STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of LaCROSSE COUNTY Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION	Case 146 No. 52775 DR(M)-563 Decision No. 28773

Appearances:

Mr. William A. Shepherd, Assistant Corporation Counsel, P.O. Box 2937, LaCrosse, Wisconsin 54602-2937, for the County.

Cullen, Weston, Pines & Bach, by Mr. Richard Thal, 20 North Carroll Street, Madison, Wisconsin 53703, for the Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On June 20, 1995, LaCrosse County filed a petition with the Wisconsin Employment Relations Commission requesting a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., regarding a dispute between the County and the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division regarding the County's duty to bargain with the Association over a retirement proposal. Efforts by the parties to resolve the dispute or to enter into a stipulation of facts proved unsuccessful. Hearing was ultimately held on November 10, 1995 before Examiner Peter G. Davis in LaCrosse, Wisconsin. The parties thereafter filed written argument, and the record was closed on March 15, 1996.

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

FINDINGS OF FACT

1. LaCrosse County, herein the County, is a municipal employer having its principal offices at 400 Fourth Street, LaCrosse, Wisconsin 54602.

2. Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, herein WPPA, is a labor organization having its principal offices at 7 North Pinckney Street, Madison, Wisconsin 53703.

3. WPPA is the exclusive collective bargaining representative for certain regular full-time and regular part-time jailers employed by the County.

4. During collective bargaining between the WPPA and the County, the Association made the following proposal:

> Effective January 1, 1996, the County shall enroll the Jailers in protective status. The county (sic) shall pay all the employees' duties contributions to the Wisconsin Retirement Fund except that portion contributable (sic) to protective status, which the employees shall pay.

5. The proposal set forth in Finding of Fact 4 primarily relates to wages.

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

CONCLUSIONS OF LAW

1. Although the proposal set forth in Finding of Fact 4 primarily relates to wages, said proposal irreconcilably conflicts with the statutory process through which an employe's status as a protective occupation participant is established under Chapter 40 of the Wisconsin Statutes and Chapter ETF 11 of the Wisconsin Administrative Code.

2. The proposal set forth in Finding of Fact 4 is a prohibited subject of bargaining.

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

DECLARATORY RULING 1/

LaCrosse County does not have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., with WPPA over the proposal set forth in Finding of Fact 4.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of June, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by 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.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

> (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.
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> (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.

LaCROSSE COUNTY

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

BACKGROUND

On December 28, 1989, the Wisconsin Employment Relations Commission issued a declaratory ruling decision involving these same parties concluding that the following WPPA proposal was a mandatory subject of bargaining:

> Effective January 1, 1990, the County shall pay the full amount of the established employer's and employee's contribution rates of Protective Service schedule for all deputies and jailers covered by this agreement.

In that decision, the Commission held:

> The disputed proposal seeks to improve the level of retirement benefits available to jailers and to have the County make all applicable contributions to the Public Employee Trust Fund. In essence, the proposal seeks to improve the level of deferred compensation which employe will be entitled to receive for providing the County with employment service. We have consistently held deferred compensation proposals to be primarily related to wages and thus to be mandatory subjects of bargaining. Green County, Dec. No. 21144 (WERC, 11/83) and City of Brookfield, Dec. No. 25517 (WERC, 6/88); aff'd CtApp II (11/89) Case 89-0345, publication recommended.
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> Here, the County urges us to depart from our general holdings as to deferred compensation proposals because it alleges: (1) Sec. 40.02(48), Stats. prohibits collective bargaining over the determination of whether employes can be protective occupation participants; and (2) the proposal impermissibly intrudes into management determinations regarding the duties of jailers. We do not find either of these County contentions to be persuasive.
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> As to the County's statutory contention, we would initially note that as a general matter, the authority of a municipal employer to take certain action does not necessarily remove that subject from the realm of collective bargaining. Thus, for instance, Sec.

59.15(2)(c), Stats. authorizes a county board to establish the level of employe compensation. However, as Milwaukee County v. District Council 48 makes clear, this statutory authorization does not preclude collective bargaining over wages. Having reviewed the statutes cited by the County, we conclude that Sec. 40.02(48), Stats. does not preclude collective bargaining over the WPPA proposal. Sec. 40.02(48) provides in pertinent part:

> (48) "Protective occupation participant" means any participant whose principal duties are determined by the participating employer, or by the departmental head in the case of a state employe, to involve active law enforcement or active fire suppression or prevention, provided the duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning.
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> (a) "Protective occupation participant" is deemed to include any participant whose name is certified to the fund as provided in s. 40.06(1)(d) and who is a conservation warden, conservation patrol boat captain, conservation patrol boat engineer, conservation pilot, conservation patrol officer, forest fire control assistant, member of the state patrol, state motor vehicle inspector (if hired prior to January 1, 1968), police officer, fire fighter, sheriff, undersheriff, deputy sheriff, county traffic police officer, state forest ranger, fire watcher employed by the Wisconsin veterans home, state correctional-psychiatric officer, excise tax investigator employed by the department of revenue, special criminal investigation agent in the department of justice, assistant or deputy fire marshal, or person employed under s. 61.66(1).
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> (b) Each determination of the status of a participant under this subsection shall include consideration, where applicable, of the following factors:
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> . . .

> 3. A "deputy sheriff" or a "county traffic police officer" is any officer or employe of a sheriff's office or county traffic department, except one whose principal duties are those of a telephone operator, clerk, stenographer, machinist or mechanic and whose functions do not clearly fall within the scope of active law enforcement even though such an employe is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active law enforcement. Deputy sheriff or county traffic police officer includes any person regularly employed and qualifying as a deputy sheriff or county traffic police officer, even if temporarily assigned to other duties.
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> . . .
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> (c) In s. 40.65, "protective occupation participant" means a participating employe who is a police officer, fire fighter, a person determined by a participating employer under sub. (48) (intro.) to be a protective occupation participant, county undersheriff, deputy sheriff, county traffic police officer, conservation warden, state forest ranger, field conservation employe of the department of natural resources who is subject to call for forest fire control or warden duty, member of the state traffic patrol, university of Wisconsin system full-time police officer, guard or any other employe whose principal duties are supervision and discipline of inmates at a state penal institution, excise tax investigator employed by the department of revenue, person employed under s. 61.66(1), or a special criminal investigation agent employed by the department of justice.

First, we conclude that there is no issue before us herein as to whether the duties of the jailer position meet the criteria established by Sec. 40.02(48)(intro.). This is so because Sec. 40.02(48)(c), Stats., establishes two basic methods by which an employe becomes eligible to be a protective occupation participant. One method

involves an employer determination that the principal duties of the employe meet the tests set forth in sub. (48) (intro.). The other method involves simply being employed in the capacities listed in (48)(c). "Deputy sheriff" is one of the listed occupations which are eligible for inclusion as a protective occupation participant. Sec. 40.02(48)(b)3, Stats. defines "deputy sheriff" in a manner which includes the jailer positions in question. Thus, we are satisfied that the jailers are eligible to be deemed protective occupation participants.

