STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DANE COUNTY LAW ENFORCEMENT OFFICERS' ASSOCIATION (LEER DIVISION OF WPPA),	
Complainant,	Case 102 No. 34877 MP-1705 Decision No. 22681-A
vs.	
COUNTY OF DANE,	
Respondent.	

Appearances:

Cullen, Weston & Pines, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, by Mr. Lee Cullen, appearing on behalf of Complainant.

Mr. Cal Kornstedt, Corporation Counsel, Dane County, City-County Building, 210 Monona Avenue, Madison, Wisconsin 53709, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Dane County Law Enforcement Officers Association (LEER Division of WPPA) filed a complaint on April 19, 1985 with the Wisconsin Employment Relations Commission, alleging that Dane County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4, Wis. Stats., by transferring three sheriff's deputies from process serving work and replacing them with a new and lower-paid classification. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(5), Wis. Stats. A hearing was held in Madison, Wisconsin, on June 6, 1985, at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs, and the record was closed on August 12, 1985. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Dane County Law Enforcement Officers' Association (LEER Division of WPPA), herein referred to as the Union or Complainant, is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and has its principal office at 23 N. Pinckney Street, Madison, Wisconsin 53703.

2. Dane County is a municipal employer and has its principal offices at the City-County Building, 210 Monona Avenue, Madison, Wisconsin 53709.

3. Complainant is the exclusive representative for collective bargaining purposes of a bargaining unit of Respondent's employes, consisting of all regular full-time deputy sheriffs in the Sheriff's Department, excluding the captains, evidence technician, lieutenants, special investigator and chief deputy. Complainant and Respondent have been parties to a 1984 collective bargaining agreement, but as of the date of the hearing herein had not agreed on a successor agreement.

4. Up to April, 1985 approximately eight sheriff's deputies were assigned full-time to the work of serving civil and criminal process in the County. These employes work on two shifts, from Monday to Friday, and do not rotate shifts or days worked. Each employe serving process is assigned a geographic area, and in the past all deputy sheriffs assigned to process serving worked full-time at that duty, with the exception that approximately three to four times per week a deputy sheriff serving process would be called as a backup officer to aid another officer. Not all of the deputy sheriffs serving process are uniformed, but all

are certified law enforcement officers who carry firearms and have the power of arrest. All of the deputy sheriffs serving process were classified as Deputy Sheriff II, and the 1984 pay scale for that position ranged from $9.77 per hour to $10.94.

5. In or about April, 1985 the Department opened a new county jail, with expanded capacity. The expansion created a need for more deputy sheriffs, and in planning for the new facility Sheriff Jerome Lacke had requested the County Board, beginning approximately in 1983, to provide twenty-eight new Deputy Sheriff I and II positions. In the 1985 budget process, Lacke initially submitted twenty-eight new Deputy Sheriff I and II positions, in accordance with his initial estimate. The County budget as enacted, however, provided for twenty-five new Deputy Sheriff I and II positions and three positions identified as Process Server. The County unilaterally established a 1984 hourly pay range for Process Server of $7.69 to $8.37.

6. In or about April, 1985 three Deputy Sheriff II's were transferred from full-time serving of process to other duties, as specified below:

William Vilbrandt:	from 12:30 p.m. - 8:30 p.m. civil process shift, to bailiff.
Robert Doyle:	from 7:00 a.m. - 3:00 p.m. civil process shift, to bailiff.
Joann Raymer:	from 12:30 p.m. - 8:30 p.m. civil process shift, to women's jail.

7. In or about March and April, 1985 the County began to replace Raymer, Doyle and Vilbrandt with three process servers, Richard Peterson, Cathy Bishell and William Toft. All of those hired as process servers were applying for the position as transfers or voluntary demotions from other county positions; none of these three individuals was a certified law enforcement officer. Sheriff Lacke deputized the three process servers for purposes of serving process only, but they had neither the power of arrest nor the authority to carry a firearm. Following the appointment of one process server, Complainant obtained a temporary injunction in Dane County Circuit Court, which set aside the appointments of the remaining two process server positions pending resolution of this matter.

8. The record shows that a substantial proportion of the work of serving process performed by the process serving unit does not require the skills or training of a certified law enforcement officer.

9. The record shows that while the Complainant and Respondent have met and discussed wages and working conditions of process servers, Complainant has not agreed to the creation of that position or the transfer from process serving of Deputy Sheriff II's formerly assigned to that task. Respondent has offered to bargain the impact of these changes on wages, hours and working conditions.

