

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE COUNTY DEPUTY
SHERIFF'S ASSOCIATION,

Complainant,

vs.

RACINE COUNTY,

Respondent.

Case 160
No. 52837 MP-3050
Decision No. 28498-A

Appearances:

Hanson, Gasiorkiewicz & Weber, S.C., Attorneys at Law, by Mr. Robert Weber,
514 Wisconsin Avenue, P. O. Box 1875, Racine, Wisconsin 53401-1875, appearing
on behalf of Racine County Deputy Sheriff's Association.

Long & Halsey Associates, Inc., by Mr. Victor Long, 8338 Corporate Drive, Suite 500,
Racine, Wisconsin 53406, appearing on behalf of Racine County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Racine County Deputy Sheriff's Association filed a complaint with the Wisconsin Employment Relations Commission on June 27, 1995, alleging that Racine County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 5 of the Municipal Employment Relations Act. On August 24, 1995, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. A hearing was held on October 26, 1995, in Racine, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. Afterwards, the parties filed briefs whereupon the record was closed December 6, 1995. The Examiner, having considered the evidence and the arguments of counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

No. 28498-A

1. Racine County Deputy Sheriff's Association, hereinafter referred to as the Association, is a labor organization with its mailing address c/o Karl Goetzke, 400 North Water, Waterford, Wisconsin 53185. The Association is the certified exclusive collective bargaining representative for all regular deputy sheriffs in Racine County, excluding the sheriff, chief deputy, captains, lieutenants, sergeants, jail corporals and civilian employees.

2. Racine County, hereinafter referred to as the County, is a municipal employer with its offices located at 730 Wisconsin Avenue, Racine, Wisconsin 53403.

3. The Association and the County have been parties to a series of collective bargaining agreements. The parties' most recent agreement covered 1994 and 1995. That agreement contained, among its provisions, the following:

ARTICLE I RECOGNITION

1.01 Racine County recognizes the Association as the sole and exclusive bargaining representative for all regular Deputy Sheriffs in the Sheriff's Department, Racine County, Wisconsin, excluding the Sheriff, Chief Deputy, Captains, Lieutenants, Sergeants, Jail Corporals, and civilian employees.

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ARTICLE VI PROMOTIONS

6.01 The County agrees that wherever practical, keeping the good of the Department in mind, promotions to higher positions in the bargaining unit shall be made from within the unit. Promotions shall be made on the basis of promotional examinations.

6.02 Promotional examinations shall consist of a written test and an oral interview evaluation. The County shall administer one exam for the following promotional positions: All Investigators, D.A. Liaison, and the Special Investigative Unit. This will occur upon the expiration of the first existing promotional list. The County will maintain a continuing eligibility list which will be updated every 24 months.

After January 1, 1994, Deputy Sheriffs who are promoted into the previous classifications of detective, juvenile investigator or

narcotics investigator (Metro) shall be known as investigators and subject to assignment within the three foregoing areas. The special investigative unit shall remain a separate unit.

All individuals holding a particular classification as of December 31, 1993 shall be grandfathered for purposes of exercising shift and vacation picks, work assignments and days off, according to past practice.

Individuals currently holding a particular classification may, on a voluntary basis, accept a voluntary assignment in another classification, but will thereafter lose their grandfather protection outlined above.

6.03 The written test score in a promotional job examination will be given a sixty percent (60%) weight and the oral interview examination will be given a forty percent (40%) weight.

6.04 Oral interview examinations will be conducted after the written test scores are received. The median score of all candidates taking the written examination for a specific position will determine the passing grade for eligibility to take the oral examination. If this passing median grade fails to provide enough candidates for the Civil Service Commission to certify three (3) names to the Sheriff for each promotional position, then the Commission may allow the next highest scoring candidate(s) on the written test to take the oral examination until enough candidates have passed both examinations which will enable the Civil Service Commission to certify three (3) eligible candidates for a position.

