STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

MILWAUKEE COUNTY

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

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION

Case 511
No. 60166
DR(M)-627

Decision No. 30431

Appearances:

Gimbel, Reilly, Guerin & Brown, by **Attorney Aaron M. Hurvitz,** 330 East Kilbourn Avenue, Suite 1170, Milwaukee, Wisconsin 53202-3146, appearing on behalf of Milwaukee Deputy Sheriff's Association.

Davis & Kuelthau, by **Attorney Roger E. Walsh,** 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of Milwaukee County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On July 26, 2001, Milwaukee County filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., regarding the County's duty to bargain with the Milwaukee Deputy Sheriff's Association.

After the parties unsuccessfully attempted to settle the dispute, hearing was ultimately held on January 29, 2002 by Commission Examiner Peter Davis in Milwaukee, Wisconsin. The parties filed post hearing briefs -- the last of which was received April 8, 2002.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Milwaukee County, herein the County, is a municipal employer having its principal offices at 901 North 9th Street, Milwaukee, Wisconsin. The County provides law enforcement services to its citizens through the Sheriff's Department. The County Sheriff is responsible for operation of the Department.

2. Milwaukee Deputy Sheriff's Association, herein the Association, is a labor organization having its principal offices at 821 West State Street, Milwaukee, Wisconsin. The Association is the collective bargaining representative of certain law enforcement employees of the Sheriff's Department.

3. The 1998-2000 collective bargaining agreement between the County and the Association contained the following provisions that the Association proposes be included in the successor agreement. The County asserts it has no duty to bargain over these proposals because the proposed contract language is either a permissive (Sections 1.02 and 3.30) or a prohibited subject of bargaining (Sections 1.02 and 6.02).

1.02 MANAGEMENT RIGHTS.

. . .

No employee covered by this Agreement shall, during the term of this Agreement, have his position within the Milwaukee County Sheriff's Department diminished on any basis except for misconduct in the performance of his duties within the department.

In the event the organizational structure of the Sheriff's Department is modified by the establishment of positions in classifications other than those currently represented by the Association, and where new employees assigned to such positions will perform duties traditionally performed by unit employees (Deputy Sheriff I, Deputy Sheriff I (Bilingual)(Spanish), Deputy Sheriff Sergeant), such positions shall not be filled in the new classifications except as vacancies occur through attrition in the unit classification which had traditionally performed such duties. The County reserves the right to assign employees within classification to other duties within the department in order to create vacancies in the function to which the employees in the classification are to be appointed.

. . .

3.30 LAYOFF AND RECALL.

. . .

(1) Whenever it becomes necessary to reduce the number of County employees represented by the Association in any position in the classified service, . . .

. . .

6.02 SAVING CLAUSE

. . .

This Agreement shall remain in full force and in effect until replaced by a subsequent agreement.

. . .

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

CONCLUSIONS OF LAW

1. The disputed portions of Section 1.02 are prohibited subjects of bargaining because they infringe on the Milwaukee County Sheriff's constitutionally protected right to maintain law and order and preserve the peace.

2. The disputed portion of Section 3.30 is a permissive subject of bargaining because it is primarily related to the formulation and management of public policy.

3. The disputed portion of Section 6.02 is a prohibited subject of bargaining because it irreconcilably conflicts with the three year limitation on the length of a collective bargaining agreement established by Sec. 111.70(3)(a)4, Stats.

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

DECLARATORY RULING

Milwaukee County and Milwaukee Deputy Sheriff's Association have no duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., over the disputed portions of Sections 1.02, 3.30, and 6.02.

Given under our hands and seal at the City of Madison, Wisconsin, this 29th day of July, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

I concur

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

Milwaukee County (Sheriff's Department)

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

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

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

> "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees 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 employee 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 employees 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 employees 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 employees 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.

Section 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 employees." Furthermore, sec. 111.70(a)(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.

Section 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 weighted to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interests 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 contrast, 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, it easier than isolating the applicable competing interests in a specific situation and evaluating them. (footnotes omitted)

We have held that inclusion of a permissive subject in a prior agreement does not bar a challenge to the mandatory status of contract language proposed for inclusion in a successor agreement. GREENFIELD SCHOOL DISTRICT, DEC. NO. 14026-B (WERC 11/77). Thus, to the extent the Association argues otherwise here, we reject that argument.

