

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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 In the Matter of the Petition of :  
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 OUTAGAMIE COUNTY PROFESSIONAL :  
 POLICE ASSOCIATION : Case 185  
 : No. 43942 DR(M)-474  
 : Decision No. 26831  
 Requesting a Declaratory Ruling :  
 Pursuant to Section 111.70(4)(b), :  
 Wis. Stats., Involving a Dispute :  
 Between Said Petitioner and :  
 :  
 :  
 OUTAGAMIE COUNTY :  
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Appearances:

Mohr & Beinlich, S.C., Attorneys at Law, by Mr. Frederick J. Mohr, 415 South Washington Street, P.O. Box 1098, Green Bay, Wisconsin 54305, appearing on behalf of the Association.  
 Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Lon D. Moeller, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-3101, appearing on behalf of the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On April 25, 1990, the Outagamie County Professional Police Association filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling as to Outagamie County's duty to bargain with the Association over certain matters. On May 3, 1990, the Commission asked the Association to specify whether the declaratory ruling was being filed under Sec. 111.70(4)(b), Stats. or Sec. 227.41, Stats. Having received no response to said letter, the Commission, by letter dated July 10, 1990, asked the Association whether the parties' dispute had been resolved. On July 16, 1990, the Association advised the Commission that the matter had not been resolved and that its petition had been filed pursuant to Sec. 111.70(4)(b), Stats. The County filed a statement in response to the petition on August 3, 1990. Hearing on the petition was conducted by Examiner Peter G. Davis on September 25, 1990 in Appleton, Wisconsin. Thereafter, the parties filed written argument, the last of which was received on November 20, 1990. Having considered the record and the parties' argument, and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Outagamie County, herein the County, is a municipal employer having its principle offices at 410 South Walnut Street, Appleton, Wisconsin 54911.
2. The Outagamie County Professional Police Association, herein the Association, is a labor organization having its principle offices at P.O. Box 1098, 415 South Washington Street, Green Bay, Wisconsin 54305.
3. The Association is the collective bargaining representative for certain employes of the Outagamie County Sheriff's Department. The Association and the County are parties to a collective bargaining agreement which contains the following provisions:

. . . .

ARTICLE II - RECOGNITION

2.01 - This Agreement made and entered into at Appleton, Wisconsin, pursuant to the provisions of Chapter 111.70 of the Wisconsin Statutes by and between Outagamie County, hereinafter referred to as the "County", and the Outagamie County Professional Police Association, sole bargaining agent for all regular permanent full-time and regular permanent part-time employees within the Sheriff's Department having the power of arrest, excluding the Sheriff, Undersheriff, Lieutenants, and all confidential, supervisory, and managerial employees and independent contractors, hereinafter referred to as the "Association". This provision shall not be interpreted for purposes other than the identification of the bargaining representative and of the bargaining unit.

. . . .

ARTICLE IV - RULES AND REGULATIONS

4.01 - The rules and regulations of the Outagamie County Sheriff's Department as established by the County in accordance with the provisions of and pursuant to Chapter 111.70 of the Wisconsin Statutes shall be made a part of this Agreement by reference. The Association shall be given thirty (30) days notice on any new rule or regulation proposed before it becomes effective.

. . .

ARTICLE XXXII - NO OTHER AGREEMENT

32.01 - The County agrees not to enter into any other agreement written or verbal with the members of the bargaining unit individually or collectively which in any way conflicts with the provisions of this Agreement.

4. When it needs to transport out-of-state prisoners, the County solicits bids from various entities. Pursuant to this bidding procedure, on occasion, the County has contracted with Freedom Air, Inc. to transport such prisoners. The two principal owners of Freedom Air, Inc. are also municipal employees of the County Sheriff's Department and are represented for the purposes of collective bargaining by the Association. When the principal owners of Freedom Air, Inc. transport prisoners for the County, they are functioning in their capacity as representatives of Freedom Air, Inc. Such transports occur while the principal owners are off-duty from their employment by the Sheriff's Department. When Freedom Air, Inc. handles a prisoner transport, the County does not assign an on-duty deputy sheriff to accompany the prisoner being transported. On-duty deputies do accompany prisoners when the transport is being handled by a private carrier other than Freedom Air, Inc.

5. The County does not retain significant control over the manner and means by which Freedom Air, Inc. provides prisoner transport service, but rather retains control only as to the result.

