

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of	:	
MARGARET M. THOMAS and	:	
GLORIA SONNENTAG	:	Case 118
	:	No. 37346 ME-2608
Involving Certain Employees of	:	Decision No. 24467
MARATHON COUNTY	:	
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In the Matter of the Petitions of	:	
WISCONSIN PROFESSIONAL POLICE	:	Case 116
ASSOCIATION and WISCONSIN	:	No. 37195 ME-2599
COUNCIL 40, AFSCME, AFL-CIO	:	Decision No. 24468
	:	
Involving Certain Employees of	:	Case 83
MARATHON COUNTY	:	No. 371588 ME-100
(SHERIFF'S DEPARTMENT)	:	Decision No. 20999-A
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Appearances:

Ms. Margaret M. Thomas, 4702 County Highway G, Antigo, Wisconsin, 54409, appearing pro se.
Cullen, Weston, Pines & Bach, Attorneys, by Mr. Lee Cullen, 20 North Carroll Street, Madison, Wisconsin, 53703, appearing on behalf of Wisconsin Professional Police Association/LEER Division.
Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin, 53719, appearing on behalf of AFSCME.
Mulcahy & Wherry, S.C., Attorneys, by Mr. Dean R. Dietrich, P. O. Box 1004, Wausau, Wisconsin, 54401, appearing on behalf of the Employer.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, DIRECTION OF ELECTION AND
ORDERS CLARIFYING BARGAINING
UNIT AND DISMISSING PETITION

Margaret M. Thomas and Gloria N. Sonnentag, individuals, having on July 28, 1986 filed a petition requesting the Wisconsin Employment Relations Commission to conduct an election among Courthouse employees in the employ of Marathon County, to determine whether said employees desired to continue being represented by Wisconsin Council 40, AFSCME, AFL-CIO; and Wisconsin Council 40, AFSCME, AFL-CIO having, on June 20, 1986, filed a petition requesting the Commission to clarify the bargaining unit of Courthouse employees by including in that unit five relief corrections officers and two clerical employees in the Sheriff's Department; and Wisconsin Professional Police Association/LEER Division having, on June 30, 1986, filed a petition requesting the Commission to conduct an election among corrections officers, communications personnel and clerical personnel in the Sheriff's Department of Marathon County, to determine whether said employees desire to be represented by WPPA/LEER Division; and said petitions having been consolidated for purposes of hearing and decision; and a hearing in these matters having been conducted on October 9, 1986 at Wausau, Wisconsin, before Examiner Christopher Honeyman, a member of the Commission's staff; and post-hearing briefs having been filed, the last of which was received on December 15, 1986; the Commission, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following

No. 24467
No. 24468
No. 20999-A

FINDINGS OF FACT

1. That Marathon County, referred to herein as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., and has its principal offices at Marathon County Courthouse, 500 Forest Street, Wausau, Wisconsin, 54401.

2. That Wisconsin Council 40, AFSCME, AFL-CIO and its affiliated Local 2492-E are labor organizations within the meaning of Sec. 111.70(1)(h), Stats., and have their offices located at 5 Odana Court, Madison, Wisconsin, 53719.

3. That Marathon County and Local 2492-E, AFSCME, AFL-CIO were parties to a collective bargaining agreement effective from January 1, 1985 until December 31, 1986, covering wages, hours and conditions of employment of employees of the County in the following collective bargaining unit, known as the Courthouse unit:

all regular full-time and regular part-time non-professional employees in the employ of Marathon County; but excluding all confidential, supervisory and managerial employees, elected officials and all other represented employees of Marathon County.

and that said unit includes the following positions from the Sheriff's Department: Corrections Officer, Police Communications Specialist, Clerical Assistant I and II, Terminal Operator and Vehicle Maintenance Specialist.