Given the foregoing, whatever role remains for the County to fulfill under Sec. 40.02(48), Stats. if the jailers are to become protective occupation participants appears to be a ministerial one. Fulfilling our obligation under Muskego-Norway Consolidated Joint School District No. 9 v. WERC, 35 Wis. 2d 540 (1967), to harmonize the provisions of the Municipal Employment Relations Act with other statutes, we find no conflict between the attempt by WPPA to use the collective bargaining process to seek protective occupation status for the jailers and Sec. 40.02(48), Stats. The WPPA proposal would simply require that the County exercise whatever role remains for it to play under Sec. 40.02(48), Stats. in a manner consistent with gaining protective status for the jailers. Like the statutory power to set compensation levels discussed in Milwaukee County, the County retains its statutory role but within any confines established by the collective bargaining agreement.

As to the County's contention that the WPPA proposal impermissibly intrudes into management's prerogatives regarding the duties to be assigned jailers, we concur with WPPA's assertion that the proposal has no impact upon any such management prerogatives. The County is not obligated to alter work assignments in any manner. Further, the Union proposal does not seek to limit or expand job assignments. We view the proposal as one which simply seeks to change the level of the retirement component of the overall compensation which jailers receive for performing their present duties.

Given the foregoing, we find that WPPA proposal to be primarily related to wages and thus a mandatory subject of bargaining.

The County appealed the Commission's decision, and on October 31, 1990, the

Commission's decision was affirmed in LaCrosse County Circuit Court. The County appealed the Circuit Court's decision. On June 18, 1992, the Court of Appeals, District IV (Judge Eich dissenting) reversed the Circuit Court's decision. The Court held as follows:

> SUNDBY, J. In this appeal, we decide that whether La Crosse County shall classify its jailers as protective occupation participants in the Wisconsin retirement system is not a mandatory subject of bargaining under sec. 111.70(1)(a), Stats. We conclude that classification of participating employees in the Wisconsin retirement system as protective occupation participants through collective bargaining is incompatible with the public employe trust fund law, ch. 40, Stats., except as specifically authorized by the legislature. We therefore reverse the order of the circuit court which affirmed a contrary declaratory ruling of the Wisconsin Employment Relations Commission (WERC).
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> BACKGROUND
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> In collective bargaining with the County for a 1989-1990 contract, the Wisconsin Professional Police Association (WPPA) made the following proposal:
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> > Effective January 1, 1990, the County shall pay the full amount of the established employer's and employee's contribution rates of Protective Service schedule for all deputies and jailers covered by this agreement.
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> To implement WPPA's proposal the County must classify its jailers as protective occupation participants, sec. 40.02(48)(a), Stats., and certify the names of such participants to the Department of Employe Trust Funds (DETF) pursuant to sec. 40.06(1)(d), Stats.
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> Section 40.02(48)(a), Stats., defines "protective occupation participant" to "mean[s] any participant whose principal duties are determined by the participating employer. . .to involve active law enforcement or active fire suppression or prevention, provided the duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning." It is undisputed that the County is a participating employer in the Wisconsin retirement system and that the County's jailers are participants.

Section 40.06(1)(d), Stats., requires that each participating employer notify DETF of the names of all participating employees classified as protective occupation participants. Section 40.02(48)(am), Stats., describes the notification process as certification. An employee may appeal the participating employer's failure or refusal to classify the employee as a protective occupation participant to DETF and the Employe Trust Funds Board (ETFB). Section 40.06(1)(e), Stats. DETF may review any such determination by the employer on its own initiative and appeal the determination to ETFB. Section 40.06(1)(em), Stats.

On August 1, 1989, the County petitioned WERC pursuant to sec. 111.70(4)(b), Stats., for a declaratory ruling that WPPA's proposal was not a mandatory subject of bargaining. WERC found that WPPA's proposal related primarily to wages and thus was a mandatory subject of bargaining under sec. 111.70(1)(a), Stats. The circuit court affirmed.

STANDARD OF REVIEW

WERC acknowledges that this appeal involves the relationship between the Municipal Employment Relations Act (MERA) and ch. 40, Stats., and thus we do not give weight to WERC's determination. ***City of Brookfield v. WERC***, 87 Wis. 2d 819, 826-27, 275 N.W.2d 723, 726-27 (1979). The interpretation and harmonization of ch. 40 and MERA is a judicial function. *See* ***id***. at 831, 275 N.W. 2d at 729 (court fulfilled "exclusive judicial role" when it interpreted and harmonized ch. 62, Stats., and what is now sec. 111.70(1)(a), Stats.).

I.

DUTY TO BARGAIN

Section 111.70(1)(a), Stats., imposes on the municipal employer the duty to bargain with the representative of its employees with respect to wages, hours and conditions of employment. However, the municipal employer is generally not required to bargain on subjects reserved to management and direction of the governmental unit. ***Id.*** The County argues that the right to determine whether the principal duties of its jailers involve active

law enforcement is an important management right which should be reserved to the County and the sheriff.

Section 111.70(1)(a), Stats., "necessarily presents certain tensions and difficulties in its application." ***West Bend Education Ass'n v. WERC***, 121 Wis. 2d 1, 8, 357 N.W. 2d 534, 538 (1984). These tensions generally arise when a proposal touches simultaneously upon wages, hours and conditions of employment and upon managerial decision making or public policy. ***Id.*** To resolve a conflict, the Wisconsin Supreme Court has adopted a "primarily related" standard. ***Id.*** This standard requires a balancing of the employees' interest in wages, hours and conditions of employment and the public employer's interest in management prerogatives or public policy. ***Id.*** at 9, 357 N.W. 2d at 538.

However, the balancing test assumes that the proposal is one with respect to which each party is free to bargain. The public employer is not free to bargain with respect to a proposal which would authorize a violation of public policy or a statute. ***Glendale Professional Policemen's Ass'n v. Glendale***, 83 Wis.2d 90, 106, 264 N.W.2d 594, 602 (1978); ***WERC v. Teamsters Local No. 563***, 75 Wis. 2d 602 612, 250 N.W. 2d 696, 701 (1977), *overruled on other grounds*. The same principle logically extends to a proposal which requires the public employer to fail to perform a duty imposed on it by statute or to perform that duty in a way contrary to the policy and purpose of the statute.

WPPA's proposal requires that the County neglect to perform its duty under sec. 40.02(48)(a), Stats., to determine whether its jailers qualify as protective occupation participants. We conclude that WPPA's proposal is contrary to the policy and purpose of the public employe trust fund law. In Part II, we examine the county's duty under sec. 40.02(48)(a) in the context of the policy and purpose of public employee trust fund law.

II.

PARTICIPATING EMPLOYER'S DUTY TO DETERMINE EMPLOYEES' STATUS

A.

