STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE LABOR ASSOCIATION OF WISCONSIN, INC. for and on behalf of Winnebago County Sheriff's Professional Police Association, Complainant, vs. THE COUNTY OF WINNEBAGO, Respondent.	Case 239 No. 49647 MP-2770 Decision No. 27798-A

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, The Labor Association of Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222, appearing on behalf of The Labor Association of Wisconsin, Inc., for and on behalf of Winnebago County Sheriff's Professional Police Association.

Mr. John A. Bodnar, Corporation Counsel for Winnebago County, 415 Jackson Street, Oshkosh, Wisconsin 54903-2808, appearing on behalf of the County of Winnebago.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission on August 5, 1993, alleging that the Respondent had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5, Stats. After attempts to resolve the matter informally proved unsuccessful, the Commission, on September 13, 1993, appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07, Stats. Hearing on the matter was held on November 18, 1993, in Oshkosh, Wisconsin. A transcript of that hearing was provided to the Commission on December 7, 1993. The parties filed briefs with the Commission by January 26, 1994.

FINDINGS OF FACT

1. The Labor Association of Wisconsin, Inc., referred to below as the Association, is a labor organization which maintains its principal offices at 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222. The Winnebago County Professional Police Association is a local affiliated with the Association.

2. Winnebago County, referred to below as the County, is a municipal employer which maintains its principal offices at 415 Jackson Street, P.O. Box 2808, Oshkosh, Wisconsin 54903-2808.

3. The Association and the County are parties to a collective bargaining agreement which was in effect, by its terms, from "January 1, 1991 . . . until and including December 31, 1992." Included among the provisions of that agree-ment are the following:

ARTICLE 1
RECOGNITION AND UNIT OF REPRESENTATION

The County hereby recognizes the Association as the sole and exclusive bargaining agent with respect to hours, wages, and other conditions of employment for all regular full-time and regular part-time employees employed by Winnebago County in its Sheriff's Department, including Sergeants, Detectives, Juvenile Officers, Corporals, Police Officers, and Corrections Officers, but, excluding from the unit of representation, the Chief Deputy, Captain, Lieutenants, and clerical employees.

This recognition clause shall be construed to apply to employees and not to work. It shall not limit the County's right to contract out work or to transfer work to other employees not included within the aforementioned unit when the nature or amount of work changes.

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 5
GRIEVANCE PROCEDURE

Grievances within the meaning of the Grievance Procedure shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and items concerning wages, hours and conditions of employment, and about alleged violations of this Agreement.

. . .

Step 3.

. . .

The decision of the arbitrator shall be binding upon the parties except for judicial review.

. . .

ARTICLE 39
NEGOTIATIONS

> This Agreement shall be effective January 1, 1991, and shall remain in full force and effect until and including December 31, 1992, and from year to year thereafter . . .
>
> In the event the parties do not reach a written successor agreement to this contract by the expiration date, the provisions of this Agreement shall remain in full force and effect during the pendency of negotiations and until a successor agreement is executed.

The terms of this agreement were, in part, determined by an interest arbitration decision which the County has appealed. A Circuit Court upheld the award, and the County has appealed that decision to the Court of Appeals. The provisions cited above are not the focus of that appeal.

4. In mid-October of 1992, during the preparation of its 1993 budget, the County Board approved two amendments which established the position of Control Module/Booking Clerk. William Wagner is the County's Director of Personnel. In a letter to the Association dated October 23, 1992, Wagner thus described the changes underlying the creation of the Control Module/Booking Clerk position:

> Because of the recent change in state administrative rules regarding the handling of juvenile prisoners . . . it has become necessary for the Sheriff's Department to change the staffing arrangement in the Winnebago County Jail in the near future in order to resume the holding of juvenile prisoners. Among the changes is a requirement that jail personnel assigned to juvenile prisoners during a shift cannot also work with adult

> prisoners during the same shift. As a result, the Sheriff will be required to assign all available Corrections Officers to the floor.
>
> In order to free up all available Corrections Officers to work the floor, most clerical functions currently assigned to Corrections Officers will be reassigned to clerical personnel. This will be done as soon as additional clerical staff can be hired and trained. The primary clerical activities being reassigned include the operation of the jail control module and the booking of prisoners. Personnel currently performing these clerical functions will be assigned to perform other duties with their existing job descriptions.
>
> . . .