4. That Margaret M. Thomas and Gloria Sonnentag are two individuals employed by Marathon County and presently represented by AFSCME as part of the Courthouse bargaining unit, and have their addresses respectively at 4702 County Highway G, Antigo, Wisconsin, 54409 and 5003 Alderson Street, Schofield, Wisconsin, 54476.

5. That the petition for election filed by Margaret M. Thomas and Gloria M. Sonnentag, herein referred to as the Decertification Petitioners, timely raised a question concerning the majority status of the present representative of the bargaining unit referred to in Finding of Fact 3.

6. That Wisconsin Professional Police Association/LEER Division, referred to herein as WPPA, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its offices located at 7 North Pinckney Street, Madison, Wisconsin, 53703.

7. That Marathon County and WPPA were parties to a collective bargaining agreement effective from January 1, 1985 until December 31, 1986, covering wages, hours and conditions of employment of employees of the County in a collective bargaining unit consisting of employees who possess the power of arrest in the positions of Detective and Deputy Sheriff.

8. That WPPA has petitioned for an election in a separate bargaining unit within the Sheriff's Department consisting of the employees in the positions of Police Communication Specialist, Terminal Operator, Corrections Officer, Vehicle Maintenance Specialist and Clerical Assistant I and II who are currently in the AFSCME Courthouse unit; that said employees perform duties related to the law enforcement function; that said employees do not share a substantial community of interest independent of the Courthouse bargaining unit in which they are presently placed; that such a unit is inappropriate for collective bargaining because some of said employees possess the power of arrest and some do not; and that undue fragmentation of bargaining units would result if a separate unit were to be established for those Department employees who do not possess the power of arrest.

9. That WPPA, in the alternative, has filed a unit clarification petition asking that all the Sheriff's Department employees currently represented by AFSCME be made part of the unit of Detectives and Deputy Sheriffs which it presently represents; and that some of these employees subject to the unit clarification petition do not possess the power of arrest.

10. That in its Sheriff's Department, Marathon County employs five Relief Corrections Officers, some of whom possess the power of arrest, who perform duties related to the law enforcement function, replace Corrections Officers with

sufficient consistency that they constitute regular part-time employees, and have a reasonable expectation of continuing employment; and that they are appropriately included in either the bargaining unit referenced in Finding of Fact 3 or 7 depending upon their possession of the power of arrest.

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

CONCLUSIONS OF LAW

1. That a question concerning representation within the meaning of Sec. 111.70(4)(d) of the Municipal Employment Relations Act has arisen among the municipal employees in the appropriate unit set forth in Finding of Fact 3.

2. That the bargaining unit petitioned for by WPPA described above in Finding of Fact 8 is not an appropriate bargaining unit within the meaning of Sec. 111.70(4)(d)2.a. of the Municipal Employment Relations Act.

3. That the employees holding the positions identified in Findings of Fact 8 and 10 who possess the power of arrest and perform duties related to the law enforcement function are appropriately included in the law enforcement bargaining unit represented by WPPA referenced in Finding of Fact 7.

4. That the disputed Relief Corrections Officers in the Sheriff's Department who do not possess the power of arrest share a sufficient community of interest with the employees in the bargaining unit described in Finding of Fact 3 to be appropriately included in that unit.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following Direction and Orders:

DIRECTION OF ELECTION.

It is directed that an election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Commission within 45 days from the date of this directive, in the collective bargaining unit consisting of all regular full-time and regular part-time non-professional employees in the employ of Marathon County, excluding all confidential, supervisory and managerial employees, elected officials and all other represented employees, who were employed by Marathon County on May 1, 1987, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of said employees desire to be represented by Wisconsin Council 40, AFSCME, AFL-CIO, for the purpose of collective bargaining with Marathon County concerning wages, hours and conditions of employment or by no labor organization.

ORDER CLARIFYING BARGAINING UNIT. 1/

1. It is ordered that the bargaining unit described above in Finding of Fact 3 be, and the same hereby is, clarified by including within that unit those regular part-time Relief Corrections Officers who do not possess the power of arrest.