When it is claimed that a proposal is a prohibited subject of bargaining because it runs counter to express *statutory* command, the court has held that proposals made under the auspices of the Municipal Employment Relations Act (MERA) should be harmonized with existing statutes "whenever possible" and that only where a proposal "explicitly contradicts" statutory powers will it be found to be a prohibited subject of bargaining. BOARD OF EDUCATION V. WERB 52 WIS.2D 625 (1971); WERC V. TEAMSTERS LOCAL NO. 563, 75 WIS.2D 6-2 (1977). Otherwise mandatory proposals which *limit* but do not eliminate statutory powers remain mandatory subjects. GLENDALE PROFESSIONAL POLICEMAN'S ASSOCIATION V. CITY OF GLENDALE, 83 WIS.2D 90 (1978); WISCONSIN PROFESSIONAL POLICE ASSOCIATION V. DANE COUNTY, 106 WIS.2D 303 (1982) (WPPA I); FORTNEY V. SCHOOL DISTRICT OF WEST SALEM, 108 WIS.2D 169 (1982).

When it is claimed a proposal is a prohibited subject of bargaining because it limits or infringes upon the Sheriff's *constitutional* powers or duties, the Court has held that duties which "gave character and distinction" to the office of sheriff at common law are constitutionally protected and thus cannot be infringed upon by a collective bargaining agreement. Duties which are "mundane and commonplace" do not give "character and

distinction" to the office of sheriff and thus are not constitutionally protected. BROWN COUNTY SHERIFF'S DEPT. V. EMPLOYEES ASS'N, 194 WIS.2D 265 (1995); HEITKEMPER V. WIRSING, 194 WIS.2D 182 (1995); WASHINGTON COUNTY VS. DEPUTY SHERIFF'S ASS'N, 192 WIS.2D 728 (CT.APP. 1995); MANITOWOC COUNTY VS. LOCAL 986B, 168 WIS.2D 819 (1992); WISCONSIN PROFESSIONAL POLICE ASSN. VS. DANE COUNTY, 149 WIS.2D 699 (CT.APP. 1989) (WPPA II); WPPA I; SUPRA.

The power to dismiss or demote (HEITKEMPER, SUPRA) or to dismiss and not reappoint (BROWN COUNTY, SUPRA) are not constitutionally protected. The duties of: (1) selecting a "court officer" (WPPA I, SUPRA); (2) deciding who should perform interstate conveyance of prisoners (WPPA II, SUPRA); (3) deciding who shall perform undercover drug law enforcement duties (MANITOWOC COUNTY, SUPRA); and (4) maintaining law and order and preserving the peace by utilizing non bargaining unit employees to provide law enforcement services (WASHINGTON COUNTY, SUPRA) have been found to be duties which give "character and distinction" to the office of the sheriff and thus are constitutionally protected from infringement by a collective bargaining agreement. In its decisions, the Court has emphasized that it is the nature of the duty assigned – not the power of assignment – which is critical for the purposes of analysis (HEITKEMPER, SUPRA; MANITOWOC COUNTY, SUPRA.)

THE DISPUTED CONTRACTUAL PROPOSALS

Proposal 1

6.02 SAVING CLAUSE

. . .

This Agreement shall remain in full force and in effect until replaced by a subsequent agreement.

The County argues that this contract provision is a prohibited subject of bargaining because it can create a contract duration in excess of the three year limit established by Sec. 111.70(3)(a)4, Stats. The County cites the Commission's decision in CITY OF SHEBOYGAN, DEC. NO. 19421 (WERC, 3/82) in support of its position.

The Association acknowledges the content of Sec. 111.70(3)(a)4, Stats., and the Commission's holding in CITY OF SHEBOYGAN and concedes that the disputed language would be a prohibited subject of bargaining if found in a contractual duration clause. However, the Association contends because the disputed provision is part of the contractual Saving Clause, the text of Sec. 111.70(3)(a)4, Stats., and the holding of CITY OF SHEBOYGAN are inapplicable and the provision is a mandatory subject of bargaining.

The Association further argues that the intent of the disputed provision is merely to maintain the status quo until a new contract is bargained. Among other matters, the disputed provision insures that the Association will have the financial resources to be able to continue to effectively represent employees through collection of union security payments from employees. A Commission holding that the provision is prohibited will wreak havoc on the Association's ability to effectively represent the employees and is contrary to the County's obligation under Sec. 111.70(3)(a) 4, Stats., to execute a contract previously agreed upon.

Discussion

Section 111.70(3)(a)4, Stats., provides in pertinent part:

> The term of any collective bargaining agreement shall not exceed 3 years.

In CITY OF SHEBOYGAN, the Commission found the following contract provision to be a prohibited subject of bargaining to the extent it could create a contract term in excess of the three year limit created by Sec. 111.70(3)(a)4, Stats.

> This Agreement shall be effective when signed by both parties and shall remain in full force and effect until its expiration date, December 18, 1981, or until a successor agreement is signed.

Here, the disputed contract provision states:

> This Agreement shall remain in full force and in effect until replaced by a subsequent Agreement.

As was true in CITY OF SHEBOYGAN, this contract provision has the potential to create a contract term in excess of the three year limit created by Sec. 111.70(3)(a)4, Stats., where, as here, the length of time it takes the parties to reach a new agreement becomes extended. Therefore, we conclude the disputed provision is to that extent a prohibited subject of bargaining.

In reaching this conclusion, we reject the Association argument that placement of the disputed provision in the Saving Clause demonstrates that the intent of the provision is different. The text of the disputed provision itself is unambiguous as to its meaning and thus its placement in the Saving Clause does not persuade us that the meaning of the language is thereby altered.

We also reject the Association contention that the disputed language is distinguishable from that in CITY OF SHEBOYGAN because it is designed to maintain the status quo -- not extend the contract's duration. Again, the language of the contract provision itself unambiguously specifies that it is the "Agreement" that remains in effect. There is no mention of the status quo. 1/

1/ Once a contract expires, the employer's statutory duty to bargain generally obligates it to maintain the status quo as to all provisions of the expired contract that are mandatory subjects of bargaining. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS.2D 671 (CT.APP. 1994); JEFFERSON COUNTY V. WERC, 187 WIS.2D 647 (CT.APP. 1994); MAYVILLE SCHOOL DIST. V. WERC, 192 WIS.2D 379 (CT.APP. 1995). This protection is in effect without regard to whether there is a contract provision that also recites the employer's status quo obligation. However, we have long held that the employer's general obligation to maintain the status quo does not extend to contractual union security provisions (SAUK COUNTY, DEC. NO. 2255-B (WERC, 6/87); NEW LISBON SCHOOLS, DEC. NO. 27632 (WERC, 4/93) or to contractual grievance arbitration provisions (GREENFIELD SCHOOLS, DEC. NO. 14026-B (WERC, 1/77); RACINE SCHOOLS, DEC. NO. 19983-C (WERC, 1/85); NEW LISBON SCHOOLS, SUPRA. To the extent the Association asserts that the union security exception to the general status quo obligation creates another persuasive reason why it should be allowed to contractually extend its right to union security payments for as long as it takes to reach agreement on a new contract, we again point to the three year statutory limitation on the term of a contract as the basis for rejecting this argument.

To the extent the Association argues that the County's position in this litigation is at odds with the prohibition in Sec. 111.70(3)(a)4, Stats., against refusing to execute a collective bargaining agreement previously agreed upon, we again disagree. The disputed contract language does not create any obligation on the County's part to execute an agreement that includes this disputed contract language (or any other portion of the expired 1998-2000 agreement) in the parties' next contract. Nor does it create an obligation on the County's part execute an interim bargaining agreement until a new agreement is reached.

Given all of the foregoing, we have found the disputed provision as written to be a prohibited subject of bargaining. As we noted in CITY OF SHEBOYGAN, if the language were modified to indicate that in no event will the term of the agreement exceed three years, then the proposal would be a mandatory subject of bargaining.

Proposal 2

3.30 LAYOFF AND RECALL.

(1) Whenever it becomes necessary to reduce the number of County employees represented by the Association in any position in the classified service, ...

The County argues this provision is permissive to the extent is allows the Association to challenge whether a layoff is "necessary". Citing CITY OF BROOKFIELD V. WERC, 87 WIS.2D 819 (1979), the County contends that the Wisconsin Supreme Court has held that provisions which restrict the ability of a municipal employer to lay off employees are not mandatory subjects of bargaining. The County asserts the record in this proceeding makes clear that the Association understands this contract language allows it to challenge the wisdom of County decisions to lay off for economic or other reasons. Thus, the Commission should find the proposal to be a permissive subject of bargaining.

The Association contends the contract language is a mandatory subject of bargaining. It argues the Court's narrow holding in BROOKFIELD does not warrant finding the broader contract language at issue here to be a permissive subject of bargaining. The Association asserts that GRAFTON SCHOOL DISTRICT, DEC. NO. 27935 (WERC, 2/94); ROCK COUNTY, DEC. NO. 27918 (WERC, 1/94); and WINNEBAGO COUNTY, DEC. NO. 27755 (WERC, 8/93) support its position.

Discussion

In CITY OF BROOKFIELD, SUPRA, the Court held that the decision to lay off public employees is a "matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government." Since the issuance of BROOKFIELD, we have held that a municipal employer need not bargain with a labor organization over the decision to lay off employees. As we held in WEST BEND JOINT SCHOOL DISTRICT NO. 1, DEC. NO. 18512, (WERC, 5/81) since the municipal employer "has no duty to bargain regarding the layoff decision it follows that it may not be required as part of its bargaining duty, to discuss the necessity of said layoffs." The Association proposal before us subjects the County's layoff decision to a "necessary" standard. Therefore, consistent with BROOKFIELD, we find the objected to portion of this Association proposal to be a permissive subject of bargaining.

The Commission decisions cited by the Association in support of its position are not inconsistent with our holding here. In GRAFTON, the layoff proposal found to be a mandatory subject of bargaining set forth the procedure the municipal employer must follow where its layoff decision was based on reasons other than job performance. The municipal employer's right to lay off was not subjected to a "necessary" standard. In ROCK COUNTY, the layoff matters litigated by the parties and decided by the Commission did not include an examination of the mandatory or permissive nature of the standards for layoff. In WINNEBAGO COUNTY, the layoff proposal did not subject the decision to lay off to any standard but merely stated "In the event that the County decides to reduce the work force, . . ."

Proposal 3

1.02 MANAGEMENT RIGHTS.

. . .

> No employee covered by this Agreement shall, during the term of this Agreement, have his position within the Milwaukee County Sheriff's Department diminished on any basis except for misconduct in the performance of his duties within the department.
>
> In the event the organizational structure of the Sheriff's Department is modified by the establishment of positions in classifications other than those currently represented by the Association, and where new employees assigned to such positions will perform duties traditionally performed by unit employees (Deputy Sheriff I, Deputy Sheriff I (Bilingual)(Spanish), Deputy Sheriff Sergeant), such positions shall not be filled in the new classifications except as vacancies occur through attrition in the unit classification which had traditionally performed such duties. The County reserves the right to assign employees within classification to other duties within the department in order to create vacancies in the function to which the employees in the classification are to be appointed.

The County argues that the above quoted portions of the expired contract which the Association propose be included in the successor agreement are prohibited and permissive subjects of bargaining.

As to the portion of the Association proposal that does not allow the County to "diminish" a position, the County contends this proposal is permissive because it restricts the County's ability to change the job duties or qualifications for existing unit positions, to eliminate positions, or to lay off employees-all management prerogatives that need not be bargained.

As to the portion of the Association proposal that limits the County's ability to fill new positions, the County argues that this proposal is permissive because it restricts the County's ability to determine the level of service it wishes to provide and to create new positions to provide that service.

The County argues that the Association's testimony and written argument make clear that through its proposal, the Association proposal seeks to prevent any Sheriff from altering the present level and quality of law enforcement services. The County asserts that it is clear that the Association cannot compel the County to bargain over any proposal that has such an impact even where there may also be some impact on employees' wages, hours and conditions of employment.

As to both portions of this Association proposal, the County also asserts that the proposals are prohibited subjects of bargaining because they interfere with the Sheriff's constitutionally protected right to choose his or her own ways and means of performing his or her duties connected with law enforcement and preserving the peace. The County asserts that under the Court's holdings in WPPA II, MANITOWOC COUNTY and WASHINGTON COUNTY, the Sheriff has a constitutionally protected right to determine whether to use Association represented employees or others to: (1) staff the jail; (2) function as computer specialists; and (3) serve as forensic crime scene investigators.

The Association argues that the disputed portions of Section 1.02 are mandatory subjects of bargaining because the relationship of these proposals to employee wages, hours and conditions of employment predominates over the impact on the County's management interests. The Association points to numerous Commission decisions holding that protection of unit work is a mandatory subject of bargaining.

As to the constitutional issue, the Association agrees that Section 1.02 would prevent the Sheriff from using non-unit employees to perform unit work but argues that HEITKEMPER makes clear that bargaining over "conditions of employment" still exists despite the Sheriff's constitutional status. The Association further argues that MANITOWOC COUNTY is distinguishable precedent because the issue presented to the Court was which bargaining unit employee was to receive an assignment -- not whether unit work could be performed by non-unit employees.

Discussion

The Association correctly argues that protection of bargaining unit work is generally found to be a mandatory subject of bargaining. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89 (1977); BROWN COUNTY V. WERC, 86-0731, unpublished, (CT.APP III, 3/87); CITY OF OCONOMOWOC, DEC. NO. 18724 (WERC, 6/81); NORTHLAND PINES SCHOOL DISTRICT, DEC. NO. 20140 (WERC, 12/82); SCHOOL DISTRICT OF MARINETTE,

DEC. NO. 20406 (WERC, 3/83); CITY OF GREEN BAY, DEC. NO. 18731-B (WERC, 6/83); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-A (WERC, 2/83) and DEC. NO. 20093-B (WERC, 8/83); MILWAUKEE METROPOLITAN SEWERAGE DISTRICT, DEC. NO. 21268 (WERC, 12/83); RACINE UNIFIED SCHOOL DISTRICT, DEC. NOS. 20652-A AND 20653-A (WERC, 1/84); SCHOOL DISTRICT OF JANESVILLE, DEC. NO. 21466 (WERC, 3/84); SCHOOL DISTRICT OF FRANKLIN, DEC. NO. 21846 (WERC, 7/84); and MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 21893-B (WERC, 10/86). These decisions reflect the reality that few, if any, employee "wage, hour and condition of employment" interests are stronger than the ability to protect one's job. However, as the County points out, in both WPPA II and WASHINGTON COUNTY, the Court concluded that the sheriff had a constitutional right to assign bargaining unit work to non-bargaining unit individuals if the assignment involved maintaining law and order and preserving the peace. Based on the record before us, we conclude the three assignments in dispute here all involve maintaining law and order and preserving the peace. 2/ Thus, although the Association correctly argues that HEITKEMPER makes clear that the sheriff's constitutional power does not eliminate collective bargaining, WPPA II and WASHINGTON COUNTY require that we find Section 1.02 to be a prohibited subject of bargaining to the extent it infringes on the sheriff's constitutionally protected rights to make assignments which give "character and distinction" to the office. We so hold.

2/ By contrast, in CRAWFORD COUNTY, DEC. NO. 20116 (WERC, 12/82), we concluded that assignment of janitorial duties in a jail is not a constitutionally protected power.

Dated at Madison, Wisconsin, this 29th day of July, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

I concur

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

Milwaukee County (Sheriff's Department)

CONCURRENCE OF COMMISSIONER A. HENRY HEMPE

I am in full agreement with the majority. There can be little doubt that "(t)he legislature has made it clear that a budgetary lay off decision is not a subject of mandatory bargaining." CITY OF BROOKFIELD V. WERC, 87 WIS.2D 819, 833, 275 NW2D 723 (1979). (Emphasis supplied).

However, it may also be helpful to remind the parties that the impact or effect of the layoff is a mandatory subject of bargaining. CITY OF BROOKFIELD V. WERC, SUPRA at 833. "Whether an employer is required to bargain the impact prior to implementation is handled on a case by case basis, as to whether the totality of conduct is consistent with the statutory requirement of good faith." CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84).

Dated at Madison, Wisconsin, this 29th day of July, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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