STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE COUNTY DEPUTY SHERIFFS' ASSOCIATION, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 588
No. 65503
MP-4220

Assignment of correctional officers to the Jail

Decision No. 31615-A

Appearances:

Rachel Pings, Attorney at Law, Eggert & Cermele, S.C., 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee County Deputy Sheriffs' Association.

Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, 901 North 9th Street, Room 303, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner: On January 19, 2006, the above-named Complainant, Milwaukee County Deputy Sheriffs' Association, filed with the Commission a complaint, alleging that the above-named Respondent, Milwaukee County, violated the provisions of Ch. 111.70, MERA, by employing non-Association members to perform bargaining unit work in the Milwaukee County Jail.

A hearing was held on March 6, 2006, at the Milwaukee County Courthouse, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant. The hearing was transcribed and a transcript was received on March 13, 2006. The parties thereafter submitted briefs and reply briefs, the last of which was received on May 5, 2006, whereupon the record was closed.

On the basis of the record evidence, the arguments of the parties, and the record as a whole, the Examiner makes and issues the following, Findings of Fact.

FINDINGS OF FACT

1. Milwaukee County (hereinafter referred to as either the County or the Respondent) is a municipal employer, which provides general governmental services to the citizens of the County. The County's business address is 901 North 9th Street, Milwaukee, WI 53233. At the time the events underlying this complaint took place, David A. Clarke was the Sheriff of Milwaukee County, and Scott Walker was the Milwaukee County Executive.

2. The Milwaukee County Deputy Sheriffs' Association (hereinafter referred to as either the Association or the Complainant) is a labor organization and is the exclusive bargaining representative for the County's sworn, non-supervisory law enforcement personnel in the classifications of Deputy I, Deputy I(bilingual)(Spanish), and Deputy Sheriff Sergeants. The Association also represents employees with the working title of Detective. The President of the Association at the time this complaint was filed was Roy Michael Felber. Felber became the Acting President in November of 2004, and took office as President in January of 2005. He was preceded in office by James Fuerst. The Association's bargaining consultant and Chief Spokesperson in contract negotiations is Patrick Coraggio.

3. The County and the Association have been parties to a series of collective bargaining agreements, including one having a term covering calendar year 2004 and the current contract, which covers calendar year 2005 and 2006. The Sheriff is not a signatory to the collective bargaining agreements.

4. Negotiations over the 2004 collective bargaining agreement were initiated on November 18, 2003. After two sessions in January, 2004, the parties agreed to go to mediation. Five sessions were held with the mediator – January 21, April 21, June 16, June 23, and August 17. A tentative agreement was reached at the August 17 session. It was ratified by the Association on October 5, 2004 and was signed by the County Executive on December 28, 2004.

5. After ratification of the 2004 collective bargaining agreement, in October and November of 2004, two informational meetings were held with Acting Association President Felber, Business Agent Jerry Rieder, and representatives of the Sheriff's Department. The second of these meetings also included representatives of AFSCME District Council 48, the labor organization that represents the majority of the County's employees, including civilian correctional officers employed at the Milwaukee County House of Corrections. The topic of these meetings was a budget initiative to bring correctional officers into the Milwaukee County Jail. Prior to this time, the security for prisoners at the Jail was solely provided by members of the Association. In the course of the meeting, Rieder stated that the Association objected to

the correctional officers being assigned to the Jail, and Sheriff's Department Human Resources representative Minnie Linyear replied that their objection was noted. Linyear described the plan to bring the correctional officers in, and the duties they would be assigned. Rieder and Felber raised issues concerning the impact on deputies of bringing correctional officers into the Jail, and Linyear replied that "we'll cross that bridge when we get to it" and that she would take the issues under advisement.

6. The decision to replace deputy sheriffs with civilian correctional officers was motivated by a desire to reduce costs.

7. On January 9, 2005, the Sheriff's Department hired eight new correctional officers and assigned them to training. The Association was not notified of the hiring.

8. On January 26, 2005, Sheriff David Clarke issued Order No. 760, reassigning the eight new correctional officers from training duty to the Jail, effective February 6:

. . .

> Effective Sunday, February 6, 2005, the following Correction Officers have been reassigned:
>
> | NAME | FROM | TO |
> |---|---|---|
> | Steven J. Artus | Special Operations - Training | Detention Bureau |
> | Keyontay T. Earl | Special Operations - Training | Detention Bureau |
> | Alysa B. Engel | Special Operations - Training | Detention Bureau |
> | Martin J. Fonte | Special Operations - Training | Detention Bureau |
> | Richard A. Freihoefer | Special Operations - Training | Detention Bureau |
> | Christopher T. Kindschi | Special Operations - Training | Detention Bureau |
> | Lisa Rivera-Thompson | Special Operations - Training | Detention Bureau |
> | Tucker, El Gerrith | Special Operations - Training | Detention Bureau |
>
> Please contact the supervisor of your newly assigned bureau as soon as possible.
> Approved:
>
> Sheriff David A. Clarke Jr.

The Order was distributed to Department personnel, and Association President Felber received it on January 27th.

9. The correctional officers have worked in the Jail since February 6, 2005, providing services including booking, monitoring, restraining, feeding, transporting and disciplining inmates. Prior to the assignment of the correctional officers, this work in the Jail had been provided exclusively by members of the Association.

10. The 2004 collective bargaining agreement expired on December 31, 2004. The County and the Association reached a tentative agreement on the 2005-2006 contract on June 22, 2005, and the Association ratified on July 14. The County approved the contract on October 12, and the contract was signed by the parties on December 15, 2005.

11. The 2005-2006 collective bargaining agreement contains, inter alia, a Recognition Clause, and a Management Rights Clause:

1.01 RECOGNITION

The County of Milwaukee agrees to recognize and herewith does recognize the Milwaukee Deputy Sheriffs' Association as the exclusive collective bargaining agent of all Deputy Sheriffs I, Deputy Sheriffs I (Bilingual)(Spanish), and Deputy Sheriff Sergeants in the employ of the County of Milwaukee in respect to wages, hours and conditions of employment.

Wherever the term "employee" is used in this Agreement, it shall mean and include only those employees of the County of Milwaukee within the certified bargaining unit represented by the Association.

1.02 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is:

- The right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed;
- The right to determine the number of positions and the classifications thereof to perform such service;
- The right to direct the work force;
- The right to establish qualifications for hire, to test and to hire, promote and retain employees;
- The right to assign employees, subject to existing practices and the terms of this Agreement;
- The right, subject to civil service procedures and §. 63.01 to 63.17, Stats., and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action;
- The right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

> In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy, procedures and practices and matters relating to working conditions giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Association.
>
> By the inclusion of the foregoing managements rights clause, the Milwaukee Deputy Sheriffs' Association does not waive any rights set forth in S. 111.70, Stats., created by Chapter 124, Laws of 1971, relating to bargaining the impact upon wages, hours or other conditions of employment of employees affected by the elimination of jobs within the Sheriff's Department by reason of the exercise of the powers herein reserved to management.

The collective bargaining agreement does not include any provision specifically addressing the assignment of correctional officers to the County Jail. Neither party made any proposal on this topic in the negotiations leading up the tentative agreement on the 2005-2006 collective bargaining agreement, nor did they discuss the impact of the assignment of work to non-unit personnel on association represented deputies.

12. On January 19, 2006, the instant Complaint was filed by the Association against Milwaukee County, asserting the decision to assign correctional officers to duties in the Jail which had previously been performed exclusively by members of the Association was a mandatory subject of bargaining, and that the County had violated its duty to bargain in good faith by making the decision without first negotiating with the Association.

13. The Order issued by Sheriff Clarke on January 26, 2005 marks the specific act signifying that a final decision had been reached on the transfer of duties to the civilian correctional officers, giving rise to the instant complaint. The filing of the instant complaint on January 19, 2006 falls within one year from the occurrence of that specific act.

14. The Order issued by Sheriff Clarke on January 26, 2005 was an action taken in the exercise of the historic power of the Sheriff as the keeper of the jail.

15. The assignment of correctional officers to the Jail had not, through the date of hearing on this complaint in March, 2006, resulted in the layoff of any Association members. The addition of correctional officers to the Jail had reduced overtime opportunities for Association members, had reduced the ability of Association members to utilize their seniority in picking vacations, and had reduced the scope of the Association's bargaining unit. All of these relate primarily to wages, hours and conditions of employment.

16. The failure of the Association to demand bargaining over vacation picks, overtime and other impacts of the transfer of duties to civilian correctional officers in the course of negotiations over the 2005-2006 collective bargaining agreement constitutes a waiver of bargaining.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Complainant, Milwaukee County Deputy Sheriffs' Association, is a labor organization within the meaning of Section 111.70(1)(h), MERA.

2. That the Respondent, Milwaukee County, is a municipal employer, within the meaning of Section 111.70(1)(j), MERA.

3. The determination of Jail staffing is one of the traditional functions giving character and distinction to the office of Sheriff as the keeper of the Jail, and the Sheriff's Order to replace deputy sheriffs with correctional officers in the Jail as a means of saving money is therefore a constitutionally prohibited subject of bargaining as between the County and the Association.

4. The impact of the decision to replace deputy sheriffs with correctional officers in the Jail on wages, hours and conditions of employment is a mandatory topic of bargaining.

5. By negotiating the 2005-2006 collective bargaining agreement without making any demand to bargain over the impact of the decision to replace deputy sheriffs with correctional officers in the Jail on wages, hours and conditions of employment, the Association waived bargaining over such impact.

6. The Respondent, Milwaukee County, did not refuse to bargain with the Association, and did not thereby commit violations of any provision of Section 111.70(3)(a), MERA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

It is ORDERED that the instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Racine, Wisconsin, this 1st day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

This case involves the County's decision to assign civilian correctional officers in the District Council 48 bargaining unit to perform work previously performed by sworn deputy sheriffs in the Association's bargaining unit. The possibility had been generally discussed in the past. In October and November of 2004, the Department's Human Resources office arranged meetings with the Association, in which it stated its intention to go forward with the change. The Association's Business Agent, Jerry Rieder, objected to the change, and Minnie Linyear, on behalf of the Department, told them their objection was noted. Rieder and incoming Association President Michael Felber also protested that such a change would affect overtime opportunities and vacation picks. Linyear told them "We'll cross that bridge when we get to it."

No further meetings or discussions were held, and nothing more happened until late January, 2005. On January 26, Milwaukee County Sheriff David Clarke issued an Order effectuating the assignment of eight civilian correctional officer to the Jail, as of February 6. They have been working in the Jail, performing duties previously assigned solely to deputies, since that time.

The 2004 collective bargaining agreement expired at the end of that year, and the parties engaged in negotiations over a successor through late June 2005, when a tentative agreement was reached. In the course of those negotiations, neither party made any proposal concerning the transfer of work to the correctional officers, nor the impact of that transfer. The 2005-2006 labor agreement does not contain any provision addressing those subjects.

The Association filed this complaint on January 19, 2006.

THE ARGUMENTS OF THE PARTIES

The Complainant:

The Complainant takes the position that the subcontracting of work to non-unit personnel for budgetary reasons is a mandatory topic of bargaining. The work of booking, monitoring, restraining, feeding, transporting and disciplining inmates has historically been performed by deputy sheriffs. It was incumbent upon the County to negotiate with the

Association before transferring those duties to the correctional officers represented by AFSCME. It did not, and thereby committed a clear prohibited practice. The various defenses raised by the County – that the powers of the Sheriff trump the bargaining obligation, that the complaint is untimely, that the Association waived bargaining, and that the contract permits this subcontracting - are all unfounded.

While the County made reference to the constitutional authority of the Sheriff to run the jail, the Complainant notes that the Sheriff did not make this decision, and has not taken any position on this controversy. He does not sign the collective bargaining agreement, and plays no role in the negotiations. There is nothing in the record to support the County's claim that the Association's right to bargain over this issue in any way conflicts with some constitutional right reserved to the Sheriff. It is pure speculation, and cannot form the basis of any finding or conclusion.

The complaint was plainly filed within the one year statute of limitations. The County asserts that the Association was advised of its plans during mediation session in April and August of 2004. There is no evidentiary basis for this claim – it is an assertion and nothing more. While the County attempted to prove that the first correctional officers were placed on the payroll on January 10, 2005, there is no evidence that the Association knew or should have known of this administrative action. Instead, the record is clear that the Sheriff first advised the deputies that correctional officers actually would be placed in the jail through his Order dated January 26, 2005. According to the Order, the effective date of this change would be February 6, 2005. The filing of this complaint on January 19, 2006 was within the one year statute.

The County's claim that there was a waiver of bargaining by the Association must be rejected. A waiver of statutory rights must be clear and unmistakable. In this case, there were no formal proposals made by either party about the use of correctional officers. The possibility of non-Association members being assigned to the jail was a possibility for some time, and the concept was discussed informally between the parties. However, once the possibility became more concrete, the County's position was that the decision had been made, and that there was no changing it. The presentation of a mandatory decision as a fait accompli is inconsistent with the duty to bargain in good faith. By making a final decision, without any meaningful opportunity for bargaining, the County violated Sec. 111.70(3)(a)4, MERA.

Finally, the claim that the current contract waives bargaining over the use of correctional officers is a misreading of the document. The contract does not contain a subcontracting clause, nor any reference to job security. It is silent, and a silent contract cannot be a waiver. The Management Rights clause is not susceptible to interpretation as a broad waiver of bargaining. It does permit the County to determine the classifications which will provide services, but that means the classifications within the bargaining unit. It cannot reasonably be read as a far-reaching right to assign bargaining unit work to whatever group the County chooses.

The decision to transfer work from the Association to the correctional officers for budgetary reasons is clearly a mandatory topic of bargaining. There is no conflict between the rights of the Sheriff as a constitutional officer, and the right of the Association to bargaining over mandatory topics. The complaint was timely filed, and there is no clear and unmistakable evidence that the Association has waived its right to demand bargaining, either through inaction or by contract. As the County made the decision without bargaining, it violated MERA, and the Association is entitled to relief.

The Respondent:

The Respondent takes the position that the complaint is legally barred and, even if it were not, the Association had waived any claim it may have had to bargaining over the use of correctional officers. The right to pursue a prohibited practice complaint is strictly limited to events occurring within one year before the filing of the complaint. Here, the Association was advised of the County's intention to start using correctional officers during mediation over the 2004 collective bargaining agreement, in April and August of 2004. The County hired correctional officers on January 9, 2005. Yet the complaint was not filed until January 19, 2006. It is outside of the statute of limitations, and must therefore be dismissed.

Even if the Examiner were to find the complaint timely, the decision at issue here is a fundamental right of management, and is not a mandatory topic of bargaining. Management has reserved its right to determine what work will be performed, and by what classifications. The method and means by which a public employer pursues its public function is primarily related to the formulation and implementation of public policy. A union may have the right to bargain over the impact of such a decision, but it may not use MERA as a means of defeating the municipality's right to make this fundamental choice about public services. The County clearly has the right to create classifications outside of the Association's bargaining unit, and to determine the work to be performed by those classifications.

The proposition that this is an inherent management right is reinforced by the fact that this case involves the operation of the Milwaukee County Jail. Given that the subject is jail operations, not only does MERA not compel bargaining, the constitution itself prohibits bargaining. The keeper of the jail is the Sheriff, and the constitutional powers of the Sheriff to decide the assignment of duties giving "character and distinction" to his office – such as jail operations – cannot be circumscribed by the statutory duty to bargain. Had the County chosen to bargain with the Association, the result of that bargain would not have been binding on the Sheriff.

The collective bargaining agreement between the County and the Association specifically reserves to the County "the right to determine the number of positions and the classifications thereof to perform such service" and "the right to direct the work force..." There is no reference in the collective bargaining agreement to a limitation on these rights if their exercise affects the represented employees, and there is no preservation of bargaining unit work to the Association. Thus the contract itself recognizes the County's authority to create the position of correctional officer, and to assign work to that classification.

Even if there was a duty to bargain, there is no evidence that the County failed to bargain. The Union never made a contract proposal regarding the use of correctional officers, and never demanded bargaining over the topic. The Union's negotiator admitted having had a conversation about the subject of correctional officers with the County's negotiators, although he was vague as to when it occurred. The President of the Association concedes that he knew no later than November of 2004 that the County planned to bring correctional officers into the Jail. Yet the Association made no effort to protest the move or to respond in any formal way. It did not seek a declaratory ruling, did not file a grievance, did not seek a unit clarification, and did not even bring a complaint until late January of 2006. It executed a successor collective bargaining agreement many months after this change, without ever seeking to include language on this subject. The County cannot have failed to bargain when it was not asked to bargain, and the Association cannot sit on its hands for two years and then ask the WERC to change what the Association never sought to change. It has waived any remedy it might theoretically have been entitled to receive.

DISCUSSION

A. Statute of Limitations

Section 111.07(14), WEPA establishes a one year statute of limitations for the bringing of unfair labor practices and prohibited practice charges: "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." The County asserts that this complaint is untimely, because the Association had clear notice in 2004 that the County intended to proceed with assigning civilian correctional officers to the Jail. The allegation here is unilateral change in a mandatory topic of bargaining. I conclude that clear notice that the decision to make the change had been finally reached took place when the Sheriff issued his Order on January 26, 2005. The Association may have known of the County's general intentions prior to that date, but no specific act had yet been taken to change the status quo ante. That specific act occurred on January 26, which is within one year of the filing of this complaint. The complaint is therefore timely filed.

B. The Constitutional Prerogatives of the Sheriff

An employer's decision to replace one set of workers with another for the purpose of saving money is a mandatory topic of bargaining, and the decision itself cannot be finally arrived at without first engaging in good faith negotiations with the labor organization representing the affected employees.[1] In this case, there is little doubt that the County's

[1] RACINE UNIFIED SCHOOL DISTRICT NO. 1 V. WERC, 81 WIS. 2D 89, 259 N.W.2D 724 (1977).

motive in placing civilian correctional officers in the County Jail was economically motivated. The record evidence is that there is no difference in the way that services are provided, nor in the overall operation of the Jail, other than the substitution of lower paid correctional officers for higher paid deputies. The County asserts that there is an inherent management right to establish classifications, but that is not what is at issue here. It appears that the correctional officer classification already existed, since it has previously been in place at the House of Corrections. Even if it was a new classification, it is not the creation of the classification which is the occasion for bargaining. It is the transfer of work from the deputies' bargaining unit to the bargaining unit represented by District Council 48 for the purpose of reducing labor costs.

On its face then, the decision to place correctional officers in the Jail to perform the duties of sworn deputies is clearly a mandatory topic of bargaining. As the Respondent notes, however, the involvement of the Sheriff in this dispute adds a constitutional dimension not present in the run of the mill subcontracting or bargaining unit work transfer case.

The constitutional prerogatives of the Sheriff extend to the assignment of non-bargaining unit personnel to perform duties directly related to the historic distinguishing powers of the Sheriff at common law. In WISCONSIN PROFESSIONAL POLICE ASSOCIATION V. DANE COUNTY, 106 WIS. 2D 303 (1982)[2] the Wisconsin Supreme Court held that the assignment of a supervisor to serve as court officer, when that position had been in the bargaining unit, was within the constitutional prerogatives of the Sheriff. Thereafter the Courts of Appeals have held that contracting with the U.S. Marshall's Service for the interstate conveyance of prisoners, even purely as a money saving device over the use of bargaining unit deputies,[3] and the utilization of area police officers to help keep the peace during a large event, despite a clear contractual reservation of unit work to the deputies,[4] were both within the prerogatives of the Sheriff.

The Supreme Court determined 136 years ago that the keeping of the jail was one of the duties giving character and distinction to the office of Sheriff. In striking down the legislature's attempt to transfer control of the Milwaukee County Jail from the Sheriff to another official, the Court observed:

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[2] Hereinafter referred to as "WPPA I."

[3] WISCONSIN PROFESSIONAL POLICE ASSOCIATION V. DANE COUNTY, 149 Wis. 2d 699 (Ct. App. 1989) (hereinafter referred to as "WPPA II").

[4] WASHINGTON COUNTY V. WASHINGTON COUNTY DEPUTY SHERIFF'S ASSOCIATION, 192 Wis. 2d 728 (Ct. App. 1995) (hereinafter referred to as "Washington County").

> "…But there can be no doubt that the framers of the constitution had reference to the office with those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted. Among those duties, one of the most characteristic and well acknowledged was the custody of the common jail and of the prisoners therein." STATE EX REL. KENNEDY V. BRUNST, 26 WIS. 412 (1870), AT 414, CITED IN WPPA I, AT PAGE 310.

Thus the custody of the jail and its prisoners is one of the areas in which the application of MERA must be reconciled with the sheriff's constitutional prerogatives or, if no reconciliation is possible, must yield.

The Association points out that there is little or no record evidence that the Sheriff was involved in the decision to utilize civilian correctional officers in place of deputies and has taken no part in this litigation, and it therefore suggests that this was purely a budget initiative by County officials, without policy impacts or implications for the constitutional powers of the Sheriff. I would note, however, that action being challenged here is the Order of the Sheriff assigning the correctional officers to the Jail.[5] I cannot assume that the Sheriff issued that Order without some conscious thought to approving it or adopting it as his own action. Moreover, WPPA I makes it clear that a decision to substitute one group of workers for another for purely budgetary reasons, even though there is no evidence of a difference in the nature of the service or that some policy goal is served by the change, is nonetheless constitutionally protected where it is done in the execution of the historical duties giving character and distinction to the office of the sheriff. The fact that it would clearly be a mandatory topic of bargaining in a different setting is of no account if the bargaining obligation imposed on the County by statute runs afoul of the powers bestowed on the Sheriff by the Constitution.

Not every decision of a Sheriff is constitutionally privileged, and there is no presumption that a statute or contract term will be applied in an unconstitutional fashion. As the Commission noted in a recent declaratory ruling concerning the scope of permissible bargaining over unit work security proposals, these decisions are made on a case-by-case analysis of the specific duty or job in question,[6] and the fact that a particular bargaining proposal or piece of contract language could theoretically interfere with the Sheriff's prerogatives does not mean that it is invalid. It means, instead, that the labor organization, arbitrator, county or administrative agency interpreting and applying the proposal or language must take care to do so "in a manner that does not conflict with the Sheriff's constitutional prerogatives."[7]

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[5] If it is not the Sheriff's Order, and the implementation of the Order, which give rise to the complaint, the Association is left to challenge the decision-making process of the civilian leadership of the County, which took place more than one year prior to the filing of this complaint.

[6] DUNN COUNTY, DEC. NO. 31084 (WERC, 9/27/2004) AT PAGE 5.

[7] DUNN COUNTY, AT PAGE 5.

The question then is whether the decision to use correctional officers in place of deputies could have been made contingent on mandatory collective bargaining, without impairing the Sheriff's authority over the Jail. I conclude that it could not. I base this conclusion on the fact that the staffing decisions in WPPA I and WPPA II seem to be squarely on point. As here, both of those cases involved the substitution of non-bargaining unit personnel in roles that had traditionally been filled by the bargaining unit, and both involved core historical functions of the Sheriff. While the Commission's analysis in DUNN COUNTY posits that there is a way to apply contract language in a manner so as to conform to the boundaries set by the constitution, this case involves a demand for decision bargaining. It is possible that negotiations over this decision could have yielded a result that was consistent with the Sheriff's authority, but that is purely speculative and is, in any event, beside the point. The duty to bargain cannot be defined in retrospect, by examining the result. The issue is whether the obligation to bargain before making the decision infringes on the Sheriff's constitutional authority. As the making of the decision itself is an exercise of the prerogatives of the Sheriff, I conclude that it cannot be conditioned on the duty to bargain under MERA.

C. The Impact of the Sheriff's Decision

Notwithstanding the fact that the decision to utilize civilian correctional officers is constitutionally shielded from bargaining, the impacts of that decision on wages, hours and conditions of employment are mandatory topics of bargaining. As a general proposition, there is nothing in such impact bargaining that intrudes on the Sheriff's constitutional prerogatives. The regulation of vacation picks is not "peculiar to" the office of the Sheriff, and the assignment of overtime opportunities among deputies does not give "character and distinction" to that office. Thus the County had a duty to bargain, upon demand, over the impact of this decision.

As a matter of mechanics, the duty to bargain over the impact of a decision arises with a demand for such bargaining. The Association noted its general concern over the impact of the contemplated decision in the November 2004 meeting with Linyear. It is possible to interpret that as a demand to bargain over the impact. Linyear's response – that the parties could cross that bridge when they got to it – is not a refusal. At most, it is a suggestion that bargaining would be premature. Thereafter, neither party made any demand or any proposal regarding the impact of the introduction of correctional officers. In 2005, the parties went to the bargaining table over the 2005-2006 labor agreement. They negotiated before, during and after the process of introducing the correctional officers to the Jail. They reached agreement on a contract some five months after the correctional officers appeared on the scene. At no time between November of 2004 and the filing of this complaint in January 2006 did the

Association demand impact bargaining with the County. An employer cannot refuse a demand that was never made, and the County is not obligated to take the lead in bargaining over the impact of a non-mandatory decision.[8] Having failed to make any demand for bargaining, and having negotiated a new labor agreement after the decision to bring in civilians was implemented, without addressing the impact of that decision, the Association waived its right to demand bargaining over those impact issues.[9] I have therefore dismissed the complaint in its entirety.

Dated at Racine, Wisconsin, this 1st day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

[8] CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85); CITY OF APPLETON, DEC. NO. 18451-A (DAVIS, 9/81); WALWORTH COUNTY, DEC. NOS. 15429-A, 15430-A (GRATZ, 12/78).

[9] The waiver applies to interim bargaining. The Association retains the right to raise these issues in negotiations over the successor collective bargaining agreement.