STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of DANE COUNTY Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and THE WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION	Case 112 No. 38507 DR(M)-425 Decision No. 25650

Appearances:

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Jon E. Anderson, P.O. Box 1110, 131 West Wilson Street, Madison, Wisconsin 53701-1110, on behalf of the County.

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Dane County, herein the County, having on March 12, 1987 filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling as to the County's duty to bargain with the Wisconsin Professional Police Association/LEER Division, herein the Association, over certain matters; and the Association having on March 20, 1987 filed a Motion to Dismiss the County's petition; and the County having on March 25, 1987 filed a written response to said Motion; and the Commission, through its General Counsel, having advised the parties that hearing was needed before the Commission could rule upon the Association's Motion; and the parties having subsequently agreed upon a June 30, 1987 hearing date; and the parties having subsequently agreed to postpone said hearing until August 28, 1987; and hearing having been held on said date in Madison, Wisconsin before General Counsel Peter G. Davis; and during said hearing the Association having withdrawn its Motion to Dismiss; and following said hearing the parties having filed written argument, the last of which was received on December 14, 1987 and the record having been supplemented through the receipt of additional exhibits on the following dates: October 12, 1987; January 19, 1988; February 23, 1988; and May 25, 1988; June 29, 1988; and the Commmission having considered the matter and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Dane County, herein the County, is a municipal employer having its principal offices at 210 Martin Luther King Jr. Boulevard, Madison, Wisconsin 53709.

2. That the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, herein the Union, is a labor organization having its principal offices at 7 North Pinckney Street, Madison, Wisconsin 53703.

3. That during collective bargaining between the County and the Union over a successor to their 1985-1987 collective bargaining agreement, a dispute arose as to whether the County had a duty to bargain over certain matters; that the County filed the instant petition for declaratory ruling to seek a resolution of that dispute; and during hearing, the dispute was narrowed to the following two portions of the 1985-1987 contract:

Section 7.11

. . .

Bargaining unit work, including that assigned on an overtime basis, shall only be performed by bargaining unit personnel unless after advance notice has been given of the opportunity to perform such work or other reasonable efforts made by the shift commander fails to provide bargaining unit personnel for such work assignments.

Section 9.01

In order to qualify to apply for promotion, the applicant must be a member of his department as follows:

. . .

(b) For Sergeant - a minimum of four (4) years of full-time continuous duty with the department.
(c) For Lieutenant - have the rank of Sergeant or a minimum of seven (7) years of full-time continuous duty with the department.
(d) For Captain - have the rank of Lieutenant or a minimum of ten (10) years of full-time continuous duty with the department.

. . .

4. That the Union and the County have agreed that although they have a duty to bargain "dispute," the pendency of this petition for declaratory ruling will not suspend their efforts to reach a successor agreement to their 1985-1987 collective bargaining agreement.

5. That the disputed portion of Sec. 7.11 primarily relates to wages, hours and conditions of employment.

6. That the disputed portion of Sec. 9.01 primarily relates to the formulation or management of public policy.

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

CONCLUSIONS OF LAW

1. That the disputed portion of proposal 7.11 is a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

2. That the disputed portion of Sec. 9.01 is a permissive subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

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

DECLARATORY RULING 1/

That the County and the Union have a duty to bargain within the meaning of Secs. 111.70(3)(a)4 and (1)(a), Stats., as to Sec. 7.11.

(Footnote 1/ on page 2)

That the County and the Union have no duty to bargain within the meaning of Secs. 111.70(3)(a)4 and (1)(a), Stats., as to Sec. 9.01.

Given under our hands and seal at the City of Madison, Wisconsin this 26th day of August, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

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

1/ continued

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.

DANE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT CONCLUSIONS OF LAW AND DECLARATORY RULING

BACKGROUND:

The parties herein disagree over whether two provisions from their 1985-1987 contract are mandatory subjects of bargaining and thus seek a ruling from the Commission which will resolve their disagreement. The parties have agreed to proceed with their efforts to reach agreement on a successor contract during the pendency of this petition. Before entering into a discussion of each proposal, it is useful to set forth the general legal framework within which the issues raised by the parties must be resolved.

