

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

KENOSHA COUNTY

Requesting a Declaratory Ruling  
Pursuant to Section 111.70(4)(b),  
Wis. Stats., Involving a Dispute  
Between Said Petitioner and the

KENOSHA COUNTY DEPUTY  
SHERIFF'S ASSOCIATION

Case 154  
No. 53203 DR(M)-569  
Decision No. 28640

Appearances:

Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400,  
Milwaukee, Wisconsin 53202-6613, by Mr. Mark L. Olson and Ms. Nancy L.  
Pirkey, for the County.

Hanson, Gasiorkiewicz & Weber, S.C., Attorneys at Law, 514 Wisconsin Avenue,  
Racine, Wisconsin 53403, by Mr. Robert K. Weber, for the Union.

ORDER DENYING MOTION TO DISMISS  
PETITION FOR DECLARATORY RULING

On October 6, 1995, Kenosha County filed a petition for declaratory ruling with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats. asking that the Commission determine whether certain portions of the Kenosha County Deputy Sheriff's Association final offer contained permissive or prohibited subjects of bargaining. On October 11, 1995, the Kenosha County Deputy Sheriff's Association filed a motion to dismiss the petition asserting that the County had not timely raised its objections to the Association's final offer.

The parties thereafter filed written argument in support of and in opposition to the motion, the last of which was received November 6, 1995.

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

No. 28640

## FINDINGS OF FACT

1. Kenosha County, herein the County, is a municipal employer having its principal office at 912 - 56th Street, Kenosha, Wisconsin 53140.

2. Kenosha County Deputy Sheriff's Association, herein the Association, is a labor organization having its principal offices at 1000 - 55th Street, Kenosha, Wisconsin 53140.

3. The Association is the collective bargaining representative for certain law enforcement employees employed in the County's Sheriff's Department.

4. The County and the Association were unable to reach an agreement on a successor to their 1992-1994 collective bargaining agreement. On December 30, 1994, the Association filed a petition to initiate interest arbitration pursuant to Sec. 111.77, Stats. The parties thereafter met with Commission Investigator Herman Torosian in an effort to reach a voluntary agreement. That effort proved unsuccessful and the Investigator directed the parties to submit final offers. The parties complied with the Investigator's request.

5. During the exchange of final offers, the Investigator sent the County the following letter dated September 13, 1995:

Mr. Frank Volpintesta  
Corporation Counsel  
Kenosha County  
Kenosha County Courthouse  
912 56th Street  
Kenosha, WI 53140-3747

Re: Kenosha County (Sheriff's Department)  
Case 143 No. 52750 MIA-1990

Dear Frank:

Enclosed is the Union's amended final offer in the above-entitled matter. If you wish to amend your final offer, please do so

by postmark dated no later than September 21, 1995.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Herman Torosian /s/  
Herman Torosian  
Investigator

cc - Mr. Robert K. Weber, Hanson, Gasiorkiewicz and Weber,  
S.C., Attorneys at Law

By letter dated September 19, 1995, which was received by the Investigator on September 21, 1995, the County responded as follows:

Mr. Herman Torosian  
Investigator  
W.E.R.C.  
P.O. Box 7870  
Madison, WI 53707-7870

Re: Kenosha County (Sheriff's Department)  
Case 143 No. 52750 MIA-1990

Dear Mr. Torosian:

In response to your correspondence of September 13, 1995, and in response to the latest union proposal dated September 7, 1995, please be advised that the County will not be making any changes to its last proposal.

Our last proposal reflects the second tentative agreement that was reached by the union's bargaining committee and the County. This was rejected in the same manner as the first tentative agreement was rejected.

If the County were to make any significant and substantive change from the pattern that was established with its other bargaining units, such an action would jeopardize at least some of those contracts which have a "me too" clause in them. We cannot, and we will not,

depart from the pattern that has been established with all of the other unions.

Consequently, it is my belief that we are at impasse and that this matter needs to be certified as such and referred for arbitration. Please forward a copy of our response to Mr. Weber at your earliest convenience.

I would like to personally thank you for your efforts and endeavors in assisting the parties.

Sincerely,

Frank Volpintesta /s/  
Frank Volpintesta  
Corporation Counsel

6. On September 26, 1995, the Investigator issued the following Notice of Close of Investigation and Advice to Commission:

NOTICE OF CLOSE OF INVESTIGATION  
AND ADVICE TO COMMISSION

Herman Torosian, having been appointed as an Investigator by the Wisconsin Employment Relations Commission pursuant to the provisions of Sec. 111.77(4)(b) of the Municipal Employment Relations Act (MERA) for the purpose of investigating an alleged impasse in the negotiations between the Kenosha County Deputy Sheriff's Association and Kenosha County concerning wages, hours and working conditions for the non-supervisory law enforcement personnel employed by said Municipal Employer and represented by said Labor Organization; and the Investigator having met with the parties on March 30 and June 26, 1995 in an effort to mediate the dispute and being satisfied that an impasse within the meaning of Sec. 111.77(3) of MERA exists with regard to the issues in dispute between said Municipal Employer and Labor Organization as outlined in their final offers attached hereto and marked Appendix "A" and Appendix "B" respectively; and that on said basis the Investigator has closed the investigation and recommends that the

Commission issue an Order requiring arbitration in the matter.

Dated at Madison, Wisconsin, this 26th day of September, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/  
Herman Torosian, Investigator

That same day, prior to the standard 4:30 p.m. closure of the Commission's offices, the following facsimile transmission addressed to the Investigator was received in the Commission's offices:

Herman Torosian  
Commissioner  
Wisconsin Employment Relations Commission  
P.O. Box 7870  
Madison, WI 53707-7870

**Re: Kenosha County (Sheriff's Department)  
Case 143 No. 52750 MIA-1990**

Dear Mr. Torosian:

We have recently been retained by Kenosha County to assist them in their negotiations with the Deputy Sheriff's Association. The purpose of this letter is to notify you that we believe that certain aspects of the expired collective bargaining agreement between Kenosha County and the Kenosha County Deputy Sheriff's Association are permissive/illegal subjects of bargaining. More specifically, in light of the Supreme Court's ruling in *Manitowoc County v. Local 986B*, 168 Wis. 2d 819, 484 N.W.2d 534 (1992), we assert that the current contract language at Section 9.1 - Seniority, Section 9.5 - Filling of Job Vacancies and Section 9.7 - Tours of Duty is permissive/illegal as it relates to duty assignments to the County's controlled substances unit. In addition, we believe that a side letter of agreement dated July 25, 1992, is also permissive/illegal as it requires the Sheriff to use seniority when making assignments to the controlled substances unit.

We will be filing a petition for declaratory ruling and

supporting documents as required under Wisc. Admin. Code ch. ERC 18. In the meantime, we would respectfully request that an impasse not be declared in these negotiations until a decision is reached on the question of whether the County has any obligation to negotiate over the above-cited contract language.

By copy of this letter, we are notifying the Association's attorney, Robb Weber, that we object to certain language and addenda to the contract as permissive/illegal subjects of bargaining. The County does not, by raising an objection to the current contract language, waive its right to file an appeal of Judge Flynn's ruling on the arbitrability of the grievance filed on January 14, 1993 nor does it waive its right to challenge the authority of Arbitrator Mawhinney to decide the merits of the January 14, 1993 grievance.

If you have this matter, please do not hesitate to contact me. Your assistance in this matter is greatly appreciated.

Very truly yours,

DAVIS & KUELTHAU, S.C.

Mark L. Olson /s/  
Mark L. Olson

7. On October 6, 1995, the County filed the instant petition for declaratory ruling.

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

#### CONCLUSION OF LAW

When a duty to bargain objection to the content of a final offer is received prior to 4:30 p.m. on the same day a Notice of Close of Investigation is issued by placement in the mail, the objection is timely filed.

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

#### ORDER



1. The Motion to Dismiss Petition for Declaratory Ruling is denied.
2. The investigation into the Association's petition for interest arbitration is reopened.
3. The parties are directed to immediately provide the Commission's General Counsel with their earliest available hearing dates.

Given under our hands and seal at the City of Madison, Wisconsin,  
this 24th day of January, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

James R. Meier /s/  
James R. Meier, Commissioner

KENOSHA COUNTY

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION  
TO DISMISS PETITION FOR DECLARATORY RULING

POSITIONS OF THE PARTIES

The Association

Citing ERC 32.11, the Association argues that the County's objection was untimely because it was not raised with the Investigator prior to the close of the investigation. The Association also contends that, in any event, filing an objection by facsimile transmission is not permitted under Commission rule.

Given the foregoing, the Association asks that the Commission dismiss the County's petition for declaratory ruling.

The County

The County argues that its objection was timely because it was received before the close of business on the day the Investigator closed the investigation. Citing ERC 10.08(4), the County argues that its objection "shall be deemed filed upon actual receipt at the place specified for such receipt before the close of business." Under such circumstances, the County argues that it met its obligation under ERC 32.11 to provide notice to the Commission's Investigator of its objection prior to the close of the investigation.

As to the Association's contention regarding the sufficiency of a facsimile transmission, the County contends that verbal notice would be sufficient to satisfy ERC 32.11 and thus that a facsimile transmission should also suffice.

Given the foregoing, the County asks that the Commission deny the Association's motion.

DISCUSSION

This dispute arises in the context of the interest arbitration provisions contained in Sec. 111.77, Stats. Neither that statute nor our administrative rules implementing that statute (ERC 30) provide any specific guidance as to the legal standard to be applied to this dispute. However, in City of Brookfield, Dec. No. 19944 (WERC, 9/82), we concluded that in a Sec. 111.77 interest arbitration proceeding, an objection that a proposal is not a mandatory subject of bargaining must be "raised. . . prior to the close of the informal investigation of the alleged impasse." Our holding in this regard makes the legal standard applied to "timeliness of objections" issues under interest arbitration petitions filed pursuant to Sec. 111.77, Stats. parallel to the standards established by

ERC 32 and 33 (and cited by the parties) for such disputes under interest arbitration pursuant to Sec. 111.70(4)(cm), Stats.

Given the foregoing, the question before us is whether the County's objection was "raised. . . prior the close of the informal investigation." We are satisfied that where, as here, the objection was received in the Investigator's offices prior to the end of the business day on which the Notice of Close of Investigation was issued by placement in the mail, 1/ the objection was timely filed under City of Brookfield.

The County is correct when it argues that any form of communication is generally sufficient to "raise" an objection. While an investigator is free to establish the precise means by which an initial objection can be raised, where, as here, no method is specified, a telephone call, a conversation, a facsimile transmission, telegram or letter are all available methods. Thus, the County's facsimile transmission was an appropriate means for the County to seek to communicate with the Investigator.

For the purposes of this decision, we presume that the Investigator did not become aware of the County's objection until after the Notice of Close of Investigation was placed in the mail. We make this presumption because had he been aware of the objection prior to issuance of the Notice, it would have been inappropriate for him to close the investigation under any interpretation of Brookfield (i.e., the objection would have been raised prior to the close of the investigation.) However, even conceding an actual sequence of events in which the objection did not reach the Investigator before the Notice was issued, we conclude that the objection was timely.

If the Brookfield test for timeliness were literally applied, our analysis in each dispute would focus on the question of the precise time during the day that the Notice of Close of Investigation was placed in the mail versus the timing of the receipt of the objection itself. We reject such an analysis because, in our view, the happenstance of the timing of such events on the same day ought not be the determining factor as to the important rights of parties to this dispute. Rather, we believe the better approach is to presume the Notice of Close was placed in the mail (and thereby issued) as of the end of our formal business day (4:30 p.m.) 2/ on the date the Notice

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1/ In School District No. 5, Franklin, Dec. No. 22211 (WERC, 12/84) the Commission held that an investigator's Notice was issued by placement in the mail or hand delivery.

2/ Such a presumption closely approximates the reality of the timing of the Commission's "mail" practice, although the precise time of when mail is placed in the postal box may vary

was issued, and to then determine whether any objection was received prior to 4:30 p.m. Such an approach provides parties with a fair and predictable test by which the timeliness of an objection can be determined and has the additional benefit of avoiding the need for an evidentiary hearing to determine when during the day the Notice was actually placed in the mail.

Where, as here, the objection was received prior to the close of business, the objection precedes the issuance of the Notice which closes the investigation, and thus is timely.

Given the foregoing, we have denied the motion to dismiss, and directed that the investigation be reopened.

Dated at Madison, Wisconsin this 24th day of January, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

James R. Meier /s/  
James R. Meier, Commissioner

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by 5-10 minutes each day.