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

CONCLUSIONS OF LAW

1. The two principal owners of Freedom Air, Inc. are independent contractors vis-a-vis Outagamie County when they transport prisoners for the County in their capacity as owners and employees of Freedom Air Inc.

2. The collective bargaining agreement between the Outagamie County Professional Police Association and Outagamie County does not apply to independent contractors.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issue the following

DECLARATORY RULING 1/

Outagamie County has no contractual duty to bargain with the Outagamie County Professional Police Association over the terms of any prisoner transport contract between the County and Freedom Air, Inc.

Given under our hands and seal at the City of Madison, Wisconsin this 18th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
A. Henry Hempe, Chairman

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner

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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 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

(Footnote 1/ Continued on Page 4)

(Footnote 1/ Continued)

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 Association

The Association acknowledges that the transportation of prisoners is within the purview of the Sheriffs' statutory powers. Nevertheless, the Association contends that because the principal owners of Freedom Air, Inc. are also members of the bargaining unit represented by the Association, the County is obligated to bargain with the Association pursuant to Article XXXII of the contract if the Sheriff elects to use Freedom Air, Inc. for prisoner transport.

The Association argues that it is clear that the principal owners are acting as sheriff deputies when transporting prisoners for Freedom Air, Inc. The Association cites provisions of the Department's policy manual which specifically require that off-duty deputies act in their official capacity when there is an immediate danger to person or property. The Association contends that the transport of prisoners is by its very nature a danger to person and property. The Association also notes that the Department's policy manual requires the presence of an officer when prisoner transports occur. Under these circumstances, the Association asserts that it is clear that it has the right to bargain wages, hours and conditions of employment which pertain to prisoner transports handled by Freedom Air, Inc.

The Association denies that the Sheriff's constitutional powers override the County's obligations under the collective bargaining agreement. Contrary to the County, the Association argues that the holding in Wisconsin Professional Police Association v. Dane County, 149 Wis.2d 699 (CtApp 1989) does not deprive the Association of the ability to bargain. The Association argues that Dane County does not stand for the proposition that the Sheriff does not have to pay for transportation of prisoners. It contends that the case merely indicates that the Sheriff may choose the method of transportation.

Thus, the Association concedes that the Sheriff does indeed have the right to choose to use Freedom Air, Inc. or any other carrier for the transport of prisoners. However, if the Sheriff chooses to use Freedom Air, Inc., the Association asserts that the County must bargain with the Association as to the terms of the contract.

As to the independent contractor status of Freedom Air, Inc., the Association asserts that the integrity of its status as the exclusive bargaining representative would be substantially diminished if the County can bargain individually with members of the bargaining unit who have formed a private corporation.

Given the foregoing, the Association asks that the Commission find that the County must bargain over the terms of any prisoner transport performed by Freedom Air, Inc.

The County

The County contends that the issue of prisoner transport presented by this case involves a prohibited subject of bargaining. It urges the Commission to conclude that the Sheriff's duty to execute court-issued arrest warrants and to transport a prisoner back to Wisconsin is established under the Wisconsin Constitution and Wisconsin common law. Citing Wisconsin Professional Police Association v. Dane County, 106 Wis.2d 303 (1982) and Wisconsin Professional Police Association v. Dane County, 149 Wis.2d 699 (CtApp. 1989), the County argues that it is under no obligation to bargain with the Association regarding the manner by which the Sheriff chooses to exercise his constitutional power to execute arrest warrants and to bring a prisoner before the court.

Contrary to the argument raised by the Association, the County contends that the Sheriff's constitutionally established authority with respect to prisoner transport extends beyond the mere decision to use private air carriers and includes "the ways and means elected by the Sheriff to perform the task." Dane County, 149 Wis.2d at 710. Thus, the County argues that the obligation the Association attempts to impose on the Sheriff to "negotiate" the terms of the contract for prisoner transport awarded to Freedom Air, Inc. impermissibly limits the Sheriff's determination of which air carrier will be given the work.

The County argues that the added cost of doing business with Freedom Air, Inc. caused by the delay and expense of bargaining with the Association effectively precludes the Sheriff from considering Freedom Air, Inc. The County asserts that indirect attempts to limit the exercise of the Sheriff's constitutional duties through the "purse-strings" of the County were rejected by the Court of Appeals in Dane County, 149 Wis.2d at 711-712.

The County also contests the Association argument that the Sheriff is obligated by the existing collective bargaining agreement to negotiate the terms of any contract for prisoner transport awarded to Freedom Air, Inc.