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.

(Footnote 1 continued on Page 4.)

(Footnote 1 continued from Page 3.)

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 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. 227.49, 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 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.

2. It is ordered that the bargaining unit referenced in Finding of Fact 7 be, and the same hereby is, clarified by including within that unit those employes in the positions of Police Communications Specialist, Terminal Operator, Corrections Officer, regular part-time Relief Corrections Officer, Vehicle Maintenance Specialist, and Clerical Assistant I and II who possess the power of arrest.

ORDER DISMISSING PETITION. 2/

It is ordered that the petition for election filed by WPPA in this matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of
Madison, Wisconsin this 1st day of May, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

2/ Ibid.

MARATHON COUNTY (SHERIFF'S DEPARTMENT)

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW, DIRECTION OF ELECTION AND
ORDERS CLARIFYING BARGAINING
UNIT AND DISMISSING PETITION

This proceeding involves three varied petitions, consolidated for purposes of efficiency. Margaret Thomas and Gloria Sonnentag, two individuals, petitioned the Commission for an election among all employees in the Courthouse bargaining unit, to determine whether said employees wished to continue to be represented by Wisconsin Council 40, AFSCME. AFSCME petitioned the Commission to clarify the same bargaining unit by including within it five relief corrections officers in the Sheriff's Department. WPPA petitioned the Commission for an election in a unit consisting of certain personnel in the Sheriff's Department that it does not currently represent or, in the alternative, to clarify said personnel into the existing unit of Sheriff's Deputies. No issues were raised with respect to the decertification petition, and we find an election with respect to that petition appropriate. Our discussion of the remaining petitions follows.

SHERIFF'S DEPARTMENT EMPLOYEES

In its petition, WPPA requested the creation by election of a separate bargaining unit of all non-sworn Sheriff's Department employees. At the hearing, WPPA modified its position so that, in the alternative, it argued for a department-wide unit of employees in the Sheriff's Department, excluding supervisors but including deputies, dispatchers, jailers, clericals, and the one vehicle maintenance specialist. In its brief it has all but abandoned its original proposal and now argues primarily for the department-wide unit. To the extent that we still need to respond to the alternative "civilian only" unit argument, we find no merit to same in view of the anti-fragmentation principle expressed in Sec. 111.70(4)(d)2.a., Stats., and of the record evidence establishing a community of interest among all employees currently in the Courthouse unit.

Turning to the WPPA's request that we create a department-wide law enforcement unit, the Commission has long held that only those employees 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. 3/ As we have also indicated in prior cases, that interpretation is based in part on the definition of law enforcement officer found elsewhere in the statutes. 4/

Those employees who possess the power of arrest play a critical role in maintaining the public peace and because of same, the Legislature failed to provide that said employees in their attempt to settle disputes under Sec. 111.77, Stats., have the right to strike. On the other hand, employees in law enforcement departments who do not possess the power of arrest do not have the same critical role in maintaining the public peace. Consequently, the Legislature has provided these employees with a different statutory scheme under which to attempt to settle disputes, and said employees are afforded the right to strike under the limited circumstances set forth in Sec. 111.70(4)(cm), Stats. Because law enforcement

3/ Waukesha County, Dec. No. 14830 (WERC, 8/76); Waukesha County, Dec. No. 14534-A (WERC, 11/76); LaCrosse County, Dec. No. 19539 (WERC, 4/82); Vernon County, Dec. No. 21082 (WERC, 10/83); Kenosha County, Dec. No. 21910 (WERC, 8/84).

