no harmonization is possible between Articles XI and XII and Sec. 59.21(4), Stats. Glendale, supra; Dane County, supra ; City of Oshkosh v. Library Local 796 99 Wis. 2d 95 (1980). It contends that had the legislature desired to subordinate

the Sheriff's statutory power to the provisions of MERA it would have specifically done so as it did when enacting Sec. 111.70(9) of MERA.3/

The County additionally argues that it ought not be able to bargain away the authority of the Sheriff to regulate the work force inasmuch as the County is insulated from liability for the acts of the Sheriff by Article VI, Section 4 of the Wisconsin Constitution, while the Sheriff is liable for misconduct by his deputies under Sec. 59.22, Stats. Bablitch v. Lincoln County 92 Wis. 2d 574 (1978). It also cites Teamsters Local 346 v. Aitkin County Board (Dist. Ct., 9th Dist., Minn. 1979) in this regard.

Should the Commission find that no irreconcilable conflict exists, the County argues that Articles XI and XII relate to permissive subjects of bargaining. It asserts that if a Sheriff were compelled by an arbitrator to retain an unsatisfactory employe, political ramifications could result, which would impact upon the Sheriff's ability to provide service to the electorate. Given the court's concern for integrity of the political process and the level of service as expressed in Racine, supra and City of Brookfield, supra , it contends that the bargaining table is not the proper forum for resolution of disciplinary determinations.

The Union contends that under Beloit, supra, Articles XI and XII clearly involve mandatory subjects of bargaining. It argues that Sec. 59.21(4), Stats., is simply enabling legislation which can be harmonized with the duty to bargain under MERA, as per Glendale, supra; and thus is clearly distinguishable from the specific statutory procedure (Sec. 63.10, Stats.) which formed the basis for the Commission's decision in Milwaukee County, supra. The Union contends that Articles XI and XII merely limit, but do not eliminate, the Sheriff's statutory authority. It alleges that the just cause standard and arbitration are hardly matters of public policy which should be excluded from the bargaining process Beloit, supra; Racine, supra. As to the impact of Dane County, supra, the Union argues that the Sheriff's discretion under Sec. 59.21(4), Stats., does not fall within the purview of the statutory authority which the court held could not be bargained away. Buech, supra. It also alleges that the Sheriff's power to discharge deputies is not a power which gives a constitutionally recognized character and distinction to the office. Thus, the Union seeks the conclusion that Articles XI and XII relate to mandatory subjects of bargaining.

The County's argument that the just cause and arbitration proposals are prohibited subjects of bargaining must be rejected. The proposals do not "explicitly contradict" the Sheriff's statutory power under Sec. 59.21(4), Stats. Harmonization between this statutory power and the collective bargaining proposals can be accomplished since the Sheriff retains his exclusive right to discharge. Said right is simply limited by the requirement that the Sheriff must have just cause for discharge and by the potential for arbitral review of his decision. This harmonization parallels that found appropriate by the court in West Salem, supra wherein it was concluded that a school board's statutory power to discharge teachers, under Sec. 118.22, Stats., could be limited by provisions of a collective bargaining agreement providing a just cause standard and arbitral review of discharge decisions. As the court there held:

> We conclude that harmonizing the collective bargaining agreement provisions with the Board's power to discharge set forth in sec. 118.22(2), Stats., leaves the Board with the exclusive right to discharge an employe, but requires that just cause exist for the discharge. If the employe contends there was no just cause for discharge, he may process a grievance through the procedure contained in the agreement. If that grievance goes to arbitration, the arbitrators, under the terms of the agreement, may make an independent determination of whether there was just cause for the discharge, relying on whatever procedures they deem necessary to reach that determination. If the parties disagree with the procedure employed by the arbitrators, their remedy is to change the language of the agreement.

3/ "(9) POWERS OF CHIEF OF POLICE. Nothing in s. 62.50 grants the chief of police in cities of the 1st class any authority which diminishes or in any other manner affects the rights of municipal employes who are members of a police department employed by a city of the 1st class under this section or under any collective bargaining agreement which is entered into between a city of the 1st class and a labor organization representing the members of its police department."

The County's alternate argument, regarding its constitutional insulation from liability for the acts of the Sheriff, must also be rejected. Said insulation, which now, due to constitutional amendment, may be eliminated, does not establish a limitation upon the Sheriff's constitutional powers.

Turning to the County's argument that the proposals are permissive, we can only respond by noting that the essence of bargaining over conditions of employment under MERA is the opportunity to bargain over standards for job retention and procedures for review of disciplinary action. Thus such proposals have consistently been held to relate to mandatory subjects of bargaining. Beloit, supra ; Richards v. Board of Education 58 Wis. 2d 444 (1973); West Salem, supra. The political ramifications about which the County speculates are clearly insufficient to overturn the mandatory nature of the proposals. Thus the Commission has concluded that the Article XI and XII proposals pertain to mandatory subjects of bargaining.

Layoff and Recall Proposal - ARTICLE X

The County alleges that the Article X proposal, which regulates the layoff and recall of deputies, is in irreconcilable conflict with Sec. 59.21(4), 59.21(1) and 59.21(3), Stats., and thus must be found to be a prohibited subject of bargaining. It relies substantially upon the same arguments made with respect to Articles XI and XII.

The Union contends that the layoff and recall language is a mandatory subject of bargaining under Beloit, supra and that no irreconcilable conflict exists between the proposal and the statutory provisions cited by the County. It points out that the layoff and recall language is expressly subject to the employe's ability to perform the work and thus, as in Glendale, supra the proposal limits but does not eliminate the Sheriff's discretion. It again argues that the power in question is not derived from the Wisconsin Constitution and does not give character and distinction to the office of Sheriff. Thus harmonization does not run afoul of Dane County, supra.

As with the just cause and arbitral review proposals previously discussed, we find no irreconcilable conflict between the Sheriff's statutory powers and the Union's layoff and recall proposal. Such a proposal only serves to limit, but not eliminate, the Sheriff's statutory discretion. The Union persuasively analogizes its proposal to that at issue in Glendale, supra, wherein a contractual limitation upon the right of the police chief to promote was found to be a mandatory subject of bargaining. Given the absence of an irreconcilable conflict and the court's holding in Beloit, supra, that layoff and recall proposals are mandatory subjects of bargaining, we must reject the County's position.

Full Coverage of Shift Proposal - ARTICLE XIV

The County asserts that the last sentence of the Section 14.01 proposal relates to permissive or prohibited subject of bargaining because it regulates the decision of management regarding the level of services, and interferes with the Sheriff's ability under Secs. 59.21(3) and 59.23(11), Stats., to appoint the number of deputies he deems appropriate to conduct operations in the County, City of Brookfield, supra; City of Manitowoc (18333) 1980.

The Union contends that Section 14.01 is a mandatory subject of bargaining, since it only requires that the manpower level be maintained to protect employes' hours and leave privileges once the Sheriff determines the level and quality of service to be provided under Secs. 59.23(11) and 59.21(3), Stats. Thus, the Union alleges that its proposal does not run afoul of the Commission's holding in City of Manitowoc, supra; but rather falls under the rationale expressed in Kenosha County (14937) 1977.

The Commission finds the proposal to relate to a permissive subject of bargaining. While not in irreconcilable conflict with the Sheriff's statutory powers, the proposal does in essence mandate the maintenance of current staff levels on the various shifts. Thus, it interferes with the County's determination regarding level of service and, absent evidence of impact upon employe safety, must be found to primarily relate to the formulation or management of public policy. Our conclusion is consistent with past Commission determinations regarding minimum manning proposals. City of Brookfield, supra; City of Manitowoc, supra; Manitowoc County (18995) 1981. The Union is, of course, free to bargain over the impact which alterations of staff level may have upon wages, hours and conditions of employment. The Kenosha County decision cited by the Union only supports the right to impact bargaining over such changes as opposed to bargaining over staff levels themselves.

Investigator Proposal - ARTICLE XIV

The County asserts that the Union's Article 14.01 proposal with respect to the classification of Investigator and to regulate his hours of work relates to a permissive or, in the alternative, a prohibited subject of bargaining, contending that the decision as to what job classifications should exist is a fundamental managerial decision, and a statutory prerogative under Sec. 59.025(3), Stats. Hence a decision to maintain or eliminate a position pertains to a permissive subject of bargaining. City of Brookfield, supra. The County further alleges that, as the essence of the Sheriff's constitutional function is to investigate crimes, any impingement upon the Sheriff's ability to assign investigatory duties to any employe at any hour cannot be permitted via collective bargaining. Dane County, supra; Andrewski v. Industrial Commission 261 Wis. 234 (1952).

The Union argues that its proposal to retain the position of Investigator involves a mandatory subject of bargaining. It asserts that a decision to eliminate the position is akin to the reorganization proposal found by the Commission to constitute a mandatory subject of bargaining in Milwaukee County (9904) 1970. It denies that the elimination of the position goes to the level of services to be provided, and asserts that the reassignment of investigative duties to other deputies has a clear impact upon the conditions of employment. The Union reiterates its arguments regarding the impact of Dane County, supra.

While the parties have chosen to litigate this proposal within the context of their respective desires to maintain or eliminate the position of Investigator, the language of the Union's proposal only sets forth the work schedule for a position. It does not mandate retention of the Investigator position. If it did, we would find it to be permissive as it interferes with the County's managerial decisions regarding its table of organization and the manner in which law enforcement services will be provided and thus primarily relates to the formulation or management of public policy. Sewerage Commission of the City of Milwaukee (17025) 5/79, Milwaukee Board of School Directors (17504) 12/79, City of Waukesha (Fire Dept.) (17830) 5/80. The Milwaukee County decision cited by the Union predates the applicability of the 'primary relationship' test set forth in Beloit, supra and Racine, supra and thus is no longer persuasive. However, if the County eliminates the Investigator position, the Union can bargain over the impact the dispersal of the Investigator's duties may have on the wages, hours, and conditions of employment of other employes.

As the Union does have a right to bargain over the work schedule of all employes and as the proposal at issue only establishes work hours and days off, it is a mandatory subject of bargaining, inasmuch as the County retains the right to require employes in that classification to work if needed at other times. City of Green Bay (12402) 1/75; Madison Metropolitan School District (16598) 10/78; City of Brookfield (17947) 7/80.

Shift Schedule Proposal - ARTICLE XIV

The County argues that the Union's proposal to amend Section 14.02 of the 1981 agreement to eliminate the 12:00 midnight to 8 a.m. shift for Traffic Patrol and to add a 6 a.m. to 2 p.m. traffic shift is a permissive subject of bargaining as it affects the nature and level of service to be provided. It further asserts that the proposal infringes upon the Sheriff's constitutional authority to determine when patrols will occur and thus is a prohibited subject of bargaining. Andreski, supra.

The Union argues that the proposal primarily relates to employes hours, and thus is a mandatory subject of bargaining City of Green Bay, supra. The Union denies that its proposal places any limitation upon the Sheriff's constitutional powers, claiming that the authority to travel is not, in and of itself, a power which at common law gave character and distinction to the office of Sheriff.

While we agree with the County's assertion that it need not bargain over the hours during which law enforcement protection will be provided, we do not view the Union's Article 14.02 proposal as an infringement upon either the County's or the Sheriff's right to make such a determination. Article 14.02 sets forth the regular working hours of certain employes, a subject about which the County must bargain. City of Brookfield (17947) 7/80. Nothing in the proposal precludes the Sheriff from providing protection at other hours, or requiring law enforcement personnel to work other hours to provide service. We view this proposal as one which sets forth the "standard" or regular working hours but does not prohibit employes from being required to work other hours.

Implementation of Work Rules Proposal - ARTICLE IV

The County alleges that Section 4.02 of the Union's proposal prevents the Sheriff from implementing rules of any kind if the Union objects and requires that the Sheriff submit disputed rules to arbitration. It asserts that the proposal on its face affects all rules, including those which do not affect wages, hours and conditions of employment. In light of the foregoing, the County contends that the proposal pertains to a prohibited subject of bargaining. It argues that Section 4.02 is in irreconcilable conflict with the Sheriff's authority to conduct operations as he sees fit under Sec. 59.23(11), Stats., and to regulate the terms of employment of his deputies under Sec. 59.21(4), Stats. The County further contends that Section 4.02 infringes upon the constitutional authority of the Sheriff to run the department so that he can maintain the peace.

In the alternative, the County argues that Section 4.02 is permissive. Even assuming that the impact of work rules would be a mandatory subject of bargaining, it contends that the decision to implement them is a managerial function which can neither be delayed by the Union nor reversed by an arbitrator. City of Milwaukee (9429) 1970; City of Milwaukee (14873-B; 14875-B) 1980. It also renews its argument that the political impact of a deputy's adherence to the Sheriff's rules requires a finding that the proposal is permissive.

The Union argues that its proposal can reasonably be interpreted as applying only to the promulgation of rules and regulations which primarily relate to conditions of employment. It thus contends that its proposal is designed to protect contractual benefits and secure contractual compliance and is a mandatory subject of bargaining. City of Wauwatosa (15917) 1977. The Union further contends that its proposal can be harmonized with the Sheriff's authority under Sec. 59.23(11) and 59.21(4), Stats., as it limits but does not eliminate the Sheriff's authority. It also argues that the Sheriff's ability to promulgate rules relating to conditions of employment is not a constitutional power or duty. The Union contends that the County's argument in that regard must be rejected.

A review of Article 4.01 and 4.02 reveals that the "rules" referred to therein are not restricted to only those which primarily relate to wages, hours and conditions of employment. Thus, the clause in question, with its submission of disputes over a proposed rule to a grievance arbitrator, could prevent the Sheriff from adopting rules which involve the performance of his constitutional duties and responsibilities. This potential infringement upon those duties which give "character and distinction" to the office of Sheriff requires a finding that the proposal is a prohibited subject of bargaining. Dane County, supra. If the language were modified to limit its applicability to mandatory subjects of bargaining which do not expressly contradict the Sheriff's statutory powers or limit his constitutional powers and duties, we would find it to be a mandatory subject of bargaining. City of Wauwatosa, supra.

Duties Proposal - ARTICLE XXV

The County argues that the Union's proposal which would prevent deputies from being assigned custodial duties and from having to shoot animals pertains to a prohibited subject of bargaining. It contends that as the Sheriff has a constitutional right to maintain the jail, Brunst, supra, and as custodial duties may be involved in the maintenance of the jail, the proposal infringes on the Sheriff's constitutional authority. As to the shooting of animals, the County contends that such action may be necessary to maintain peace and order and that the Sheriff's authority in that regard cannot be limited. Dane County, supra.

The Union responds that its proposal relates to conditions of employment and thus is a mandatory subject of bargaining. It argues that as the functions in question are merely incidental to the Sheriff's constitutional duties, Dane County, supra does not render the proposal prohibited.

The Court in Dane County, supra stated that if the duties involved are among the "principal and important duties which characterized the office of sheriff", then the Sheriff's powers in that regard cannot be restricted by the terms of a collective bargaining agreement. The Court also cited Brunst, supra, wherein it was concluded that control of the jail was a duty which fell within the constitutional powers of the Sheriff. While it may be that there are, as the County argues, certain custodial duties which are associated with the running of the jail, and thus arguably related to control of the jail, we believe that any such relationship is so tenuous that the performance of custodial duties do not fall within the constitutional duties of the Sheriff. Thus we must reject the County's assertion that the Union's proposal as to custodial duties is a prohibited subject of bargaining.

Normally if a particular duty is fairly within the scope of responsibilities applicable to the kind of work performed by the employes involved, an emp loyer may unilaterally impose such an assignment and it will be deemed a non-mandatory subject of bargaining. City of Wauwatosa (15917) 11/77. Frankly, the Commission is unable to reach a definite conclusion as to whether the "custodial work" proposal, as written, relates to a permissive or mandatory subject of bargining, since the scope of the custodial duties is not set forth in the proposal. There may be a distinction between such duties if they are performed in cells where prisoners are housed vis-a-vis the remaining premises of the department. Thus the Commission cannot make a determination as to this portion of the proposal.

Turning to the portion of the proposal which would not require employes to shoot animals, the County correctly cites Andreski, supra, for the proposition that the maintenance of law and order is one of the "principal and important duties" which characterize the office of Sheriff. As maintenance of law and order may well include the need to have deputies shoot animals which threaten the peace and safety of the citizenry, we agree with the County's assertion that the Union's proposal would limit the Sheriff's constitutional powers and duties. We have therefore found the proposal, as it relates to the shooting of animals to relate to a prohibited subject of bargaining.

Duration Proposal - ARTICLE XXIX

The County contends that the duration language proposed by the Union does not limit the term of the contract to a maximum of three years, and thus is a permissive subject of bargaining under City of Sheboygan (19421) 3/82. The Union counters by arguing that the proposal merely renews the agreement for successive yearly periods and thus is in conformity with the statutory three year limit. City of Wauwatosa (15917) 11/77.

In Wauwatosa supra, the following proposal was in issue before the Commission:

> This Agreement shall . . . remain in full force and effect to and including, December 31, 1976 and thereafter shall be considered automatically renewed for successive twelve month periods unless procedures are instituted in accordance with Section 111.77 of the Wisconsin Statutes. * * * In the event the parties do not reach written agreement by the expiration date, the existing Agreement shall be extended until a new agreement is executed.

Therein the Commission determined that the proposed provision "seeks to preserve contractual benefits and duties until a new agreement is reached" and, since it pertained primarily to wages, hours and conditions of employment, it constituted a mandatory subject of bargaining. The City therein contended that the provision was permissive "because it compels permissive subjects in an expired agreement to be continued into the arbitration process. The City did not contend that the provision could extend the agreement for more than three years.

In Sheboygan, supra, the Commission was called on to determine whether the following proposal constituted a mandatory subject of bargaining.

> This Agreement shall be effective when signed by both parties and shall remain in full force and effect until its expiration date, December 18, 1981 or until a successor agreement is signed.

In concluding that the above provision related to a non-mandatory subject of bargaining the Commission stated as follows:

> In analyzing the duration language in question, it is readily apparent that said language provides for an indefinite duration by providing that the agreement would stay in effect ". . . until a successor agreement is reached". The Union does not really take issue with same and concedes that the term of any collective bargaining agreement cannot exceed three years, but argue that if negotiations proceed a full year beyond the term of a two-year contract "the proposal must simply be interpreted in such a manner as to conform with the three year limit imposed by the statute.
>
> The Commission's role, however, in declaratory rling cases is to determine whether the proposal being challenged as written is a mandatory or non-mandatory subject of bargaining. Clearly the proposal here as written does not

limit the term of the agreement to three years (or less) as required by law. It could by its terms exceed three years depending on the original term of the agreement and the length of time it takes the parties to reach a successor agreement. Since MERA prohibits collective bargaining agreements which are for a term of more than three years, we have concluded that the instant proposal relates to a non-mandatory subject of bargaining.

By our decision we are in no way precluding the Union from proposing language which would continue the agreement until a successor agreement is reached, as long as said proposal specifies that the agreement cannot exceed the statutory three year limit."

We find the Union's analysis of the duration clause to be persuasive. Under the proposal, if either party gives written notice by August 15 of its desire to "modify, alter, or otherwise amend", the contract terminates on December 31. Absent notice, the contract is renewed for a year. Unlike Sheboygan, supra; where the clause in question extended the term of the contract "until a successor agreement is reached", the instant duration clause renews the contract for one year periods unless either party wishes to modify same. We conclude that this contract renewal, as opposed to an extension, in essence provides the parties with a new one year contract and thus does not run afoul of the three year limitation upon contract duration found in Sec. 111.70(3)(a)4, Stats. Therefore the Union proposal is found to be a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 3rd day of December, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

_____
Herman Torosian, Commissioner

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