A municipal employer has no enforceable duty to collectively bargain on matters relating to permissive subjects of bargaining, and of course, it cannot bargain on prohibited subjects of bargaining. The inclusion of a permissive subject of bargaining in the prior agreement does not bar a challenge by a party to the inclusion thereof in the successor agreement. Greenfield School District, Dec. No. 14026-B (WERC, 11/77).

In Beloit Education Association v. WERC 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC 81 Wis.2d 89 (1977) and City of Brookfield v. WERC 87 Wis.2d 819 (1979) the court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy," respectively. When it is claimed that a proposal is a prohibited subject of bargaining because it runs counter to express statutory command, Board of Education v. WERB 52 Wis.2d 625 (1971); WERC v. Teamsters Local No. 563 75 Wis.2d 602 (1977), the court has held that proposals made under the auspices of the Municipal Employment Relations Act (MERA) should be harmonized with existing statutes "whenever possible" and that only where a proposal "explicitly contradicts" statutory powers will it be found to be a prohibited subject of bargaining. Otherwise mandatory proposals which limit but do not eliminate statutory powers remain mandatory subjects. Glendale Professional Policeman's Association v. City of Glendale 83 Wis.2d 90 (1978); Professional Police Association v. Dane County 106 Wis.2d 303 (1982); Fortney v. School District of West Salem 108 Wis.2d 169 (1982). A proposal will be found to be a prohibited subject of bargaining if it limits or infringes upon the Sheriff's constitutional powers or duties, Crawford County, Dec. No. 20116 (WERC, 12/86). As to the constitutional duties of a Sheriff, the court has limited the scope of the matters which cannot be subjected to bargaining to those "principal and important duties" which characterize and distinguish the office. Dane County, supra; see also State ex rel Kennedy v. Brunst 26 Wis. 412 (1870); State ex rel Milwaukee County v. Buech 171 Wis. 474 (1920).

POSITIONS OF THE PARTIES

The County

The County asserts that Association proposal 9.01(b),(c), and (d) sets forth criteria for promotion to non-bargaining positions and therefore is a permissive subject of bargaining. The County notes that it is undisputed that the positions of Sergeant, Lieutenant and Captain are not within the scope of the unit represented by the Association herein. As determinations as to which individuals will best implement County policy choices and will best supervise County employes

In this regard, the County argues that the lack of a definition of "bargaining unit work" in Sec. 7.11 significantly infringes upon the authority of the Sheriff's Department managers to manage and direct the operations of their Department. The County argues that the breadth of the language in question pushed to its logical extreme gives the Association clear veto power over management decisions relating to how, and when, work will be done and by whom. In a law enforcement situation where employes are statutorily charged with the responsibility of enforcing laws, the County contends that the language in question is both unworkable and intolerable. The County notes that the "bargaining unit work" limitation fails to recognize the overlap of responsibilities between unit and non-unit personnel which is both historical and continuing. The County argues that the deployment of staff to accomplish department objectives is the right which is at issue in this proceeding, a right which is curtailed significantly by the language of the collective bargaining agreement in Sec. 7.11. The County asserts that said right must remain unfettered and within the exclusive province of management. The County contends that the language in question has no exceptions and creates an extenuated process which must be satisfied prior to the performance of "bargaining unit work," whatever that may be, by a non-unit person. In a profession where prompt action is critical, the County argues that such language and the restrictions imposed are both unreasonable and unworkable.

The County asks the Commission to resist the circuitous definition of "bargaining unit work" offered by the Association during this proceeding. While the Association asserts that the clause only seeks to protect the "core" of duties and responsibilities of the members of the unit, the County argues that the contract does not define "unit work" nor what the "core" includes. The County asserts that what the Association today chooses to call "core" responsibilities may change tomorrow. Thus, the County argues that relying upon the intent of the proponent of proffered language is dangerous indeed. In this regard the County contends that the Commission has previously found that if language is ambiguous and may be construed to primarily relate to the formulation or management of public policy, it must be found permissive even where, as here, the proponent of the language asserts that no such permissive interpretation was intended. Nicolet High School District, Dec. No. 19386 (WERC, 2/82). The County asserts that while the Association may not now vigorously exercise its "reserved" veto power under Sec. 7.11 as to when it will challenge County decisions, Sec. 7.11 remains an available mechanism to effectively deprive the County of its right to manage and direct the law enforcement activities of its employes. The County therefore urges the Commission to find the language permissive on this basis.