WPPA contends that its proposal relates solely to the employees' deferred level of compensation which we have held is a mandatory subject of bargaining. ***City of Brookfield v. WERC***, 153 Wis. 2d 238, 242-43, 450 N.W. 2d 495, 497 (Ct. App. 1989) (***Brookfield* II**). WERC agrees. It concluded: "In essence, [WPPA's] proposal seeks to improve the level of deferred compensation which [an] employe will be entitled to receive for providing the County with employment service." WERC also relies on ***Brookfield II*.**

Brookfield II is inapposite. In that case, the union sought to bargain on its proposal that the city would provide group health benefits to employees who retired during the term of the collective bargaining agreement. The city was free to bargain on the union's proposal unconstrained by statute. Here, Sec. 40.02(48)(a), Stats., requires that the County determine whether its jailers qualify as protective occupation participants. The County lacks the power in a collective bargaining agreement or otherwise to make a final determination that its jailers are protective occupation participants; its decision is subject to review and appeal by DETF under sec. 40.06(1)(em), Stats.

We conclude that the duty imposed on the County to determine the status of participating employees in the Wisconsin retirement system is part of the legislative plan to ensure the integrity of the public employe trust fund. The legislature was aware that the treatment of "protectives" in early retirement and pension plans had led to actuarially unsound systems. *See* Report and Recommendations of the Joint Legislative Interim Committee on Pension and Retirement Plans, State Journal, Supplement, Sixty-Eighth Session at 6, 19-20, 66-67, 71, and 79 (1947). It was also aware that the requirement of limited tenure in protective occupations creates special retirement problems. Governor's Retirement Study Commission Final Report, January 15, 1959.

In 1964, the Retirement Research Council (RRC) noted that "[o]ne of the most troublesome problem areas in the development of a sound retirement program for public employes in Wisconsin centers around the benefit program[s] for employes in what are commonly referred to as the protective occupations." RRC Staff Report No. 10 at 1 (1964). RRC noted that since coverage of protective occupation employees in 1948, the legislature had often

been successfully petitioned to add additional employment categories within the special retirement benefit programs. ***Id***. at 1-2. RRC stated that, "The requests of additional groups for inclusion in such programs have multiplied in recent years, posing a serious problem for the legislature in attempting to maintain some semblance of order and equity in the development of the retirement and other related benefit programs." ***Id***. at 2.

In 1967, the legislature lowered the normal retirement age and years-of-service requirement for protective occupation participants in the Wisconsin retirement fund. Chapter 355, Laws of 1967. "Protective occupation participant" was redefined in section 2 of the law. The Joint Survey Committee on Retirement Systems (JSCRS) recommended this legislation as "in the best public interest." Appendix to 1967 S.B. 415 at 94.

The JSCRS report to the legislature incorporated a portion of RRC's study of the retirement age and years-of-service pattern for protective occupation employees in the retirement systems of other states. RRC concluded that "[a]n individual whose principal duties do not consist of 51% or more of his work time being devoted to active law enforcement or active fire suppression would not be eligible for protective occupation membership." ***Id***. at 93. RRC stated that "[i]t is assumed that an individual's duties, under the protective occupation philosophy, would subject him to periods of great mental and physical stress as well as possible personal injury or perhaps even death," id., and that "[t]hese employes must be able to undergo great mental and physical strain on occasion," ***id***. at 94.

It is evident that RRC and JSCRS considered that the status of protected occupation participant would be limited to a narrow class of employees meeting stringent standards. Those standards remain unchanged, in sec. 40.02(48)(a), Stats.

What has changed is the degree of state control over the determination by the municipal employer that an employee is a protective occupation participant. In the 1989 executive budget bill, 1989 S.B. 31, sec. 815e, the governor recommended amendments to sec. 40.02(48), Stats., which would have required DETF to approve or deny each classification of a participant as a protective occupation participant based upon DETF's determination whether the employee's occupation met the statutory requirements. 1989 S.B. 31,

Analysis by the Legislative Reference Bureau at 384-85. However, upon recommendation of JSCRS, these amendments were deleted from the budget bill. JSCRS recommended "greater study and development." Appendix to 1989 S.B. 31 at 379. In place of these provisions, sec. 40.06(1)(em), Stats., was created in the budget act to make review by DETF discretionary as to protective occupation participants who are not state employees. June 19, 1989, memorandum from RRC/JSCRS Director of Retirement Research to co-chairmen of RRC/JSCRS (June 19, 1989 RRC/JSCRS Director's Memo). Section 40.06(1)(em) provides in part:

> The department may review any determination by a participating employer to classify an employe who is not a state employe as a protective occupation participant and may appeal the determination to the board by filing a written notice of appeal with the board.

The budget bill retained sec. 40.06(1)(dm), Stats., which requires that the Department of Employment Relations approve each determination by a department head classifying a state employee as a protective occupation participant. The June 19, 1989 RRC/JSCRS Director's Memo states: "These amendments together appear to tighten the procedures governing protective designation, and these may be desirable. . ."

The "greater study and development" recommended by JSCRS includes study of the appropriate classification of county jailers. Because of questions received by DETF regarding the retirement employment category of jailers, in 1985 DETF surveyed the counties, asking for information as to their jailers. May 14, 1986 memorandum, concerning local jailer classification, from RRC/JSCRS Director of Retirement Research to members of the Ad Hoc Committee on [sec.] 40.65[,Stats.,] Benefits, attachment, (May 14, 1986, RRC/JSCRS Director's memo). The survey revealed that thirty-four counties classified jailers as protective occupation participants, while twenty-nine classified them as general employees. ***Id.***

The May 14, 1986 RRC/JSCRS Director's memo stated:

> The DETF Board has reviewed appeals from

> jailers who are classified as general employees, and the [DETF] has deemed that they do *not* meet the requirement[s] for protective designation under present statutes. The DETF Board felt that the legislature should investigate their arguments further, and consider whether statutory changes were appropriate. [Emphasis in original.]

The May 14, 1986, RRC/JSCRS Director's memo further stated: "If the legislature mandated all jailers to be classified as protectives, such action would ignore the local differences in job requirements." ***Id.*** In the memo, the Director of Retirement Research outlined alternatives that the Ad Hoc Committee could consider: do nothing; amend the definition of protective occupation participants to include jailers; expand the eligibility definition for benefits under sec. 40.65, Stats., to include any positions designated by the employer by unilateral action or collective bargaining; or amend the law to permit the employer to designate positions to be covered under the protective program even if they were not law enforcement or fire prevention service, if the positions otherwise would meet the requirements of frequent exposure to danger or peril and a requirement for high physical conditioning. ***Id.*** at 2. The Director of Retirement Research stated that the latter approach would allow employers to bargain on the protective designation. ***Id.***

The Ad Hoc Committee considered the RRC staff memo at its meeting of May 14, 1986. Minutes of the May 14, 1986 meeting of the sec. 40.65, Stats., Ad Hoc Committee of the RRC. RRC files. According to a June 29, 1988 memorandum of the RRC/JSCRS Director of Retirement Research to RRC members (June 29, 1988 RRC/JSCRS Director's memo), the Ad Hoc Committee determined that there was no need to mandate all local jailers as protectives. The June 29, 1988 RRC/JSCRS Director's memo stated: "The Committee noted that the existing employer designation process allows county employers to recognize the existing differences in duties and job descriptions from county to county."

