STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OUTAGAMIE COUNTY PROFESSIONAL POLICE ASSOCIATION, Complainant, vs. BRADLEY GEHRING and OUTAGAMIE COUNTY, Respondents.	Case 218 No. 47750 MP-2624 Decision No. 27341-A

Appearances:

Mr. Frederick J. Mohr, Attorney at Law, 414 East Walnut Street, Suite 261, P. O. Box 1015, Green Bay, Wisconsin 54305, appearing on behalf of the Association.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Roger E. Walsh, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-3101, appearing on behalf of Bradley Gehring and Outagamie County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Outagamie County Professional Police Association filed a complaint on July 15, 1992, with the Wisconsin Employment Relations Commission alleging that Bradley Gehring and Outagamie County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, 4 and 5 of the Municipal Employment Relations Act. On August 4, 1992, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on said complaint was held on September 30, 1992, in Appleton, Wisconsin. The parties filed briefs, the last of which was received on January 22, 1993. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Outagamie County Professional Police Association, hereinafter referred to as the Association, is a labor organization and the exclusive collective bargaining representative of employes of Outagamie County in a bargaining unit set forth as follows:

> 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."

Its offices are located c/o Frederick J. Mohr, 414 East Walnut Street, Suite 261, P. O. Box 1015, Green Bay, Wisconsin 54305.

2. Outagamie County, hereinafter referred to as the County, is a municipal employer with its offices located at the Outagamie County Courthouse, 410 South Walnut Street, Appleton, Wisconsin 54911. Bradley Gehring is the duly elected Sheriff of Outagamie County and has acted on its behalf.

3. The Association and the County are parties to a collective bargaining agreement which by its terms was effective from January 1, 1990 through December 31, 1992. The agreement contained a grievance procedure which provided for the final and binding arbitration of disputes arising thereunder.

4. In the Spring of 1991, members of the bargaining unit set forth in Finding of Fact 1 were classed as Patrol Officers or Investigator-Sergeants. The Patrol Officers were assigned to a 5-2, 5-3 rotating shift with 8 1/3 hours per shift. The Patrol Officers wore uniforms, drove marked patrol cars and did general patrol duties. The Investigator-Sergeants work 8 hours a day, Monday through Friday and some holidays. Their daily shifts were 8:00 a.m. to 4:00 p.m., 9:00 a.m. to 5:00 p.m. or 1:00 p.m. to 9:00 p.m. The Investigators did not wear uniforms and did not perform patrol work.

5. In the Spring of 1991, Sheriff Gehring desired to create a new position of "Law Enforcement Specialist" with the following job description:

CLASS TITLE: Law Enforcement Specialist

CLASS FUNCTION: Performs duties associated with training, juveniles, evidence, identification lab, general patrol, accident investigations and reconstruction, criminal investigations and other duties as assigned from time to time by management.

EXAMPLES OF DUTIES: (This is not an all-inclusive list.)

- Refers juvenile offenders to court;
- Works with other agencies in child protection and delinquency cases;
- Identifies and collects evidence, including photographing, at crime and accident scenes and in criminal investigations;
- Provides leadership and direction to other officers at crime and accident scenes and in criminal investigations;
- Fingerprint work;
- Reconstructs fatality and other accidents;
- Conducts training programs;
- Performs general routine patrol duties;
- Attends training programs other than the annual in-service program.

KNOWLEDGE, SKILLS AND ABILITIES:

- Leadership and decision making abilities in stressful, fast paced situations;
- Knowledge of relevant state, federal and local laws;
- Ability to produce clear, concise reports;
- Knowledge of crime scene processing procedures;
- Accident investigation skills;

- Skilled in law enforcement level photography;

- Has knowledge and ability to train other officers.

MINIMUM QUALIFICATIONS:

- Associate Degree in Police Science or Criminal Justice;

- Successful completion of relevant training programs other than the annual in-service program, or of additional college courses beyond the Associate Degree level;

- Demonstrated previous leadership ability.

REPORTS TO:

The supervisor that is designated from time to time by the Sheriff or his representative.

6. Also in the Spring of 1991, the Sheriff assigned two Investigators to patrol duties on a temporary basis. The two least senior investigators, David Spaeth and Steve Meitner, were assigned to patrol duties and the Association filed a grievance over these assignments which was processed to arbitration.