The County also argues that Sec. 7.11 is permissive to the extent that it covers work which, although historically performed by unit members, is part of the process by which policy choices are made by the employer. The County asserts that the record demonstrates that non-unit employes are members of various committees which formulate the policy recommendations in the Sheriff's Department. The County asserts that service on said committees must be construed as falling within the reach of the language in question and argues that the County has a right to make policy decisions without mandated involvement of bargaining unit members. Citing School District No. 5 of Franklin, Dec. No. 21846 (WERC, 7/84), the County asserts that Sec. 7.11 is permissive because it would compel continued involvement of bargaining unit members in policy making committees.

The County also argues that Sec. 7.11 is permissive because it would preclude the reallocation of work historically performed by sworn law enforcement employes to non-sworn employes in different County units or to non-County law enforcement personnel. In this regard, the County argues that in the law enforcement area, effective utilization of staff is of critical importance to the safety and welfare of the public. Public policy choices among alternatives available, including choices as to who will maintain the public peace, must, in the County's view, be preserved. The County argues that the current contract language takes that choice away as it effectively precludes such a policy determination. The County contends that the Association's legitimate interest in protecting the work of its members is far outweighed by the public policy interest in maximizing the County's continuing ability to maintain the public peace, security and safety of the residents. The County asserts that the Association's interests are adequately protected by the obligation on the part of the County to bargain over the impact of any reallocation decision.

In the alternative, the County argues that Sec. 7.11 is a prohibited subject of bargaining because it infringes upon the Sheriff's constitutional powers and duties. The County contends that any infringement upon the Sheriff's constitutional authority renders the language prohibited citing Crawford County, Dec. No. 20116 (WERC, 12/82); and Wisconsin Professional Police Association v. County of Dane, 106 Wis.2d 303 (1982). Citing Andreski v. Industrial Commission, 261 Wis. 234 (1952), the County argues that among the Sheriff's constitutional powers are the choice of the "ways and means" of meeting his law enforcement responsibilities as well as "executive and administrator" functions. The County contends that the office of the Sheriff carries with it the authority and obligation to function, not only as a law enforcement officer, but also as an effective manager and administrator of those persons appointed by the Sheriff to act as deputies. The County asserts that the managerial and administrative functions of the Sheriff are grounded in the Constitution and are extremely broad. The County alleges that Sec. 7.11 can reasonably be construed to prohibit the Sheriff from exercising his law enforcement responsibility and thus must be held to be a prohibited subject of bargaining.

The County further argues that the maintenance of law and order in Dane County may well require that a Sheriff, himself, take proper enforcement action or that the Sheriff direct that work be performed by non-unit employes who are nonetheless statutorily charged with the responsibility for maintaining law and order as deputies acting on behalf of the Sheriff. The County argues that the language in question would restrict the Sheriff in assigning duties to himself or other nonsupervisory personnel which fall within the scope of maintaining the public peace an order, a constitutional authority reserved to the Sheriff. The County alleges that the breadth of the bargaining unit language and the restriction it imposes impermissibly interferes with the Sheriff's authority and therefore must be found to be a prohibited subject of bargaining.