WERC notes that 1989 S.B. 352 specifically would have added county jailers to the list of employees deemed to be protective occupation participants, but the bill failed to pass. (*See* 1989 S.B. 352, amending secs. 40.02(48)(am) and (c), Stats.) WERC suggests that the failure of the bill may demonstrate that jailers are not

deemed protective occupation participants presently unless they are specifically determined to be such by their employer. WERC also suggests, however, that the bill may have been intended simply to clarify that jailers already are protective occupation participants. It concedes that this interpretation is contradicted by the fact that the legislation would have conferred protective occupation participant status on jailers prospectively only.

In the 1991-92 legislative session a renewed effort was made to include county jailers in the positions listed in secs. 40.02(48)(am) and (c), Stats. 1991 A.B. 482 was virtually identical to 1989 S.B. 352. 1991 A.B. 482 was considered by JSCRS at a public hearing on February 20, 1992. The minutes of the JSCRS meeting show that the bill was supported by the La Crosse County Sheriff's Department and Deputy Sheriff's Association, the Wisconsin County Police Association, the Wisconsin Professional Police Association, the Wisconsin Sheriffs and Deputy Sheriffs Association and the American Federation of State, County and Municipal Employees. The bill was opposed by the Wisconsin Counties Association. Minutes of the February 20, 1992 meeting of the JSCRS. 1991 A.B. 482 failed to pass pursuant to Senate Joint Resolution #1. Assembly Journal, April 7, 1992.

It is the general rule that the failure of the legislature to enact a bill is not evidence of legislative intent. ***State ex rel. Fitas v. Milwaukee County***, 65 Wis. 2d 130, 135, 221 N.W. 2d 902, 905 (1974). "The nonpassage of a bill may be explainable for a number of reasons unrelated to the merits of the legislation." Id. We conclude, however, that the failure of the legislature to enact 1989 S.B. 352 or 1991 A.B. 482 is evidence of an understanding of the legislature and the proponents of the legislation that legislative action is necessary to permit counties to designate jailers as protective occupation participants without determining that they satisfy the requirements of sec. 40.02(48)(a), Stats.

Public employee retirement systems are unique in that legislative adjunct agencies oversee the systems and suggest and pass on legislation affecting the systems. The RRC "provid[es] a continuous review and study of the retirement benefits afforded by the state and. . .allocate[s] adequate study to the complexities of modern retirement programs." Section 13.51(1), Stats. No bill modifying a retirement system for public officers or employees may

be acted upon by the legislature until it has been referred to JSCRS and the committee has submitted to the legislature a report as to the desirability of such proposal as a matter of public policy. Section 13.50(6)(a), Stats.

Here, RRC outlined to the Ad Hoc Committee on [sec.] 40.65 [,Stats.,] Benefits alternative courses of legislative action. The Ad Hoc Committee determined that there was no need to mandate local jailers as protective occupation participants. The JSCRS did not recommend legislation which would have included county jailers in the enumeration of "protective occupation participant[s]" under secs. 40.02(48)(am) and (c), Stats. We conclude that, in the unusual circumstances of this case, the failure of the legislature to include county jailers in the enumeration of protective occupation participants demonstrates that the legislature considers that county jailers are not protective occupation participants unless so determined by the county employer under sec. 40.02(48)(a), Stats. Without enabling legislation, the county employer may not submit that determination to the collective bargaining process.

B.

We are also persuaded to our conclusion that the determination by the County of the status of jailers is not a mandatory subject of collective bargaining by comparing the provisions of MERA and the State Employment Labor Relations Act (SELRA). Under SELRA, a collective bargaining agreement between a state agency and its employees supersedes conflicting statutory provisions as to wages, hours, fringe benefits, and conditions of employment. MERA does not contain a comparable provision. In **Glendale Professional Policemen's Ass'n**, the court noted that determining the scope of the municipal employer's duty to bargain under sec. 111.70, Stats., is particularly difficult because the statute does not contain a legislative resolution of statutory conflicts as does SELRA. 83 Wis. 2d at 106, 264 N.W. 2d at 602.

The failure of the legislature to include in MERA a provision giving collective bargaining agreements precedence over conflicting statutes evidences an intent that such priority does not exist.

C.

We are further persuaded as to our conclusion by the fact that when the legislature has wished to permit the employer to classify an employee as a protective occupation participant without requiring that the employer determine that the principal duties of the participant involve active law enforcement or active fire suppression or prevention, it has done so by specific legislation. 1989 Wis. Act 357 created sec. 40.02(48)(bm), Stats., which permits a participating employer to classify an emergency medical technician (EMT) as a protective occupation participant, notwithstanding sec. 40.02(48)(a), Stats. Further, a determination by the employer under sec. 40.02(48)(bm) may not be reviewed by DETF or appealed to ETFB, unless it involves the classification of a state employee.

In the May 14, 1986 RRC/JSCRS Director's memo the RRC/JSCRS Director of Retirement Research advised the Committee that one alternative as to local jailers was to amend the Wisconsin retirement system law and sec. 40.65, Stats., to permit the employer to designate positions as "protective" even if the employees were not involved in law enforcement or fire prevention. The May 14, 1986 RRC/JSCRS Director's memo stated that "[t]his approach would allow employers to bargain on the protective designation, and to recognize the job requirements for the position and also the costs involved in the protective program." The legislature adopted that approach as to EMT's but has rejected that approach as to county jailers.

It is evident that classification of local jailers is highly controversial. It is also evident that the legislature and the proponents of protective occupation participant status for local jailers consider that legislative action is required before their status may become a mandatory subject of bargaining.

An employee who believes that he or she has been improperly classified as a general employee is not without remedy. The employee may appeal that determination to DETF and ETFB. Section 40.06(1)(e), Stats. A decision of ETFB is reviewable by certiorari pursuant to sec. 40.08(12), Stats.

When a statute sets forth a procedure for review of an administrative decision, such remedy is exclusive, unless the remedy is inadequate. ***Nodell Inv. Corp. v. Glendale***, 78 Wis. 2d 416, 422, 254 N.W. 2d 310, 314 (1977). This requirement is sometimes

termed the exhaustion of remedies doctrine and sometimes the primary jurisdiction doctrine. Here, the exhaustion of remedies doctrine applies rather than the primary jurisdiction doctrine because the administrative process began when the County addressed the classification of its jailers under sec. 40.02(48)(a), Stats. ***See Nodell***, 78 Wis. 2d at 427 n.13, 254 N.W. 2d at 316 n.13 (If administrative procedure has begun, the primary jurisdiction rule does not apply).

