

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

 :
 In the Matter of the Petition of :
 :
 MANITOWOC COUNTY SHERIFF'S DEPARTMENT : Case 210
 EMPLOYES, LOCAL 986B, AFSCME, AFL-CIO : No. 43829 ME-404
 : Decision No.
 25851-A
 Involving Certain Employees of :
 :
 MANITOWOC COUNTY :
 :

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40,
Mr. Mark Hazelbaker, Corporation Counsel, Manitowoc County, Manitowoc

AFSCME
 County

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

On March 6, 1990, Manitowoc County Sheriff's Department Employees, Local 986B, AFSCME, AFL-CIO, hereafter the Union, filed a petition with the Wisconsin Employment Relations Commission to clarify an existing bargaining unit of employees of Manitowoc County, hereafter the County. The Union seeks inclusion in its unit of eight named Sheriff's Department Deputies, classified as "Reserve" but "who are working on a regular basis", "and anyone else similarly scheduled". Hearing in the matter was held on May 8, 1990, before Examiner Stuart Levitan, a member of the Commission's staff. A stenographic transcript of the hearing was prepared and delivered to the parties by June 2, 1990. The Union and the County filed initial written argument on August 20 and August 27, respectively. The Union filed a reply brief on September 5; on October 8, the County notified the Examiner it would not be filing a reply brief, at which time the record was closed. The Commission, having considered the evidence and arguments of the parties, and being fully advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. Manitowoc County Sheriff's Department Employees, Local 986B, AFSCME, AFL-CIO, hereafter the Union, is a labor organization with offices at P.O. Box 370, Manitowoc, Wisconsin.

2. Manitowoc County, hereafter the County, is a municipal employer with offices at 1010 South Eighth Street, Manitowoc, Wisconsin.

3. The Union is currently the certified collective bargaining representative for a collective bargaining unit described in the parties' 1989-1990 contract as:

the employees of the County Sheriff Department, excluding the positions of Sheriff, Inspector, Deputy Inspector, Training/Jail Administrator, Court/Process Administrator, Communications Administrator, Food Services Manager/Matron, Lieutenant, Sergeant, and temporary employees.

4. On March 30, 1983, the Wisconsin Employment Relations Commission issued Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit (Decision No. 18351-A) concluding that Reserve Deputies were casual as opposed to regular part-time employees of the Sheriff Department and thus should continue to be excluded from the Union's bargaining unit then described as:

the employees of the County Sheriff Department, excluding the positions of Sheriff, Chief Deputy, Food Service Manager/Matron, Support Division Director, Investigation Division Director, Patrol Division Director, Jail Division Director, Lieutenant, and temporary employees.

5. At hearing on May 8, 1990, the Union amended its petition to encompass seven specific Reserve Deputies. The subject employees, with their respective starting dates, are:

- David Keery (6-2-82)
- Barbara Meister (1-2-88)
- Cory Zimmer (6-6-88)
- George Kunz (11-2-88)
- Dennis Reimer (11-2-88)
- Brian Kohlmeier (4-24-89)
- Steven McConnell (4-24-89)

The Union has proposed an accretion effective date of January 1, 1990 for all except for Kohlmeier and McConnell, for whom it proposes an accretion effective date of April 24, 1990.

6. On March 20, 1990, Diane Schmidt, Manitowoc County Assistant Director for Human Resources, sent to the seven Reserve Deputies named in Finding of Fact 5 the following letter:

Due to a change in the Wisconsin Retirement Law, any individual employed for one full year in 1989 who worked more than 600 hours must be put on the Wisconsin Retirement System effective January 1, 1990. In addition to retirement coverage, you will also be eligible to enroll in the Group Life program.

This change affects you as well as several other reserve deputies. Please contact me by March 30, 1990 so we may schedule an appointment to discuss the retirement system and get your enrollment taken care of.

7. On March 21, 1990, Ms. Schmidt sent the following memo to Ken Peterson, Inspector/Undersheriff:

RE: Reserve Deputies eligibility for enrollment in Wisconsin Retirement System

Attached are copies of the letters sent to the Reserve Deputies who are eligible for coverage under the Wisconsin Retirement System. Most of them are eligible effective January 1, 1990; Brian Kohlmeier and Steven McConnell are first eligible in April (one year after employment).

