STATE OF WISCONSIN
CIRCUIT COURT
OUTAGAMIE COUNTY

OUTAGAMIE COUNTY PROFESSIONAL POLICE ASSOCIATION,
Petitioner,

vs.

Wisconsin Employment Relations Commission,
Respondent

Case No. 90-CV-318
Decision No. 23203-A

DECISION

This case is a Chapter 227 administrative review of a Wisconsin Employment Relations Commission (Commission) decision dated February 28, 1990. Petitioner, a municipal labor association, requested the Commission to clarify its collective bargaining unit. Because the Commission issued an order denying petitioner's request, this review was sought.

Petitioner wanted to exclude from its bargaining unit the following positions: matrons/cooks, Huber law officers, jailors, communication aides, radio operators, process servers and clerical employes. The Commission's conclusion that the employes in question are law enforcement personnel depended on a finding that these employes have the power of arrest and they perform job dudes which are related to the law enforcement function.

The parties stipulated to the facts at the administrative hearing held on October 23, 1989. Most important of these were: that all bargaining unit employes have the power of arrest; that all bargaining unit employes perform duties related to the law enforcement function of the Sheriff's Department; that no bargaining unit employee has ever been told by supervisors or administrators not to exercise his/her authority to make an arrest; and that all employees in the bargaining unit have been deputized by the Outagamie County Sheriff.

Because the administrative hearing was submitted on a stipulation of facts, there is no need to judicially review findings of fact made by the Commission. Therefore, it is not necessary to apply the credible evidence test to findings of fact. In fact, petitioner does not even challenge any findings of fact. (It is obvious that the stipulated facts were the operative ones used by the Commission in denying petitioner's request for clarification.)

The construction of a collective bargaining agreement is a conclusion of law. Board of Ed., Brown Deer Schools v. WERC, 86 Wis.2d 201; Tecumseh Products Co. v. Wisconsin E.R. Board, 23 Wis.2d 118. The applicable standard of review on a conclusion of law reached by an administrative agency provides that a reviewing court is not bound by an agency conclusion of law. But due weight must be accorded the experience, specialized knowledge and discretionary authority of the

Commission. Milw. Co. v. ILHR Dept., 80 Wis.2d 445.

While Sec. 111.77, Stats., does not define law enforcement personnel, I am satisfied the Commission's conclusion that the questioned positions should be included in the bargaining unit is correct.

While not enunciated, carrying a gun seems to be the pivotal criteria petitioner would like to see adopted as the standard for inclusion in the bargaining unit. Petitioner goes to great lengths in an attempt to justify its proposed exclusion by referring to other statutes that are unrelated to the underlying issue of this case - "collective bargaining." (Municipal Employment Relations Act) Specifically, while the definition of a law enforcement officer, Sec. 165.85(2)(c) and (4)(b)1, Stats., seem to exclude positions such as the questioned ones, the purpose of the definition in Chapter 165 is to establish minimum law enforcement training standards. That definition is of no significance to the administrative agency determining unit clarification for collective bargaining purpose of Chapter 111.

I note with curiosity that if petitioner is correct that the bargaining unit should exclude the questioned positions, it would have to modify its proposal in one key respect. If Sec. 165.85(2)(c), Stats., correctly defines law enforcement officer for collective bargaining purposes then the definition of a "jail officer" (jailor) would require that jailors also be included in the bargaining unit since that position is also subject to minimum law enforcement training standards, Sec. 165.85(4)(an) & (b)2 & (c), Stats.

The legislative policy which controls the purpose of these minimum law enforcement training standard statutes is Sec. 165.85(1), Stats. It provides:

> Findings and Policy. The legislature finds that the administration of criminal justice is of statewide concern, and that law enforcement work is of vital importance to the health, safety and welfare of the people of this state and is of such a nature as to require training, education and the establishment of standards of a proper professional character. The public interest requires that these standards be established and that this training and education be made available to persons who seek to become law enforcement or jail officers, persons who are serving as these officers in a temporary or probationary capacity and persons already in regular service.

Petitioner's reference to Sec. 968.07, Stats., which delineates the circumstances when a law enforcement officer can make a valid arrest, is not supportive of its claim. This statute states when circumstances are appropriate to exercise the Power of arrest (emphasis supplied). It has nothing to do with granting of the power of arrest. It has no collective bargaining purpose. It simply informs both law enforcement officers and the general public when a valid arrest may be made in the lawful performance of an officers job. It further provides a protection to law enforcement officers by insulating officers against spurious claims made by citizens alleging an infringement of one's constitutional rights.

The Commission was correct in its conclusion that all individuals who possess the power of arrest

and whose job duties are related to the law enforcement function belong in petitioner's bargaining unit. It is the possession of the power of arrest and not the exercise of the power of arrest (carrying guns) that is the correct line of demarcation to determine unit membership for collective bargaining purpose.

Since the power of arrest is the only legal basis of petitioner's challenge to the Commission's order, it should be affirmed. (Petitioner did not allege that any of the questioned positions were not related to the law enforcement function. Anyway, I agree with respondent that all the questioned positions are critical to the efficient performance of the law enforcement function. This is so regardless of the frequency with which any of the questioned personnel might exercise the power of arrest.)

Petitioner's collective bargaining unit should remain as originally defined:

> 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.

While a reasonable mind might find some conflict between the meanings of law enforcement personnel (Chapter 111) and law enforcement officers (Chapter 165), I agree that the statutory purposes are different. The Commissions obligation dealt with petitioner as a collective bargaining entity (Chapter 111), not minimum law enforcement training standards (Chapter 165). Petitioner's interpretative statutory spin is unpersuasive to exclude the questioned positions from its bargaining unit. While oranges and tangerines are the same color, only one is an orange.

The Commission's order must be affirmed if it is reasonable and consistent. Milw. v. WERC, 71 Wis.2d 709. I am so satisfied. I hereby adopt the Commission's order in its entirety, as well as the supporting arguments of respondents, and make them my own.

Attorney Niemisto is directed to prepare the appropriate order affirming the Commission's order, and dismissing the petitioner's action.

Dated at Waupaca, Wisconsin, this 19th day od December, 1990.

BY THE COURT,

/s/ Philip M. Kirk
Phillip M. Kirk
Circuit Judge