First, the County contends that it is clear that any such contract language produced by bargaining would conflict with the Sheriff's constitutional powers and would therefore be void. Second, the County contends that it has not "negotiated" with Freedom Air, Inc. for transport work. The County contends that Freedom Air, submitted bids and that, on occasion, when Freedom Air's bid was the lowest, the Sheriff awarded them the contract. Third, the County contends that the principal owners of Freedom Air, Inc. are functioning as independent contractors within the meaning of Sec. 111.70(1)(i), Stats. when transporting prisoners and thus are outside the scope of the collective bargaining agreement between the Association and County. Fourth, the County notes that all prisoner transports performed by Freedom Air, Inc. took place when the principal owners are off-duty. The Association's arguments to the contrary, the County argues that the Department's policy manual does not give off-duty officers "peace officer authority" when they are outside of the County. The County contends this is significant because all the transports made by Freedom Air, Inc. involve the extradition of out-of-state prisoners. Lastly, the County contends that there is no Departmental policy which governs interstate prisoner transport. The County contends that the Departmental policy cited by the Association is strictly limited to the transport of prisoners in County-owned vehicles.

Given the foregoing the County asks that the Commission find the issue of prisoner transport in this case to be a prohibited subject of bargaining.

#### DISCUSSION

Resolution of the dispute before us requires that we determine whether the County has contractually obligated itself to bargain with the Association over the wages, hours and conditions of employment applicable to prisoner transports by off-duty members of the Association's unit. We conclude that the County has not so obligated itself. Given our conclusion, we need not decide what impact the Sheriff's statutory and constitutional powers would have upon any such obligation.

Articles II and XXXII of the parties' contract state:

. . .

#### ARTICLE II - RECOGNITION

2.01 - This Agreement made and entered into at Appleton, Wisconsin, pursuant to the provisions of Chapter 111.70 of the Wisconsin Statutes by and between Outagamie County, hereinafter referred to as the "County", and the Outagamie County Professional Police Association, sole bargaining agent for all regular permanent full-time and regular permanent part-time employees within the Sheriff's Department having the power of arrest, excluding the Sheriff, Undersheriff, Lieutenants, and all confidential, supervisory, and managerial employees and independent contractors, hereinafter referred to as the "Association". This provision shall not be interpreted for purposes other than the identification of the bargaining representative and of the bargaining unit.

. . .

#### ARTICLE XXXII - NO OTHER AGREEMENT

32.01 - The County agrees not to enter into any other agreement written or verbal with the members of the bargaining unit individually or collectively which in any way conflicts with the provisions of this Agreement.

The Association would have us conclude that these Articles prohibit the County from entering into individual agreements with unit members as to off-duty prisoner transports and obligate the County to bargain with the Association over the wages, hours and conditions of employment applicable to such transports. We do not find the Association's interpretation of these Articles to be persuasive.

Article XXXII seeks to protect the integrity of the Association's contract by prohibiting County agreements with unit members which conflict with the contract. However, the phrase "members of the bargaining unit" can most reasonably be interpreted as applying only to unit members when they are serving as employees of the Sheriff's Department. This is so because Article II defines the unit represented by Association as "employees within the Sheriff's Department." Independent contractors such as Freedom Air, Inc. are specifically excluded by Article II from the group for whom the Association is the bargaining representative. Thus, in our view, Article XXXII does not apply to agreements reached by the County with Freedom Air, Inc. and therefore, Article XXXII cannot persuasively be viewed as a basis for a contractual County

obligation to bargain over prisoner transports by independent contractors who are also off-duty members of the unit. 2/

Nor can Article II be independently read to establish such a contractual bargaining obligation, if for no other reason than the Article II language which specifies in pertinent part that:

. . .

ARTICLE II - RECOGNITION

. . . This provision shall not be interpreted for purposes other than the identification of the bargaining representative and of the bargaining unit.

. . .

Given the foregoing, we have concluded that the County has no contractual duty to bargain with the Association over the prisoner transport issue posed by the Association's petition.

Dated at Madison, Wisconsin this 18th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
A. Henry Hempe, Chairman

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner

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2/ Given our conclusion that the Freedom Air owners are not functioning as "members of the bargaining unit" within the meaning of Article XXXII when they transport prisoners, the content of Departmental rules cited by the Association becomes irrelevant to the issue before us.