7. On May 10, 1991, the Association, by Counsel, sent a letter to the Sheriff which stated, in part, as follows:

> I do understand your desire to create the position of "Enforcement Specialist". As of this time, however, I have received no proposal on the part of the County to create such a position. It would appear to me that your actions are an attempt to unilaterally implement that program. I must object to your doing so because it presently violates the constraints of our Contract.

On May 23, 1991, the Sheriff, by Counsel, made a proposal on the new position, stating:

> Enclosed is a copy of a proposed "Supplemental Agreement" related to the Sheriff's desire to create the classification of a (sic) "Enforcement Specialists". Please review this and be prepared to discuss it when you meet with Sheriff Gehring on May 28, 1991. When the Supplemental Agreement is approved by the Association, the Sheriff will take it to the County Board for its approval. Copies of this "Supplemental Agreement" have been given to the local Association officers.
>
> If you wish to discuss this matter with me, please call me.

8. On June 7, 1991, the Sheriff posted the Law Enforcement Specialist position but the County Board had not established the new positions and the posting was withdrawn.

9. On or about June 28, 1991, the Association made a revised proposal to the Sheriff on the new position of Enforcement Specialist. The Sheriff responded to the Association's proposal on July 9, 1991, stating as follows:

> I have had the opportunity to review your letter of 6-28-91 in regards to the Association's proposal for the Law Enforcement Specialists.

I am writing this response to advise the Association of this directive that as of September 1, 1991, all current pay grade 16 sergeants will have the following per Policy Manual:

3 - Uniform short sleeve shirts
3 - Uniform long sleeve shirts
3 - Uniform trousers
2 - Stetsons, one each straw and felt
1 - Tie
Squad jacket
Rain coat
Squad case

Leather gear will be provided

In view of the above directive, I am willing to negotiate and resolve by August 15, the financial impact of this action.

Non precedential negotiations should also take place simultaneously to resolve the on-call pay of the investigators.

I feel the other matters the Association presented in its proposal are not negotiable at this time or fall within my rights to direct law enforcement for the safety of the residents of Outagamie County.

Please contact me as to the time of our meeting prior to August 15.

10. On August 28, 1991, the Association, by Counsel, sent a letter to the Sheriff, which stated as follows:

In response to your letter of July 9, 1991, we believe that it is your obligation to bargain much more than merely a change in the uniform policy. It is the Association's position that we have a valid, enforceable labor contract and that you may not unilaterally change its terms.

However, we do not oppose the establishment of six new positions for the Law Enforcement Specialist title. We do, however, reserve the right to bargain wages, hours and conditions of employment in regard to those positions.

At some date in October, 1991, the parties entered into settlement discussions over the Spaeth-Meitner grievance and the Law Enforcement Specialist position. On October 10, 1991, the County, by Counsel, sent copies of the proposed settlement to the Association's Counsel, stating the following:

Enclosed are five copies each of the proposed Settlement Agreements relating to the Investigator's grievance and the William Fehrman grievance. If these drafts meet with your approval, please have the appropriate Association officials execute four copies and submit them to the Outagamie County Human Resources Director, Robert Sunstrom. Mr. Sunstrom will obtain the appropriate County signatures and return two fully executed copies of each Agreement to you.

If you have any questions on this, please call me.

By a letter dated October 22, 1991, the Association informed the County that the membership had turned the proposed settlement down.

11. On December 23, 1991, the County submitted a revised Memorandum of

Agreement on the Spaeth-Meitner grievance and the Law Enforcement Specialists to the Association. This proposed agreement was also rejected by the Association's membership. On January 7, 1992, a third proposed Settlement Agreement was reached but this too was rejected by the membership.

12. On January 13, 1992, the Sheriff posted the Law Enforcement Specialist positions and effective April 5, 1992, employes were selected to fill the positions. These employes were assigned the hours, wages and working conditions in accord with the proposed Settlement Agreements. A sixth position was posted on June 30, 1992, and was filled effective September 1, 1992.

13. After the third Settlement Agreement was rejected, the parties proceeded to arbitration on the Spaeth-Meitner grievance. On June 10, 1992, the arbitrator issued a decision in the Spaeth-Meitner grievance, concluding that the County did not violate Articles VIII, IX and/or XX by the assignment of Spaeth and Meitner to patrol duties between May 1, 1991 and January 24, 1992. The arbitrator did find a violation with respect to the annual clothing allowance.

14. In the summer of 1992, the Department had some officers on leave of absence, the Sheriff had almost depleted the amount budgeted for the Department's overtime and Patrol Officers did not want to come in to work any more overtime. On July 10, 1992, the Undersheriff notified the Investigator-Sergeants that four of them would be assigned patrol duties. The four were Spaeth, Meitner, Schuh and Schevers. These four were the least senior of the Investigators and the assignment was intended to be temporary.

15. Prior to this assignment, the Sheriff met with the Association and any dispute on the annual clothing allowance was resolved and, at the Association's insistence, the four least senior Investigators were assigned to patrol duties.

16. Investigator-Sergeant Ronald L. Springer is President of the Association and has acted on its behalf. Richard Schevers is the Association's Treasurer and Stephen Meitner and Dave Spaeth are on the Association's bargaining committee.

Based on the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The County did not refuse or fail to bargain collectively in good faith with the Association before unilaterally implementing the wages, hours and conditions of employment for the Law Enforcement Specialist position, and therefore, did not violate any provision of Secs. 11.70(3)(a)4 and 1, Stats.

2. The County did not refuse or fail to bargain in good faith with the Association by transferring four Investigator-Sergeants to patrol positions in July, 1992, and therefore, the County did not violate Secs. 111.70(3)(a)4 and 1, Stats.

3. The Association failed to demonstrate by a clear and satisfactory preponderance of the evidence that the County interfered with and/or discriminated against employes for the exercise of rights guaranteed by the Municipal Employment Relations Act, by its transfer of three members of the Association's bargaining committee to patrol duties, and therefore, the County did not violate Secs. 111.70(3)(a)3 or 1, Stats.

4. The Commission will not assert its jurisdiction to determine whether the County has violated Sec. 111.70(3)(a)5, Stats.

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

ORDER 1/

The Association's complaint of prohibited practices be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 8th day of March, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Association alleged that the County violated Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by creating the new position of Law Enforcement Specialist and refusing to bargain to impasse the impact on employes to be assigned the position, by transferring four Investigators to patrol positions on a permanent basis without negotiating the decision or impact of the decision to transfer said employes, and by transferring members of the Association's bargaining committee to interfere with, restrain and coerce them because they opposed the establishment of the Law Enforcement Specialist position and grieved the assignment of Investigators to patrol duties.

The County answered that the establishment of the Law Enforcement Specialist is a permissive subject of bargaining and as such it is not obligated to bargain the decision, and it may implement the decision without bargaining to impasse and further, the Association never requested to bargain the impact of said decision. The County denied that it committed any prohibited practice, that the transfer of Investigators is covered by the terms of the parties' collective bargaining agreement and that an arbitrator's award barred the proceedings on the basis of res judicata and/or collateral estoppel.

Association's Position:

The Association identifies three issues involved in the instant matter as follows:

> I. Did the County refuse to bargain in good faith by unilaterally implementing its wages, hours and conditions of employment for the L.E.S. position without first bargaining the same to point of impasse and thereby violate sec. 111.70(3)(a)1 and 111.70(3)(a)4 of MERA?
>
> II. Did the County refuse to bargain in good faith by unilaterally implementing a transfer of the Investigator-Sergeants to patrol positions and thereby changing their hours and conditions of employment, without first bargaining the same to the point of impasse and thereby violate sec. 111.70(3)(a)1 and 111.70(3)(a)4 of MERA?
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> III. Did the County interfere and discriminate against members of the Association in violation of sec. 111.70(3)(a)1 and 111.70(3)(a)3 of MERA by unilaterally transferring three members of Association's bargaining committee to a rotating shift schedule?

The Association argues that the parties were not at impasse when the County unilaterally implemented the wages, hours and conditions of employment for the Law Enforcement Specialist position. Citing, Green County, Dec. No. 20308-A (Crowley, 8/83), the Association submits that the following five criteria must be examined to determine whether an impasse exists:

1. Bargaining History
2. Length of Negotiations
3. Importance of the Issue
4. Contemporaneous Understanding of the Parties as to the State of negotiations
5. Other Relevant Factors.

With respect to bargaining history, the Association contends that the Sheriff began talking about creating the position in 1991 and after meeting with the Association and encountering resistance to his idea, he transferred two Investigators to patrol duties which transfer the Association grieved. It notes that the Association gave the Sheriff its demands in June, 1991, but the Sheriff refused to acknowledge his obligation to negotiate the mandatory subjects of bargaining. The Association pointed out it responded on August 28, 1991, instructing the Sheriff that the mandatory items must be negotiated. It admits that the County did make proposals in October and December, 1991, and on January 7, 1992, made an offer which the Association rejected. Thereafter, the Association asserts that the position was posted and the Sheriff unilaterally implemented the wages, hours and conditions of employment. It insists that no impasse had been reached at the time of implementation. The Association points out that the parties met face to face only once after the County Board authorized the position so the length of negotiations was minimal.

The Association alleges that the importance of the issue cannot be overemphasized. It claims that the effect of the change by creating this new position is drastic to the nine Investigators and changes the full aspect of their jobs.

With respect to the understanding of the state of negotiations, the Association maintains that the County could not believe impasse existed because the parties attempted to settle the issue at the arbitration hearing on February 13, 1992.

On other relevant factors, the Association contends that the County had the option of resorting to Sec. 111.77, Stats., for binding arbitration, but instead it failed to utilize any of its legal options. It takes the position that impasse is not a valid defense to a unilateral change in a mandatory subject of bargaining. It concludes that the County violated its statutory duty to bargain and thereby violated Secs. 111.70(3)(a)1 and 4, Stats.

With respect to the transfer of the four Investigators to patrol duty, the Association insists that the County failed to bargain the same to the point of impasse. The Association argues that the arbitrator's decision of June 10, 1992, allowed the Sheriff to make a temporary transfer of two Investigators to patrol duties under emergency conditions, and the Sheriff incorrectly read that to give him broad and sweeping authority to make unilateral changes in mandatory subjects of bargaining. After the arbitrator's decision, the Sheriff permanently transferred four Investigators unilaterally when no emergency existed.

The Association points out that a bargaining position of the County is to eliminate the Investigator-Sergeant position. It submits the Sheriff has made a change without negotiations, and this is a refusal to bargain in violation of Secs. 111.70(3)(a)1 and 4, Stats.

The Association claims that the Sheriff discriminated against members of the Association by transferring three members of the bargaining committee to a rotating shift. It states that to show discrimination the following must be proven:

1. The employees were engaged in protected activities; and

2. The employer was aware of those activities; and

3. The employer was hostile to those activities; and

4. The employer's conduct was motivated, in whole or in part, by hostility toward the protected activities.

It further notes that the motivation need only be in part to establish a violation of law.

It contends that the employes were engaged in protected activities as Spaeth and Meitner filed the grievance which resulted in the arbitration. It further argued that when the January, 1992 proposal was rejected, the Sheriff immediately retaliated by implementing the Specialist position. After the arbitration award was received, the Sheriff immediately notified three members of the bargaining committee of their transfer to patrol duties. It insists the Sheriff was aware of their protected activities.

It submits the Sheriff was hostile as demonstrated by his retaliatory conduct and his refusal to negotiate evidenced by his July 9, 1991 letter to the Association. It claims that the transfer of the Investigators to patrol duties was to punish members of the bargaining committee and to interfere with and coerce employes to refrain from exercising their protected rights. It maintains that the Sheriff sent the message to do it his way or he would do it any way. It concludes that the message was intended to coerce employes and it had that effect. It alleges that the Sheriff has violated Secs. 111.70(3)(a)1 and 3, Stats. It asks for an immediate return to the status quo and an order to require the County to negotiate and to cease and desist further illegal conduct as well as a make-whole remedy for the Investigators.

