STATE OF WISCONSIN
CIRCUIT COURT
LA CROSSE COUNTY
BRANCH 4

COUNTY OF LA CROSSE,
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
Respondent, and

WISCONSIN PROFESSIONAL POLICE ASSOCIATION,
Intervenor.

Case No. 90-CV-70
Decision No. 26270

NOTICE OF ENTRY OF ORDER

To:
William A. Shepherd
Assistant Corporation Counsel
Suite 220, Powell Place 200 Main Street
La Crosse, Wisconsin 54602-2937

Richard Thal
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Madison, Wisconsin 53703

PLEASE TAKE NOTICE that an order, of which a true and correct copy is hereto attached, was signed by the court on the 31st day of October, 1990, and duly entered in the Circuit Court for La Crosse County, Wisconsin, on the 31st day of November, 1990.

Dated this 6th day of November, 1990.

DONALD J. HANAWAY
Attorney General

/s/ David C. Rice
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STATE OF WISCONSIN
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WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Defendant,

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FILE NUMBER: 90 CV-70
CALENDAR NUMBER: JP-671
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MEMORANDUM, DECISION and ORDER

This is an appeal from a decision by the Wisconsin Employment Relations Commission. This case arose out of collective bargaining sessions held between the plaintiff and the Wisconsin Professional Police Association (hereinafter referred to as WPPA, the Intervenor).

As part of the negotiations, WPPA submitted a final proposal which included a provision stating that the County would designate all jailers as "protective service employees". Currently, the deputy sheriffs are listed as such employees and jailers are not. The County filed a petition with WERC seeking a declaratory ruling that this retirement proposal, as it related to the jailers, was a permissive subject of bargaining rather than a mandatory subject of bargaining within the meaning of Section 111.70(1)(a).

The WERC entered its order finding that the proposal was a subject of mandatory bargaining and LaCrosse County has appealed.

STANDARD OF REVIEW

This case involves the interrelationship between two statutes, Section 40.02(48) and Section 111.70(1)(a). Generally, the WERC's rulings, like any administrative agency's rulings, are entitled to "great weight" and will be affirmed, if reasonable, if the decision rests in the area of expertise of that agency. However, where the issue presented involves the interrelationship between two separate laws, not necessarily in the agency's area of expertise, it becomes a question of law and the Court will review the matter de novo. City of Brookfield v. WERC, 87 Wis.2d 819, 275 N.W.2d 273 (1979).

Therefore, this Court will review the matter de novo.

DECISION

Under Section 111.70(1)(a) municipal employers are required to bargain with respect to "wages, hours and conditions of employment". They have no choice. The municipal employer must bargain about them. Thus those issues are referred to as mandatory issues. Matters "reserved to management and direction of the government unit" are permissive subjects of bargaining. That is, the employer may bargain about those issues if the employer so desires, but the employee can not force the employer to do so.

In general, those items directly related to the management function are permissive in nature. The bargaining table is not the appropriate place for public policy decisions to be made. Management, even in the public sector, must have those prerogatives usually accorded to management and issues related thereto are subject to bargaining only at the discretion of management.

However, matters related to "wages, hours and conditions of employment" do not terribly infringe on the management prerogative and are accorded the status of mandatory issues.

In determining whether an issue is permissive or mandatory, the courts have traditionally focused on the primary and fundamental nature of the issue. If the primary and fundamental issue involves wages, hours or conditions of employment, then it is a mandatory subject of bargaining. If not, then it is permissive. Beloit Education Assn. v. WERC, 73 Wis.2d 43, 54, 242 N.W.2d 231 (1976). If the proposal touches simultaneously upon wages, hours and conditions of employment, as well as on managerial issues, the same test is used. If it is "primarily related" to wages, etc., then it is mandatory. West Bend Education Assn. v. WERC, 121 Wis.2d 1, 8-9, 357 N.W.2nd 534 (1984).

Both parties have advanced a number of theories and different forms of analysis to support their respective positions. One other method of analysis is particularly illuminating. Assume the Court finds the issue is mandatory and that the jailers are ultimately awarded status as protected employees. What would change? The County would still determine what work is done, they would determine where the work is done, they would determine who would do it and what qualifications that person would have. All of the normal management prerogatives would still be fully and firmly settled in the county's hands. The only change would involve how much the jailers receive in retirement benefits. None of the normal functions usually associated with management would be affected in any way. Clearly, therefore, this issue is primarily and fundamentally involved with wages rather than any of the normal functions of management.

The county indicates that its management function under 40.02(48) would be affected. The county indicates that only management has the right to determine whether or not an employee qualifies as a protective occupation participant.

Under the statute, an employee can generally become a protective occupation participant in one of two ways. First, a person can be hired in a designated occupation such as a police officer or a fire fighter. Section 40.02(48)(a). Secondly, an employee can become a protective occupation participant if his or her " ... principal duties are determined by the participating employer... to involve

active law enforcement or active fire suppression or prevention, provided that the duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning." Section 40.02(48).

The county takes the position that, because of the wording of the underlined phrase, it is a management prerogative to determine which employees are protective occupation participants. Therefore, under the county's theory, allowing bargaining on this issue would infringe on managements prerogatives. This Court disagrees.

The underlined words do not affect in any way the county's ability to determine what the duties of the jailers shall be. The underlined words only require the county, after the county has established those duties, to evaluate whether or not those duties fit the definition set forth in the statutes. The county still has all of the normal rights reserved to management such as what work is done, who would do the work, what qualifications that person would have. etc. The underlined wording only establishes that the employer must then determine whether or not the duties of that employee fit the statutory definition.

Thus, the only effect on the county is that now the county must bargain about whether or not jailers fit that definition and are entitled to the retirement benefits accorded protective occupation participants". This is a wage issue, not a management issue. Whether the county hires a person in a designated occupation, such as a police officer, or determines that a jailer fits the definition, the county is doing a purely ministerial act. The employer's management prerogatives are not limited in the least. In addition, it is clear from the statutory definition that jailers could easily be determined to be protective occupation participants" based on their duties.

Accordingly, the proposal by the WPPA is the subject of mandatory bargaining.

ORDER

IT IS ORDERED that the decision of the WERC is affirmed.

Dated at LaCrosse, Wisconsin, this 31st day of October, 1990.

BY THE COURT:

/s/ John J. Perlich
JOHN J. PERLICH
Circuit Judge - Branch 4

cc: Attorney William Shepherd, Attorney Peter G. Davis, Attorney David C. Rice, Attorney Richard Thal, Mr. Robert Taunt