10. The record shows that the decision to transfer three Deputy Sheriff II's from service of process and to replace these employes with three members of a new classification of process server is related to judgments by the County that the skills and abilities of three Deputy Sheriff II's would be better utilized in other capacities and that the qualifications of said employes exceed the level necessary to do a proportion of the work of the unit. The record does not demonstrate a substantial adverse relationship of the transfers to the wages, hours or working conditions of the three deputy sheriffs who were transferred. The record shows that the lower wage level anticipated by Respondent for process server positions, and implemented for said position in the interim pending bargaining, was a substantial factor in Respondent's decision to institute this classification, but that said wage level is related to the qualifications necessary for the position and is subject, by Respondent's offer, to collective bargaining with Complainant. The record therefore shows that the decisions to institute the process server classification and to transfer certain Deputy Sheriff II's were primarily related to matters of public policy and only derivatively related to wages, hours and conditions of employment.

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

CONCLUSIONS OF LAW

1. The decision to transfer three Deputy Sheriff II's to other assignments and to replace these employes with a new classification of process server is primarily related to questions of public policy, and Respondent does not have a duty to bargain with Complainant concerning this decision. Respondent therefore did not violate Sec. 111.70(3)(a)1 or 4 by its refusal to bargain concerning this decision.

2. Respondent has offered to recognize Complainant as representative of the new positions of process server as part of Complainant's bargaining unit and to bargain the impact of the changes on wages, hours and working conditions, including wage rates to be paid to process servers from the inception of their appointment. Respondent has therefore not refused to bargain concerning mandatory subjects of bargaining within the meaning of Sec. 111.70(3)(a)1 and 4, Stats.

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

ORDER 1/

IT IS ORDERED that the complaint filed in this matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 8th day of November, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

DANE COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint alleges that the County violated Sec. 111.70(3)(a)1 and 4, Stats., by unilaterally employing process servers to replace deputy sheriffs at a substantial reduction in wages. The essential facts are not disputed, are articulated in the Findings and need not be repeated here.

The controlling principle was set out by the Wisconsin Supreme Court in Unified School District No. 1 of Racine County vs. WERC. 2/ That case involved the subcontracting of a food service operation in the Racine schools. The Court adopted the test of whether the particular decision is primarily related to wages, hours and conditions of employment or is primarily related to the formation and choice of public policy. 3/ The Court described the test in the following terms:

> . . . the question is whether a particular decision is primarily related to wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people. . . .

The Court went on to analyze the facts of the Racine case in light of this test and concluded as follows:

> The policies and functions of the district are unaffected by the decision. The decision merely substituted private employees for public employees. The same work will be performed in the same places and in the same manner. The services provided by the district will not be affected. The decision would presumably be felt in only two ways; it is argued that it would result in a financial saving to the district, and the district's food service personnel will have to bargain with ARA for benefits which they enjoyed before the decision, including the loss of some 2,304 accumulated sick-leave days and participation in the Wisconsin Retirement Fund.
>
> The primary impact of this decision is on the "conditions of employment";' the decision is essentially concerned with wages and benefits, and this aspect dominates any element of policy formulation.

Complainant, noting the general principle that an employer commits a per se refusal to bargain by making a unilateral change in a condition of employment, 4/ contends that the removal of the work of process serving from three deputy sheriffs and its assignment to process servers constituted several unilateral changes in mandatory subjects of bargaining. First, Complainant argues that serving process has been a favored position within the department, because of its regular hours and preferred working conditions.

2/ 81 Wis.2d 89 (1977).

3/ The court had first applied this test to other types of mandatory/permissive issues in Beloit Education Association v. WERC, 73 Wis.2d 43.

4/ NLRB v. KATZ, 369 U.S. 736.

Complainant notes that at least one of the three deputy sheriffs transferred out of this position has been assigned to a job which rotates throughout all days of the week. Complainant further notes that the process servers have been employed at a substantially lower rate of pay than the deputy sheriffs, and argues that the effect is to reduce pay unilaterally for "bargaining unit work". 5/ Complainant argues that numerous cases stand for the proposition that changes which directly affect wages, as well as changes involving the reclassification of existing positions with new wages or working conditions, are "almost invariably" found to be mandatory subjects of bargaining. Complainant notes that in City of Green Bay 6/ the Commission found that the transfer of existing data processing positions from city to county employment was a mandatory subject of bargaining because it affected working conditions and did not represent "a choice among alternative social or political goals or values", and that the Commission ordered the reestablishment of the positions at issue. Complainant likens the existing situation to subcontracting because the work may have been moved out of the bargaining unit.

Complainant also argues that the County fundamentally intended by this change to reduce the pay given to its employes, and that it did so by altering the existing staffing, reorganizing job classifications, and imposing changes on the bargaining unit. Complainant argues that any public policy concerns which the County may have had as to the need to staff the expanded jail could as easily have been met by expanding the number of regular deputies. Complainant contends that the fundamental reason for the change is shown to be wage savings because of the fact that the Employer chose not to follow this approach.

Respondent argues that the process server positions are within the bargaining unit represented by Complainant. Respondent contends that there is nothing in the statutory definition of "law enforcement officer" which would deny the use of that term in connection with process servers employed by the Sheriff's Department, even if they possess only limited powers. Respondent contends that it reached impasse in its bargaining process with Complainant and implemented the changes in staffing only following the impasse. Respondent notes that with the opening of the new jail the increase in staff had to be implemented promptly, and argues that any impact on Complainant's bargaining rights can be addressed by the on-going bargaining process. Respondent further argues that any disadvantages accruing to existing bargaining unit members have been "slight in the extreme", amounting only to allegedly less preferable working assignments, and notes that none of the three individuals allegedly harmed appeared at the hearing to testify that any harm was suffered.

Respondent contends that the real issue is whether a municipal employer has the right to create new positions of employment and to fill those positions, even after making a good-faith attempt to reach agreement on wages, hours and working conditions with a union.

Both parties have argued this matter as one relating to various broad questions of mandatory/permissive status. I find, however, that this case requires only a narrow interpretation based on the specific facts present here. In this case, Complainant has shown relatively little adverse impact on any existing employe in the bargaining unit. No layoffs were suffered, and the testimony concerning adverse shifts or working assignments was notably vague, contradictory, and second-hand. Meanwhile, far from the reductions in employment present in the Green Bay 7/ and Brown County 8/ subcontracting cases, an expansion of the bargaining unit is involved here.

5/ Complainant has not, to date, accepted Respondent's offer that process servers be included within Complainant's bargaining unit. Neither party has requested the WERC to determine whether the new classification should be in the unit involved here or another County bargaining unit.

6/ Dec. No. 18731-B, (WERC, 6/83).

7/ Supra.

8/ Dec. No. 20857-B, (WERC, 7/85).

Complainant's argument that the decisions made here by the County are similar to the subcontracting decisions found to be mandatory in Racine, Green Bay and Brown County cannot be dismissed out of hand. Certainly there is a theoretical similarity between subcontracting in order to obtain lower wage costs and transferring employes, replacing them with a new and lower-paid classification. But the Racine test is not a theoretical one, as a close reading of the Court's opinion and its Green Bay and Brown County progeny makes clear. In the passage of Racine quoted above, it is plain that the Court was engaged in weighing against the employer's asserted public-policy reasons not only the fact of a relationship to wages, hours and working conditions but also its magnitude. The Court's reference to employes' loss of retirement benefits and sick leave days attendant on their transfer to a private-sector employer has since been echoed by the Commission's citation of adverse effects on incumbent employes in Green Bay and Brown County, including layoffs in the latter case. To say that the seriousness, or lack thereof, of those effects on incumbent employes is not a factor in the "relationship" of these decisions to wages, hours and working conditions is not only to misread the language of these cases but to negate the nature of the weighing process expressly required by Racine: Complainant is technically correct in arguing that it represents the "positions" involved, but a balancing test of that kind cannot ignore the difference between the effects of a decision on an actual human being, and the same decision's effects on a vacant spot in an organization chart.

In this case the decision's adverse relationship to the wages, hours and working conditions of the three transferred deputy sheriffs is not evidenced in the record by any direct testimony from any of those allegedly harmed. Complainant's sole evidence tending to establish harm to the incumbents was second-hand and general testimony to the effect that employes consider these slots to be highly prized because of their regular hours. Against this testimony is set not only the failure of those transferred out of these "desirable" positions to register any audible objection at the hearing, but the fact that two of the three incumbents had obtained those positions despite relatively low seniority. I can only conclude that an adverse relationship between the County's decisions and the wages, hours and working conditions of the incumbents is, at best, remote. 9/

There is no evidence of subterfuge or of an intention by the County to avoid bargaining entirely. The County notified the Union promptly of its intentions and offered to bargain concerning the wage rates and other conditions of employment of the new positions it contemplated. The relationship of the County's decision to wages, hours and working conditions is therefore almost entirely, in this instance, in the decision's effects on the vacated and changed positions rather than on the incumbent employes. This is significant because in two ways the County has claimed a substantial relationship between the nature and existence of the new positions and matters traditionally considered primarily related to public policy.

9/ A grievance was filed by the Union and is pending, and nothing in this discussion should be construed as reflecting an opinion of the merits of the grievance. Neither party requested that this matter be either deferred to arbitration or held in abeyance pending the results of arbitration. This decision is therefore concerned solely with the balancing test which establishes whether the County's decision was a mandatory or permissive subject of bargaining, and not with whether an element of that decision violated the parties' collective bargaining agreement. If in fact the contract was violated, Complainant is entitled to its contractual remedy even if the subject matter of the decision as a whole is permissive.

It could be argued that if the contract contains a provision which is violated by the County's actions, that in and of itself establishes a form of harm to incumbent employes not evident in the record now before me. But as both parties have treated this matter as independent from the grievance proceeding, it is not within my jurisdiction to speculate as to the grievance's merits. The parties have a contractual grievance and arbitration procedure sufficient to remedy any contractual violation which may be found, and as such a finding would carry its own contractual remedy there is no compelling need for me to defer, on my own motion, decision on this matter pending the outcome of the grievance in order to weigh that outcome in the Racine balance.

The first is the intent to redistribute work within the process serving unit in order to differentiate between different types of process serving. Respondent presented testimony to the effect that a substantial volume of process serving in the county is done by private contractors who are neither uniformed nor armed, and that a large percentage of its own process serving does not require the skills or equipment of a deputy sheriff. The County witnesses testified to an intent to use process servers for these parts of the work while using the five deputy sheriffs who continue to be assigned to the unit for those instances which call for their abilities.

Second, and central to Respondent's argument, is the lower level of minimum qualifications acceptable to the County for the process server positions. By the redistribution of work noted above, the County concluded that its needs for qualifications would be reduced. The record shows that the County's motivation in establishing a position with lower qualifications was indeed largely the prospect of lower wage costs. But not only would the wage rate ultimately be set by collective bargaining in any event, it is necessarily related to the minimum qualifications demanded and the type of employe the County hopes to attract to that position. The Commission has repeatedly held that the establishment of minimum qualifications for a position is a matter primarily related to public policy; 10/ here, the "public policy" desire of the County to establish a new classification with lower minimum qualifications is untainted in this proceeding 11/ by any notable adverse relationship to the former incumbent employes.

Complainant also argues that Respondent is prohibited from instituting and filling process server positions absent the completion of the bargaining process, citing City of Brookfield. 12/ I read Brookfield, however, as leaving open to an employer a defense of necessity, 13/ and here the record demonstrates that the jail expansion required rapid hiring. Though I conclude that the decision to institute the new classification was not a mandatory subject of bargaining, the impact of the decision, including possibly retroactive wage rates, will still have to be bargained. Furthermore, there is no authority in Brookfield or elsewhere for a claim that execution of a public-policy decision must be suspended until the completion of bargaining, and if necessary interest arbitration, over its impact on wages, hours and working conditions.

For these reasons, I conclude that the relationship of the County's decision to the wages, hours and working conditions of deputy sheriffs was of minor importance, and that the relationship of that decision to the wage levels anticipated by the County for process servers, while substantial, related directly to the minimum qualifications necessary for that position, which is a permissive subject of bargaining. I therefore find that the balancing test required by the Supreme Court's decision in Racine 14/ falls in favor of finding this decision to be primarily related to matters of public policy and only secondarily to wages, hours and conditions of employment. As Respondent has clearly agreed to bargain concerning the impact of the changes on wages, hours and conditions of employment,

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10/ Brown County, Dec. No. 19041, 11/81; City of Waukesha, Dec. No. 17830, 5/80; Milwaukee Sewerage Commission, Dec. No. 17302, 9/79; City of Madison, Dec. No. 16590, 10/78.

11/ The caveat noted above in fn. 9 provides, as noted, its own remedy if in fact a contract violation, and the associated adverse impact, proves to exist.

12/ Dec. No. 19822-C (WERC, 11/84).

13/ See Brookfield, supra, fn. 6.

14/ Supra.

I find that the complaint concerns a non-mandatory subject of bargaining, and it is therefore dismissed.

Dated at Madison, Wisconsin this 8th day of November, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner