

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

:

In the Matter of the Petition of :

:

FOREST COUNTY DEPUTY : Case 60

SHERIFFS' ASSOCIATION : No. 47481 ME-583

: Decision No. 27552

:

Involving Certain Employes of :

:

FOREST COUNTY (SHERIFF'S DEPARTMENT) :

:

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222, on behalf of the Forest County Deputy Sheriffs' Association.
Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Dean R. Dietrich,

P.O. B

FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER DISMISSING PETITION

On May 26, 1992, the Forest County Deputy Sheriffs' Association filed a petition requesting that the Wisconsin Employment Relations Commission clarify the bargaining unit of the Forest County Sheriff's Department to include certain positions on the basis that they are regular part-time employes and share a community of interest with the full-time employes in the existing bargaining unit represented by the Association. Forest County opposed the petition. A hearing on the petition was held on September 8, 1992 in Crandon, Wisconsin before Examiner David E. Shaw, a member of the Commission's staff. A stenographic transcript was made of the hearing and post-hearing briefs were submitted by November 23, 1992. The Commission, having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Forest County, hereinafter the County, is a municipal employer having its principal offices located at 200 East Madison Street, Crandon, Wisconsin 54520. The County maintains and operates the Forest County Sheriff's Department.
2. The Forest County Deputy Sheriffs' Association, hereinafter the Association, is a labor organization with its offices located in Crandon, Wisconsin 54520. The Association and the County are party to a collective bargaining agreement covering the period of 1991 through 1992 and said Agreement contains the following Recognition Clause:

No. 27552

ARTICLE I

RECOGNITION AND REPRESENTATION

Section 1.01: The County hereby recognizes the Association as the exclusive bargaining agent for all the Forest County full-time Deputies, Investigator and Deputized Steno-Clerk, (excluding the Sheriff, elected officials, supervisors, managers and confidential employees) hereinafter called the Association for the purpose of bargaining collectively on the matters pertaining to wages, benefits and working conditions.

Section 1.02: The Association shall be represented in all such bargaining or negotiating with the County by such person or committee as the Association may deem advisable.

The Department currently employs ten full-time employees who are in the bargaining unit described above as well as approximately 26 "part-time" employees. 2/ The Association has petitioned for the inclusion of five of those part-time employees in the bargaining unit and the County has contested the petition.

3. The Association was voluntarily recognized by the County in the early 1970's as the exclusive bargaining agent for the full-time deputies in the Department. At that time, there were approximately five or six full-time deputies and approximately four part-time deputies in the Department. At the time, there were not enough full-time deputies to cover two or three days in the week and the same four individuals were employed on a weekly basis to cover those days. Currently, there are approximately 26 part-time employees utilized by the Department. The part-time deputies are classified as either Level I (certified in law enforcement) or Level II (non-certified). Those classified as Level I may be assigned to work alone. The Association has petitioned for the inclusion of the following five part-time deputies: George Ison, George Stamper, Thomas Tallier, John Thornton and Steven Weber. All of those individuals are certified in law enforcement and are classified as Level I officers on that basis. They are assigned the same duties as the full-time officers and wear the same uniform with the exception that instead of having the Department insignia on both shoulders, they have the American flag insignia on one shoulder. Level I part-time officers are paid \$7.67 an hour while full-time deputies are paid \$1914.98 a month, as of July 1, 1992. The part-time officers receive no benefits other than retirement if they work 600 hours in a year. The part-time officers are used to fill in on regular shifts when full-time officers call in sick, are on vacation, are using their 110 hours of Kelly time that they receive each year or are otherwise unavailable and the other full-time officers have turned down the opportunity to work the overtime. Part-time officers are also used for the weekends and the Monday following if that is a court day, and also for the Brush Run, a local event which occurs twice a year. A regular shift is 12 hours, but a weekend shift is only ten hours and a park patrol shift (weekends through a contract with the National Forest Service) is four hours. The five individuals in question worked the following number of hours for the year 1991 and up to May 6 in 1992:

2/ The use of the term "part-time" in these Findings and Discussion is intended to refer only to their status as other than "full-time".

	<u>1991</u>	<u>1992 (To 5/6/92)</u>
Ison	1641.5	286
Stamper, G.	465.5	124.5
Tallier, T.	533.5	136.5
Thornton	629	112
Weber	192.5	108

The part-time officers are overseen by Captain Gibson and Lieutenant Wilson, who are full-time. The part-time officers hold rank apart from the full-time officers, i.e., there is a part-time captain and part-time lieutenant who do not possess authority over the full-time officers. When the part-time officers work with the full-time deputies, they report to the latter. The part-time officers meet approximately once a month to decide who will receive the scheduled part-time work for the coming month and then that list is turned in to the Chief Deputy by the part-time captain or lieutenant and the assignments are generally made on that basis, unless it is determined that other individuals need to be assigned.

4. The Association and the County have voluntarily agreed to a bargaining unit consisting only of the full-time officers in the Department and have not agreed to include the part-time officers in the bargaining unit.

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

CONCLUSION OF LAW

A unit clarification petition is not an appropriate means by which to add any regular part-time sworn employees of the Forest County Sheriff's Department to the bargaining unit set forth in Finding of Fact 2.

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

ORDER 2/

The petition for unit clarification to include certain part-time officers in the Forest County Sheriff's Department in the bargaining unit represented by the Association is hereby dismissed.

Given under our hands and seal at the City of
Madison, Wisconsin this 5th day of February,
1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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

2/ 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.

(Footnote 2/ continues on the next page.)

(Footnote 2/ continues)

(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.

FOREST COUNTY (SHERIFF'S DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER DISMISSING PETITION

The Association has petitioned for the inclusion of the five part-time officers in the Forest County Sheriff's Department who have worked the most hours during 1991 through May 6, 1992. The County has opposed the petition to include the part-time officers.

POSITIONS OF THE PARTIES

Association

The Association notes the history of the voluntary recognition of the Association as the bargaining agent for the unit consisting of all full-time deputies in the Department and asserts that the issue of part-time employees was not addressed at the time. Since the Association was recognized in the 1970's, circumstances have changed and the number of part-time employees utilized in the Department has greatly increased since that time from approximately four to twenty-six. The use of part-time deputies has become an integral part of the operation of the Department and it could not function without part-time employees. Further, the use of part-time deputies is addressed in the parties' bargaining agreement.

The Association also asserts that it is appropriate to include the part-time employees in the current bargaining unit. The part-time officers do the same work as the full-time employees, are trained the same and work side-by-side with full-time employees. They have the same supervision and wear the same uniforms. The part-time employees are used on a regular basis both for road patrol and in the jail/dispatch center. Citing the Commission's test for determining the appropriate bargaining unit, the Association asserts that the foregoing satisfies those criteria, especially the "community of interest" criterion. Also, the Commission has held that employees who possess the power of arrest are appropriately included in the same bargaining unit.

Citing the Commission's decision in Manitowoc County, Dec. No. 8152-J (WERC, 11/90), the Association asserts that these five individuals meet the test of regular part-time as set forth in that decision, and notes that employees working on an "as-needed" basis have been held to constitute regular part-time employees "where the need of the Employer for the employee has been regular." The five individuals requested have worked on a part-time basis for the Department from anywhere from four to nineteen years and that type of tenure cannot be considered casual or temporary. Further, the number of hours those individuals have worked over the last two year period cannot be considered de minimis. As in Manitowoc County and in the Village of Poynette, Dec. No. 26744, 26745 (WERC, 1/91), the part-time employees should be accreted into the existing unit of full-time employees.

The Association asserts that it would be appropriate to amend the Recognition Clause to include the regular part-time employees in the bargaining unit. While the Commission has been reluctant to amend a voluntarily-recognized unit except in certain specific circumstances, two of those exceptions apply in this case. First, the five part-time employees have been impacted by the substantial increase in the use of part-time employees over the past 17 years. The use of part-time employees has increased, while the number of full-time deputies has remained more or less constant. The increased use of part-time deputies has detrimentally impacted on the full-time employees' ability to improve their wages, hours and conditions of employment and has similarly impacted on the part-time employees in that same regard. Secondly,

MERA gives regular part-time employees the right to organize and otherwise exercise their rights under that law. Given their community of interest with the full-time employees, the similarity in functions, duties and skills, common supervision and uniforms and the same training, certification and law enforcement recognition, powers of arrest, common workplace and their desire to improve their wages, hours and conditions of employment, it would be repugnant to MERA to conclude otherwise than that the five part-time employees are "municipal employees" who should be included in the existing bargaining unit. The Association further concludes that if it were found that the part-time employees would constitute a separate unit of their own, Forest County would be the only county out of all 72 counties in the state to have two law enforcement units for the same municipal employer. That result would constitute undue fragmentation and therefore would also be repugnant to MERA.

County

The County takes the position that the Association's petition is barred by the parties' prior agreement to exclude part-time/on-call deputies from the bargaining unit. It is well-established that the Commission will not authorize the expansion of an existing bargaining unit to include positions the parties mutually agreed to exclude. Citing, Mid-State Vocational, Technical and Adult Education District, Dec. 14526-A (WERC, 5/85) and West Allis - West Milwaukee School District, Dec. No. 16405-C (WERC, 1/89), the County asserts that the criteria applied by the Commission in deciding when it will not alter a voluntarily-recognized unit apply in this case. First, part-time positions were in existence when the County voluntarily recognized the Association in the 1970's. Secondly, the unit description excludes the positions in question. The parties voluntarily agreed that only full-time deputies would be included in the bargaining unit. This is reflected in both the Preamble and the Recognition Clause in the parties' labor agreement. Further, review of the agreement's provisions demonstrates that it was the parties' intent to only apply it to full-time deputies. Third, the County opposes the expansion of the agreed-upon bargaining unit. Fourth, the prior exclusion was not for statutory reasons, but was simply by the parties' mutual agreement. Fifth, the existing unit excluding the on-call deputies would not be repugnant to the provisions of MERA. There are substantial differences between the working conditions of the on-call deputies versus the full-time deputies. Sixth, there has been no intervening event which has materially affected the status of the on-call deputies. To the contrary, the evidence indicates the County has been utilizing on-call deputies in the same manner as it has in the past. Therefore, the petition should be dismissed. Further, the petition should be dismissed on the grounds of equity. The parties having previously mutually agreed to exclude the on-call deputies from the bargaining unit, it would be unfair to now permit the Association to include those individuals in a proceeding such as this. To do so would allow the Association to unilaterally abrogate the collective bargaining agreement.

Next, the County asserts that the "on-call" deputies are temporary or casual employees and that it would therefore be inappropriate to include them in the existing bargaining unit. The County cites a number of Commission decisions for the proposition that temporary or casual employees should not be included in a bargaining unit consisting of regular full-time and regular part-time employees. The Commission has consistently held that on-call employees are temporary or casual employees. In determining temporary status, the primary factor to be considered is the individual's "reasonable expectation of continued employment." Citing, Manitowoc County, Dec. 15250-B (WERC, 9/77). In determining whether an individual is a "casual employee", the Commission has held that the primary factor to be considered is the regularity of employment, rather than the number of hours worked. Citing, Richland County, Dec. No. 11484 (WERC, 12/72); City of Onalaska, Dec. No. 20509 (WERC, 4/83); and Madison

Metropolitan School District, Dec. No. 14814-C (WERC, 8/78). Other factors to be considered are whether the individual has the right to accept or reject work when offered; whether there is a sufficient community of interest with the other regular employees based upon similarity of job functions, wages, and conditions of employment; and whether there are defined work periods and work hours. Citing, Ozaukee County, Dec. No. 22667 (WERC, 5/85); Madison Metropolitan School District, Dec. No. 6746-C, 14161-A (WERC, 1/77). An individual performing functionally similar work to the other bargaining unit employees may still be found to be temporary or casual and properly excluded from the unit. Citing, City of Appleton, Dec. No. 16090-A (WERC, 9/78).

The County also finds the facts in this case similar to the facts in a number of cases where on-call officers with the right to decline work and who had not worked a significant number of hours on a reasonably regular basis were held to be "casual" employees. City of Milton, Dec. No. 13442-A (WERC, 6/83); Manitowoc County, Dec. No. 18351-A (WERC, 3/83); City of Medford (Police Department), Dec. No. 16846 (WERC, 2/79); and Village of Mount Horeb (Police Department), Dec. No. 19188 (WERC, 12/81). In this case the five on-call deputies in question work on an on-call or as needed basis. The hours vary from month to month and season to season. Looking at the hours worked by the five individuals in 1992 by the time of hearing, the County asserts that the highest hours worked equated to only 19% of the regular work hours for the period. For each of those individuals there were months when they did not work at all and months when they only worked one or two days. The County also notes that the hours in 1992 have decreased from the hours those individuals worked in 1991. The on-call deputies are scheduled to work on an "as available" basis. The County does not control which on-call deputy may work a particular vacant shift or the number of hours the on-call deputy may work in the specified time period. They are totally free to reject the work when it is offered and there have been times when all of the on-call deputies have done so, and the Chief Deputy has had to assign a full-time deputy to the work. The on-call deputies may terminate their employment at any time without notice or penalty and could do so by not scheduling themselves to work. Further, they are not guaranteed a specific number of work hours in a set time period. With the exception of the "kelly days", under the labor agreement, all overtime time must first be offered to the full-time deputies. If the full-time deputies accepted the overtime work on a more regular basis, there would be less work for the on-call deputies. There is also no guarantee that any specific on-call deputy will automatically be used to work. Rather, it is the on-call deputies themselves who determine who will work and when as to the work available. Thus, they do not possess a reasonable expectation of continued employment or regular employment and should be considered temporary or casual employees.

The County also asserts that the wages and conditions of employment of the part-timers differ substantially from those of the full-time deputies. The full-time deputies are paid on a monthly basis while the on-call deputies are paid per hour and do not receive any of the benefits received by the full-time deputies. The full-time deputies work pre-determined scheduled hours while the on-call deputies determine their own work hours. While the Sheriff supervises both full-time and on-call deputies in the Department, the on-call deputies are also supervised by the full-time deputies. Thus, the on-call deputies do not share a community of interest with the full-time deputies and it would be inappropriate to include the on-call officers in the existing bargaining unit. Creating a separate bargaining unit of on-call deputies would, therefore, not result in undue fragmentation.

The County disputes the Association's argument that the parties' prior agreement to exclude part-time or on-call deputies should not be honored. Why the on-call deputies were excluded from the unit consisting of full-time deputies is irrelevant to the dispute. What is relevant is that at the time

the parties did agree to exclude the part-time deputies, and that agreement has been honored for over 22 years. During that time, the parties have negotiated numerous labor agreements based upon that agreement. The County also disputes that there has been any intervening event that has materially affected the status of the on-call deputies. While the number of on-call deputies has grown since the parties voluntarily agreed to the bargaining unit, the County still only uses four or five on any type of frequent basis. The fact that the total number designated as on-call deputies has grown over the years hardly establishes the intervening event materially affecting their status or that of the bargaining unit employes.

DISCUSSION

The parties correctly cite Commission case law that in a unit clarification proceeding, the Commission will not alter the voluntarily agreed upon composition of a bargaining unit over the objection of one of the parties to said agreement unless:

1. The position(s) in dispute did not exist at the time of the agreement; or
2. The position(s) in dispute were voluntarily included or excluded from the unit because the parties agreed that the position(s) were or were not supervisory, confidential, etc.; or
3. The position(s) in dispute have been impacted by changed circumstances which materially affect their unit status; or
4. The existing unit is repugnant to the Act. 3/

The Association asserts that exceptions 3 and 4, above, apply in this case.

Regarding exception 3, the Association contends that the County has substantially increased its use of part-time deputies in the Sheriff's Department since the parties agreed upon the make-up of the bargaining unit, and that this has materially affected the unit status of the part-time employes. We disagree. In this case, the part-time deputy positions remain part-time and the scope of the bargaining unit remains "all the Forest County full-time Deputies, Investigator and Deputized Steno Clerk. . ." (emphasis added). While the fact that the County utilizes more part-time deputies than it did at the time the parties agreed to the definition of the unit might have some impact upon the full-time employes, that does not affect the unit status of the part-time deputies, i.e., they have not de facto become "full-time".

As to the issue of whether the existing unit is repugnant to MERA, the Association correctly argues that only one unit of regular sworn law

3/ City of Sheboygan (Water Department), Dec. No. 7378-A (WERC, 5/89); Howard-Suamico School District, Dec. No. 23639-A (WERC, 10/89); City of Greenfield, Dec. No. 25646-A (WERC, 7/90); Manitowoc County, Dec. No. 7116-C (WERC, 11/91).

enforcement employes is appropriate. 4/ Thus, if the Association (or any other union) wishes to represent any regular part-time sworn Department employes, such representation must occur in the confines of a "regular full-time and regular part-time" law enforcement unit. However, where, as here, the parties have

4/ City of Marshfield, Dec. No. 25700-A (WERC, 10/92).

voluntarily agreed to the exclusion of part-time employes, the Association can only acquire representative status for regular part-time employes through an election proceeding. 5/

Thus, we have dismissed the unit clarification petition.

Dated at Madison, Wisconsin this 5th day of February, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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

5/ The Association could either file an accretion election petition as to regular part-time employes or timely file an election petition in the overall unit. Stevens Point Schools, Dec. No. 7713-A (WERC, 8/89).