

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of: :

:

WINNEBAGO COUNTY :

:

Requesting a Declaratory Ruling : Case 230

Pursuant to Sec. 111.70(4)(b), Stats., : No. 48205 DR(M)-508

Involving a Dispute between Petitioner : Decision No. 27755

and :

:

WINNEBAGO COUNTY PROFESSIONAL POLICE :

ASSOCIATION :

:

Appearances:

Mr. John A. Bodnar, Corporation Counsel, P.O. Box 2808, 415 Jackson Street, Oshkosh, WI 54903-2808, on behalf of the County.
Mr. Patrick J. Coraggio, Labor Consultant, 2825 North Mayfair Road, Wauwatosa, WI 53222, on behalf of the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On October 15, 1992, Winnebago County filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether certain provisions of an existing collective bargaining agreement constitute mandatory subjects of bargaining. The parties waived hearing and submitted written argument, the last of which was received June 9, 1993.

Having considered the matter, the Commission makes and issues the following:

FINDINGS OF FACT

1. Winnebago County, herein the County, is a municipal employer having its principal offices at 415 Jackson Street, P.O. Box 2808, Oshkosh, WI 54903-2808.
2. Winnebago County Sheriff's Professional Police Association, herein the Union, is a labor organization having its principal offices at 2825 North Mayfair Road, Wauwatosa, WI 53222.
3. The Union is the collective bargaining representative of certain law enforcement employees of the County. The Union and the County have a dispute as to whether the following provisions of their collective bargaining agreement are illegal or mandatory subjects of bargaining:

No. 27755

ARTICLE 4, PROBATIONARY EMPLOYEES

All newly promoted or transferred employees shall serve a six (6) month probationary period following the date of promotion or transfer. At any time during the course of this probationary period, the Department may return the employee to his former position, and any such decision shall not be grievable under Article 5 of this Agreement.

The promoted or transferred employee may return to his former position upon written request within the first sixty (60) days of assignment to the position.

ARTICLE 7, WORK WEEK

Employees serving in the capacities listed below shall work on a duty schedule consisting of five (5) consecutive workdays of seven hours and forty minutes each, Monday through Friday, broken by an unpaid lunch period.

Sergeant - Huber/Classification Officer
Sergeant - Detective Division
Juvenile Officer
Welfare Fraud Investigator
Police Officer - Court Officer
Police Officer - Transportation Officer
Police Officer - Process Server
Police Officer - Warrant Officer
Police Officer - Matron Specialist

All other employees of the Department shall work a schedule consisting of six (6) consecutive duty days of eight hours and ten minutes each followed by three (3) consecutive days off. Such employees shall be provided a paid lunch period within the duty shift as has been provided in the past.

Variations of the regular work schedules of employees, other than Substitute Corrections Officers, or temporary job assignments in excess of ninety (90) calendar days in any twelve (12) month period shall only be made by agreement between the Department and the Association Board of Directors, and only as long as the regularly scheduled hours do not exceed an average of 38.2 hours per week.

ARTICLE 21, ACTING OFFICER PAY

In the absence of a Sergeant, Corporal, Detective, or Juvenile Officer for a full shift, the Department shall have the right to temporarily designate a Police Officer to perform such duties.

ARTICLE 30, LAYOFF

In the event that the County decides to reduce the work force, any seasonal, temporary and casual employees shall be laid off first, excluding any employees assigned to undercover work. Regular part-time employees shall be laid off next according to seniority with the last person hired the first period to be laid off. Thereafter full-time employees will be laid off in the order of seniority with the person having the least amount of seniority laid off first. Part-time and full-time employees who are laid off shall be eligible for recall to their previous position if an opening occurs for a period of fifteen (15) calendar months. In the event new positions are created with special qualifications, or if special qualifications are established for an existing position or positions, the parties agree to reopen the contract to negotiate the layoff provisions applicable to the new or changed positions.

ARTICLE 34, SENIORITY

Seniority, as defined above, shall be used to determine the pay grade, the number of vacation days an employee is eligible for vacation selection, the amount of money due him via longevity, and the status of the employee for layoff and recall purposes.

ARTICLE 37, PROMOTIONAL PROCEDURES: APPENDIX C, PROMOTIONAL PROCEDURE

Persons selected for placement into any rank above that of Police Officer/Corrections Officer shall be selected from a list of the three candidates who score highest in the competitive written examination for named ranks administered by the State of Wisconsin. (In the event that tie scores in the competitive exam result in more than three finalists, the number of finalists shall be reduced to three by means of an oral interview.)

In order to be eligible to write the competitive exams for promotion, candidates must meet or exceed the following minimum length of service requirements for the respective ranks at the time of examination:

1. Corporal Exam - equivalent of two (2) years of service for the Jail Division or 3.5 years for the Patrol Division in the department.
2. Detective Exam - equivalent of 3.5 years of service in the department.
3. Sergeant Exam - equivalent of five (5) years of service in the department.

In addition to meeting the length of service requirements, actual promotion shall be contingent upon the candidates meeting or exceeding the following minimum time-in-grade requirements for the respective ranks:

1. Corporal - One (1) year experience in the division in which the vacancy exists.
2. Sergeant - One (1) year experience in the division in which the vacancy exists.

Upon completion of the examination process, the results shall be posted by Social Security Number, and the Association shall be provided with a copy. The results shall remain valid for a period not to exceed two years and to coincide with the Sheriff's term of office.

Once a vacancy occurs, the names of the top three candidates for promotion shall be presented to the Sheriff.

In the event of vacancies in more than one rank the vacancy in the highest rank shall be filled first.

4. The parties' most recent collective bargaining agreement also contains the following provisions:

ARTICLE 2 - MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this Agreement, the County reserves and retains, solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing herein contained shall divest the Association from any of its rights under Wisconsin Statutes, Section 111.70.

ARTICLE 22 - SEPARABILITY

The provisions of this Agreement are deemed to be separable to the extent that if and when a court or governmental agency of competent jurisdiction adjudges any provision of this Agreement to be in conflict with any law, rule or regulations issued thereunder, such decision shall not affect the validity of the remaining portion of this Agreement, but such remaining provisions shall continue in full force and effect.

It is further provided that in the event any provision, or provisions are so declared to be conflicting with such law, rule, or regulations, both parties shall meet within thirty (30) days for the purpose of renegotiating the provision or provisions so invalidated.

5. When viewed in the context of the argument made by the parties herein, the contract provisions set forth in Findings of Fact 3 primarily relate to wages, hours and conditions of employment.

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

CONCLUSIONS OF LAW

1. When viewed in the context of the contract provisions set forth in Finding of Fact 4, the contract provisions set forth in Finding of Fact 3 do not conflict with the statutory and constitutional authority of the County Sheriff.

2. The contract provisions set forth in Finding of Fact 3 are mandatory subjects of bargaining.

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

DECLARATORY RULING 1/

Winnebago County has a duty to bargain under Secs. 111.70(1)(a) and 111.70(3)(a) 4, Stats., with the Winnebago County Professional Police Association over the placement of the contract provisions set forth in Finding of Fact 3 in a successor to the parties' existing agreement.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of August, 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

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 (Footnote is continued on page 6.)

1/ (Footnote is continued from page 5.)

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 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.

(Footnote is continued on page 7.)

1/ (Footnote is continued from page 6.)

(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.

WINNEBAGO COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECLARATORY RULING

BACKGROUND

In Beloit Education Association v. WERC 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC 81 Wis.2d 89 (1977) and City of Brookfield v. WERC 87 Wis.2d 819 (1979) the court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy", respectively. When it is claimed that a proposal is a prohibited subject of bargaining because it runs counter to expressed statutory command, Board of Education v. WERC 52 Wis.2d 625 (1971); WERC v. Teamsters Local No. 563 75 Wis.2d 602 (1977), the court has held that proposals made under the auspices of the Municipal Employment Relations Act (MERA) should be harmonized with existing statutes "whenever possible" and that only where a proposal "explicitly contradicts" or is in "direct conflict" with statutory powers will it be found to be a prohibited subject of bargaining. Otherwise mandatory proposals which limit but do not eliminate statutory powers remain mandatory subjects. Iowa County v. Iowa County Courthouse 166 Wis.2d 614 (1992), Glendale Professional Policeman's Association v. City of Glendale 83 Wis.2d 90 (1978); Professional Police Association v. Dane County 106 Wis.2d 303 (1982); Fortney v. School District of West Salem 108 Wis.2d 169 (1982). A proposal will be found to be a prohibited subject of bargaining if it limits or infringes upon the Sheriff's constitutional powers or duties, Manitowoc County v. Local 986B 168 Wis.2d 819 (1992); Dane County, supra; Crawford County, Dec. No. 20116 (WERC, 12/86). As to the constitutional duties of a Sheriff, the court has limited the scope of the matters which cannot be subjected to bargaining to those "immemorial principal and important duties that characterized and distinguish the office of sheriff at common law. . . ." Manitowoc County, supra; Dane County, supra; see also State ex rel Kennedy v. Brunst 26 Wis. 412 (1870); State ex rel Milwaukee County v. Beuch 171 Wis. 474 (1920).

POSITIONS OF THE PARTIES

The County

The County argues that under Manitowoc County, it has no authority to bargain over proposals which limit the Sheriff's constitutional right to determine which employee will perform law enforcement and peace preservation duties and when these duties will be performed.

Citing Crawford County and Iowa County, the County further asserts that it cannot bargain over proposals which abridge the statutory power of the Sheriff as an elected official.

Given the foregoing, the County contends that it cannot bargain over Articles 4, 7, 21, 30, 34, 37 (Appendix C) of the parties' existing contract. The County concedes its obligation to bargain over proposals which address the impact of Sheriff's exercise of constitutional and statutory authority.

The Union

The Union contends that under the Court's decision in Manitowoc County, the disputed contract provisions continue to be mandatory subjects of bargaining. The Union urges the Commission to view Manitowoc as a narrow decision whose impact is confined to the facts and contract language before the Court. Because no specific factual situation is present herein and the

contract language differs from the language before the Court, the Union argues the disputed provisions remain mandatory subjects of bargaining.

The Union summarizes the consequences of the County's position as follows:

In essence, the County is saying that the Sheriff, because of his constitutional authority, can promote whomever he wants and as many officers as he wants, to whatever position he wants. (Article 37). Once the Sheriff has promoted these individuals there will not be a probationary period unless the Sheriff deems it appropriate, or the Sheriff can set whatever probationary period he wants. (Article 4). The Sheriff can then, by eliminating Article 7 - Work Week, work the officers under his direction and control, any hours that he deems appropriate in carrying out the mandates of the constitution and preserving the peace irrespective of the number of hours worked in a day, which could be consecutive or fragmented. The hours and assignments would/could then be made at the direction of the Sheriff without due consideration to the tenure or expertise of the officer because seniority (Article 34) is another contract provision which the County believe violates the Sheriff's constitutional authority. Finally, if the Sheriff did not believe that the officers were working up to his expectations he would have the authority to lay them off (Article 30). Because there is no seniority, the Sheriff could pick and choose the persons that he wanted to lay off. With a new Sheriff there could come a new set of rules and a new group of employees. It is hard to comprehend that the County is seriously proposing that these articles of the collective bargaining agreement be found null and void.

DISCUSSION

The Court in Manitowoc County made clear that the collective bargaining process still has a significant role to play in determining the wages, hours and conditions of employment of law enforcement employees who are otherwise subject to the Sheriff's statutory and constitutional authority. The Court noted:

The union argues that this decision will lead to the situation forewarned in Beuch where neither the legislature nor a collective bargaining agreement may ever limit a sheriff's power. The union asserts that nearly every function of the sheriff may be described as a law enforcement duty, and that in effect the office of sheriff will become a fourth branch of government. This argument is hyperbolic. The legislature may still regulate the administrative and executive duties of a sheriff, and the collective bargaining agreement will still control wages, hours and conditions of employment. Where the courts eventually decide to draw the line regarding which activities of a sheriff involve law enforcement and preserving the peace such that they are constitutionally protected is not at issue here; the focus here is on the job assigned--undercover detective work--and undercover detective work is part of a modern sheriff's traditional and historical duties of law enforcement and preserving the peace.

Here, the County in effect is arguing that because the contract language could be interpreted or applied in such a way as to improperly infringe on statutory or constitutional powers, the provisions are illegal subjects of bargaining.

We disagree.

As evidenced by the provisions of Articles 2 and 22, we think it apparent the parties understand their obligation to interpret all provisions in the contract in ways which respect the statutory and constitutional authority. In the absence of a dispute premised on differing applications of the language in question to a specific set of facts, we have no reason to believe either the Union or the County will assert interpretations of the contract which are at odds with the Sheriff's statutory and constitutional power. Thus, under the record before us, we find all provisions to be mandatory subjects of bargaining.

Dated at Madison, Wisconsin this 9th day of August, 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