In response to arguments made by the Association, the County asserts that the County's decision not to pursue a declaratory ruling as to the language in question during prior bargains is fundamentally irrelevant to the mandatory, permissive or prohibited nature of Sec. 7.11. In this regard the County notes that it is undisputed that prior bargaining over permissive subjects of bargaining does not forever waive the right of the employer to challenge potentially permissive language. The County also rejects the Union's argument that the County's motivation herein is to save money by substituting less expensive employes for those sworn employes in the Association's unit. The County argues that its motivation herein is to preserve the Sheriff's constitutional authority so as to best maintain the public peace and safety in situations of admitted fiscal limitation. The County asserts that the Sheriff desires to effectively deploy limited manpower resources in a manner best suited to enhance the safety and welfare of County residents. In such circumstances, the County argues that the use of non-unit personnel represents a conscious choice among goals and values with obvious policy implications. This case, unlike the Brown County case cited by the Association, reflects, in the County's view, a desire to make a choice as to what type of employe should handle certain job duties and responsibilities; what type of training should be involved as well as what qualifications such an employe should possess. The County also contends that the evidence does not support the Association's argument that the County seeks to "civilianize" its law enforcement functions. The County asserts that the Association's presentation of evidence as to this matter is another attempt to cloud the issue. Nonetheless, the County would assert that the language of Sec. 7.11 effectively precludes the County from pursuing a policy decision of "civilianization" as an effort to enhance its law enforcement strength within existing resources. The County contends that a decision to "civilianize" relates to minimum qualifications and the nature and character of the type of employe which the County seeks to attract to a law enforcement position. The Association would seemingly suggest that the Sheriff and the County can continue to effectively carry out their respective duties and responsibilities by simply adding positions to the table of organization. However, the County notes that staffing level decisions are permissive subjects of bargaining. Moreover, in the County's view, the Association fails to point out that the practical effect of Sec. 7.11 is to mandate that any increase in staff to perform "bargaining unit work" occur within the ranks of the Association's unit. The County argues that this, in essence, prevents consideration by the Sheriff and the County of the minimum qualifications necessary to provide service to Dane County residents, including, most significantly, whether an employe should be sworn or non-sworn. As the Commission

has repeatedly held that the establishment of minimum qualifications for a position is a permissive matter, the County argues that the interference of Sec. 7.11 with minimum qualification determinations also requires that the proposal be found to be permissive.

The Association

As to Sec. 9.01, the Association argues that subsections (b), (c) and (d) merely establish minimum years of service or rank necessary to be considered for the promotional positions in question. The Association argues that these minimum qualifications primarily relate to the wages, hours and conditions of employment of bargaining unit members because historically bargaining unit members are promoted to these positions. The Association contends that the County is incorrect in its contention that such language infringes upon the County's ability to determine the "loyalty, attitute, aptitute or any other criteria" of candidates for non-unit positions because the County has retained this ability and exercised it through its adoption of a detailed promotional policy as to which the Association does not seek to bargain. While the Association recognizes that the Commission has generally held that an employer has no obligation to bargain with respect to wages, hours and conditions of employment for positions outside the bargaining unit, the Association argues that the very limited degree to which the language in question establishes minimum qualifications, when viewed within the context of a "military-like advancement system," indicates that the Commission's general rule should not be applied in the present case.

The Association asserts that Sec. 7.11 is a mandatory subject of bargaining because it primarily relates to the preservation of bargaining unit work. The Association argues that the language in question is nearly identical to language found mandatory by the Wisconsin Supreme Court in Unified School District No. 1 of Racine County v. WERC, supra. When such language is present, the Association argues that the burden is on the employer to prove that the use of non-unit personnel represents a choice among alternative social or political goals and values, citing School District No. 5 of Franklin, supra. The Association asserts that the County has failed to meet its burden in this case as evidenced by the fact that the contract language in question merely continues to protect the core of bargaining unit members' responsibilities.

Contrary to the County's arguments, the Association asserts that the language in question does not give it veto power over management decisions. The Association asserts that the language only gives bargaining unit members the right of first refusal when work is proposed to be shifted out of the unit. The Association argues that the scope of the work protected by Sec. 7.11 has been defined, at least in part, by a series of arbitration awards which illustrate that the "core" responsibilities include work as "jailer," "bailiff's" in criminal court, "process servers," and interstate conveyance of prisoners. The Association argues that the record makes it clear that Sec. 7.11 does not limit the law enforcement authority of supervisory personnel or prevent supervisors from performing activities incidental to their supervisory duties even though these same duties may be performed by unit personnel. The Association argues that there is no evidence that the Sheriff is unable to perform his constitutional duties with the 191 authorized, sworn, non-supervisory personnel represented by the Association.