The premise of the exhaustion rule is that the administrative remedy (1) is available to the party on his or her initiative, (2) relatively rapidly, and (3) will protect the party's claim of right. ***Nodell***, 78 Wis. 2d at 424, 254 N.W. 2d at 315. WPPA has not shown that the appeal procedure under sec. 40.06(1)(e), Stats., is inadequate in these or other respects.

The exhaustion rule is a doctrine of judicial restraint which the legislature and the courts have evolved in drawing the boundary line between administrative and judicial spheres of activity. ***Castelaz v. Milwaukee***, 94 Wis. 2d 513, 532, 289 N.W. 2d 259, 268 (1980) (quoting ***Nodell***, 78 Wis. 2d at 424, 254 N.W. 2d at 315). However, the principle which underpins the doctrine supports equally the proposition that collective bargaining should not supplant the administrative remedy provided by sec. 40.06(1)(e), Stats. The exhaustion doctrine is premised on the notion that the expertise that comes with experience and the fact-finding facility that comes with a more flexible procedure enable the administrative agency to perform a valuable public function. ***Wisconsin Collectors Ass'n v. Thorp Finance Corp.***, 32 Wis. 2d 36, 44, 145 N.W. 2d 33, 36 (1966).

While Wisconsin Collectors discussed the primary jurisdiction rule, we noted in ***Thiensville Village v. DNR***, 130 Wis. 2d 276, 282 n.2, 386 N.W. 2d 519, 522 n.2 (Ct. App. 1986), that the doctrines of exhaustion of remedies and primary jurisdiction have developed into complementary parts of a general principle.

In ***Thiensville Village***, we extended the exhaustion doctrine to competing administrative agencies. We stated that the spirit of the doctrine is served by allowing the agency with the expertise and experience to retain the right of first review. ***Thiensville Village***, 130 Wis. 2d at 282, 386 N.W. 2d at 522. We conclude that the goals of the exhaustion/primary jurisdiction principle -- agency expertise and fact-finding facility -- are best served by requiring that an

employee who wishes to contest the employer's failure or refusal to classify the employee as a protective occupation participant appeal that determination to DETF and ETFB. It violates these goals to substitute for the administrative and judicial process, the collective bargaining process where the decision as to whether a participating employee shall be classified as a protective occupation participant may be made by an arbitrator lacking the expertise and experience of DETF or ETFB.

III.

EFFECT OF ENUMERATION OF DEPUTY SHERIFFS IN SECTION 40.02(48)(am), STATS.

We next consider the WERC's conclusion that the County's role in classifying jailers as protective occupation participants is "ministerial". WERC concluded that jailers could be classified as protective occupation participants simply by being employed in one of the capacities listed in sec. 40.02(48)(am), Stats. Because a jailer may meet the definition of "deputy sheriff" in sec. 40.02(48)(b)3, Stats., and deputy sheriff is listed in sec. 40.02(48)(am), WERC concluded "whatever role remains for the County to fulfill. . .if. . .jailers are to become protective occupation participants appears to be a ministerial one." We disagree.

The listing of "deputy sheriff" in sec. 40.02(48)(am), Stats., does not automatically confer protective occupation participant status upon jailers. A jailer must also meet the definition of "protective occupation participant" in sec. 40.02(48)(a), Stats. As we have seen, thirty-four counties have concluded that their jailers meet the definition, while twenty-nine have concluded that their jailers do not. The determination of whether a jailer meets the definition of "protective occupation participant" is not ministerial because the participating employer must determine whether the participant's "principal" duties involve "active" law enforcement, "frequent" exposure to a "high degree" of danger or peril, and require a "high degree" of physical conditioning. The determination requires fact finding and the exercise of judgment.

IV.

DECISION

For the foregoing reasons, we conclude that the classification of county jailers under sec. 40.02(48)(a), Stats., is not a mandatory subject of bargaining under sec. 111.70(1)(a), Stats. We therefore reverse the order affirming WERC's declaratory ruling.

By the Court.-- Order reversed.

In his dissent, Judge Eich held:

> . . .I would affirm the circuit court because I believe the WPPA proposal is "primarily related" to wages and thus a mandatory subject of bargaining, ***City of Brookfield v. WERC***, 153 Wis. 2d 238, 242-43, 450 N.W. 2d 495, 497 (Ct. App. 1989), and because I disagree with the majority's determination that the provisions of secs. 40.02(48)(am) and b(3), Stats., are to be given no weight in determining whether La Crosse County deputy sheriffs working as jailers are engaged in a "protective occupation." To me, those statutory sections are plain and unambiguous and compel affirmance of the trial court's decision. Nor would I, as the majority has done, rely so heavily on recitations of legislative history not cited, relied on or argued to us by the parties to the appeal.
>
> The County's argument, and the majority's decision, appear to give controlling weight to language in sec. 40.02(48)(a), Stats., which they consider to delegate to the employer full discretion to determine who is, and who is not, a "[p]rotective occupation participant." Doing so, they give no weight to the subsections that follow.
>
> Section 40.02(48)(a), Stats., does, as the majority points out, state that the term "'[p]rotective occupation participant' means any [employee] whose principal duties are determined by the. . .employer. . .to involve active law enforcement. . .[and] require frequent exposure to a high degree of danger or peril and. . .require a high degree of physical conditioning." But that does not end the matter.
>
> The following subsection, sub. (am), goes on to state that the term "[p]rotective occupation participant" also "includes any [employee]. . . who is a. . .deputy sheriff. . ." And a succeeding subsection, sub. (b)3, states that a "deputy sheriff" is any employee of a sheriff's office other than one "whose principal duties are those of a telephone operator, clerk, stenographer, machinist or mechanic. . ." I thus read the several subsections of 40.02 to designate as "protective occupation participants" persons in certain named occupations, such as that of a deputy sheriff (unless the persons in those occupations are assigned to specific non-law enforcement related duties such as those of a clerk, stenographer, etc.) *and* other employees not in traditional law enforcement positions whose duties

> are nonetheless determined by the employer to involve active law enforcement (*see* sec. 40.02(48)(a)).
>
> There is no question that a jailer is a deputy sheriff and that jailers' duties are not of the "non-law enforcement" type just mentioned. It follows, I believe, that they are protective occupation participants within the meaning of sec. 40.02, and that both the WERC and the circuit court correctly decided the issues brought before them. I therefore respectfully dissent from the position taken by my colleagues in this case.

On appeal of the Court of Appeals' decision, the Wisconsin Supreme Court in County of LaCrosse v. WERC, 180 Wis. 2d 100 (1993) held as follows:

> The sole issue on this review is whether a bargaining proposal by the Wisconsin Professional Police Association (WPPA) that would require La Crosse County to make its contributions to the Public Employee Trust Fund for its jailers equal in amount to those made for its Protective Occupation Participants (POPs) is a mandatory subject of bargaining.
>
> The court of appeals, in a published decision, reversed the order of the La Crosse County Circuit Court, Judge John J. Perlich presiding, which affirmed a determination by the Wisconsin Employment Relations Commission (WERC) that the proposal was a mandatory subject of bargaining. We granted review of this appeal pursuant to Section (Rule) 809.62, Stats. We now reverse the decision of the court of appeals.
>
> The facts are not in dispute. Beginning in November of 1988, and continuing into 1989, La Crosse County and WPPA, representing the county's deputy sheriffs and jailers, attempted to negotiate an extension of their collective bargaining agreement. During the course of those negotiations, WPPA offered the following bargaining proposal on behalf of the deputies and jailers:
>
> > Effective January 1, 1990, the County shall pay the full amount of the established employer's and employee's contribution rates of Protective Service schedule for all deputies and jailers covered by this agreement.

Upon receiving WPPA's proposal, La Crosse County petitioned WERC under sec. 111.70(4)(b), Stats., for a declaratory ruling on the question of whether the proposal was a mandatory or permissive subject of bargaining.

It is clear from their arguments before WERC that both La Crosse County and WPPA assumed that the proposal required the county to reclassify its jailers as POPs for Wisconsin retirement system purposes. In fact, until quite recently, all the parties continued to characterize the proposal in that fashion. As a result, virtually the entire focus of this litigation has centered on one issue, that being whether a proposal requiring a county to reclassify its jailers as POPs is a mandatory subject of bargaining.

Understandably, that characterization of the issue is reflected in WERC's declaratory ruling and the decisions of the circuit court and court of appeals. Due to the nature of our holding today, we need not examine the reasoning expressed in those opinions other than to note that they were predicated completely upon the assumption that WPPA's proposal required the county to reclassify its jailers as POPs.

It was not until oral argument before this court that counsel for WERC and WPPA first suggested a different characterization of WPPA's original proposal. The new argument was prompted by counsels' discovery, the evening prior to oral argument, of sec. 40.05(2)(g)1, Stats. That statute provides that:

> A participating employer may make contributions as provided in its compensation agreements for any participating employee in addition to the employer contributions required by this subsection. . .

In light of sec. 40.05(2)(g)1, WERC argued for the first time that WPPA's proposal could be interpreted as merely asking the county to increase the level of retirement fund contributions it made on behalf of its jailers. In other words, the proposal need not be read so as to require the county to reclassify the jailers as POPs. Thus characterized, WERC argued that the proposal fell under sec. 40.05(2)(g)1, and sec. 111.70(1)(a), thereby making it a mandatory subject of bargaining. Owing to the eleventh-hour nature of WERC's new position, we allowed the parties to submit

supplemental briefs.

In their joint supplemental brief, WERC and WPPA reiterate the view that in light of sec. 40.05(2)(g)1, Stats., this court could interpret WPPA's original bargaining proposal as merely requesting increased retirement fund contributions by the county. If we adopt that characterization, the proposal clearly, in their estimation, is a mandatory subject of bargaining. Their reasoning in this regard is easily summarized. First, they point to previous decisions of this court which held that under sec. 111.70(1)(a), proposals "primarily related" to wages, hours and conditions of employment are mandatory subjects of bargaining. *West Bend Education Assn. v. WERC*, 121 Wis. 2d 1, 8-9, 357 N.W. 2d 534 (1984); *Unified School District No. 1 of Racine County v. WERC*, 81 Wis. 2d 89, 102, 259 N.W. 2d 724 (1977). Next, they cite *City of Brookfield v. WERC*, 153 Wis. 2d 238, 242-43, 450 N.W. 2d 495 (Ct. App. 1989) ("*Brookfield II*"), for the proposition that proposals dealing with retirement benefits and other forms of deferred compensation are "primarily related" to wages. Since the WPPA offer is such a proposal, it is a mandatory subject of bargaining.

Alternatively, WERC and WPPA suggest that we could still interpret WPPA's proposal as requiring a POPs reclassification by the county. They believe that such an interpretation is reasonable because it is how the parties themselves have framed the issue throughout. In fact, WERC and WPPA encourage us to adopt this latter characterization and proceed to the question thereby posed, namely, whether a bargaining proposal that requires a county to reclassify its jailers as POPs is a mandatory subject of bargaining.

La Crosse County, in its supplemental brief, agrees that if we interpret WPPA's proposal as merely requiring additional retirement fund contributions, it is a mandatory subject of bargaining. It vigorously disputes that characterization, however, labelling it an attempt by WPPA to "disguise" the real issue. That issue, according to the county, is whether a proposal that requires the county to make a POPs reclassification is a mandatory subject of bargaining. Needless to say, the county believes it cannot be forced to bargain on any proposal that encompasses such a requirement. The county also argues that sec. 40.05(2)(g)1, Stats., has no bearing on this case because WPPA's proposal, as both WPPA and WERC maintained until oral argument, implicates not only the level of trust fund

contributions, but the entire range of additional benefits to which POPs are entitled, including an earlier retirement age and unique disability benefits.

Before proceeding with our analysis, we note that normally, WERC's rulings with respect to the bargaining nature of proposals are entitled to "great weight." *West Bend*, 121 Wis. 2d at 13. That deference is predicated on the commission's perceived expertise in collective bargaining matters. *Id*. at 12. Yet, courts of this state have held that such deference is unwarranted when the proposal in question requires harmonization of the Municipal Employment Relations Act (MERA) (secs. 111.70-111.77, Stats.) with other state statutes. See, *City of Brookfield v. WERC*, 87 Wis. 2d 819, 826-27, 275 N.W. 2d 723 (1979) ("*Brookfield I*"); *Glendale Professional Policemen's Assn. v. City of Glendale*, 83 Wis. 2d 90, 100-01, 264 N.W. 2d 594 (1978). Such legal questions fall within the special competence of courts. *Glendale*, 83 Wis. 2d at 100-01. Moreover, deference is particularly unwarranted in this case because our decision today is based upon a characterization of the case that was neither presented to nor addressed by WERC during its original determination. For these reasons, our review of WPPA's proposal is *de novo*.

We accept the interpretation first raised by WERC at oral argument. The language of WPPA's proposal is directed solely at the level of contributions the county must make to the Public Employee Trust Fund. As such, it falls squarely within the scope of sec. 40.05(2)(g)1, Stats. Under that statute, it is clear that the legislature intended counties to be able to bargain with respect to the level of retirement fund contributions they make for their employees.