Patrick Coraggio, a labor consultant for the Association, responded to this letter with a letter dated October 26, 1992, which reads thus:

> I am in receipt of your October 23, 1992 letter regarding the County utilizing clerical people to do Winnebago County Professional Police Association employees work. Please be advised that the Association is vehemently opposed to any subcontracting out of work historically, normally, and currently being performed by members of the Winnebago County Sheriff's Professional Police Association represented by the Labor Association of Wisconsin, Inc. Any attempts to subcontract the work out without going through the negotiation process, will result in litigation . . .

The Board authorized the hire of five full-time employes to staff this position. Section H of Chapter 3 of the Winnebago County Personnel Policy Manual reads thus:

> GROUP ASSIGNMENT. Concurrent with the creation of a position, the Director of Personnel shall determine the appropriate employee group to which persons holding the position will be assigned. This determination shall be based upon the contents of recognition/representation clauses in the County's various collective bargaining agreements . . .

Wagner determined that since the occupants of the Control Module/Booking Clerk position did not have the power of arrest and performed clerical functions the County courthouse bargaining unit would be the appropriate unit to assign the occupants of the position.

5. In a grievance filed with the County on November 17, 1992, the Association alleged that the County had violated Articles 1, 2 "and all other applicable articles or sections of the labor agreement now in effect which may impact upon the grievance" by assigning work once performed by Association represented employes to employes in the Control Module/Booking Clerk position. The grievance states the issue thus:

> (T)he Employer violated the expressed and implied terms and conditions of the collective bargaining agreement, now in effect, when the Employer subcontracted bargaining unit work to non-bargaining unit employees and refused to bargain the implementation, and impact, of said subcontracting with the collective bargaining representative of the grievant . . .

6. The County executed an agreement covering the "WORKING CONDITIONS AND PAY FOR NEW POSITIONS OF CONTROL MODULE/BOOKING CLERK" with representatives of the Winnebago County Courthouse Employees' Association on November 24, 1992.

7. The County denied the Association's grievance. Wagner's Step 2 denial, dated December 2, 1992, reads thus:

. . .

> Since the recognition clause of the collective bargaining agreement with the Winnebago County Courthouse Employees' Union specifically provides that clerical positions within the Sheriff's Department are to be represented by the Courthouse Employees' Association, it is appropriate that these positions be placed within that bargaining unit. Bargaining has already occurred with representatives of the Courthouse Employees' Association regarding all aspects of employment.
>
> While, admittedly, most of the clerical work to be assigned to these employees was previously done by sworn Corrections Officers, we view the work as incidental to their primary responsibility of guarding prisoners. Corrections Officers may continue to be called upon in the future to perform these and other clerical functions on a limited basis as conditions warrant.
>
> . . . In the event that the Association wishes to pursue this matter further, it is suggested that you consider initiating Unit Clarification proceedings with the WERC rather than grievance arbitration.

. . .

The Association formally filed a request with the Commission for the appointment of a grievance arbitrator. On February 22, 1993, the Commission appointed one of its staff members to serve as grievance arbitrator. The arbitrator set hearing for April 28, 1993, and subsequently postponed the hearing until May 19, 1993. On May 11, 1993, the County filed with the Commission a petition for declaratory ruling "to determine whether a dispute between the County and the Winnebago County Professional Police Association over alleged subcontracting of work was more appropriately resolved in a Commission unit clarification proceeding than a grievance arbitration case scheduled for hearing on May 19, 1993." The Commission denied the petition in Dec. No. 27669 (WERC, 5/93). In a letter to the Commission-appointed arbitrator dated June 10, 1993, the Association requested that the grievance be scheduled for hearing. The County responded in a letter to the arbitrator dated June 30, 1993, which reads thus:

> Please be advised that, as to the Union's request for an arbitration hearing in this matter, it is the County's position that this dispute is not arbitrable. Winnebago County is of the position that this dispute really involves a Union clarification issue and that the dispute is not governed by the terms of the collective bargaining agreement between Winnebago County and the Winnebago County Sheriff's Professional Police Association.
>
> Consequently, Winnebago County is not consenting to grievance arbitration in this matter, in that the County believes that the arbitrator is without jurisdiction, pursuant to the terms of the collective bargaining agreement, to arbitrate this matter.

8. It cannot be said with positive assurance that Article 5 is not susceptible of an interpretation that covers the grievance noted in Finding of Fact 5.

CONCLUSIONS OF LAW

1. The Association is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The County is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. The County's refusal to submit the grievance noted in Finding of Fact 5 to arbitration violates Sec. 111.70(3)(a)5, Stats.

ORDER 1/

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

To remedy its violation of Sec. 111.70(3)(a)5, Stats., the County, its offices and agents, shall immediately:

1. Cease and desist from refusing to schedule hearing before the arbitrator appointed by the Commission on February 22, 1993, regarding the grievance noted in Finding of Fact 5.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

a. Participate in the arbitration of the grievance noted in Finding of Fact 5.
b. Notify the Wisconsin Employment Relations Commission, in writing, within twenty days following the date of this Order, as to what steps the County has taken to comply with this Order.

Dated at Madison, Wisconsin, this 23rd day of March, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

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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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint alleges a County violation of Sec. 111.70(3)(a)5, Stats. Although the grievance questions the County's implementation of the Control Module/Booking Clerk position without bargaining, no issue is posed regarding Sec. 111.70(3)(a)4, Stats.

THE PARTIES' POSITIONS

The Association's Brief

The Association characterizes the complaint as the most recent aspect of an "odyssey . . . on-going since October of 1992." The Association, after a review of the facts, notes that the "merits of the grievance (are) . . . not relevant to these proceedings." Rather, the Association contends that the relevant point to these proceedings "is whether or not there is a collective bargaining agreement in effect at the time the grievance was commenced and that the grievance procedure was operable, thus requiring the County to arbitrate." After a review of relevant contract language, the Association asserts that the contract unambiguously requires that the County arbitrate disputes which concern the interpretation of a contract provision; pertain "to any items concerning wages, hours and conditions of employment"; or allege a violation of the agreement.

Acknowledging that Article I does not limit the County's right to contract out work, the Association contends that the final sentence of that provision "is vague and over broad." That sentence needs interpretation regarding work formerly done by the Booking/Control Module Clerks, or regarding the County's application of Article I to that work. Beyond this, the Association contends that the "definition of a grievance found in Article 5 . . . is very broad . . . and goes beyond the four corners of the agreement." That the County processed the grievance to arbitration underscores, according to the Association, that the grievance is within the scope of Article 5. Any other conclusion would, the Association contends, violate the contract by placing judicial review before the decision of the arbitrator. Under established Commission case law, arbitration must be ordered, the Association concludes.

Citing AT&T Technologies v. Communication Workers, 2/ the Association argues that "substantive arbitrability" is determined by the Courts unless the parties have a specific clause in the labor agreement binding the parties to arbitration. In this case, according to the Association, Article 5 of the labor agreement binds the parties to arbitrate this dispute.

The pleadings viewed with testimony establish, the Association notes, an undisputed factual record. Those facts, the Association contends, establish "a cold blooded act of labor larceny." The Association requests the award of "an appropriate remedy" which takes into account that the record is undisputed and that the County "has caused unnecessary prolonged litigation and unnecessary expense in their refusal to comply with the collective bargaining agreement."

The County's Brief

2/ 475 US 643, 121 LRRM 3329 (1986).

After a review of the factual background, the County notes that the Wisconsin Supreme Court has established the "primary relationship" test to distinguish "on a case by case basis" between mandatory and permissive subjects of bargaining. Noting that the County has created the new position of Control Module/Booking Clerk; specified the duties of that position; filled that position with qualified employes; and "made a determination that said positions were clerical in nature and assigned those positions to the Courthouse Employees Association as the appropriate unit of representation", the County concludes it did not affect any position represented by the Association in any way "as a result of the creation of the new positions."

The County notes that claims to the arbitrability of disputes are virtually unlimited, but that judicial precedent establishes that "(n)ot every dispute . . . is subject to arbitration." Article 5 demands, the County contends, that a grievance question the interpretation or application of an agreement provision to be arbitrable. Neither the grievance nor the complaint state, the County asserts, "any indication that the Employer violated the terms of the agreement or Section 111.70, Wisconsin Statutes, by creating the positions in question." Under the "primary relationship" test, the creation of the positions was, the County concludes, a permissive subject of bargaining.

Nor can the grievance or the complaint be plausibly read to state any arbitrable challenge the County's right to assign duties to the new positions, or to fill those positions. The assertion that the County has subcontracted unit work is, the County argues, misplaced. The existence of a subcontract is, the County contends, "a mixed question of law and fact," which to be arbitrable must fall within the scope of a contract provision. Article I does not apply to work, according to the County, and does not limit its right to subcontract. It is, then, inapplicable, and it necessarily follows, the County concludes, that there is no issue under the agreement concerning subcontracting. The sole issue raised in this matter is, the County asserts, "the appropriate bargaining unit for the new employees." That determination is the Commission's under Sec. 111.70(4)(d)(2), Stats., according to the County.

The County concludes that the complaint should be dismissed and that "the County be granted such other and equitable relief as the Hearing Examiner believes is appropriate."

DISCUSSION

The parties dispute whether the grievance is arbitrable under Sec. 111.70(3)(a)5, Stats. The standards governing the enforcement of an agreement to arbitrate date back to the Steelworkers' Trilogy. 3/ The Wisconsin Supreme Court incorporated, from the Trilogy, the teaching of the limited function served by a court or an administrative body in addressing arbitrability issues. 4/ The Court stated this "limited function" thus:

> The court's function is limited to a determination whether there is a construction of the arbitration

3/ United Steelworkers v. American Mfg. Co., 363 US 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 US 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 US 593 (1960).

4/ Dehnart v. Waukesha Brewing Co., Inc., 17 Wis.2d 44 (1962).

> clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 5/

The Jefferson Court held that unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" the grievance must be considered arbitrable. 6/

The first element of the Jefferson analysis focuses on the arbitration clause. The first paragraph of Article 5 defines a grievance, and does so broadly. Two of the areas of dispute pulled within the definition of a grievance focus narrowly on the application of agreement terms to alleged agreement violations. However, one of the areas of dispute is not so narrowly defined, referring expansively to "items concerning wages, hours and conditions of employment." The assignment of work to sworn officers is susceptible to being viewed as an item concerning wages, hours and conditions of employment. The Article 5 definition of a grievance is, then, broad enough to incorporate the dispute posed here.

More significantly, the final sentence of Article 1 is sufficiently broad and unclear to pose the grievance's allegations. The grievance filed by the Association questions the application of Articles 1 and 2 to the duties assigned to the occupants of the Control Module/Booking Clerk position. The final sentence of the final paragraph of Article 1 broadly alludes to situations "when the nature or amount of work changes." The Association apparently argues that there has been no such change warranting the loss of work formerly performed by Association represented employes. The Article 5 definition of a grievance is broad enough to cover this type of dispute, even if the definition is restricted to "alleged violations of this Agreement." The Association, contrary to the County, thus believes that the final paragraph of Article 1 limits the circumstances in which the County can assign work to non-unit employes. The Association's citation of Article 2 does not need to be separately addressed. That provision reserves to the County rights not "expressly abridged" by the agreement. Article 2 thus neither adds to, nor detracts from, the conclusion that Article 1 is broad enough to incorporate the parties' dispute.

In sum, the Article 5 definition of a grievance does "cover the grievance on its face."

The more difficult issue is whether the second element of the Jefferson analysis is applicable. The first sentence of the final paragraph of Article 1 restricts the article "to employees and not to work." The County forcefully argues that this provision, as underscored by the admonition of the introduction to the following sentence, grant it the right the Association seeks to interfere with through the grievance. This argument has persuasive force. The force of that argument is, however, its merit as a matter of contract interpretation, not its relevance to the Jefferson analysis. The sentences do not "specifically exclude" from arbitration a dispute regarding the assignment of "unit work" to non-unit employes. Rather, the sentences caution an interpreter of the article against implying rights to work based on the unit description: "This recognition clause shall be construed to apply to employees and not to work." The reference to "construed" directs the provision

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5/ Jt. School Dist. No. 10 v. Jefferson Ed. Asso., 78 Wis.2d 94, 111 (1977).

6/ Ibid., at 113.

to the interpretation of the agreement. Article 5 makes the interpreter of the agreement an arbitrator, not an examiner. That the final paragraph may be "construed" to dictate that the County has the authority to assign the duties at issue here to non-unit personnel does not mean it specifically excludes such disputes from arbitration. To accept the County's position requires an interpretation of the cited reference and the sentence which follows it. The agreement does not, then, specifically exclude the dispute from arbitration.

Thus, the second element of the Jefferson analysis is not applicable. Because there is no agreement provision specifically excluding the dispute from arbitration, and because the arbitration clause is broad enough to cover the grievance on its face, the dispute must be addressed by an arbitrator.

Before closing, it is necessary to more specifically apply these conclusions to the arguments of the parties. The County has noted that the creation of positions is its right, and is a permissive subject of bargaining. Neither point is, however, determinative here. Even if Articles 1 and 2 contain permissive elements, their inclusion in a collective bargaining agreement makes them enforceable in arbitration. The permissive/mandatory nature of a contract proposal is relevant only to determining whether or not a party can be statutorily compelled to bargain it. Once incorporated into a collective bargaining agreement, rights and duties become enforceable without regard to their mandatory or permissive nature.

The County persuasively notes that the parties' dispute may have implications resolvable through a unit clarification. Whatever those implications may be, the issue posed here is not amenable to resolution through that process. The Association claims Articles 1 and 2 limit the County's ability to assign duties once performed by sworn officers to employes in the Control Module/Booking Clerk position. The Commission, in a unit clarification proceeding is without authority to reach that issue:

> (A) unit clarification ruling by the commission is not an adjudication of the substantive provisions of a collective bargaining agreement. A unit clarification merely clarifies and/or determines whether certain classifications are included in the existing collective bargaining unit. 7/

This is the point underlying the Commission's dismissal of the County's petition for a declaratory ruling. 8/ Whether non-sworn positions should be included in a unit of sworn officers does not address whether the Association and the County agreed to assign certain duties to sworn officers.

That the County's actions may not properly be characterizable as a sub-contract does not affect the Jefferson analysis. This restates the interpretive problem posed for arbitration. Whether the assignment of duties formerly assigned to sworn officers to occupants of the Control Module/Booking Clerk position constitutes a sub-contract and whether Articles 1 and 2 grant or limit that right is the issue the arbitrator must address.

The Association correctly notes that the merits of the grievance are not posed here. Articles 1 and 2 may well have to be read by the arbitrator as the

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7/ Milwaukee Board of School Directors, Dec. No. 14614-B (WERC, 2/77) at 4.

8/ See Winnebago County, Dec. No. 27669 (WERC, 5/93) at 5.

County asserts. This conclusion is, however, reserved under Article 5 to the arbitrator.

The Association apparently reads AT&T to require submission of the arbitrability dispute to the arbitrator. Neither AT&T nor Jefferson will support this assertion. Each requires a court, or in this case the Commission, to determine if the parties have agreed to submit the dispute at issue to arbitration. 9/ Standing alone, the reference of Article 5 to the binding nature of an arbitration decision "except for judicial review" does not dictate the conclusion that the parties agreed to let the arbitrator determine arbitrability issues.

The pending appeal of the interest arbitration which produced the 1991-92 labor agreement has no demonstrated impact here. The parties agree that none of the provisions addressed here is the focus of the appeal.

The Order entered above does not require extensive discussion. The Commission appointed an arbitrator before the County lodged its objection to the arbitrability of the grievance. The Order entered above requires the County to cease and desist from refusing to schedule hearing in the matter, and to submit the grievance to arbitration.

9/ See Jefferson 78 Wis.2d at 101, AT&T 121 LRRM at 3331.

The Association's request for further relief is not persuasive on this record. The Association is understandably concerned about the time taken to get this matter to arbitration. This concern, however, reflects not just the intransigence of the County but also the subtle nature of the arbitrability determination in this case. Whether the final paragraph of Article 1 "specifically excludes" this grievance from arbitration is a finer point than the Association's request for further relief acknowledges.

Dated at Madison, Wisconsin, this 23rd day of March, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner