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-B

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, The Labor Association of Wiscon 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

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND AFFIRMING AND MODIFYING EXAMINER'S ORDER

On March 23, 1994, Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order in the above matter wherein he concluded Respondent Winnebago County had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by refusing to arbitrate a grievance. He ordered the County to participate in the arbitration of the grievance.

On April 12, 1994, Respondent County timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received May 31, 1994.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

A. Examiner's Findings of Fact and Conclusions of Law are affirmed.

B. Examiner's Order is affirmed but modified as follows:

2. Take the following affirmative action which the Wisconsin Employment Relations Commission 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. Post the Notice attached hereto as Appendix "A" in conspicuous places in the workplace. The notice shall be signed by the representative from the County and shall remain posted for a period of 30 days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

c. Notify the Wisconsin Employment Relations Commission in writing within twenty days of the date of this Order as to the action the County has taken to comply with this Order.

Given under our hands and seal at the City of Madison, Wisconsin this 1st day of August, 1994.

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

(Footnote 1/ appears on the next page.)

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the 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 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

> (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.
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> . . .
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> (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.

APPENDIX A

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employes that:

> WE WILL NOT violate Sec. 111.70(3)(a)5, of the Municipal Employment Relations Act by refusing to participate in the arbitration of grievances which raise contractual issues not specifically excluded from the contractual arbitration process.
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> WE WILL participate with the Winnebago County Sheriff's Professional Police Association in the arbitration of the Control Module/Booking Clerk grievance.

WINNEBAGO COUNTY

By ________________________________

Dated this _________________ day of ________________, 1994.

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

WINNEBAGO COUNTY

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING AND MODIFYING EXAMINER'S ORDER

DISCUSSION

The issue before the Examiner was whether the County was improperly refusing to arbitrate a grievance and thereby violating Sec. 111.70(3)(a)5, Stats.

The Examiner analyzed the matter as follows:

> 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:
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> > The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 5/
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> 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/

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).

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

6/ Ibid., at 113.

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 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 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

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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.

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.

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

On review, as it did before the Examiner, the County argues that the contract provisions in question cannot reasonably be interpreted in a manner which will sustain the grievance. A grievance arbitrator may find the County to be correct. However, as the Examiner pointed out, the merits of the grievance are not at issue in this proceeding. What is at issue is whether the County has contractually obligated itself to have a grievance arbitrator decide if the contract has been violated. 2/ Because the Examiner exhaustively and correctly applied the appropriate analysis to the parties' dispute, we need not comment further. 3/

2/ The County correctly notes that in City of Appleton, Dec. No. 18171-A (WERC, 1/82), the Commission interpreted a recognition clause in a manner which can be viewed as supportive of the County's position on the merits of this grievance. However, the Commission, in Appleton, was not determining the merits of a grievance, not the question of whether the employer had improperly refused to proceed to arbitration.

3/ See Northwestern Mutual Life Insurance Company, Dec. No. 22366-B (WERC, 7/86) for an exhaustive analysis of applicable law. In Northwestern Mutual, we concluded that the employer was obligated to arbitrate some but not all of the grievance claims at issue.

Given the foregoing, we have affirmed the Examiner's Findings of Fact and Conclusions of Law. We have modified his Order to include the standard remedial requirement that the County post a notice to advise employes that it will proceed to arbitration. 4/

Dated at Madison, Wisconsin this 1st day of August, 1994.

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

4/ We also deny the Association's request for attorney's fees and costs. The County's position in this litigation does not meet the requisite extraordinary bad faith or frivolous standard. See, Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90).