

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

 :
 In the Matter of the Petition of :
 :
 LA CROSSE COUNTY :
 :
 Requesting a Declaratory Ruling : Case 112
 Pursuant to Sec. 111.70(4)(b), : No. 42645 DR(M)-464
 Stats. Involving a Dispute Between : Decision No. 26270
 Said Petitioner and :
 :
 WISCONSIN PROFESSIONAL POLICE :
 ASSOCIATION/LEER DIVISION :
 :

Appearances:

Mr. Robert B. Taunt, Personnel Director, La Crosse County, Room B-04,
 400 North Fourth Street, La Crosse, Wisconsin 54601, for the
 County.
Mr. Richard Thal, Cullen, Weston, Pines & Bach, Attorneys at Law, 20
 North Carroll Street, Madison, Wisconsin 53703, for the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECLARATORY RULING

La Crosse County having on August 1, 1989 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/Law Enforcement Employee Relations Division over a retirement proposal; and both parties having filed written argument and waived hearing by November 16, 1989; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That La Crosse County, herein the County, is a municipal employer providing law enforcement services to residents of La Crosse County and having its principal offices at 400 North Fourth Street, La Crosse, Wisconsin 54601.

2. That Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, herein WPPA, is a labor organization functioning as the collective bargaining representative of certain employes of the County employed in the Sheriff's Department and having its principal offices at 7 North Pinckney Street, Madison, Wisconsin 53703.

3. That during collective bargaining between the County and WPPA, a dispute arose as to whether the following WPPA proposal is a mandatory subject of bargaining:

14.02.2 Effective January 1, 1990, the County shall pay the full amount of the established employer's and employees' contribution rates of Protective Service schedule for all deputies and jailers covered by this agreement.

and that presently jailers are not treated as protective occupational participants for the purposes of retirement benefits and contribution levels.

4. That the WPPA contends the proposal set forth in Finding of Fact 3 primarily relates to wages; that the County asserts that the proposal is a prohibited subject of bargaining because the decision as to whether jailers will

be protective occupation participants for retirement purposes is statutorily reserved by Sec. 40.02(48), Stats. to the County; and that the County argues that the proposal is a permissive subject of bargaining because it impermissibly intrudes into management prerogatives regarding the duties which jailers perform.

5. That the proposal set forth in Finding of Fact 3 primarily relates to wages.

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

CONCLUSIONS OF LAW

1. That there is no irreconcilable conflict between Sec. 40.02(48), Stats. and the proposal set forth in Finding of Fact 3.

2. That the proposal set forth in Finding of Fact 3 is a mandatory 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 La Crosse County and Wisconsin Professional Police Association/LEER Division, have a duty to bargain within the meaning of Sec. 111.70(3)(a)4, Stats., over the proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of
Madison, Wisconsin this 28th day of December,
1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate as he is serving as the mediator for these parties in their attempts to reach a successor agreement.

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.

(Footnote one continued on page three)

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 DECLARATORY RULING

POSITIONS OF THE PARTIES

The County

The County asserts that the disputed WPPA proposal is a prohibited subject of bargaining because Sec. 40.02(48), Stats. specifically reserves to the municipal employer the determination of which employes qualify as "protective occupation participant" for the purpose of retirement benefits. Citing City of Brookfield v. WERC, 87 Wis.2d 819 (1979), the County contends that it is not appropriate for the collective bargaining process to become involved in a decision which has been statutorily left to the County.

The County further argues that Sec. 40.02(48), Stats. requires that the determination of protective occupation status be based on the duties of the employe. The County equates the WPPA proposal with a determination that the existing duties of the jailers meet the statutorily established criteria. As the County contends that it need not bargain over the duties which its employes will perform, it argues it cannot be compelled to bargain over a proposal which intrudes into the freedom of the County and the Sheriff to make such decisions consistent with statutory and constitutional authority. To this extent, the County contends that the WPPA proposal is a permissive subject of bargaining.
WPPA

WPPA argues that its proposal is primarily related to wages and thus is a mandatory subject of bargaining. WPPA contends that as the jailers meet all three requirements established by Sec. 40.02(48) for protective occupation participation, the County is not precluded by law from agreeing to give jailers protective occupation status through collective bargaining.

WPPA asserts that its proposal has no impact upon the County's right to determine jailer duties. The WPPA contends that the focus of its proposal is limited to the question of the level of retirement benefits jailers will receive for performing their duties.

WPPA disputes the County's contention that because Sec. 40.02(48), Stats. authorizes the County to designate jailers as having protective status, the County cannot be compelled to bargain over how the County will exercise its discretion. WPPA alleges that county boards are statutorily authorized to exercise discretion in many areas which are also mandatory subjects of bargaining. For example, WPPA argues that while Sec. 59.07(2)(c), Stats. gives counties discretion in determining the level of health insurance benefits available to employes, it is nonetheless clear that the level of insurance benefits is a mandatory subject of bargaining.

Given the foregoing, WPPA asks that its proposal be found to be a mandatory subject of bargaining.

DISCUSSION

The disputed proposal seeks to improve the level of retirement benefits available to jailers and to have the County make all applicable contributions to the Public Employee Trust Fund. In essence, the proposal seeks to improve the level of deferred compensation which employe will be entitled to receive for providing the County with employment service. We have consistently held deferred compensation proposals to be primarily related to wages and thus to be mandatory subjects of bargaining. Green County, Dec. No. 21144 (WERC, 11/83) and City of Brookfield, Dec. No. 25517 (WERC, 6/88); aff'd CtApp II (11/89) Case 89-0345, publication recommended.

Here, the County urges us to depart from our general holdings as to deferred compensation proposals because it alleges: (1) Sec. 40.02(48), Stats. prohibits collective bargaining over the determination of whether employes can

be protective occupation participants; and (2) the proposal impermissibly intrudes into management determinations regarding the duties of jailers. We do not find either of these County contentions to be persuasive.

As to the County's statutory contention, we would initially note that as a general matter, the authority of a municipal employer to take certain action does not necessarily remove that subject from the realm of collective bargaining. Thus, for instance, Sec. 59.15(2)(c), Stats. authorizes a county board to establish the level of employe compensation. However, as Milwaukee County v. District Council 48 2/ makes clear, this statutory authorization does not preclude collective bargaining over wages. Having reviewed the statutes cited by the County, we conclude that Sec. 40.02(48), Stats. does not preclude collective bargaining over the WPPA proposal. Sec. 40.02(48) provides in pertinent part:

(48) "Protective occupation participant" means any participant whose principal duties are determined by the participating employer, or by the departmental head in the case of a state employe, to involve active law enforcement or active fire suppression or prevention, provided the duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning.

(a) "Protective occupation participant" is deemed to include any participant whose name is certified to the fund as provided in s. 40.06(1)(d) and who is a conservation warden, conservation patrol boat captain, conservation patrol boat engineer, conservation pilot, conservation patrol officer, forest fire control assistant, member of the state patrol, state motor vehicle inspector (if hired prior to January 1, 1968), police officer, fire fighter, sheriff, undersheriff, deputy sheriff, county traffic police officer, state forest ranger, fire watcher employed by the Wisconsin veterans home, state correctional-psychiatric officer, excise tax investigator employed by the department of revenue, special criminal investigation agent in the department of justice, assistant or deputy fire marshal, or person employed under s. 61.66(1).

(b) Each determination of the status of a participant under this subsection shall include consideration, where applicable, of the following factors:

. . . .

3. A "deputy sheriff" or a "county traffic police officer" is any officer or employe of a sheriff's office or county traffic department, except one whose principal duties are those of a telephone operator, clerk, stenographer, machinist or mechanic and whose functions do not clearly fall within the scope of active law enforcement even though such an employe is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active law enforcement. Deputy sheriff or county traffic police officer includes any person regularly employed and qualifying as a deputy sheriff or county traffic police officer, even if temporarily assigned to other duties.

(c) In s. 40.65, "protective occupation participant" means a participating employe who is a police officer, fire fighter, a person determined by a participating employer under sub. (48)(intro.) to be a protective occupation participant, county undersheriff, deputy sheriff, county traffic police officer, conservation warden, state forest ranger, field conservation employe of the department of natural resources who is subject to call for forest fire control or warden duty, member of the state traffic patrol, university of Wisconsin system full-time police officer, guard or any other employe whose principal duties are supervision and discipline of inmates at a state penal institution, excise tax investigator

2/ 109 Wis.2d 14, 32-33 (1982).

employed by the department of revenue, person employed under s. 61.66(1), or a special criminal investigation agent employed by the department of justice.

First, we conclude that there is no issue before us herein as to whether the duties of the jailer position meet the criteria established by Sec. 40.02(48)(intro.). This is so because Sec. 40.02(48)(c), Stats., establishes two basic methods by which an employe becomes eligible to be a protective occupation participant. One method involves an employer determination that the principal duties of the employe meet the tests set forth in sub. (48)(intro.). The other method involves simply being employed in the capacities listed in (48)(c). "Deputy sheriff" is one of the listed occupations which are eligible for inclusion as a protective occupation participant. Sec. 40.02(48)(b)3, Stats. defines "deputy sheriff" in a manner which includes the jailer positions in question. Thus, we are satisfied that the jailers are eligible to be deemed protective occupation participants.

Given the foregoing, whatever role remains for the County to fulfill under Sec. 40.02(48), Stats. if the jailers are to become protective occupation participants appears to be a ministerial one. Fulfilling our obligation under Muskego - Norway Consolidated Joint School District No. 9 v. WERC, 35 Wis.2d 540 (1967), to harmonize the provisions of the Municipal Employment Relations Act with other statutes, we find no conflict between the attempt by WPPA to use the collective bargaining process to seek protective occupation status for the jailers and Sec. 40.02(48), Stats. The WPPA proposal would simply require that the County exercise whatever role remains for it to play under Sec. 40.02(48), Stats. in a manner consistent with gaining protective status for the jailers. Like the statutory power to set compensation levels discussed in Milwaukee County, the County retains its statutory role but within any confines established by the collective bargaining agreement.

As to the County's contention that the WPPA proposal impermissibly intrudes into management prerogatives regarding the duties to be assigned jailers, we concur with WPPA's assertion that the proposal has no impact upon any such management prerogatives. The County is not obligated to alter work assignments in any manner. Further, the Union proposal does not seek to limit or expand job assignments. We view the proposal as one which simply seeks to change the level of the retirement component of the overall compensation which jailers receive for performing their present duties.

Given the foregoing, we find that WPPA proposal to be primarily related to wages and thus a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 28th day of December, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate as he is serving as the mediator for these parties in their attempts to reach a successor agreement.