4/ In addition to the definition in Sec. 165.85(2)(c), Stats., see also Sec. 102.475(8)(c), Stats., which defines a law enforcement officer for purpose of death benefits; and Sec. 967.02(5), Stats., which defines a law enforcement officer in the criminal procedure code; and Sec. 40.02(48)(b)(1) and (3) Stats., which defines a police officer and deputy sheriff for purposes of retirement benefits.

personnel and other municipal employees are subject to different statutory provisions regarding their respective rights to strike or to pursue interest arbitration, it is inappropriate to include the civilian employees who do not possess the power of arrest in the same bargaining unit with law enforcement personnel. To combine law enforcement personnel with non-law enforcement personnel would create an untenable situation when implementing the interest arbitration and limited right to strike provisions of Secs. 111.77 and 111.70(4)(cm), Stats.

In summary, the Commission is not persuaded that there is any substantial basis to alter its long-standing policy of relying on the power of arrest as the determinative factor in establishing the composition of law enforcement bargaining units. We further note that the Legislature has amended the Municipal Employment Relations Act several times during years we have been applying this policy and has not seen fit to modify the law in a manner which would produce a different result. Furthermore, if we were to adopt the WPPA position, the department employees who do not possess the power of arrest would be deprived of the limited right to strike they have been statutorily granted. As certain of the employees of the Sheriff's Department do not possess the power of arrest, we must dismiss the WPPA request for a department-wide unit. However, the record does reveal that several Sheriff's Department employees currently included in the AFSCME Courthouse unit do possess the power of arrest and perform duties related to the law enforcement function. Thus, said employees are appropriately included in the WPPA Sheriff's Department unit and said unit has been accordingly clarified.

RELIEF CORRECTIONS OFFICERS

For the purposes of this AFSCME unit clarification petition, we will note only that an admitted shortage of jailers has caused heavy County use of a group of five Relief Corrections Officers. These five individuals, for approximately the last two years, have worked a very substantial percentage of full-time hours; one or two even approach full-time status. They have not been included in any bargaining unit and are not, in fact, deemed by the County to constitute "positions" for purposes of its internal recordkeeping. All of the Relief Corrections Officers have worked shifts similar to regular Corrections Officers and have done essentially the same work. These facts the County does not deny. Both Unions take the position that accretion of these employees to an existing unit is appropriate.

The County presented evidence to the effect that the expectation of continuing employment of the Relief Corrections Officers was not so substantial as it might appear, essentially because their heavy pattern of use has caused the County to create new regular Corrections Officer Positions. The record shows that an outside study performed for the County recommended that an additional 20 to 25 full-time Corrections Officer Positions be added to supplement the mere seven now in existence. This recommendation was intended, apparently, to tie in to the construction of a new jail facility adjacent to the Courthouse. The recommendation has not been adopted in its entirety. But as of the date of the hearing, there was unchallenged testimony to the effect that the County had committed itself to hire six additional full-time Corrections Officers, and that its target date for completing the hiring process was December, 1986. The County's essential contention is that the six full-time officers to be hired will initially replace the Relief Corrections Officers, thus depriving them of any likelihood of continuing employment.

While, absent other circumstances, the timing of the County's move might appear suspect, we find no evidence here that the County is engaging in manipulation in order to avoid unionization of these five individuals. The construction project of the jail appears genuine, it is clear that the County has been short-handed for a substantial period in the jail, and the hiring of regular Corrections Officers is clearly not a route which will avoid the presence of unionized employees, or even evade any possible wage structure which might be established for the Relief Corrections Officers. But that does not necessarily mean that the County's argument should be accepted. These five employees do not have a permanent fixed schedule, but they are present so much of the time that they are effectively "regular" part-timers. (None of the parties argued that they are casual employees). The existing pattern of work makes it speculative for the County to say that the six new full-timers will supplant them; and this is particularly indicated by the fact that the County has moved to hire only six of

the twenty-odd new jailers recommended by its own study. To say under these circumstances that the Relief Corrections Officers may lose work is supportable; to say that they have "no reasonable expectation" of continuing employment is not a conclusion we can reach on this record. We therefore include them in either the Courthouse unit or the law enforcement unit consistent with the incumbent's possession of the power of arrest.

Dated at Madison, Wisconsin this 1st day of May, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner