

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

**BROWN COUNTY SHERIFF'S DEPARTMENT**  
**NON-SUPERVISORY LABOR ASSOCIATION**, Complainant,

vs.

**BROWN COUNTY**, Respondent.

Case 659  
No. 61172  
MP-3821

**Decision No. 30614-A**

---

Appearances:

Shneidman, Hawks & Ehlke, S.C., Attorneys at Law, by **Attorney Aaron N. Halstead**, 222 West Washington Avenue, Suite 705, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of the Association.

Davis & Kuelthau, S.C., Attorneys at Law, by **Attorney James M. Kalny**, 200 South Washington, Suite 401, P.O. Box 1534, Green Bay, Wisconsin 54305-1534, appearing on behalf of the County.

**ORDER DENYING MOTION TO DISMISS COMPLAINT**

Brown County Sheriff's Department Non-Supervisory Labor Association, filed a complaint with the Wisconsin Employment Relations Commission on April 30, 2002, alleging that Brown County had committed prohibited practices by its failure to bargain in good faith with it over the Job Bulletin in 2001. On May 13, 2003, the Commission assigned Dennis P. McGilligan, an examiner on its staff, to hear the case. On May 13, 2003, hearing in the matter was scheduled for July 24, 2003. On July 9, 2003, Brown County filed an Answer and a Motion to Dismiss the complaint, along with supporting arguments. Thereafter, by letter dated July 15, 2003, hearing in the matter was postponed and a briefing schedule was established. The parties completed their briefing schedule in the matter on November 3, 2003.

No. 30614-A

The Examiner, having considered the record to date and the arguments of the parties, makes and issues the following

**ORDER**

The prehearing Motion to Dismiss is denied.

Dated at Madison, Wisconsin, this 22nd day of December, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

Dennis P. McGilligan, Examiner

**BROWN COUNTY**

**MEMORANDUM ACCOMPANYING ORDER**  
**DENYING MOTION TO DISMISS COMPLAINT**

On July 9, 2003, Brown County filed a Motion to Dismiss the complaint, along with supporting arguments. Thereafter, the parties briefed the matter as noted above.

The County argues, in material part, that the Commission should dismiss the complaint because it fails to state a claim upon which the Association is entitled to relief and because the Commission lacks jurisdiction over the complaint.

Lack of jurisdiction or failure of the complaint to state a cause of action are grounds to dismiss a contested case prior to hearing. COUNTY OF WAUKESHA, DEC. NO. 29477-A (Shaw, 10/98). The Commission has held:

Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief.

UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27982-B (WERC, 6/94).

The Association complains that “the County’s delay in bargaining over the Job Bulletin in 2001 reflected failure to act in good faith insofar as its duty to bargain with the Association was concerned.” The Association submits that this County conduct constitutes, *inter alia*, a violation of Section 111.70(3)(a)1 and 4, and 5, Stats.

The County, on the other hand, basically argues that the complaint should be dismissed for at least three separate reasons:

1. This matter must be deferred to arbitration.
2. The content of the Job Bulletin is a permissive subject of bargaining.
3. Accepting the facts as alleged would require the amendment or violation of the collective bargaining agreement.

The Examiner first turns his attention to the contention that this matter must be deferred to arbitration under the arbitration provision of the parties' collective bargaining agreement and the Commission's deferral rules.

In support thereof, the County argues that the contract violation, failure to bargain and bad faith allegations all hinge on the notion that there was a duty to bargain the bulletin under the agreement in a timely manner before the bulletin was posted. The County opines that a grievance should have been filed over the issue of whether there existed a duty to bargain the "form" of the bulletin, but that the Association failed to utilize the grievance procedure to enforce a contractual remedy. The County notes that the Commission has consistently refused to assert its jurisdiction to consider alleged contractual violations when the parties' agreement provides for the final and binding impartial disposition of such issues. CITY OF BELOIT SCHOOL DISTRICT, DEC. NO. 14702-B (Davis, 3/77).

The Commission has "long held that it will defer to the contract grievance arbitration forum appropriate cases in which the Respondent objects to the Commission exercise of jurisdiction in the matter." BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83); MENOMONIE SCHOOLS, DEC. NO. 16724-B (WERC, 1/81) at 5-6; MILWAUKEE SCHOOLS, DEC. NO. 11330-B (WERC, 6/73) at 17.

As rooted in SCHOOL DISTRICT OF CADOTT COMMUNITY, DEC. NO. 27775-C (WERC, 6/94); *aff'd* 197 WIS.2D 46 (Ct. App., 1995), and re-stated in CENTRAL HIGH SCHOOL DISTRICT OF WESTOSHA, ET. AL., DEC. NO. 29671-A (8/99), the Commission's criteria for deferral to arbitration are:

- (1) The parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator;
- (2) The collective bargaining agreement must clearly address itself to the dispute; and
- (3) The dispute must not involve important issues of law or policy. GREEN COUNTY (PLEASANT VIEW NURSING HOME), DEC. NO. 30355-A (Levitan, 4/03).

The Association submits that the County failed to bargain over a mandatory subject of bargaining, a job bulletin, that specifies job hours, shifts and vacation rights for a number of bargaining unit employees. In arguing over this matter, the parties have addressed issues concerning the mandatory versus permissive nature of the content of the job bulletin, the constitutional authority of the Sheriff that would allegedly be encroached upon if the County was obligated to bargain over the job bulletin and the supposed poor public policy that would result from requiring the County to negotiate the content of the job bulletin. These issues and claims

are rooted in the statutes and not in the contract, and they are important issues of law and policy. Moreover, the record does not indicate any grievance pending and the parties have not agreed to arbitrate these allegations. Thus, deferral is inappropriate.

The next issue is whether the content of the job bulletin is a permissive or mandatory subject of bargaining. The County points out that since at least *BELOIT EDUCATION ASSOCIATION v. WERC*, 73 Wis. 2d 43, 242 W.2d 231 (1976), the Courts and the Commission have wrestled with the “primary related” standard in determining what items are mandatory or permissive subjects of bargaining. The County states that the primary related standard is a balancing test which is applied on a case by case basis recognizing that employees and the public have significant interests at stake and that they are competing interests which should be weighed to determine whether a proposed subject of 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 management prerogatives for public policy, the proposal is a mandatory subject of bargaining. In contrast, where the management and direction of the public entity or formulation of public policy predominates the matter is not a mandatory subject of bargaining. The County contends that the creation of the annual job bulletin is at the very heart and direction of the law enforcement activities in the County.

The Association, on the other hand, argues that the Commission has found employee bargaining proposals relating to hours of work, including work schedules, to be a mandatory subject of bargaining. In the instant case, the Association believes that the parties’ negotiations over the job bulletin clearly related to a mandatory subject of bargaining because the bulletin established employee work schedules, i.e., whether employees will work 7:00 a.m. – 3:00 p.m. vs. 11:00 p.m., employee work groups, i.e., whether employees will work a 5-2 schedule or a 4-4 schedule and vacation rights.

The parties have made excellent arguments on this subject. However, the Examiner believes that the Motion should be denied as premature since the complaint allegations set forth matters in the nature of a contested case requiring a full hearing on the pleadings. The Examiner also believes that the contrasting assertions of the parties make it clear that this is a matter where the facts are in dispute and, therefore, they must be resolved through the normal hearing process. The Examiner concludes that the issues raised by the parties can only be decided upon a full evidentiary record.

Therefore, the Examiner has denied Brown County’s Motion to Dismiss on the grounds that it is premature, and because the complaint presents a contested case, WISCONSIN STATUTES, SEC. 111.07(2)(A), SEC. 111.07(4), SEC. 227, requiring a full hearing on the pleadings. *MUTUAL FED. SAVING & LOAN ASSOC. v. SAVINGS & LOAN ADV. COMM.*; (1968) 38 Wis.2d 381 STATE EX. REL. *CITY OF LACROSSE v. ROTHWELL*, (1964) 25 Wis.2d 228, REHEARING DENIED, *TOWN OF ASHWAUBENON v. PUBLIC SERVICE COMMISSION*, (1964) 22 Wis.2d 38, REHEARING DENIED; *STATE EX. RE. BALL v. MCPHEE* (1959) 6 Wis.2d 190; *GENERAL ELECTRIC CO. v. WISCONSIN EMPLOYMENT RELATIONS BOARD*, (1957) 3 Wis.2d 227.

Finally, the County argues that accepting the facts as alleged would require the amendment or violation of the collective bargaining agreement. In support thereof, the County relies on the clear language of the agreement which in its opinion does not provide for negotiations of the job bulletin prior to posting, a lack of any past practice requiring negotiations over the job bulletin, and a zipper clause which prohibits the amendment of the agreement without a written agreement. To the contrary, the Association asserts that the contract language concerning the job bulletin is not clear and unambiguous, that it is silent as to the method by which the content of the bulletin shall be determined, and that the parties have a past practice by which they have determined the job bulletin on an annual basis that interprets the applicable contract language referencing the job bulletin. The Examiner adds that if the Association is correct and the parties have negotiated the content of a job bulletin on an annual basis in the past and reduced their agreement to writing in the form of a job bulletin "effective January 1<sup>st</sup> of every year," then this might constitute an effective amendment of the agreement. For the reasons discussed above, the Examiner again believes that it would be premature to dismiss the complaint.

Dated at Madison, Wisconsin, this 22nd day of December, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

Dennis P. McGilligan, Examiner