As to the County's argument about the alleged imprecision of the language in question, the Association asserts that the Commission has held that the lack of a specific definition of bargaining unit work does not make proposed contract language permissive. In City of Oconomowoc, Dec. No. 18724 (WERC, 6/81), the Association asserts that the Commission accepted the definition of bargaining unit work as "jobs historically performed by members of the bargaining unit." In this case, the Association argues that the past practice and arbitration awards which serve to delineate the work bargaining unit members have performed are no different than a definition of bargaining unit work as "jobs historically performed."

The Association argues that the County's concern that it is restricted by Sec. 7.11 in managing and directing the Sheriff's Department is a veil attempting to disguise its true intent which is to have the ability to "civilianize" law enforcement functions strictly for financial reasons. Citing Brown County, supra, the Association asserts the desire to save money is not primarily related

to management and public policy. In this regard, the Association cites former County Executive Barry's statement that "the time has come to remove the brass from the slammer and move towards privitization of security services" as an unambiguous proclamation of the intent of the County. The Association notes that having private firms perform the same function as jailers currently in the unit would result in the loss of up to 53 bargaining unit jobs, over one-fourth of the bargaining unit. The Association notes that the Wisconsin Supreme Court held in Racine that "the policies and functions of the . . . (public employer) are unaffected by the decision (to privitize). The decision merely substitutes private employes for public employes . . . the services provided by the (public employer) will not be affected . . . ."

As to the County's contention that the involvement of bargaining unit members in a variety of committees and boards renders Sec. 7.11 permissive, the Association argues the participation of unit members is only in an advisory capacity to the Sheriff. The Association argues that unit members do not make policy decisions. As there is no evidence that any policy choices are "shared" with bargaining unit members herein, the Association argues that the County's analogy to Franklin is inappropriate. Even if any of the work done by bargaining unit members on committees is construed as making policy choices, the Association argues that the last sentence of Sec. 7.11 can only be considered a permissive subject of bargaining "to the extent that it covers work which although historically performed is part of the process by which policy choices are made" by the County. Therefore, to the extent that the last sentence of Sec. 7.11 focuses upon the "core" of bargaining unit responsibilities, it remains a mandatory subject of bargaining for such purposes.

The Association disputes the County's argument that Sec. 7.11 bars reallocation of bargaining unit work. The Association asserts that the County's attempt to cast the language as adversely affecting the level of services provided by the County is wildly speculative and that the record is devoid of evidence that the County has had a need to free unit employes for patrol work. Instead, the Association argues that the record indicates the County's real purpose herein is to save money. In the Association's view, the County also wrongly argues that the finding of Sec. 7.11 to be permissive will have little impact on bargaining unit members. To the contrary, the Association asserts that such a finding would almost certainly result in denying bargaining unit members the opportunity to work as jailers, bailiff's, process servers and in the interstate conveyance of prisoners; all job duties the County has attempted in the past to take from bargaining unit members. If bargaining unit members no longer have the opportunity to perform these functions, the Association asserts that there is no guarantee that they will not be laid off. The Association contends that the record demonstrates the County is trying to save money by having others perform these functions.

The Association alleges that the County is in error when it asserts that the last sentence of Sec. 7.11 infringes upon the Sheriff's constitutional powers or duties. The Association asserts that Sec. 7.11, on its face, does not explicitly infringe upon the "immemorial principal and important" duties of the Sheriff and that whether the application of Sec. 7.11 will infringe upon these duties at some time in the future can be determined on a case-by-case basis through the arbitration process and the Sheriff's right to seek to vacate arbitration awards in circuit court. The Association argues that the record indicates that Sec. 7.11 has never restricted the Sheriff in utilizing law enforcement employes to perform enforcement work in emergency or relief situations when sufficient bargaining unit members are not available to maintain law and order. Instead, the Association contends the record shows the disputed language has been utilized to protect bargaining unit work in situations where bargaining unit members were available, such as in serving process or making interstate conveyances. As stated in the record, the Association asserts that Sec. 7.11 does not cover the incidental kinds of activities shared by supervisors and non-supervisors nor restrict the Sheriff from utilizing non-bargaining unit officers to deal with events involving riot or mass civil disobedience. In the event of such a riot, the Association asserts that the Sheriff could use bargaining unit members to perform bargaining unit work to quell such a disturbance but that if there were insufficient bargaining unit members to perform the work in question, use of non-unit members would not be restricted by Sec. 7.11 because the situation would fall within the exception contained therein.

Given the foregoing, the Association asks that the Commission find the language in question to be mandatory subjects of bargaining.

DISCUSSION:

Protection of Unit Work Provision

The disputed contract provision states:

> Bargaining unit work, including that assigned on an overtime basis, shall only be performed by bargaining unit personnel unless after advance notice has been given of the opportunity to perform such work or other reasonable efforts made by the shift commander fails to provide bargaining unit personnel for such work assignments.

This provision has been present in the parties' agreements since 1977 and has been interpreted by various grievance arbitrators over the years in a manner which defined, at least in part, the bargaining unit work which the provision protects as including that of jailer, criminal court bailiff, process service and interstate conveyance of prisoners.

We concur with the Association's contention that the manner in which the language has been interpreted in these past arbitration proceedings serves as an adequate basis for accepting the Association's assertions that the disputed language protects the "core" of existing unit work and for rejecting the County's contentions that the language is fatally flawed by ambiguity. One such past arbitration proceeding ultimately prompted the Wisconsin Supreme Court's decision in Dane County, supra, which decision provides ample guidance when assessing the County's assertion that the disputed language is a prohibited subject of bargaining.

In Dane County, the Court was confronted with argument from the Sheriff and the County that an arbitration award was illegal because the award interpreted the language in dispute herein in a manner which infringed upon his statutory and constitutional powers as Sheriff. The arbitrator had concluded that the occupant of the position of "court officer" performed work protected by the disputed clause and thus that the Sheriff had improperly transferred said work to a supervisory employe. The Court concluded that unless the functions of the "court officer" are among the "principal and important duties" which constitutionally characterize the office of Sheriff, then the Sheriff's ability to select who among his deputies shall perform those duties could be restricted by a collective bargaining agreement. The Court remanded the matter to the trial court for a determination as to the precise duties performed by a "court officer."

Dane County is instructive in serveral ways. It demonstrates that the disputed language can be interpreted and applied in ways which are not constitutionally impermissible. It is also noteworthy in our view that the Court did not opine that the contract language was void despite the potential constitutional issues. What the Court makes clear is that the disputed lanugage cannot be validly interpreted in a constitutionally impermissible manner. Our record is devoid of evidence that any arbitrator since Dane County has failed to heed the Court's admonition or that the Union has advanced positions in grievance arbitration which run afoul of the Court's Dane County directive. Indeed, it appears clear that the County has remained ever vigilant to insure that no such award be issued. 2/ Under these circumstances, it is clear that the disputed language simply cannot be lawfully interpreted in a manner which will intrude upon the constitutional powers and duties of the Sheriff. The Court's decision in Dane County, like the various arbitration awards which are in our records herein, has the effect of grafting onto the dispute language the caveat that the

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2/ We note in this regard that the County recently unsuccessfully sought to vacate the award of Arbitrator Morris Slavney, Esq., in Dane County Circuit Court based upon a claim that his application of the disputed language to interstate conveyance of prisoners unconstitutionally intruded upon "the immemorial principal and important duties" that characterize the office of Sheriff.

language cannot be interpreted in a manner which would run afoul of the Sheriff's constitutional powers and duties. Therefore, we conclude that the disputed language is not a prohibited subject of bargaining as argued by the County. In light of our conclusion, we now proceed to evaluate the County's assertions that the proposal is a permissive subject of bargaining.

In Unified School District No. 1 of Racine County, supra, the Court was confronted with a situation in which a union representing school district food service workers sought to include the following proposal in a collective bargaining agreement:

> No work presently performed by bargaining unit employees shall be performed by nonunit employees, whether of this employer or another employer.

The school district took the position that it was not obligated to bargain over the decision to subcontract food service work to a private employer and proceeded to subcontract the work. The Court applied the "primary relationship" test it had established in Beloit, supra, and concluded that the district was obligated to bargain over the subcontracting decision because:

> "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." at 102.

In light of Racine, the Commission has consistently held that a union may protect the jobs of its members by bargaining restrictions on, or prohibitions against, the subcontracting or other displacement of bargaining unit work. City of Oconomowoc, Dec. No. 18724 (WERC, 6/81); Northland Pines School District, Dec. No. 20140 (WERC, 12/82); Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83) and Dec. No. 20093-B (WERC, 8/83); Racine Unified School District, Dec. Nos. 20652-A and 20653-A (WERC, 1/84); School District of Janesville, Dec. No. 21466, (WERC, 3/84); School District of Franklin, Dec. No. 21846 (WERC, 7/84); Brown County, Dec. No. 20857-C (WERC, 7/85), aff'd 138, Wis.2d 254 (CtApp. 1987); Milwaukee Board of School Directors, Dec. No. 21893-B (WERC, 10/86), aff'd Case No. 721-287 (CirCt. Milw. 8/87).

In each of the above cited cases, the employer did not establish that the ability to subcontract represented a choice among "alternative social or political goals or values" which was sufficient to overcome the apparent and substantial impact which loss of work can have upon employe wages, hours and conditions of employment.

To the extent that the County herein makes general arguments that this proposal is permissive because it infringes upon the County's ability to manage the Department and provide necessary service, we concur with the Association that the record does not establish any infringement which would warrant finding the proposal permissive. The proposal allows the County to use non-unit employes where unit employes reject the work or where it is not "reasonable" to wait to ascertain whether unit employes are available. Thus, the County is able to use non-unit employes in emergency situations or where available manpower is not sufficient to meet service needs (i.e. riots, etc.). Furthermore, as noted above, the proposal does not preclude the occasional performance of unit work by supervisory employes.

As to the County's contention that the proposal is permissive because it intrudes into the County's right to establish minimum job qualifications and into the County's ability to make public policy choices regarding the use of sworn or non-sworn personnel, we do not find any such intrusion present based upon this record. In Milwaukee Board of School Directors, Dec. No. 20093-B (WERC, 8/83), we held that the employer right to establish minimum qualifications was limited by the requirements that such qualifications be job performance related. We further held therein that where an employer has historically utilized unit employes to fill certain positions, those positions become work which the bargaining unit representative can seek to protect from assignment to non-unit personnel. Absent persuasive evidence that the decision represents a choice among alternative social and political goals and values, we held, consistent with the Supreme Court decision in Racine, that the decision to substitute non-unit for unit personnel

is a mandatory subject of bargaining. Here, the Union seeks to protect the work it has historically performed. Here, there has been no showing that, for instance, the substitution of non-unit personnel lacking the power of arrest for the current sworn personnel in the jail would represent a choice among alternative social and political goals. Here, there has been no showing that such a down-grading of needed qualifications is job performance related. While the Union speculates that the sole motivation for such an action would be to save money, a motivation which we have repeatedly rejected as a basis for finding a proposal or action permissive, this record does not allow us to make a definitive conclusion in that regard. Nevertheless, on this record, the Union's proposal does not intrude into the County's right to establish minimum job performance related qualifications or upon any alternative public policy goals or values.

Lastly, we turn to the County assertion that the proposal is permissive because it would obligate the County to continue to use unit personnel on committees which help generate law enforcement policy. The County correctly notes that in School District of Franklin, we found that a unit work protection clause was permissive to the extent that it covered the making of policy. We reaffirm that conclusion here. However, the record herein is inconclusive as to whether the work in question is sufficiently policy related to fall within the Franklin holding. If the Union were to add language to the proposal which established that the clause did not apply to "policy making," the County's concern would presumably be met. Absent such action by the Union or other mutually satisfactory solution, the parties are free to request additional hearing on this matter to allow for a more conclusive record to be established.

Promotion Provision

The County has correctly argued that the Union's promotion proposal sets forth criteria for promotion to non-bargaining unit positions and therefore is a permissive subject of bargaining. Determinations as to which individuals will best implement the County policy choices and best supervise County employes are clearly primarily related to the management and direction of the law enforcement enterprise. Thus, we reaffirm our prior holdings in Ashland County, City of Sheboygan, City of Madison, and City of Beloit and find that such a proposal is permissive.

Dated at Madison, Wisconsin this 26th day of August, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner