STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of KENOSHA COUNTY Involving Certain Employes of KENOSHA COUNTY (SHERIFF'S DEPARTMENT)	Case LXIV No. 32809 ME-2314 Decision No. 21910

Appearances:

Mr. Mark L. Olson, Mulcahy & Wherry, S.C. Attorneys at Law, 815 East Mason Street, Suite 1600, Milwaukee, Wisconsin 53202, appearing on behalf of the County.

Mr. John L. Caviale, Joling, Rizzo, Willems, Oleniewski, Stern and Burroughs, S.C., Attorneys at Law, 5603 Sixth Avenue, Kenosha, Wisconsin 53140, appearing on behalf of the Association.

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

Kenosha County having filed, on January 16, 1984, a petition requesting the Wisconsin Employment Relations Commission to clarify a voluntarily recognized unit of law enforcement personnel by excluding from the unit civilian jail guards; and a hearing having been held on February 28, 1984, in Kenosha, Wisconsin, before Examiner Carol L. Rubin; and briefs having been filed in the matter by May 8, 1984; and the Commission having considered the evidence, arguments and briefs of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. That Kenosha County, hereinafter referred to as the County, is a municipal employer and has its offices at the Kenosha County Courthouse, 912 56th Street, Kenosha, Wisconsin 53141; and that among its governmental functions, the County maintains and operates a Sheriff's Department.

2. That the Kenosha County Deputy Sheriff's Association, hereinafter referred to as the Association, is a labor organization representing municipal employes for the purposes of collective bargaining, and for the purposes of this proceeding has its offices at 5603 Sixth Avenue, Kenosha, Wisconsin 53140.

3. That the Association currently represents deputy sheriffs, investigators and civilian jail guards employed by the Kenosha County Sheriff's Department; that at some time prior to 1961, the Association was formed as a "benevolent group" for the purpose of protecting the welfare of Association members; that in 1965 the County and the Association bargained over the terms of the first collective bargaining agreement between them; that the initial collective bargaining agreement recognized the Association as the exclusive collective bargaining representative for "all the Kenosha County Sheriff's Department employees, excluding the Sheriff and Undersheriff . . ."; that at that time, the position of civilian jail guard did not exist because jail guard duties were performed by deputy sheriffs; that in 1976, Kenosha County applied for an LEAA Grant to create and fund the position of civilian jail guard; that the civilian jail guards were first recognized as included in the unit represented by the Association as part of the 1977 collective bargaining agreement; that in 1977 the bargaining unit was described as "all regular employees of the Kenosha County Sheriff's Department, including Deputy Sheriffs, Detectives, Sergeants, Matrons and Civilian Jail Guards, but excluding the Sheriff, Chief Deputy Sheriff, all employees holding the rank of lieutenant and above, and all clerical employees . . ."; that beginning in 1978, the County assumed full cost of salary and fringe benefits for the civilian jail guard positions; that in 1980 the County filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to exclude sergeants from this voluntarily recognized unit, and that the petition was dismissed after

the County and the Association reached an agreement to exclude the sergeants from the unit; that the recognition clause of the most recent available labor agreement, that in effect in 1981, describes the bargaining unit as "all regular employees of the Kenosha County Sheriff's Department, including Deputy Sheriff's, Criminal Investigators, Matrons and Civilian Jail Guards, but excluding the Sheriff, Chief Deputy Sheriff, all employees holding the rank of Sergeant and above, and all clerical employees . . ."; that the position title of "Matron" no longer exists but is now included in the term civilian jail guard; and that the existing unit currently has approximately 80 employes of whom 20 are civilian jail guards.

4. That, on January 16, 1984, the County filed a unit clarification petition with the Commission that asserts that the civilian jail guards do not have the power of arrest and lack a community of interest with the other employes in the unit, and thus should be excluded from the presently constituted bargaining unit.

5. That the Association argues that because of statutory changes in Wisconsin Statutes Secs. 111.70 and 165.85, the Commission should deny the petition to exclude the civilian jailers from the currently existing bargaining unit.