6.05 The results of the written test scores for each examination will be held in strict confidence. Written test scores will be sent directly from the testing agency McCann and Associates, to the Judge of Circuit Court Branch VIII, or in his/her absence, another Judge who is mutually acceptable to the parties. The Judge will notify the Civil Service Commission as to the candidates who have passed the written test.

6.06 A list of outside experts who will act as oral interview examination panelists will be developed by the Civil Service Commission, or the Commission's designee. Association representatives will review the listing of potential oral interview panelists. If the Association representatives raise an objection to a

particular panelist(s) being included on the listing, such potential panelist(s) will be stricken from the listing. In the event new potential panelists must be added to the listing, such names will be submitted to Association representatives for their consideration. Once selected, the same oral examination panel will interview all eligible candidates for a specific promotional position.

6.07 Deputies who apply for a posted promotional position and then fail to show for the written test examination will be required to reimburse the County for the amount charged by the testing agency for such examination. Those deputies whose absence is excusable under the guidelines as set forth by the Civil Service Commission will not be required to reimburse the County for the cost of the examination.

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ARTICLE XX GRIEVANCE PROCEDURE

20.01 A grievance is a difference of opinion between a Deputy or Deputies and the Management, or between the Association and the Management, concerning the meaning and application of the terms of this Agreement. It is agreed that grievances should be filed promptly and therefore any grievance must be presented within twenty-one (21) days after the known occurrence of the event giving rise to the grievance.

20.02 The following procedure shall be used for the adjustment of grievances:

STEP 1 Any grievance arising in the bargaining unit shall be reduced to writing and presented to the sheriff or his/her designee by the Deputy affected and his/her Association representative. A meeting between the Sheriff or his/her designee, the grievant, and the grievance committee representative will be held within five (5) working days from the date of the presentation of the written grievance. The Sheriff or his/her designee shall give a written answer to the grievance within five (5) working days from the date of the meeting.

STEP 2 If the grievance is not satisfactorily resolved

in Step 1 above, the Association may appeal the grievance further to the Labor Negotiator. Such an appeal must be made in writing within five (5) working days of the date of receipt of the written answer in Step 2 above. A meeting will then be held between the parties in an attempt to resolve the grievance. Such a meeting will be held within five (5) working days of the date of appeal of the

grievance. The Labor Negotiator shall give a written answer to the grievance within five (5) working days from the day of the meeting.

STEP 3 If the grievance is not satisfactorily resolved in Step 2 above, the Union may appeal the grievance further to the Personnel & Community Services Committee. Such an appeal must be made within seven (7) working days of the date of receipt of the written answer in Step 2 above. A meeting will then be held between the parties in an attempt to resolve the grievance. Such a meeting will be held within fifteen (15) working days of the date of appeal of the grievance. The Personnel & Community Service Committee shall give a written answer to the grievance within fifteen (15) working days from the date of the meeting.

STEP 4 If the answer of the Personnel & Community Services Committee still does not satisfactorily resolve the grievance, prior to the Union appealing the grievance to arbitration, the Union shall within fifteen (15) days following receipt of the answer from the Personnel & Community Services Committee request the WERC to designate Steve Schoenfeld of its staff to serve as a mediator. Such request shall be identified to the WERC as a joint request. If the WERC does not designate Steve Schoenfeld as the mediator, the parties shall then agree on an alternate and joint request shall be filed with the WERC requesting that staff person.

STEP 5 If Step 4 set forth above does not satisfactorily resolve the grievance, the Union may appeal the grievance to further arbitration. Such intent by the Union to arbitrate the grievance must be filed with the Labor Negotiator no later than twenty (20) days following the date of the WERC mediation service.

20.03 If a grievance is not answered within the time limits specified at any step of the procedure, the grievance will automatically advance to the next step. However, the parties may extend the time limits contained in this procedure by mutual agreement.

20.04 The arbitrator shall be selected from a list of five (5) names obtained from the Wisconsin Employment Relations Commission (WERC), each party alternately striking names until there is but one left.

20.05 The decision of the Arbitrator shall be binding upon the parties. The costs of the Arbitrator shall be shared equally by the parties.

20.06 Any Deputy who attends any of the grievance meetings, set forth above, excluding arbitration proceedings, during his/her normal working hours shall receive pay therefore at his/her straight time rate of pay.

20.07 The Association may file a policy grievance on behalf of a group of Deputies or where a policy is affected.

4. The Command Staff Association is the recognized exclusive bargaining representative for the command staff in the Racine County Sheriff's Department. The positions in this unit are chief deputy, captain, lieutenant, sergeant and jail supervisor (corporal). The position of corporal has been included in the command staff bargaining unit since January 1, 1990. Prior to that the position of corporal was in the Association's bargaining unit.

5. The County recently enacted an ordinance which established eligibility requirements for promotion to command positions in the Sheriff's Department. The ordinance provides as follows:

Sec. 17-61. Same-Eligibility.

(a) Those eligible for promotion shall be limited as follows:

- (1) *Chief Deputy.* Any deputy sheriff in the sheriff's department shall be permitted to take the examination for chief deputy provided he has at least ten (10) years of continuous service with the Sheriff's Department from date of hire at least five (5) years of which shall have been in a supervisory capacity. Effective March 1, 1997, any candidate for chief deputy shall also have a Bachelors Degree in a field

compatible with law enforcement.

- (2) *Captain.* To take the examination for promotion to captain, the candidate must have not less than seven (7) years of continuous service with the sheriff's department from his date of hire. Effective March 1, 1997, any candidate for captain shall also have a Bachelors Degree in a field compatible with law enforcement.
- (3) *Lieutenant.* To take the examination for promotion to lieutenant, the candidate must not have less than five (5) years of continuous service with the sheriff's department from his date of hire. Effective March 1, 1997, any candidate for lieutenant shall also have a Bachelors Degree in a field compatible with law enforcement.
- (4) *Sergeant.* To take the examination for promotion to sergeant, the candidate must have not less than two (2) years of continuous service with the sheriff's department from his date of hire. Effective March 1, 1997, any candidate for sergeant shall also have a Bachelors Degree in a field compatible with law enforcement.
- (5) *Corporal.* To take the examination for promotion to corporal, the candidate must have not less than two (2) years of continuous service with the sheriff's department from his date of hire. Effective March 1, 1995, any candidate for corporal shall also have an Associate Degree in a field compatible with law enforcement of sixty (60) credits or more from a fully accredited college or university leading to a Bachelor's Degree in a field compatible with law enforcement.

(b) The promotional eligibility list for corporal established prior to March 1, 1995 with an expiration date after March 1, 1995 will remain in effect after that date; however, candidates that have not met the educational requirements for the position of corporal, will be removed from the eligibility list as of

March 1, 1995. The promotional eligibility lists for the positions of sergeant and above established prior to March 1, 1997 with an expiration date after March 1, 1997 will remain in effect after that

date; however, candidates that do not meet the educational requirements for the positions of sergeant and above will be removed from the appropriate eligibility list as of March 1, 1997.

Individuals who are promoted to the rank of corporal or above after March 1, 1993 must meet the appropriate specified educational requirements by the specified date, which for corporals is March 1, 1995 and which for sergeant and above is March 1, 1997. Individuals who are promoted after March 1, 1993 who fail to meet the appropriate specified educational requirements by the date indicated, shall be reduced in rank to deputy and the resulting command staff vacancy shall be filled according to county ordinance.

All the positions referenced in this ordinance (i.e. chief deputy, captain, lieutenant, sergeant and corporal) are excluded from the bargaining unit represented by the Association.

6. After the above-noted ordinance was enacted, County Personnel Director Ken Adams sent the following memo to Sheriff William McReynolds concerning same:

Please review all current command staff members for compliance with the above-referenced ordinance cite. If an individual is not in compliance, that individual must be removed from the command position. When the above-captioned codes were enacted, the intent was to raise the educational standards required to fill designated positions. In every discussion concerning the education requirements, it was implicit in the discussion that the credits would be earned at an accredited institution.

Credits granted by institutions of higher learning which are applied towards the obtainment of a degree, which are earned based on life experience, military service, or other such activities, are not viewed as being earned credits, but rather a waiver of those credits being necessary for the obtainment of a degree.

7. One result of the above-noted memo was that some unidentified individuals in command positions were demoted to positions in the Association's bargaining unit. Another result (of the memo) was that some unidentified deputy sheriffs in the Association's bargaining unit who wanted to take the written and oral examinations for the entry-level command position of corporal

were denied permission to do so because as part of their overall qualifications, they utilized life experience and/or veterans' credits.

8. On March 10, 1995, the Association filed the following grievance concerning the matters referenced in Finding of Fact 7:

CONTRACT VIOLATION (SITE ARTICLE, PAST PRACTICE, ETC.)

County Ordinance 17-61(A)(5) and 17-61(B). The County has unreasonably applied the new ordinance to individuals who had been promoted prior to its enactment, and has announced its intention to unreasonably apply the ordinance to individuals who are currently eligible for promotion. The County has interpreted the ordinance to exclude certain earned educational credits, which are not properly excluded under the clear and unambiguous language of the ordinance.

DESCRIBE GRIEVANCE (BE SPECIFIC AS TO DATE, TIME, LOCATION,)

The County's arbitrary and capricious application and interpretation of the attached ordinance violates its general management rights, interferes with the promotional process set out in Article 6 of the collective bargaining agreement and constitutes a unilateral change in the past practice of the Department and of the working conditions of deputies. The demotion of individuals into the bargaining unit also interferes with the rights of other, less senior deputies, to exercise their transfer rights and will interfere with their ability to exercise shift and assignment picks at the annual posting.

The County's actions have also interfered with the property rights of individuals, without affording them due process, in violation of the United States and State of Wisconsin Constitution rights which supersede any other management rights of the County.

RELIEF SOUGHT

The Association is requesting the immediate return of demoted personnel to the command unit, a declaratory ruling regarding the rights of eligible applicants for promotional positions, and make-

whole relief for everyone who has been adversely affected by the County's actions up to the time this matter is resolved.

The Sheriff subsequently denied the grievance on the grounds that the underlying issue (which he characterized as involving the County ordinance establishing credit requirements for promotion to supervisory positions and the County's interpretation of same) was beyond the scope of his authority.

9. On April 4, 1995, County representative Victor Long responded to the grievance as follows:

The Association is grieving the educational credit requirements of County Ordinance 17-61 and the County's interpretation regarding the validity of some of the credits awarded for life experience.

It is the County's position that the Deputy Sheriffs Association does not have standing to grieve the qualifications for a position that is not in the bargaining unit. Ordinance 17-61 deals with Command Staff positions that are specifically excluded in Article I of the contract. Therefore, the response to this grievance is that it deals with a matter that does not constitute a valid grievance under the contract.

However, the County does recognize that the Association has legitimate concern regarding the process for placing these individuals back into positions covered by the contract. The County remains willing to discuss and bargain over this aspect of the grievance.

10. On April 24, 1995, County representative Long wrote Association representative John Swiencicki about the grievance:

Ken Adams has contacted me regarding Association grievance 95-02. Apparently there is some confusion regarding the response (copy enclosed. (sic) The County's position is that this does not constitute a valid grievance, and therefore the County will not process this grievance any further. It is not on the Personnel Committee agenda and will not be put before the Committee.

Furthermore, the County will not participate in the selection of an arbitrator, should the Association attempt to pursue this matter further.

As stated in the grievance response, the County remains willing to bargain the issue of the method for returning Command Staff members to Association positions.

If you have any questions regarding the County's position in this matter, please contact me.

11. On May 4, 1995, the Association filed for an arbitration panel with the Wisconsin Employment Relations Commission. On May 23, 1995, the Commission forwarded a list of arbitrators to the parties. The County has refused to proceed to arbitration on the grievance noted in Finding of Fact 8 on the basis that the matter is not arbitrable.

12. Grievance 95-02, which involves the qualifications of the position of corporal and the County's interpretation of County Ordinance 17-61, does not raise a claim that comes within the definition of a grievance under Sec. 20.01 of the parties' collective bargaining agreement. Additionally, grievance 95-02 deals with a command position (i.e. corporal) which is outside the Association's bargaining unit.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

Racine County's refusal to arbitrate grievance 95-02 did not violate Sec. 111.70(3)(a)4 or 5, Stats., because that grievance is not arbitrable under the terms of the parties' collective bargaining agreement.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the complaint filed in this matter is dismissed in its entirety.

Dated at Madison, Wisconsin, this 20th day of February, 1996.

1/ See footnote on Page 12.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

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

Section 111.07(5), Stats.

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

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

RACINE COUNTY (SHERIFF'S DEPARTMENT)

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint initiating these proceedings, the Association alleged that the County violated Sec. 111.70(3)(a)4 and 5, Stats., by its refusal to proceed to arbitration on grievance 95-02. The County's answer admitted that it refused to arbitrate that grievance, but denied that the grievance was arbitrable.

POSITIONS OF THE PARTIES

Association's Position

The Association's position is that grievance 95-02 is arbitrable. In its view, the contractual arbitration clause is susceptible of an interpretation that covers the asserted dispute. The Association notes at the outset that Article 6.01 of the parties' collective bargaining agreement (i.e. the promotion provision) provides for promotion from within the bargaining unit and sets up a testing procedure for promotions. Additionally, it avers that the Employer has a long-standing past practice (both before and after corporals were removed from the bargaining unit) of promoting from within to command positions in the department such as corporal. Next, the Association submits that the promotional procedure in the contract (Article VI) and the command promotional procedure contained in County Ordinance 17-61 can be harmonized since they are almost identical. That said, the Association then asserts that County Ordinance 17-61 goes further than the contract language concerning promotions. According to the Association, that ordinance extends the rights of sheriff deputies to command positions and affords them express protections, and at least by implication, eligibility protection in all promotional positions (which of course would include the position of corporal). Next, the Association alleges that the County is interpreting and applying County Ordinance 17-61 (a) (5) in an arbitrary and capricious fashion by excluding deputy sheriffs from promotional opportunities to corporal by not counting life experience and veterans credits. The Association contends that the County's actions herein violate the previously referenced past practice of promoting deputies to entry level command positions. The Association asserts that the County's interpretation of its own ordinance has resulted in deputies not being permitted to take promotional examinations which it believes are guaranteed under that same County ordinance. Finally, the Association emphasizes that its grievance challenges the County's interpretation and application of Ordinance 17-61 (a) (5) -- not the ordinance itself. The Association submits that its interpretation of that ordinance (i.e. that the ordinance could reasonably be construed to permit deputies with 60 credits from an accredited institution to take the exams for corporal -- regardless of what those credits consist of -- as long as they are granted by the institution and lead to a degree in a field compatible with law enforcement) is arguably valid. For these reasons, the Association alleges, the claim referenced in grievance 95-02 is covered by the contract and arbitration is

therefore required by the terms of the agreement.

County's Position

The County's position is that grievance 95-02 is not arbitrable. It argues that in order to meet the test of arbitrability, the grievance must state a claim which is governed by the terms of the contract. The County asserts that grievance 95-02 does not meet this test for the following reasons. First, the County characterizes that grievance as dealing with the position of corporal, specifically the qualifications for that position. The County avers that corporals are excluded from the bargaining unit represented by the Association and are included in the bargaining unit represented by the Command Staff Association. The County contends that since the instant grievance involves a position which is outside the scope of the Association's bargaining unit (i.e. corporal), the Association has no right (or standing) to arbitrate issues pertaining to promotions outside its unit. The County acknowledges in this regard that it has a policy of promoting to command positions (such as corporal) from positions in the Association's bargaining unit. However, the County asserts that just because it has chosen to promote to command positions from within does not give the Association jurisdiction to grieve the qualifications for positions outside its (i.e. the Association's) bargaining unit. Next, the County notes that the contractual grievance procedure limits grievances to only those matters involving "the meaning and application of the terms of this Agreement." The County argues that the instant grievance refers on its face to something outside the contract, namely County Ordinance 17-61 and the County's interpretation of same. According to the County, this puts the subject matter of grievance 95-02 outside the contractual definition of a "grievance" and makes it not arbitrable. Finally, with regard to the matter of individuals being demoted from command positions back into the Association's bargaining unit, the County specifically notes that it has offered to bargain the impact of same with the Association and that the Association admitted same at the hearing. In its view, this issue is now moot. The County therefore asks that the complaint be dismissed.

DISCUSSION

The issue presented in this case is whether the grievance is arbitrable. The Commission has the authority under Sec. 111.70(3)(a)5, Stats., to determine alleged municipal employer violations of "an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement . . ." The Commission has enforced contractual agreements to arbitrate disputes regarding the interpretation of the contract, and where necessary, will address disputes regarding whether a particular grievance falls within the scope of an agreement to

arbitrate. 2/

2/ The Commission first acknowledged its adherence to these policies in the administration of the Municipal Employment Relations Act in Oostburg Joint School District No. 14, Dec. No. 11196-A, B, 11/72, 12/73. The Commission had consistently applied the same policy for many years in the administration of the equivalent provisions contained in the Wisconsin Employment Peace Act. See, for example, Dunphy Boat Corporation, Dec. No. 3588 (WERB, 1953).

The law governing a Commission determination of whether a particular grievance falls within the scope of a contractual arbitration clause is ultimately rooted in the Steelworkers Trilogy. 3/ The Wisconsin Supreme Court adopted the principles of the Steelworkers Trilogy in Dehnart v. Waukesha Brewing Co., Inc., 17 Wis.2d 44 (1962). Later, in Jt. School Dist. No. 10 v. Jefferson Education Association, 78 Wis.2d 94 (1977), the Court applied the law enunciated in the Steelworkers Trilogy to the Municipal Employment Relations Act. In that case the Court held that a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. The Court further held that in determining arbitrability, the arbitration agreement enforcement forum'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." 4/ The Commission has held that a party has a right to proceed to arbitration when it makes a claim which on its face is governed by the collective bargaining agreement. 5/

Applying those principles herein, the question before the Examiner is not whether the grievance has merit, but whether it (the grievance) is arbitrable. As just noted, the focus of inquiry in determining arbitrability is whether the parties' arbitration clause is susceptible of an interpretation that covers the asserted dispute. 6/

Based on the following rationale, the Examiner finds that the parties' arbitration clause is not susceptible of an interpretation that covers the matter referenced in grievance 95-02. My analysis begins with a review of the grievance itself. It provides as follows:

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

4/ Jt. School District No. 10, at p. 111.

5/ State of Wisconsin, Dec. No. 18012-C (WERC, 11/81).

6/ Jt. School District No. 10, at p. 112.

The County has unreasonably applied the new ordinance to individuals who had been promoted prior to its enactment, and has announced its intention to unreasonably apply the ordinance to individuals who are currently eligible for promotion. The County has interpreted the ordinance to exclude certain earned educational credits, which are not properly excluded under the clear and unambiguous language of the ordinance.

The reference therein to "ordinance" refers to County Ordinance 17-61. On its face, this grievance challenges the County's interpretation of that ordinance. Lest there be any question about it, the Association's brief summarizes their grievance as follows:

The Association grieved the County's arbitrary interpretation and application of the ordinance, alleging that the earned educational credits are not properly excluded under the terms of the ordinance.

The Association emphasizes that it is not challenging the County ordinance itself, but rather is challenging the County's interpretation and application of its own ordinance. In this case though it does not matter whether the Association is challenging the ordinance itself or the County's interpretation of same because neither is allowed by the parties' contractual grievance procedure. The following shows this. Article 20.01 defines a grievance as follows:

A grievance is a difference of opinion between a Deputy or Deputies and the Management, or between the Association and the Management, concerning the meaning and application of the terms of this Agreement.

By its express terms this provision limits grievances to just those matters involving "the terms of this Agreement." If the last part of the sentence were not included in the provision (i.e. the phrase "concerning the meaning and application of the terms of this Agreement"), a grievance would cover any "difference of opinion" between a deputy and management or the Association and management. However, the provision does not say that but narrowly limits the "difference of opinion" to just "the meaning and application of the terms of this Agreement." Under this provision then not all "difference(s) of opinion" can be processed through the grievance procedure including arbitration. Rather, only those "difference(s) of opinion" which involve "the meaning and application of the terms of this Agreement" can be. Here, grievance 95-02 does not involve a "difference of opinion" concerning "the meaning and application of the terms of this Agreement"; instead, it involves a "difference of opinion" concerning how the County is interpreting a County ordinance. The Association argues in this regard that the County ordinance in question gives bargaining unit members certain protections, one of which is eligibility protection for command positions (such as corporal). However, even if that is true, a review of the contract indicates that neither the County ordinance in question (i.e. 17-61) nor County ordinances in general are incorporated by reference into the parties' labor agreement. Since the labor agreement does not incorporate County ordinances by reference, they (i.e. County ordinances) are not subject to contractual guidelines or arbitral interpretation. It therefore follows then that grievance 95-02 is not covered by Article 20.01. Were the Examiner to find otherwise and hold that the Association could grieve a County ordinance, this would not be giving effect to that part of Article 20.01 which limits

grievances to just those matters involving "the meaning and application of the terms of this Agreement."

Next, the grievance in question can certainly be read to involve the qualifications for the position of corporal. That position though (i.e. corporal) is outside the Association's bargaining unit. In point of fact, the position of corporal is a named exclusion from the Association's bargaining unit (see Article 1.01 of the Association contract) and is a named inclusion in the bargaining unit represented by the Command Staff Association. Given the foregoing, the obvious question to be answered here is whether the Association can grieve (or arbitrate) promotional matters which relate to positions outside its bargaining unit. Article 6.01 (the promotion provision) specifically gives the Association the contractual right to grieve (or arbitrate) promotional matters which relate to positions in its bargaining unit. However, that provision does not give the Association the contractual right to grieve (or arbitrate) promotional matters which relate to positions outside of its bargaining unit. The following shows this. Article 6.01 specifically refers to "promotions to higher positions in the bargaining unit . . ." (emphasis added) This reference to "bargaining unit" refers to the Association's bargaining unit. Inasmuch as the Association is attempting in grievance 95-02 to apply Article 6.01 to a promotion outside of its bargaining unit, specifically to a position in the command staff bargaining unit, the Association's grievance is not arbitrable.

Since grievance 95-02 does not meet the contractual definition of a grievance, and since it deals with a command position which is outside the Association's bargaining unit, it follows that the County is not required to arbitrate that grievance. That being so, the County's refusal to arbitrate grievance 95-02 did not violate Sec. 111.70(3)(a)5, Stats.

Finally, in its complaint the Association also alleged that the County violated Sec. 111.70(3)(a)4 by refusing to bargain about the impact of individuals being demoted from command positions back into the Association's bargaining unit. At the hearing though the Association acknowledged that this was no longer an issue because the County had offered to bargain impact and the parties had made proposals about same. 7/ Given the foregoing, the alleged violation of Sec. 111.70(3)(a)4, Stats., is dismissed as well. Accordingly, the complaint has therefore been dismissed in its entirety.

Dated at Madison, Wisconsin, this 20th day of February, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

7/ Transcript, p. 9.