I will be sending in the paperwork on these individuals. After they are on the retirement system for six months they will also be eligible to pick up the life insurance at their expense.

We will need to monitor the hours of the reserves on a regular basis. The new requirements state that anyone who works 600 hours must be put on effective the date they work the 601st hour. I will coordinate this with Diana Kranz.

Let me know if you have any questions or concerns.

8. For calendar year 1989, and the first four months of calendar year 1990, the hours worked per job function for the Reserve Deputies named in Finding of Fact 5 were as follows:

			1989	1990
Rank Sergeant Within Reserves	KEERY, DAVID J.	42 Patrol	48.00	4.5
		43 Criminal Invest.	16.40	---
		44 Transport	237.30	83.9
		45 Misc. Assign.	19.00	44.0
		46 Headquarters Duty	23.50	2.0
		47 Jail	36.50	7.0
		48 Snowmobile	49.00	35.5
		53 Training	44.00	1.5
		54 D.A./Court	12.50	---
		56 Process	66.00	---
		61 Bailiff	71.70	---
		-----	-----	
		623.90	178.4	
. . .				
	KOHLMEYER, BRIAN W.	43 Criminal Invest.	11.00	---
		44 Transport	373.15	2.0
		45 Misc. Assign.	7.25	---
		46 Headquarters Duty	1.50	---
		47 Jail	165.05	---
		53 Training	255.50	1.5
		62 Water Safety	28.00	---
	KUNZ, GEORGE K.	Misc.	----	10.1
		43 Criminal Invest.	91.25	20.7
		44 Transport	62.05	214.4

	47 Jail	3.00	152.0
	53 Training	207.40	47.0
	54 D.A./Court		.8
		-----	-----
		363.70	446.0
	. . .		
McCONNELL, STEVEN T.	43 Criminal Invest.	9.00	---
	44 Transport	275.60	307.95
	45 Misc. Assign.	19.00	9.3
	46 Headquarters Duty	1.80	1.0
	47 Jail	179.75	86.9
	53 Training	366.50	91.0
	61 Bailiff	15.00	47.5
	62 Water Safety	12.50	
		-----	-----
		879.15	543.65
	. . .		
MEISTER, BARBARA A.	44 Transport	71.25	---
	45 Misc. Assign.	25.00	---
	46 Headquarters Duty	355.75	5.0
	48 Snowmobile	13.25	8.0
	53 Training	119.00	1.5
	61 Bailiff	17.50	---
	68 Emergency Govt.	9.00	---
		-----	-----
		610.75	14.5
	. . .		
RIEMER, DENNIS A.	Snowmobile	-----	16.5
	43 Criminal Invest.	18.50	---
	44 Transport	456.20	249.15
	45 Misc	6.00	5.0
	47 Jail	774.60	195.45
	53 Training	332.00	73.5
	56 Process	186.55	73.5
	61 Bailiff	56.70	70.2
	62 Water Safety	3.50	2.0
	54 D.A./Court		
		-----	-----
		1,834.05	611.8
	. . .		
ZIMMER, CORY S.	42 Patrol	151.00	---
	43 Criminal Invest.	9.75	---
	44 Transport	639.50	413.75
	45 Misc	18.50	3.5
	46 Headquarters Duty	4.50	4.0
	47 Jail	1,226.45	319.5
	48 Snowmobile	14.00	---
	49 Accident Inv	2.00	---
	52 Report Wrtg	.75	1.5
	53 Training	104.00	1.5
	54 D.A./Court	7.00	1.5
	61 Bailiff	17.00	26.5
		-----	-----
		2,194.45	770.25
	. . .		

9. In 1989, the County employed 50 Reserve Deputies who worked a combined total of 20,998.8 hours. In 1990, as of May 4, 1990, the County had employed 32 Reserve Deputies, all of whom had also worked in 1989, for a combined total of 6,275.4 hours. Although the County is the 16th largest Wisconsin county in terms of population, it ranked 62nd out of 72 counties in the number of full-time Sheriff's Department personnel per capita in 1988, primarily due to the extensive use of Reserve Deputies. The specific allocation of hours worked by Reserve Deputies in 1989 and through May 4, 1990, was as follows:

	<u>1989</u>	<u>1990 through 5/4/90</u>
less than 100 hours	17	13
100 - 200 hours	8	7
200 - 300 hours	4	4
300 - 400 hours	5	3
400 - 500 hours	2	1
500 - 600 hours	4	2

600 - 700 hours	2	1
700 - 800 hours	-	1
800 - 900 hours	2	-
1100 - 1200 hours	1	-
1300 - 1400 hours	1	-
1700 - 1800 hours	1	-
1800 - 1900 hours	2	-
2000 - 2100 hours	1	-

10. At all times material to this matter, Thomas Kocourek was the Sheriff of Manitowoc County. Funds for the Reserve Deputies are contained in Kocourek's budget line item, "Extra Hire." Such a line item has routinely been included in departmental budgets during his 11-plus years with the department and will again be included in the 1990 budget. The 1989 budget provided for approximately \$130,000 in Reserve Deputies' wages, plus another \$30,000 for training expenses. In the past three years, Kocourek has terminated one Reserve Deputy, and no full-time Deputies. Unless the County Board reversed its current position and authorized ten new full-time Deputies, a need will remain for a certain number of Reserve Deputies, and provided a Reserve Deputy receives satisfactory annual evaluations, Reserve Deputies have a reasonable expectation of continued employment.

11. The existing Manitowoc County jail was built in 1960; it has inmate maximums of 46 (under ideal circumstances) or 25 (under a worst-case circumstance). In 1990, the average daily inmate population has been 72. The Manitowoc County Board has approved bonding for new jail, with a capacity of 160 adults and 12 juveniles; its projected opening is sometime late 1992-early 1993, assuming no unexpected delays. When the inmate population is too large to be housed in the County Jail, prisoners are transferred to other facilities, under the control of Manitowoc County Deputies, both full-time and reserve. Such transport duty is never performed by a single officer. Transport duty also occurs when there is a need for emergency medical services. For both full-time and Reserve Deputies assigned to transport duty, call-in assignments can provide advance notice of anywhere from one hour to three weeks. When assigned to transport duty, full-time and Reserve Deputies operate essentially interchangeably.

12. At their time of hire, Reserve Deputies go through a process of application/testing/interview; while they thereafter have annual evaluations, they do not repeat the hiring process, unless they wish to apply for a change in classifications. At their time of hire, Reserve Deputies are neither told they have permanent employment with the County, nor told of any termination date. Reserve Deputies are not offered any set schedule nor pattern of hours, nor promise of work beyond their current assignment. Depending on the particular assignment, Reserve Deputies may learn of an assignment anywhere from one hour to a few weeks to several months in advance. Full-time Deputies who work as jailers can choose their vacation by April 15; individual shift commanders may fill anticipated vacation-vacancies throughout the year at that time, or they may wait until close to the time the personnel is actually needed. In filling such vacancies, first offer is made to other full-time Deputies; if further personnel is needed, the openings are offered to Reserve Deputies, in an unofficial rotating manner designed to spread the work. In 1989, three full Jailer shifts were filled the entire year by Reserve Deputies. Openings for transport and patrol duty can be known from a few hours to a few weeks in advance, and are filled in the same manner. Reserve Deputies work the same hours as the Deputy they are substituting for, and, in an extended substitution, even work the same weekly schedule. Reserve Deputies supervisors vary depending on the particular assignment.

13. On patrol, Reserve Deputies generally function as assistants or trainees to full-time deputies; they never patrol alone, or only with another Reserve Deputy. The individual shift commanders make assignments on whether a Reserve Deputy will ride with a regular deputy; there are no squad cars exclusively designated for either classification. Both Reserve Deputies and full-time Deputies work in the same locations, and are under the same chain of command. Reserve Deputies and full-time Deputies track their hours in similar manners, but use differently-colored cards for reporting. While Reserve Deputies do have the power of arrest, the full-time deputy present with the Reserve Deputy, Zimmer, has issued traffic citations with a deputy present; Zimmer has never written an accident report. Only a few persons within the department are trained and certified on the intoxilyzer, none of them Reserve Deputies. Reserve Deputies are never put in charge of the response to a domestic violence call and are not trained in high-speed pursuit policies and practices. Neither Reserve Deputies nor full-time Deputies transport prisoners alone. Although the primary responsibility for testifying in court falls on the arresting officer, Reserve Deputies have testified at arraignments and trials. Only full-time Deputies have been given advanced training in accident investigation. On transport duty and jail duty, the Reserve Deputies and full-time Deputies perform essentially similar functions, except that Reserve Deputies are generally not assigned to work in the jail by themselves. A full-time Deputy who became a Reserve Deputy would not thereafter exercise the level of responsibility of a full-time Deputy. Training in the use of the squad car computer/communications system is not routinely offered to Reserve Deputies, although many have learned how to use it. On balance, the need for and work

assignments of Reserve Deputies is generally routine and predictable, with their duties and responsibilities more limited than those of full-time Deputies.

14. Unlike full-time Deputies, the Reserve Deputies cannot file grievances, nor receive any of the following fringe benefits: paid holidays, sick leave, vacation, funeral leave, overtime, paid holidays, compensatory time, paid leave; shift premium, or education incentive compensation. For discipline and discharge, Reserve Deputies are subject to a policy of progressive discipline and requirement of cause, with appeal rights which are distinct from the just cause provision which the collective bargaining agreement provides for full-time Deputies. For accident investigations, Reserve Deputies are subject to the same procedure as full-time Deputies, except they do not have union representation. Full-time Deputies and Reserve Deputies receive the same meals provisions, and both are required to be residents of the County of Manitowoc. Both groups are to purchase their uniforms from a vendor designated by the County, although only the full-time Deputies are reimbursed for their cost, and the two groups wear different colored uniforms. Both groups receive yearly performance evaluation. Both groups participate in the Wisconsin Retirement System. Reserve Deputies are paid \$6.14 per hour.

15. Zimmer, Kunz, Keery, Riemer, Kohlmeier, Meister and McConnell have a reasonable expectation of continued employment such that they are not temporary employes.

16. Kohlmeier and Meister do not work a sufficient number of hours on a regular basis to warrant their being found to be regular part-time employes.

17. Zimmer, Kunz, Keery, Riemer and McConnell do work a sufficient number of hours on a regular basis to warrant their being found to be regular part-time employes.

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

CONCLUSIONS OF LAW

1. That Reserve Deputies Kohlmeier and Meister are casual employes.
2. That Reserve Deputies Zimmer, Kunz, Keery, Riemer and McConnell are regular part-time employes who are appropriately included in the bargaining unit set forth in Finding of Fact 3.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT 1/

1. Reserve Deputies Kohlmeier and Meister shall continue to be excluded from the bargaining unit set forth in Finding of Fact 3.
2. That Reserve Deputies Zimmer, Keery, Kunz, Riemer and McConnell are hereby included in the bargaining unit set forth in Finding of Fact 3.

Given under our hands and seal at the City of
Madison, Wisconsin this 5th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, 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.

(Footnote 1/ continues on page 7.)

(Footnote 1/ continues from page 6.)

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 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.

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

In support of its position, the Union asserts and avers as follows:

The seven (7) subject positions are all uniformed municipal employees who have power of arrest; are all authorized to carry and use weapons; all have a convincing community of interest with Local 986B; all do exactly the same work as bargaining unit members, except for less pay.

The work which these employees do is available and there is a continuing need for the work. The employer's designation at the time of hire of employee status does not control; County Board approval of the Sheriff's budget and table of organization does not restrain the Commission's statutory power.

The County has more law enforcement work than can be handled by the bargaining unit; the County has found it cheaper and more convenient to employ "reserve deputies" to do bargaining unit work, rather than authorize the ten (10) or more regular full-time deputies the Sheriff feels are needed.

The subject employees all have a reasonable expectation of continue employment with the County. Numerous cases are cited to establish that such an expectation is a critical factor in differentiating between regular and temporary employees.

The Sheriff was unequivocal in testifying as to the need for additional regular employees. The County Board is the stumbling block as to the acknowledgement of regular status.

No benefit could portray the expectation of continued employment than participation of an employee in the pension program. The subject employees were notified in March, 1990, of their eligibility for such participation.

The subject employees are not employed for only a limited term or set period of time; their employment is unlimited, other than their being discharged for cause. Employment does not have to be guaranteed to qualify as regular full-time or regular part-time. And the employer's representation as to what type of position was created will not be given deference.

The determining factor in deciding whether an employee is casual is the regularity of employment rather than the number of hours worked, provided a de minimus threshold test is met. Here, the subject employees perform a variety of duties, so their scheduling practices vary.

Any County claim that "on-call" work is not a regular schedule and therefore such employees are to be excluded from the bargaining unit is too simplistic and not in harmony with prior Commission findings. See City of Milton, Dec. No. 13442-A, (WERC, 6/83), wherein the Commission discussed those circumstances in which "on-call" employees will be held to be regular part-time employees properly included in the same unit as full-time personnel.

In Milton, the Commission did not specify the relevant recent measuring period for evaluating employee regularity. But an outstanding candidate for such standard is the new WRF guideline for enrollment in the pension plan.

Regardless of the standard selected, the nature of the past service of the seven reserve deputies at issue has not been characterized as "irregular and sporadic," as discussed in City of Phillips, Dec. No. 26151 (WERC, 9/89).

Further, there exists a compelling community of interest between the subject employees and the

bargaining unit, in that the reservists and the bargaining unit members share identical training, supervision, residency requirements, duties, uniform, and other conditions. Separation of these reservists would be an affront to the statutory anti-fragmentation mandate.

The County is not particularly enamored with either the terms of the existing collective bargaining agreement of the rights of municipal employes to bargain collectively; in both cases, it feels the cost of operating is more expensive and work schedules less accommodating. Its solution has been to employ two different work forces to do the same thing -- one of which (the reservists) is not organized or covered by the contract, and thus can be worked at will for less money.

In support of its position, the County asserts and avers as follows:

The major reason why the seven identified reservists are distinct from regular employes relates to their expectation of continued employment. These reservists work irregularly, performing duties which are very different from the level of responsibility and independence of the unit members.

Testimony by the Sheriff identified distinctions between the work performed by regular deputies and that of the reservists; reservists rarely perform arrest, citation, investigative or testimonial duties, but are instead essentially helpers to, and under the direction of, the regular deputies.

The Sheriff also unequivocally testified that the reservists have no expectation of continuing employment. None are offered regular schedule of hours; none has any promise of working past their next assignment; all are told they serve completely at the pleasure of the Sheriff.

There are also distinctions regarding the jail duties, in that reservists are not left alone except when a regular deputy has to go to the other floor. Reservists are generally not assigned to the jail except to cover for vacations and holidays of regular unit employes.

Transport of prisoners has never been a regular function of any division within the Sheriff's Department, nor an ongoing, predictable and routine function of the Department. It has been a sporadic, inconsistent and irregular function which the Department has dealt with in a variety of ways, including assignment to unit members.

Moreover, court cases stand for the absolute proposition that prisoner transport work is assigned at the sole discretion of the Sheriff, whose power is constitutional and not subject to regulation by statutory authorities. The examiner has no power to award prisoner transport work to the bargaining unit; the Commission issues an order accreting this work to the bargaining unit at its own peril.

Nor does it appear that the examiner has authority to compel the Sheriff to assign other work to unit members.

Admittedly, there is some similarity between the in-jail work performed by the reservists and that performed by the regular unit deputies. However, even here, the Sheriff indicated that the reservists have a substantially lower level of responsibility and no expectations of regular, on-going employment.

As to Barbara Meister, the petition to accrete her position should be denied because the large number of hours she worked in 1989 was due entirely to a one-time clerical assignment. There is nothing in the record to contradict the Sheriff's testimony that this assignment has ceased entirely, is not expected to continue, and that Meister has no ongoing workload similar to that of Zimmer.

The record shows that Mesiter's hours went from 610 in 1989 to 14 in 1990 -- evidence that her assignment was temporary, and that she had no expectation of regular, on-going employment.

As to David Keery, his work differs from the other reservists in that his hours were predominantly spent on sporadic assignments which were irregular and in which he has no expectation of continued employment. His distribution of hours shows period assignment of miscellaneous duties of an occasional nature. With no regular set of duties or hours, he has neither explicit nor implicit expectation of indefinite employment.

In summary, while there are similarities between the work performed by reservists and that performed by unit members, there are also significant differences. The reservists do not share the expectation of continued employment and regular pattern of duties of the unit members.

Further, in that the petition seeks to compel certain actions by the Sheriff with regard to the assignment of prisoner transports, it asks the Commission to do what it cannot legally accomplish, and thus is further legally flawed.

In its reply, the Union posits further as follows:

Because the terms and conditions of the collective bargaining agreement cannot be assumed to apply automatically to accreted positions, the County's reliance on the terms of the existing agreement is misplaced. As job descriptions are not mandatory subjects of bargaining, whether an agreement does or does not set forth bargaining unit duties has little, if any, bearing on the clarification of the unit.

Moreover, the County's description of prisoner transports is in error.

The critical questions are whether the affected employees are employed regularly and whether they share a sufficient community of interest with the bargaining unit. It is a quantum leap of irrational logic for the County to argue against recognition because an ultimate contract may include an unenforceable provision.

It is the County, not the Sheriff, which is the municipal employer.

The County is in the wrong forum in requesting the Commission interpret the existing collective bargaining agreement as to temporary employees. Whether or not Meister or any other employee is considered a temporary employee according to the agreement does not prevent the Commission from proceeding as petitioned; petitions to clarify an existing bargaining unit are not barred by existing bargaining agreements.

Because the petition is not legally flawed, the Commission should grant the petition so that the parties' negotiators will deal with the issue of job posting rights and wage disparity.

DISCUSSION

When the County first recognized the Union as the collective bargaining representative of certain Sheriff's Department employees, Reserve Deputies were excluded from the bargaining unit. In 1983, we rejected a Union argument that Reserve Deputies were regular part-time employees who thus fell within the scope of the bargaining unit. We therein found persuasive the County argument that the work of the Reserve Deputies was so irregular that Reserve Deputies were casual, not regular part-time employees.

In this proceeding, the County again argues that the Reserve Deputies are casual employees and also contends that Reserve Deputies are temporary employees and lack a sufficient community of interest with unit employees to be included therein. We proceed to consider these contentions.

As to the question of whether the Reserve Deputies are temporary employees, we have long defined temporary employees as those who do not have a

reasonable expectation of continued employment. 2/ Here, the record clearly establishes that the Reserve Deputies in question have a reasonable expectation of continued employment. The Department's need for and usage of Reserve Deputies remains substantial. Most importantly, in the last 3 years, only one Reserve Deputy has been involuntarily terminated. Thus, the seven Reserve Deputies at issue have every reason to believe that they will continue to be employed as long as they perform their work in a satisfactory manner.

As to the question of casual versus regular part-time status, the critical determination is whether the seven Reserve Deputies regularly work something more than a de minimis number of hours. 3/ Reference to Finding of Fact 8 clearly establishes that Zimmer, Kunz, Keery, Reimer and McConnell regularly work a substantial number of hours and thus are regular part-time employees. However, the work records of Meister and Kohlmeier demonstrate that their employment is casual because they are not regularly working a significant number of hours. As casual employees, Meister and Kohlmeier must continue to be excluded from the unit.

Lastly, as to the County's community of interest argument, we initially note that the bargaining unit presently encompasses employees of the Department who perform a wide variety of law enforcement functions under varying working conditions. The powers, duties and conditions of employment applicable to Reserve Deputies fall within broad confines of the existing unit. In addition, exclusion of Reserve Deputies from the existing unit of other regular Department employees would lead to undue fragmentation of bargaining units. Thus, we

2/ Manitowoc County, Dec. No. 8152-J (WERC, 11/90); Manitowoc County, Dec. No. 15250-B (WERC, 9/77).

3/ City of Phillips, Dec. No. 26151 (WERC, 9/89).

conclude that this County argument does not provide a persuasive basis for continued exclusion from the existing unit of the five Reserve Deputies we have found to be regular part-time employes.

Thus, we have included five of the seven Reserve Deputies in the Union's bargaining unit. 4/

Dated at Madison, Wisconsin this 5th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

4/ Inclusion is effective with the date of this Order. Provisions of any existing contract do not apply to the newly-included positions unless bargaining has or will produce such a result. Washburn Schools, Dec. No. 26780 (WERC, 2/91).