Furthermore, we agree with the reasoning expressed in *Brookfield II*, that proposals dealing with retirement benefits are "primarily related" to wages. *Id*. at 242-43. In *Brookfield II*, the proposal at issue concerned the union's attempt to make the city provide group health insurance benefits to employees retiring during the three year term of the collective bargaining agreement. The court of appeals held that such a proposal was a mandatory subject of bargaining, in part because "it merely delays the city's deliverance of a portion of the firefighters' compensation to a time after the contract term has expired." *Id*. at 243. In this case, WPPA's proposal merely asks the county to increase the level of its contributions to the Public

> Employee Trust Fund. Rather than taking the wages today, the union seeks their deferral until its members receive them in the form of retirement benefits. Such a proposal is "primarily related" to wages, and a mandatory subject of bargaining under sec. 111.70(1)(a), Stats.
>
> Finally, we refrain from deciding whether a union's demand that a county reclassify its jailers as POPs is a mandatory subject of bargaining. That issue is not before us on the facts of this case.
>
> For these reasons, we reverse the decision of the court of appeals, and reinstate the order of the circuit court insofar as it holds that WPPA's proposal is a mandatory subject of bargaining.

POSITIONS OF THE PARTIES

The County

The County asserts that the WPPA's proposal is a prohibited subject of bargaining. The County contends the Court of Appeals correctly determined that a similar WPPA proposal would require the County to neglect to perform its duty under Sec. 40.02(48)(a), Stats. to determine whether its jailers qualify as protective occupation participants. The County urges the Commission to follow the reasoning of the Court of Appeals and to conclude that the Association proposal is contrary to the policy and purposes of the Public Employee Trust Fund.

The County contends that it has the obligation under Sec. 40.02(48)(a), Stats. to determine whether its jailers' principal duties include active law enforcement, require frequent exposure to a high degree of danger or peril, and require a high degree of physical conditioning. The County asserts that it has determined that the principal duties of its jailers do not meet the statutory criteria of Sec. 40.02(48)(a), Stats. The County alleges that since the parties to the collective bargaining agreement cannot negotiate the standards of Sec. 40.02(48)(a), Stats., the County is statutorily prohibited from classifying the jailers as protective occupation participants. The County notes that Sec. 943.395(2), Stats., provides criminal penalties for anyone who presents false or fraudulent information regarding employe benefits under Chapter 40. Thus, the County argues that the WPPA's proposal would both require the County to ignore its statutory duty and potentially subject individuals employed by the County to criminal liability.

The County acknowledges that jailers in some counties are classified as protective occupation participants. However, the County argues that under Sec. 40.02(48)(a), Stats., the question of whether jailers meet the statutory criteria is a county-by-county issue which requires the analysis of the duties of the jailers in question. Under the statutory criteria of Sec. 40.02(48)(a), Stats., the jailers must meet all listed criteria to qualify as protective occupation participants. The

County contends that its jailers do not meet any of the three criteria in question (i.e., the jailers do not perform duties of a law enforcement officer and are not involved in active law enforcement; the jailers do not have frequent exposure to a high degree of danger or peril; and the jailers are not required to attain a high degree of physical conditioning to perform their principal duties.)

The County contends that to require it to negotiate the protective status of jailers would render Secs. 40.02(48) and 40.06(1)(em), Stats. meaningless and thus would violate a basic rule of statutory construction. The County argues that these statutes give the Wisconsin Employe Trust Fund Board and the Wisconsin Department of Employe Trust Funds the authority to review determinations by participating employers that certain employes qualify as protective occupation participants and to accept appeals from employes who feel they have been improperly denied such status. The County argues that these statutory provisions exist because participating employers do not set the statutory standards for protective occupation status nor have the final say as to whether particular employes meet the statutory standards. The County concurs with the assessment of Robert Weber, Chief Counsel, Department of Employe Trust Funds, that because employes who meet the criteria cannot waive said benefits and are entitled to receive same, the only employes with an interest in bargaining with the employer over the issue at hand would be those who do not meet the criteria for protective occupation participants.

Given the foregoing, the County asserts that it is not possible to harmonize the statutory structure by which issues of protective occupation status are determined with statutes related to collective bargaining. The County argues the Legislature in Chapter 40 has set forth a mechanism by which employers determine whether the employe meets the appropriate criteria and which allows employe appeals if there is disagreement with the employer's determination. The County contends that the appeal process established by the Legislature should be seen as the employe's exclusive remedy. The County alleges that WPPA has not shown the appeal procedure under Sec. 40.06(1)(e), Stats. is inadequate to protect a jailer who meets the statutory criteria but has not been classified as a protective occupation participant.

Therefore, the County requests that the Commission issue a declaratory ruling establishing that the proposal is not a mandatory subject of bargaining.

WPPA

WPPA argues that its proposal is a mandatory subject of bargaining primarily related to deferred levels of compensation. It contends that the County jailers clearly satisfy the statutory criteria for protective status and that the County's decision to deny its jailers such status is based upon budgetary concerns rather than the statutory criteria.

WPPA alleges that its proposal can be harmonized with the Employe Trust Fund law and therefore is not a prohibited subject of bargaining. WPPA argues that its proposal would only violate public policy, and thus be prohibited, if it required the County to grant protective status to

employes who do not meet the statutory criteria under Sec. 40.02(48)(a), Stats. WPPA asserts that the jailers qualify for protective status under the appropriate statutory criteria and that requiring the County to certify their status as protective occupation participants thus is not at odds with Chapter 40. WPPA urges the Commission to conclude that the existence of an administrative appeal under Sec. 40.06(1)(e), Stats., for employes dissatisfied with a classification decision of the County should not foreclose the role of collective bargaining over the County's classification decisions. WPPA asserts the appeal mechanism provides individual jailers with an alternative to collective bargaining over protective status.

WPPA asserts that the jailers meet the statutory criteria of involvement in active law enforcement, frequent exposure to a high degree of danger or peril and a high degree of physical conditioning. WPPA contends that the statutory criteria do not require that the jailers be the most active, be exposed to the highest danger and require the highest degree of conditioning of all County employes. WPPA asks how could the duties of jailers could be determined not to fall within the statutory criteria if over half of the counties in Wisconsin have granted protective status to their jailers?

Given the foregoing, WPPA asks the Commission to find its proposal to be a mandatory subject of bargaining.

DISCUSSION

Before considering the specific proposal at issue herein, it is useful to set out the general framework within which we determine whether a proposal is a mandatory, permissive or prohibited subject of bargaining.

Section 111.70(1)(a), Stats., provides:

> 111.70(1)(a) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employes in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment, and with respect to a requirement of the municipal employer for a municipal employe to perform law enforcement and fire fighting services under s. 61.66, except as provided in sub. (4)(m) and s. 40.81(3) and except that a municipal employer shall not meet and confer with respect to any proposal to diminish or abridge the rights guaranteed to municipal employes under ch. 164. The duty to bargain, however, does not compel either party to agree

> to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The municipal employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the municipal employes in a collective bargaining unit. In creating this subchapter the legislature recognizes that the municipal employer must exercise its powers and responsibilities to act for the government and good order of the jurisdiction which it serves, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to municipal employes by the constitutions of this state and of the United States and by this subchapter.

In West Bend Education Ass'n v. WERC, 121 Wis.2d 1, 7-9 (1984), the Wisconsin Supreme Court concluded the following as to how Sec. 111.70(1)(a), Stats., (then Sec. 111.70(1)(d), Stats.) should be interpreted when determining whether a subject of bargaining is mandatory or permissive:

> Sec. 111.70(1)(d) sets forth the legislative delineation between mandatory and nonmandatory subjects of bargaining. It requires municipal employers, a term defined as including school districts, sec. 111.70(1)(a), to bargain "with respect to wages, hours and conditions of employment." At the same time it provides that a municipal employer "shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes." Furthermore, sec. 111.70(1)(d) recognizes the municipal employer's duty to act for the government, good order and commercial benefit of the municipality and for the health, safety and welfare of the public, subject to the constitutional statutory rights of the public employees.
>
> Sec. 111.70(1)(d) thus recognizes that the municipal employer has a dual role. It is both an employer in charge of personnel and operations and a governmental unit, which is a political entity responsible for determining public policy and implementing the will of the people. Since the integrity of managerial decision making and of the political process requires that certain issues not be mandatory subjects of collective bargaining,

Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 259 N.W.2d 724 (1977), sec. 111.70(1)(d) provides an accommodation between the bargaining rights of public employees and the rights of the public through its elected representatives.

In recognizing the interests of the employees and the interests of the municipal employer as manager and political entity, the statute necessarily presents certain tensions and difficulties in its application. Such tensions arise principally when a proposal touches simultaneously upon wages, hours, and conditions of employment and upon managerial decision making or public policy. To resolve these conflict situations, this court has interpreted sec. 111.70(1)(d) as setting forth a "primarily related" standard. Applied to the case at bar, the standard requires WERC in the first instance (and a court on review thereafter) to determine whether the proposals are "primarily related" to "wages, hours and conditions of employment," to "educational policy and school management and operation," to "'management and direction' of the school system" or to "formulation or management of public policy." Unified School District No. 1 of Racine County v WERC, 81 Wis. 2d 89, 95-96, 102, 259 N.W.2d 724 (1977). This court has construed "primarily" to mean "fundamentally," "basically," or "essentially," Beloit Education Asso. v. WERC, 73 Wis. 2d 43, 54, 242 N.W.2d 231 (1976).

As applied on a case-by-case basis, this primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contract, where the management and direction of the school system or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining. In such cases, the professional association may be heard at the bargaining table if the parties agree to bargain or may be heard along with other concerned groups and individuals in the public forum. Unified School District No. 1 of Racine Co. v. WERC, supra, 81 Wis. 2d at 102; Beloit Education Asso., supra, 73 Wis. 2d at 50-51. Stating the balancing test, as we have just done, is easier than isolating the applicable

> competing interests in a specific situation and evaluating them. (footnotes omitted)

When it is asserted that a proposal is a prohibited subject of bargaining, the question is whether the proposal irreconcilably conflicts with a statutory provision or limits constitutional rights. Fortney v. School District of West Salem, 108 Wis.2d 169 (1982); Professional Police Association v. Dane County, 106 Wis.2d 303 (1982); Glendale Prof. Policeman's Asso. v. Glendale, 83 Wis.2d 90 (1978); WERC v. Teamsters Local No. 563, 75 Wis.2d 602 (1977).

The record in this proceeding is far different from the record upon which the Commission based its 1989 decision involving these same parties. In the 1989 proceeding, the parties waived hearing and the Commission did not have the benefit of the views of the Wisconsin Department of Employe Trust Funds (ETF) regarding collective bargaining over the status of "protective occupation participants". Having now benefitted from an evidentiary hearing and from consideration of the views of the ETF, we conclude that receipt of the benefits which flow from protective occupation status is a statutory right for those who meet the statutory criteria set forth in Sec. 40.02(48), Stats. We further conclude that the Legislature has given ETF and the Wisconsin Employe Trust Funds Board (ETFB) the ultimate responsibility for resolving "protective occupation" status issues. Collective bargaining over "protective occupation" status irreconcilably conflicts with the statutory entitlement to "protective occupation" benefits because collective bargaining could produce scenarios in which ineligible employes receive benefits or eligible employes lose benefits. Collective bargaining over "protective occupation" status issues also irreconcilably conflicts with the statutory entitlement to benefits because it places the Commission in the role of evaluating the statutory eligibility criteria under Sec. 40.02(48), Stats. where the Legislature has reserved those roles to the County initially and ETF and ETFB, ultimately. Therefore, we have concluded that the WPPA proposal is a prohibited subject of bargaining.

To implement WPPA's proposal, the County would be obligated to classify its jailers as protective occupation participants under Sec. 40.02(48)(a), Stats., and to certify the names of the participants to ETF pursuant to Sec. 40.06(1)(d), Stats.

Sec. 40.02(48)(a), Stats., defines "protective occupation participant" to mean "any participant whose principal duties are determined by the participating employer. . .to involve active law enforcement. . .provided the duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning." Section 40.06(1)(e), Stats., allows an employe to appeal an employer's failure or refusal to classify the employe as a protective occupation participant to ETF and ETFB. Further, as provided in Sec. 40.06(1)(em), Stats., ETF may review the employer's determination on its own initiative and appeal the determination to ETFB.

The foregoing statutory provisions establish that although the County is obligated to make an initial determination as to whether its jailers qualify as protective occupation participants, the County lacks the power to make a final determination that its jailers do or do not qualify as such

participants. Ultimately, the Legislature has given that task to ETF and ETFB.

The above-noted statutes also satisfy us that the Legislature has created a structure which entitles employes who meet the protective occupation participant definition to certain benefits and provides a mechanism by which disputes over this entitlement are to be resolved. Particularly in light of the expression of legislative interest in the integrity of the Public Employe Trust Fund which is contained in Sec. 40.01(2), Stats., 1/ we are persuaded that the statutory process set forth in Chapter 40 is the exclusive means by which protective occupation participant issues are to be resolved. If these issues were subject to the collective bargaining process, it is obvious that employes who do not meet the statutory standards could acquire the legislatively established benefits and also that employes who do meet the standards in question could lose those benefits. We do not think that potential is within the range of options and alternatives contemplated by the Legislature when it created the Public Employe Trust Fund.

Given all of the foregoing, we do not believe the collective bargaining process can be reconciled with the processes and rights created by Chapter 40, and we therefore conclude that the WPPA proposal is a prohibited subject of bargaining.

Dated at Madison, Wisconsin this 26th day of June, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/

1/ Section 40.01(2), Stats. provides, in pertinent part:

> **(2)** PURPOSE. The public employe trust fund is a public trust and shall be managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose.

James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner