

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :

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OUTAGAMIE COUNTY PROFESSIONAL :

POLICE ASSOCIATION : Case 125

: No. 42601 ME-348

Involving Certain Employes of : Decision No. 23203-A

:

OUTAGAMIE COUNTY :

(SHERIFF'S DEPARTMENT) :

:

Appearances:

Mr. Frederick J. Mohr, Mohr & Beinlich, Attorneys at Law, 415 South Washington Street, Green Bay, Wisconsin 54305, appearing on behalf of the Association.
Mr. Roger E. Walsh, Lindner & Marsack, Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the County.

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

Outagamie County Professional Police Association having, on July 24, 1989, filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing unit of employes of Outagamie County by determining whether certain positions should be excluded from said bargaining unit; and the parties having attempted to resolve the matter informally for several months subsequent to the filing; and a hearing in the matter having been conducted on October 23, 1989 before Examiner Beverly M. Massing; and a stenographic transcript of the proceedings having been prepared, and received on November 1, 1989; and at hearing, the parties having been given the opportunity to present oral arguments and witnesses; and post-hearing briefs having been filed, the last of which was received on December 5, 1989; and the Commission, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Outagamie County, referred to herein as the County, is a municipal employer having its offices at 410 South Walnut Street, Appleton, Wisconsin 54911.
2. That the Outagamie County Professional Police Association, referred to herein as the Association, is a labor organization having its office at 415 South Washington Street, Green Bay, Wisconsin 54305.
3. That the Association is the exclusive bargaining representative of the following bargaining unit in Outagamie County:

All regular permanent full-time and regular permanent part-time employes within the Outagamie County Sheriff's Department having the power of arrest, excluding the Sheriff, Undersheriff, Lieutenants, and all confidential, supervisory, and managerial employes and independent contractors.
4. That on July 24, 1989, the Association filed a unit clarification petition with the Commission wherein it identified the positions it sought to exclude from the bargaining unit described in Finding of Fact 3 as: "Records Clerk, Jail Guard (2), Assistant Process Server, Receptionist Clerk (1), Radio Operator, Communications Aide, and any nonprotective service classed employes".

5. That there are 33 persons in the bargaining unit who currently fill the positions the Association seeks to exclude; and that at hearing, the Association identified said positions as: Matrons/Cooks (4), the Huber Law Officers (4), the Jailers (9), the Communications Aides (4), the Radio Operators (4), the Process Servers (3), and the Clericals (5).

6. That at hearing, the parties stipulated to the following facts:

A. All bargaining unit employes have the power of arrest.

B. All bargaining unit employes perform duties which are related to the law enforcement function of the Sheriff's Department.

C. It is the Association's position that the positions of Matron/Cook, Huber Law Officer, Jailer, Communication Aide, Radio Operator, Process Server, and Clerical should be excluded from the existing bargaining unit.

D. All positions in Joint Exhibits 1 through 5 (ie. Investigator, Transport Officer, Deputy Investigator, Floating Deputy, and Patrol Officer) have protective service status for retirement purposes, and those in Joint Exhibits 6 through 12 (ie. Matron/Cook, Huber Law Officer, Jailer, Communication Aide, Radio Operator, Process Server, and Clerical) have nonprotective status for retirement purposes.

E. Individuals in Joint Exhibits 1, 2, 3, and 5 (ie. positions of Investigator, Transport Officer, Deputy Investigator, and Patrol Officer) have or will have the 340 hours of law enforcement officer training as required by the Law Enforcement Standards Board under Chapter 165 of the Wisconsin Statutes.

F. No Bargaining unit employe has ever been told by supervisors or administrators in the Sheriff's Department or by the Sheriff not to exercise their authority to make an arrest.

G. There is no oral or written rule or policy in the Sheriff's Department which would prohibit any bargaining unit employe from exercising their authority to make an arrest.

H. All employes listed in Joint Exhibits 1 through 12 are current bargaining unit employes.

7. That all members of the bargaining unit have been deputized by the Outagamie County Sheriff.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

That the occupants of the positions of Matron/Cook, Huber Law Officer, Jailer, Communications Aide, Radio Operator, Process Server, and Clerical are law enforcement personnel within the meaning of Sec. 111.77, Stats., and thus are appropriately included in the bargaining unit described in Finding of Fact 3.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT 1/

That the Outagamie County bargaining unit described above in Finding of Fact 3 be, and hereby is, clarified to continue to include within that unit the positions of Matron/Cook, Huber Law Officer, Jailer, Communications Aide, Radio Operator, Process Server, and Clerical.

Given under our hands and seal at the City of
Madison, Wisconsin this 28th day of February,
1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

Herman Torosian, Commissioner

William K. Strycker, Commissioner

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- 1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

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

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

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for

(Footnote one continued on page four)

1/ continued

the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

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

. . . .

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

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

OUTAGAMIE COUNTY
(SHERIFF'S DEPARTMENT)

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

POSITIONS OF THE PARTIES

Association

The Association seeks to exclude individuals holding the positions of Matron/Cook, Huber Law Officer, Jailer, Communications Aide, Radio Operator, Process Server, and Clerical from the existing unit which it represents because the incumbents in said positions are not required to obtain "certification" under Sec. 165.85(4)(b)1, Stats. While acknowledging the absence of any "certification" requirement from the historical definition of "law enforcement personnel" applied by the Commission when defining the scope of law enforcement units, the Association believes that a revision of this historical definition is appropriate. Specifically, the Association argues that the Commission definition should be harmonized with the definition of "law enforcement officer" as found in Sec. 165.85(4)(b)1, Stats., which the Association contends narrowly defines "law enforcement officer" as one who is required to obtain certain training and ultimate certification. Inasmuch as Sec. 111.77 Stats., does not contain a definition for "law enforcement personnel" or "law enforcement officer", the Association urges an adoption of the definition set forth in Ch. 165.

The Association further argues that although the positions in question do have the power of arrest, the power is not exercised by the persons in those positions. Citing Manitowoc County, Dec. No. 7116-A (WERC, 4/88), the Association urges the Commission not to put form over substance and therefore to conclude that the disputed employees do not "truly" have the power of arrest.

Lastly, the Association notes that the power of arrest is governed by Sec. 968.07 Stats., and argues that, at least by implication, the Attorney General held in 61 AG 419 that only certified law enforcement officers under Sec. 165.85 (2)(c), Stats. can make arrests.

For the foregoing reasons, the Association asks that the disputed positions be excluded from its unit.

County

The County contends that because the contested positions have the power of arrest and perform job duties which are related to the law enforcement function of the Sheriff's Department, they must continue to be included in the current unit. The County points to the long-standing policy of the Commission to rely upon the power of arrest as the determining factor in establishing the appropriate scope of a law enforcement unit.

The County alleges that the Association has failed to establish any reason for the Commission to modify existing precedent. Contrary to the Association's arguments herein, the County asserts that Sec. 165.85(4)(b)1, Stats. merely establishes a requirement that those "law enforcement personnel" who are to be deemed "officers" must obtain certification. The County alleges that Sec. 165.85(4)(b)1, Stats. does not define "law enforcement personnel" as only those who are certified. The County also notes that even if there was a conflict between Chapter 165 and the Commission's interpretation of Sec. 111.77, Stats., such a conflict only reflects that the two statutes have different purposes and need not be the same. Chapter 165 sets training and certification standards while under Sec. 111.70, Stats., the Commission is determining appropriate units for collective bargaining. Given these differing purposes, the County contends that any conflict need not be resolved.

The County asserts that the question of whether the disputed employees exercise their power of arrest is irrelevant. Citing Eau Claire County, Dec. No. 11030-B (WERC, 6/78), the County argues that its only necessary functions that an employee have the power of arrest and perform law enforcement functions to qualify under the Commission's definition of "law enforcement personnel".

Lastly, the County urges the Commission to reject the Association argument that only certified "law enforcement officers" can make arrests. The County contends that the Attorney General's opinion relied upon by the Association simply does not reach such a conclusion.

For the foregoing reasons, the County asks that the disputed positions continue to be included in the unit.

DISCUSSION

The Commission has consistently found that the possession of the power of arrest, 2/ and the relationship of a position's duties to the law enforcement

2/ The extent and frequency with which an employe actually exercises the

function are the determinative factors in deciding the eligibility of a position for inclusion in a unit of law enforcement personnel. 3/ The parties in this case have stipulated that the positions in question have the power of arrest, and that all bargaining unit employees perform job duties which are related to the law enforcement function of the Sheriff's Department. Thus, it is clear that under existing Commission precedent, the disputed positions are appropriately included in the Association's unit. 4/

The Association argues that the definition of "law enforcement personnel" used by the Commission is inconsistent with the training and certification requirements applicable to "law enforcement officers" under Ch. 165, 5/ and contends that the Commission should adopt this narrower definition.

When defining the scope of the bargaining units "composed of law enforcement personnel", as that term is used in Sec. 111.77, Stats., we looked for guidance to various statutory provisions including Chapter 165. 6/ We then concluded that it was appropriate to define the phrase "law enforcement personnel" for Sec. 111.77 purposes based in part upon an employee's possession of the power of arrest. We did not limit our definition to those who held positions which required a certification under Sec. 165.85(4)(d)1, Stats.

The definition we adopted has served the interests of labor peace set forth in Sec. 111.70(6), Stats. and the legislative command in Sec. 111.70(4)(d)2.a., Stats. that we avoid fragmenting a municipal employer's workforce. 7/ Thus, we find no basis for concluding that a narrower definition of "law enforcement personnel" would advance the interests we are obligated to consider and protect.

Thus, we have issued an order clarifying that the positions of Matron/Cook, Jailer, Huber Law Officer, Communication Aide, Radio Operator, Process Server, and Clerical in the Outagamie County Sheriff's Department continue to be included in the existing unit of law enforcement personnel.

Dated at Madison, Wisconsin this 28th day of February, 1990.

power of arrest is not determinative. Eau Claire County, Dec. No. 11030-B (WERC, 6/78); Sawyer County, Dec. No. 12457 (WERC, 1/74).

3/ Village of Menomonee Falls, Dec. No. 13159-A (WERC, 6/75); Marinette County, Dec. No. 22102-D (WERC, 7/87); Douglas County, Dec. No. 18209-A (WERC, 9/81).

4/ We find the Association's interpretation of 61 AG 419 as holding that only certified law enforcement officers are empowered to make arrests to be unpersuasive.

5/ Chapter 165 provides in pertinent part:

165.85 Law enforcement standards board.

. . .

(2) DEFINITIONS.

. . .

(c) "Law enforcement officer" means any person employed by the state or any political subdivision of the state, for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances he is employed to enforce.

. . .

(4) REQUIRED STANDARDS.

. . .

(b) 1. No person may be appointed as a law enforcement officer, except on a temporary or probationary basis, unless the person has satisfactorily completed a preparatory program of law enforcement training approved by the board and has been certified by the board as being qualified to be a law enforcement officer. . .

6/ See, Waukesha County, Dec. No. 14830 (WERC, 8/76).

7/ Adopting the Association's position herein could ultimately produce an additional bargaining unit of County employees.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

Herman Torosian, Commissioner

William K. Strycker, Commissioner