6. That the civilian jail guards do not have and never have had the power of arrest.

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

CONCLUSION OF LAW

1. That because the civilian jail guards do not have the power of arrest, they are not law enforcement personnel within the meaning of the Sec. 111.77, Stats., and thus are excluded from the collective bargaining unit involved herein.

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

ORDER 1/

That since the civilian jail guards in the employ of the Kenosha County Sheriff's Department do not possess the power of arrest, the civilian jail guard classification shall be, and hereby is, excluded from the above-noted voluntarily recognized unit.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

1/ 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. (Footnote One continued on Page 3)

1/ (Continued)

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.

(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. 227.20 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.

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

The Association has been voluntarily recognized by the County as the representative of certain employes of the Kenosha County Sheriff's Department. Since 1977 the recognized unit has expressly included civilian jail guards. The County now seeks to exclude approximately 20 jail guards from the existing unit of approximately 80 employes.

Positions of the Parties:

The County argues that, since the creation of their positions in 1977, the civilian jail guards never have had and do not now have the power of arrest. The inclusion of civilian jail guards in a unit with sworn deputies possessing such authority contravenes Wisconsin case law and policy. The County further argues that the jailers lack a community of interest with the deputy sheriffs because of differences in duties, responsibilities, training, wages, work area and supervision. The County also contends that exclusion of the jailers would not violate the anti-fragmentation policy since the jailers could be included in an overall law enforcement support service unit. 2/

In response to the Association's arguments based on the recent statutory revisions to Sec. 165.85, Stats., the County notes that jail officers are not included under the Sec. 165.85(2)(c) definition of "law enforcement officer" but rather are separately defined. Thus, there is no reason for the Commission to modify its long standing definition of a law enforcement officer.

The Association argues that the jail guards should remain in the unit for several reasons. Since the inception of the classification of civilian jail guard in 1977, the County has voluntarily included them in the law enforcement unit. When the County filed a unit clarification petition in 1980 seeking to exclude Sergeants from the unit, it continued to voluntarily recognize the jail guards as part of the unit, and subsequently entered into a collective bargaining agreement which included them. In conformance with the Cudahy policy, 3/ the County should not be allowed to fragment an existing voluntarily recognized unit.

The Association contends that because of this history as a voluntarily recognized unit, the only real issue is whether the present bargaining unit is in violation of MERA. In its brief, the Association traces the history of the "power of arrest" doctrine and argues that it is not applicable in the present circumstances. Further, it notes that the rationale in the primary cases establishing power of arrest as the key factor defining a law enforcement officer 4/ was based in large part on the definition of "law enforcement personnel" found elsewhere in the statutes and particularly in Sec. 165.85, Stats., governing the "Law Enforcement Standards Board." However, that section has been significantly revised, effective July 2, 1983. Whereas previously jail guards were not included

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2/ On September 1, 1983, a unit clarification petition was filed with the Commission by Local 990, Wisconsin Council 40, AFSCME, AFL-CIO. Local 990 represents primarily clerical employes in the Kenosha County Courthouse and Social Services Department. Its petition requested the Commission to include a group of clerical and security employes of the Sheriff's Department in the existing bargaining unit without an election. The County took the position that the new positions in the Sheriff's Department should not be included in Local 990's existing unit, but would appropriately constitute a separate unit along with the jailers at issue here. After considering the record and arguments in both cases, the Commission determined that some of the positions at issue in Local 990's petition should be included in the existing unit represented by Local 990 and that some should not. See Decision No. 21909, also issued today.

3/ See Note 6, infra.

4/ The Association cites Waukesha County, Dec. No. 14830 (WERC, 8/76); and Waukesha County, Dec. No. 14534-A (WERC, 11/76).

in the statute, the revised statute provides that standards should be established and training and education made available for law enforcement or jail officers (emphasis added). "Jail officer" is now defined by statute and specifically covered by the Law Enforcement Standards Board, including a requirement of preparatory training. These statutory changes indicate that the Legislature intended that "law enforcement" now includes supervision, control and maintenance of a jail. The Association submits that because of all these factors the Commission should find that the jail officers are employes of the County's "law enforcement agency" within the meaning of Sec. 111.77, Stats. 5/

Discussion:

Generally, in a unit clarification proceeding, the Commission will not change the complement of a bargaining unit which was voluntarily agreed upon as being appropriate except where the composition of the unit contravenes the provisions of MERA. 6/ The Association is correct in stating that the central issue here is whether inclusion of civilian jail guards who do not have the power of arrest in a unit with officers having the power of arrest contravenes MERA.

While there was some testimony about jail guards being "sworn in," the record shows that whatever oath jailers may take, the oath does not confer the power of arrest upon them. In its brief, the Association acknowledges that jailers are non-sworn officers who do not have the power of arrest.

The Commission has long held that only those employes 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. 7/ As we have also indicated in prior cases, that interpretation is based primarily on the definition of law enforcement personnel found elsewhere in the statutes. 8/ We are not persuaded by the Association's contention that the recent revision in the statutes governing the Law Enforcement Standards Board materially modified the basis of the well-established Commission case law in this regard. While the statutory revision does bring jail guards under the purview of the Law Enforcement Standards Board for the purpose of training and certification, it also provides separate definitions of "law enforcement officer" and "jail officer." While a jail officer may or may not have power of arrest, that element is still essential to the definition of a law enforcement officer in this statutory section and in the others noted above. Thus, we do not believe that in revising the statute, the Legislature intended to modify the definition previously adopted and followed consistently by the Commission. While it is clear that these jail guards are employes of a "law enforcement agency," and do generally assist in the County's law enforcement function, the

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5/ The pertinent portions of Sec. 111.77, Stats., read as follows:

> 111.77 Settlement of disputes in collective bargaining units composed of law enforcement personnel and firefighters. In fire departments and city and county law enforcement agencies municipal employers and employes have the duty to bargain collectively in good faith including the duty to retrain from strikes or lockouts and to comply with the procedures set forth below:
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> . . .

6/ City of Cudahy, Dec. No. 12997 (WERC, 9/74); City of Cudahy, Dec. No. 18502 (WERC, 3/81).

7/ Waukesha County, Dec. No. 14534-A (WERC, 11/76); Waukesha County, Dec. No. 14830 (WERC, 8/ 76); LaCrosse County, Dec. No. 19539 (WERC, 4/82); Vernon County, Dec. No. 21082 (WERC, 10/83).

8/ In addition to the definition in Sec. 165.85(2)(c), Stats., see also Sec. 102.475(8)(a) which defines a law enforcement officer for purpose of death benefits; and Sec. 967.02(5) which defines a law enforcement officer in the Criminal Procedure Code.

same is also true of the various clerical workers, dispatchers, booking clerks, etc., whom a law enforcement agency may employ. Some clear distinction must be made between municipal employes covered by Sec. 111.77, Stats., and those not covered by that section. We continue to believe that power of arrest is the determinative factor and thus have ordered that the civilian jail guards be excluded from the law enforcement unit because they lack that power.

We do not reach the question of whether a unit composed of all law enforcement support staff would be an appropriate unit. We have, however, concluded today in a separate case that a number of other employes of the Sheriff's Department support staff are to be included in another existing bargaining unit. 9/ The Association's position in the present case was that the jail guards should not be excluded from the existing unit. The Association did not take part in the prior case involving other Sheriff's Department employes. Currently, no labor organization has petitioned the Commission seeking to represent the jail guards either in a separate unit or as part of a larger unit. Therefore, we make no determination herein as to the placement of civilian jail guards in any other unit.

Dated at Madison, Wisconsin this 17th day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

9/ See Kenosha County (Sheriff's Department), Dec. No. 21909 (WERC, 8/84).