County's Position:

The County contends that it did not violate the law by unilaterally implementing the wages, hours and conditions of employment for the Law Enforcement Specialist position. The County argues that the decision to create the Law Enforcement Specialist position is a permissive subject of bargaining, and it had no duty to bargain over this decision. It notes that the Association is not contesting the County's right to unilaterally create the position and the Association's Counsel's August 28, 1991 letter recognized the right of the County to unilaterally create the positions. The County maintains, contrary to the Association, that it is not obligated to bargain to the point of impasse on impact items before implementing a permissive subject of bargaining. The County recognizes that it has a duty to bargain over the impact items, and it claims it did so from May 23, 1991 through January 8, 1992. The County asserts that it does not have to exhaust its obligation to bargain over impact items prior to implementation of the decision to create the positions. The County points out that where a Union is aware of a permissive decision prior to implementation and it requests bargaining over the impact items, the Employer may be required to commence bargaining over the impact items prior to implementation. It further notes that the requirement to commence negotiations is subject to a case-by-case analysis as to whether the employer's totality of conduct is consistent with the statutory requirement of good faith. It insists that it is not obligated to bargain to the point of impasse on impact items prior to implementation of the decision. It points out that it had engaged in impact negotiations for nine months, and it did all that it was required to do before implementation of the positions.

The County, while not conceding it was required to do so, asserts that it had reached impasse on the impact items before it implemented its decision to create the positions. It submits that the testimony of Mr. Sunstrom that on January 8, 1992, the parties were at impasse was not countered by any evidence to the contrary. It maintains that three tentative settlement agreements had been reached by the bargaining representatives, but the membership rejected all three. The County had made concessions in each Settlement Agreement and it was clear that the membership would not agree to any type of settlement agreement. Using the criteria argued by the Union, the County contends that there is no question that impasse was reached. The County repeating the history of

negotiations, labels the Association's claim, that the Sheriff's July 9, 1991 reply was a refusal to negotiate, as pure fabrication and fantasy. It notes the three settlement agreements and rejections and that after January 8, 1992, the County was never requested to engage in any further impact bargaining.

The County claims that a nine-month period of bargaining, with three settlement agreements reached and rejected, was clearly a sufficient length of time for concluding that an impasse existed.

The County argues that the issue was important and that impasse was not reached on a minor item.

With respect to the understanding of the parties as to the state of negotiations, the County refers to Human Resources Director Sunstrom's testimony that the parties were at impasse on January 8, 1992, and the lack of any contrary testimony proffered by the Association as conclusive evidence that the parties felt they were at impasse.

The County argues that inasmuch as impasse had been reached, it could implement its proposals. The County rejects the Association's claim that it was required to resort to binding interest arbitration. The County asserts that the Association has misread its authorities and their holdings do not apply. According to the County, the dispute in the instant case is an in-term dispute, not subject to interest arbitration, and the impasse defense is available for in-term disputes, thus the County was free to implement its proposals and it did not violate Secs. 111.70(3)(a)1 and 4, Stats.

The County argues that it did not refuse to bargain in good faith by unilaterally changing the assignment of Investigators without first bargaining same to impasse. The County contends that the 1991 assignment of Investigators to patrol duties was upheld by the arbitrator. The 1992 assignments, according to the County, were the same type of assignments as in 1991, which the arbitrator found to be proper. The County insists that a number of people were off on maternity and paternity leaves and for worker's compensation and Patrol Officers were objecting to too much overtime, so temporary assignments were made. The County maintains it had no obligation to bargain because the contract allowed the assignment and the arbitrator had ruled on the issue. As the contract allowed the assignment, the County claims it had satisfied its bargaining obligation. The County states that it is surprised that the Association is again raising this issue. It notes the Sheriff met with the Association on July 7 and 8 where agreement was reached that the assignments were to be made using reverse seniority and the uniform allowance issue was resolved. The County concludes it had the contractual right to do what it did and it had no duty to bargain over the 1992 assignment of Investigators to patrol duties.

The County contends that there is no basis for the Association's claim that the assignment was made to three of the four Investigators because they were Union officers. The County notes that it assigned the four least senior Investigators, which method was used in 1991. The County insists that the fact that three of the four were on the Association's bargaining team had nothing to do with the assignment as the assignment was based solely and exclusively on seniority. The County claims entrapment because the Association insisted that the least senior Investigators be assigned and when the Sheriff complied, he is charged with a prohibited practice.

The County also asserts that there is no basis to claim that the Sheriff was hostile to the Association, and the Association's claim is invidious and baseless. It takes the position that the Association's claim, which is based on the Sheriff's July 9, 1991 letter, the January 7, 1992 negotiation meeting, the January 13, 1992 posting and the timing of the 1992 assignments, fail to prove any hostility. The County submits that the 1992 assignments were not

motivated in any way by hostility toward the Association. The Sheriff's actions, according to the County, were legal and in compliance with the contract and cannot be construed as a threat of reprisal or promise of benefit, and there were legitimate reasons for the transfers and attempts were made to resolve all issues through negotiations and neither the Sheriff nor the County committed any prohibited practices by these actions.

The County requests that the complaint be dismissed in its entirety and because the complaint is frivolous, it seeks attorneys' fees.

Association's Reply:

The Association, in reply, agrees that the decision to create the Law Enforcement Specialist position was a permissive subject of bargaining. It disagrees with the County's argument that the County had no obligation to bargain to impasse over impact items because Article XXXIV of the parties' agreement contains a reopener provision. It notes that the language states that the contract may be reopened by mutual agreement and the parties' actions indicate their mutual intent to reopen the contract and the County was obligated to bargain to impasse and proceed to binding arbitration before implementation.

The Association reiterates that the parties had not reached impasse prior to implementation. It argues that the issue in the negotiations was significant and the representatives had one face-to-face meeting which indicates that bargaining history supports a conclusion that the parties were not at impasse. It submits that the County did not bargain in good faith as evidenced by the Sheriff's July 9, 1991 letter, and the January 7, 1992 meeting between the principals followed by the memberships' rejection of the proposal did not permit the County to unilaterally declare an impasse. The Association contends that because the parties had negotiated to reopen and amend the contract, the County could not avail itself of the impasse defense.

The Association asserts that the County refused to bargain to impasse the 1992 assignment of the Investigators to patrol duties. The Association argues that the 1992 assignments were not the same as the 1991 assignments because they were neither temporary nor the result of an emergency. It claims that the problem is a lack of manpower, a foreseeable situation, which is not an emergency.

The Association maintains that the County discriminated against members of the Association. The Association argues that the County has failed to explain the change of heart by the Sheriff by not rotating the Criminal Justice unit to patrol positions and this is the basis for interference and discrimination. It submits that it is so logical to use the Criminal Justice employes to perform patrol duties that the failure to do so must be because the County intentionally wanted to punish the Investigators for asserting their protected rights.

Discussion:

The parties are in agreement that the establishment of the Law Enforcement Specialist position is a permissive subject of bargaining. Therefore, the decision to establish the position is not subject to the duty to bargain by the County. The parties are also in agreement that the impact of the decision to establish the Law Enforcement Specialist position is a mandatory subject of bargaining. The obligation to bargain the impact of the decision does not preclude implementation of the decision. 2/ The obligation

2/ Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83).

to bargain impact items at reasonable times may require that bargaining commence prior to implementation and the fulfillment of the bargaining obligation is subject to a case-by-case analysis as to whether the employer's totality of conduct is consistent with the statutory requirement of good faith. 3/ In other words, the employer may have to commence negotiations on impact items before implementation of a permissive decision and whether it bargained in good faith must be examined on a case-by-case basis and that impasse is not a requirement before implementation. Implementation does not extinguish the continuing obligation to bargain impact and the parties must bargain impact items to impasse but interest arbitration is not available and the impasse defense applies. If the parties' have bargained in good faith and reached impasse prior to implementation, the bargaining obligation is fulfilled and implementation obviously may take place. 4/

The Association has asserted that interest arbitration must take place prior to implementation because Article XXXIV provides for a reopener. The Association's argument is not persuasive because Article XXXIV provides for reopening by mutual agreement which requires more that the inference raised by the County's proposals to satisfy its duty to bargain over the impact items. Secondly, the formal reopener provisions must indicate that the contract may be reopened for wages or health insurance or whatever with such specificity that it is clear that the parties did not agree to that item for part of the term of the contract and that negotiations and interest arbitration would be available to both parties to resolve the issue. The establishment of the Law Enforcement Specialist position is permissive and while impact items are subject to bargaining during the term of a contract, the interest arbitration provisions are not available to resolve them mid-term and prior to implementation. 5/

The issue in the instant case is whether the County satisfied its good faith bargaining obligation on the impact items prior to implementation. A review of the facts establishes that it had. In the Spring of 1991, the Sheriff indicated to the Association that he desired to establish the Law Enforcement Specialist position. 6/ On May 10, 1991, the Association, by Counsel, objected to unilateral implementation of the position. 7/ On May 23, 1991, the County, by Counsel, made a proposal to the Association with respect to the Law Enforcement Specialist position. 8/ The Association responded with its own proposal on June 28, 1991. 9/ The Sheriff responded to this proposal on July 9, 1991, discussing uniforms and on-call pay and indicating the other matters were not negotiable "at this time." 10/ The Association, by Counsel, responded on August 28, 1991, indicating it reserved the right to negotiate the impact items. 11/ Thereafter, the parties met and reached a settlement agreement which was drafted by the County's counsel and sent to the

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3/ City of Madison, Dec. No. 17300-C (WERC, 7/83).

4/ City of Oak Creek, Dec. No. 27074-B (Crowley, 9/92).

5/ Id. citing City of Brookfield, Dec. No. 20691-A (WERC, 2/84).

6/ Tr. 9.

7/ Ex. 2.

8/ Ex. 34.

9/ Ex. 35.

10/ Ex. 3.

11/ Ex. 3.

Association's counsel on October 10, 1991. 12/ This settlement was rejected by the Association membership, 13/ and a second revised settlement agreement was proposed by the County dated December 23, 1991. 14/ This too was rejected by the membership. On January 7, 1992, the County and Association reached another settlement agreement but that too was rejected by the membership. 15/ The record fails to establish any further demand to bargain on impact or the submission of different proposals by the Association. On January 13, 1992, the Sheriff posted the Law Enforcement Specialist positions and five positions were filled on April 3, 1992, and a sixth on August 31, 1992. 16/

Based on the above facts, the undersigned concludes that the County satisfied its bargaining obligation over the impact items before implementation. There were three settlement agreements and none were satisfactory to the membership and no new demands or proposals were made. It thus must be concluded that the County bargained in good faith and satisfied its bargaining obligation even if it is concluded that impasse was not reached.

Although the parties disagreed as to whether or not impasse was reached, impasse is not a condition precedent to implementation of a permissive subject of bargaining. 17/ Even if it were, the undersigned finds that the parties were at impasse. Additionally, although the County could implement the permissive subject of bargaining, it was obligated to continue to bargain with the Association on the impact items to the point of impasse. Both parties have agreed what the criteria for impasse are 18/ but reach different conclusions based on the facts. The facts set out above on the bargaining obligation when evaluated in light of these criteria, convince the undersigned that impasse was reached on January 8, 1992. Inasmuch as the County satisfied its bargaining obligation prior to implementation and the evidence establishes that impasse was reached on impact items, the County thus satisfied its bargaining obligation and because this impact was mid-term, interest arbitration was not available. Therefore, the implementation of the position did not violate Secs. 111.70(3)(a)4 or 1, Stats.

The Association has asserted that the County has refused to bargain over the assignment of Investigators to patrol duties. The duty to bargain collectively during the term of an agreement does not extend to matters covered by the agreement or to matters over which the Union has otherwise clearly and unmistakenly waived its right to bargain. 19/ In 1991, the County temporarily assigned two Investigator-Sergeants to patrol duties. These assignments were temporary and were due to a shortage of Patrol Officers to perform necessary patrol work. The assignments were grieved and proceeded to arbitration with the arbitrator holding that the County's assignment of the Investigators to

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12/ Ex. 18.

13/ Ex. 19.

14/ Ex. 20.

15/ Tr. 95-96.

16/ Ex. 10-15, 32.

17/ City of Madison, Dec. No. 17300-C (WERC, 7/83).

18/ Green County, Dec. No. 20308-A (Crowley, 11/84).

19/ City of Richland Center, Dec. No. 22912-A (Schiavoni, 1/86) affirmed Dec. No. 22912-B (WERC, 8/86); Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

patrol duties was not violative of the parties' agreement. 20/

In 1992, the County assigned four Investigators to patrol duties pursuant to a notice to Investigators dated July 10, 1992. 21/ The assignments began on July 14 for two Investigators, July 16 for another and August 5 for the fourth. 22/ The reasons for the transfer were that regular Patrol Officers had worked large amounts of overtime and were saying no to overtime assignments the weekend of July 4, 1992. 23/ The County had expended about 95 percent of its overtime budget and a number of patrol deputies were on leaves of absence or on worker's compensation. 24/ The record further indicates that these assignments were temporary. 25/ Thus, it appears that the same scenario in 1991 was repeated in 1992. Inasmuch as these assignments were covered by the terms of the contract, the County had no obligation to bargain over them.

The record does indicate that bargaining did occur over the uniform allowance, although the County could have simply followed the arbitrator's award with respect to uniform allowance. 26/ As the contract covered these matters and the arbitrator had just held that the County did not violate the contract by the assignments, there was no obligation to bargain over them during the term of the contract and hence no violation of Sec. 111.70(3)(a)1 or 4, Stats. Although there was a reference by the Association to proposals for a succeeding contract, these are irrelevant to areas already covered by the contract.

With respect to the Association's allegation that the County violated Sec. 111.70(3)(a)3, Stats., by the assignment of certain Investigators to patrol duties, the Union must prove by a clear and satisfactory preponderance of the evidence that:

(1) the employes were engaged in protected, concerted activity;
(2) the employer was aware of said activity;
(3) the employer was hostile to such activity;
(4) the employer's action was based, at least in part, upon said hostility. 27/

Three of the Investigators who were transferred to patrol duties in 1992 were on the Association's bargaining committee and Spaeth and Meitner had grieved the 1991 assignment, so items (1) and (2) have been established. With respect to item (3), the County has not been shown to have been hostile to this activity.

The Association claims that the timing of the transfer, coming right after the arbitrator issued her award, is indicative of hostility. The Sheriff

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20/ Ex. 9.

21/ Ex. 6.

22/ Id.

23/ Tr. 60, 129.

24/ Tr. 61, 129, 171.

25/ Tr. 78, 140.

26/ Tr. 77.

27/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87), aff'd by operation of law, Dec. No. 23232-B (WERC, 4/87); Kewaunee County, Dec. No. 21624-B (WERC, 5/85).

won in the arbitration plus the factors discussed above, overtime budget mostly spent, patrol officers objecting to more overtime, the leaves of absence and worker's compensation absences, all establish that the decision to assign Investigators was not related to any hostility to employes for being on the bargaining team or for filing a grievance. The assignment was made to the least senior Investigators at the insistence of the Association. 28/ The mere fact that three of the four least senior employes were on the bargaining team has not been shown to be other than a mere coincidence. The Association asserts that the Sheriff basically reneged on a deal that would have put the Criminal Justice employes on the road. According to the Association, this further indicates that the Sheriff was hostile to members of the bargaining team. The record indicates that this alleged deal occurred on July 7 or 8, 1992, 29/ but after further discussion on the County's side, where it had concerns related to the settlement of Bill Fehrman's grievance, the Sheriff decided that based on the Fehrman case, the best course of action was to go with the transfer of the four Investigators. 30/ This evidence fails to establish any hostility and establishes non-pretextual reasons for the Sheriff's conduct. Consequently, the third element has not been proved. It follows that where there has been no showing of hostility, the fourth element perforce is also not proven. Therefore, the Association had failed to establish by a clear and satisfactory preponderance of the evidence that the County has discriminated against employes based on their concerted protected activity, and no violation of Sec. 111.70(3)(a)3, Stats., has been found.

Inasmuch as no violation of Sec. 111.70(3)(a), Stats., has been found, the complaint has been dismissed in its entirety.

The County has requested that it be awarded legal fees as the complaint is a frivolous one. The Commission has held that attorneys' fees are warranted only in exceptional cases where the allegations or defenses are frivolous as opposed to debatable. 31/ The complaint has not been shown to be so frivolous, in bad faith or devoid of merit so as to warrant the imposition of attorneys' fees and Respondents' request for same is denied.

Dated at Madison, Wisconsin this 8th day of March, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

28/ Tr. 144, 179.

29/ Tr. 164.

30/ Tr. 166.

31/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90) citing Madison Metropolitan School District, Dec. No. 16471-B (WERC, 5/81).