

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

DUNN COUNTY

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

**DUNN COUNTY JOINT COUNCIL OF UNIONS, DUNN COUNTY
LAW ENFORCEMENT CENTER, AFSCME**

Case 116
No. 63023
DR(M)-645

Decision No. 31084

Appearances:

James R. Scott, Lindner & Marsack, S.C., 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of Dunn County.

Bruce F. Ehlke and **Danielle L. Carne**, Shneidman, Hawks & Ehlke, S.C., Attorneys at Law, P.O. Box 2155, 222 West Washington Avenue, Suite 705, Madison, Wisconsin 53701-2155, appearing on behalf of Dunn County Joint Council of Unions, Dunn County Law Enforcement Center, AFSCME.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECLARATORY RULING**

On November 11, 2003, Dunn County (County) filed a Petition for Declaratory Ruling with the Wisconsin Employment Relations Commission (Commission), pursuant to Sec. 111.70(4)(b), Stats., asserting that certain collective bargaining proposals by the Dunn County Joint Council of Unions, Dunn County Law Enforcement Center, AFSCME (Union) were illegal subjects of bargaining because they conflicted with the constitutional authority of the Dunn County Sheriff. On March 4, 2004, the parties submitted a Stipulation of Facts with Exhibits in lieu of a hearing. On May 14, 2004, the Commission granted the request of the

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Wisconsin Professional Police Association (WPPA) to file an amicus brief in opposition to the County's position. Both parties filed initial briefs and reply briefs, the WPPA submitted an amicus brief, and the Union filed a brief in reply to the WPPA's brief, all of which were filed by June 16, 2004, whereupon the record was closed.

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

FINDINGS OF FACT

1. Dunn County, hereinafter the County, is a municipal employer having its principal offices in Menomonie, Wisconsin.

2. The Dunn County Joint Council of Unions, Dunn County Law Enforcement Center, AFSCME, hereinafter the Union, is a labor organization that serves as the collective bargaining representative of two bargaining units of employees in the County Sheriff's Department, including sworn deputies, jail staff, and communications and secretarial employees.

3. The collective bargaining agreement between the County and the Union expired on December 31, 2003, and the parties have been engaged in negotiations for a successor agreement since that time.

4. The expired collective bargaining agreement contained language that the Union has proposed to include in the successor agreement, including the following disputed provisions:

- a. Article 7, Section 7, which states, inter alia, "No one outside of the bargaining unit, or supervisors, shall perform work normally done by those employees within the bargaining unit, except in case of emergency."
- b. Article A-14, Section 1(a), which states, inter alia, "Departmental Overtime work shall be offered to bargaining unit employees first, then to other qualified employees within the department before offering it to casual employees."
- c. Article A-14, Section 3, which states, inter alia, "Emergency call in assignments shall first be offered to bargaining unit employees before assigning the same to temporary employees."

- d. Article G-2m, Section 9, which states, inter alia, “The Court Security Officer shall be a sworn limited deputy with powers limited to the Judicial Center. Direct supervision shall be delegated by the Sheriff to the Clerk of Courts who will have priority over the Sheriff in the scheduling, directing and supervision of these employees.”
- e. Article G-3, Section 9, which states, inter alia, “In the event that Replacement Limited Term Employees are needed in the Jail or Patrol bargaining units, these LTEs may be drawn from reserves. They will only work the schedule of the person they replace and only one LTE will replace one employee. . . . Overtime will be offered to bargaining unit members before LTEs and bargaining unit members may, with the mutual agreement of the Sheriff, switch shifts with the Limited Term position.”
- f. Article G-3, Section 10, which specifies the duties that the County may assign to Reserve Officers, including providing security for various non-County events at non-County cost, and also states, inter alia, “the practice of assigning or allowing Reserves to patrol on Friday and Saturday nights, by themselves, in a County vehicle will cease,” “Qualified Union employees will be given first opportunity to perform work offered to the department . . .,” and “The County shall not contract with the Reserves or non-Union personnel for any purpose not stated herein without prior mutual agreement of the Union.”

5. The contractual provisions/proposals referenced in Finding of Fact 4 primarily relate to wages, hours and conditions of employment.

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

CONCLUSIONS OF LAW

1. The contractual provisions/proposals referenced in Finding of Fact 4 can be interpreted and applied in a manner that does not intrude upon the Dunn County Sheriff's constitutional prerogatives and hence are not unlawful on their face.

2. The contractual provisions/proposals referenced in Finding of Fact 4 are mandatory subjects of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

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

DECLARATORY RULING

Dunn County has a duty to bargain within the meaning of Sec. 111.70(1)(a), Stats., with the Dunn County Joint Council of Unions, Dunn County Law Enforcement Center, AFSCME over the inclusion of the contractual proposals referenced in Finding of Fact 4 in a successor collective bargaining agreement.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of September, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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

The County objects to the above-referenced Union proposals principally on the ground that, by generally restricting the Sheriff's ability to assign work to non-bargaining unit employees, the proposals have the potential to restrict assignments that are within the Sheriff's constitutional prerogatives. With the possible exception of the Court Security Officer provision in Article G-2m, Section 9, however, the County does not identify particular constitutionally-reserved duties or assignments upon which the Union's proposals would intrude or specific situations where the Union has relied upon the language in an effort to restrict one or more constitutionally-reserved duty of the Sheriff.

The parties largely agree on the applicable legal principles. On the one hand, precedent firmly establishes that protection of bargaining unit work is generally a mandatory subject of bargaining, as "few, if any, employee 'wage, hour and condition of employment' interests are stronger than the ability to protect one's job." MILWAUKEE COUNTY, DEC. NO. 30431 (WERC, 7/02) at 12-13, and cases cited therein. On the other hand, the office of sheriff is a constitutional office, and duties that historically "gave character and distinction" to the sheriff's office may not be restricted by statute or by a statutorily-authorized collective bargaining agreement. STATE EX REL. MILWAUKEE COUNTY V. BUECH, 171 WIS. 474, 481-82 (1920); WISCONSIN PROFESSIONAL POLICE ASS'N V. DANE COUNTY 106 WIS.2D 303 (1982) (WPPA I). However, the constitution does not protect a sheriff's administrative and executive authority, including decisions to dismiss or reappoint deputies. HEITKEMPER V. WIRSING, 194 WIS.2D 182 (1995); BROWN COUNTY SHERIFF'S DEPT. V. BROWN COUNTY SHERIFF'S DEPT. NON-SUPERVISORY EMPLOYEES ASSOCIATION, 194 WIS.2D 265 (1995).

The case law reflects that the scope of the sheriff's constitutionally-reserved duties is determined on a case-by-case analysis of the specific job or duty in question. For example, in WPPA I the court held that assigning an employee to a court officer position will intrude upon the sheriff's constitutional discretion if an examination of the court officer's duties shows that he or she will "attend upon the circuit court" or "represent the sheriff in court." "Attendance upon the court" was later interpreted to encompass transporting prisoners across state lines pursuant to a court-issued arrest warrant. DANE COUNTY PROFESSIONAL POLICE ASS'N V. DANE COUNTY, 149 WIS.2D 699 (CT. APP. 1989) (WPPA II). Another segment of the sheriff's constitutionally-reserved authority comprises the "historical duties of maintaining law and order and preserving the peace." Determining the parameters of that sphere is also an exercise in case-by-case line drawing. MANITOWOC COUNTY V. LOCAL 986B, 168 WIS.2D 819 (1991). Thus far the courts have construed this sphere to include selecting a particular

deputy for undercover detective work, ID., and deciding to use municipal police officers to augment the County Sheriff's work force in anticipation of Harleyfest. WASHINGTON COUNTY V. WASHINGTON COUNTY DEPUTY SHERIFF'S ASSOCIATION, 192 Wis.2d 728 (CT. APP. 1995).

The Commission has previously considered the relationship between the general principal that unit work preservation language is a mandatory subject of bargaining and the particulate analysis the court has established for determining which duties cannot constitutionally be covered by such a unit work preservation clause. In DANE COUNTY, DEC. NO. 25650 (WERC, 8/88), the Commission applied the court's decision in WPPA I to a general unit work preservation clause and held the clause to be a mandatory subject of bargaining, reasoning as follows:

[WPPA I] is instructive in several ways. It demonstrates that the disputed language can be interpreted and applied in ways which are not constitutionally impermissible. It is also noteworthy in our view that *the Court did not opine that the contract language was void despite the potential constitutional issues*. [Emphasis supplied]. What the Court makes clear is that the disputed language cannot be validly interpreted in a constitutionally impermissible manner. Our record is devoid of evidence that any arbitrator since [WPPA I] has failed to heed the court's admonition or that the Union has advanced positions in grievance arbitration which run afoul of the Court's [WPPA I] directive. Indeed, it appears clear that the County has remained ever vigilant to insure that no such award be issued. Under these circumstances, it is clear that the disputed language simply cannot be lawfully interpreted in a manner which will intrude upon the constitutional powers and duties of the Sheriff. The Court's decision in [WPPA I] . . . has the effect of grafting onto the disputed language the caveat that the language cannot be interpreted in a manner which would run afoul of the Sheriff's constitutional powers and duties. Therefore, we conclude that the disputed language is not a prohibited subject of bargaining . . .

We see nothing in the courts' decisions subsequent to the Commission's DANE COUNTY decision that would undermine the above analysis. The court has continued to articulate and apply a case-by-case analysis when confronted with a question about whether a particular duty falls within the sheriff's constitutional prerogatives. Just as the court will assume that the legislature intended a constitutional interpretation of a statute if such an interpretation is available, MODERN V. MCGINNIS, 70 Wis.2d 1056 (1975); MILWAUKEE COUNTY V. DISTRICT COUNCIL 48, 109 Wis.2d 14 (CT. APP. 1982), we assume that facially valid unit work preservation language will be interpreted and applied in a manner that does not conflict with the sheriff's constitutional prerogatives. SEE RICHLAND COUNTY, DEC. NO. 23103 (WERC, 12/85), in which the Commission concluded that it would not presume that facially valid union security language might be applied in an unconstitutional manner.

It is true, as the County argues, that the arbitration awards that the courts overturned in WPPA I, WPPA II, and MANITOWOC COUNTY were rendered under general unit work preservation language similar to some of the language at issue in the instant case, but, in correcting those arbitral awards, the court did not invalidate the general contract language. It does not follow from the fact that some arbitrators have misapplied unit work preservation language in some agreements that all arbitrators will do so under all agreements. Nor does it follow that clashes are inevitable between unit work preservation clauses and the sheriff's constitutionally-protected duties. As the Union has pointed out, much of the disputed contract language has existed for some time in apparent accommodation of the sheriff's duties, and the sheriff has not himself asserted a constitutional concern in this matter. Under these circumstances, we cannot assume that such issues will arise in the future or that, if they do arise, the Union will rely upon the contract language to limit the sheriff's constitutional prerogatives. Accordingly, we continue to hold, as we did in DANE COUNTY, that if the instant disputed proposals can be interpreted in a manner that does not intrude upon constitutional principles they remain mandatory subjects of bargaining.

Applying these principles to the six disputed proposals, we conclude that all are susceptible of a valid, constitutional interpretation. While one could imagine situations in which each provision could be construed to limit the sheriff's constitutional discretion, we have already rejected the validity of assuming such an unconstitutional interpretation, based upon DANE COUNTY. None of the proposals on its face precludes the sheriff from carrying out those duties the courts have placed within the sheriff's sphere, i.e., selecting deputies for undercover police work, augmenting the deputies' ranks with other personnel in situations posing a special threat to public safety (such as Harleyfest), controlling the jail, or exercising full discretion over "attendance upon the court." Hence, each is susceptible of a constitutional interpretation and is a mandatory subject of bargaining.

Dated at Madison, Wisconsin, this 27th day of September, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner