

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION, Complainant

vs.

MILWAUKEE COUNTY, Respondent

Case 620
No. 67002
MP-4349

Decision No. 32118-A

Appearances:

Rachel L. Pings, Cermele & Associates, S.C., 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin, 53213, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Timothy R. Schoewe, Office of Corporation Counsel, 901 North 9th Street, Milwaukee, Wisconsin, 53233, appearing on behalf of the Milwaukee County.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER**

On May 29, 2007, the Milwaukee Deputy Sheriffs' Association (hereafter "Association") filed a complaint with the Wisconsin Employment Relations Commission, asserting that Milwaukee County (hereafter "County") had committed certain prohibited practices in violation of Section 111.70(3)(a)4 and, derivatively, Section 111.70(3)(a)1 of the Municipal Employment Relations Act. The Commission appointed Danielle L. Carne to act as Examiner, to make and issue Findings of Fact and Conclusions of Law and to issue appropriate Orders. On June 28, 2007, the County answered the complaint, denying any alleged violation and making certain affirmative defenses. A hearing on the matters at issue was held in Milwaukee, Wisconsin, on July 9, 2007. Thereafter, on November 19, 2007, the Association and County submitted initial briefs; the Association filed a reply brief on December 3, 2007; and County waived the opportunity to file a reply brief; 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

No. 32118-A

FINDINGS OF FACT

1. The County is a municipal employer providing general governmental services to its citizens. Among the services provided by the County is the operation of a Sheriff's Department.

2. The Association is a labor organization which is the exclusive collective bargaining representative for all Deputy Sheriffs I, Deputy Sheriffs I (Bilingual)(Spanish), and Deputy Sheriff Sergeants employed by the County. At all relevant times, County Deputy Roy Felber has been the President of the Association.

3. The County and the Association were parties to a collective bargaining agreement (hereafter "Agreement"), which was effective from January 1, 2005, through December 31, 2006. At all times material hereto, the Agreement had expired and the parties had not yet entered into a successor collective bargaining agreement.

4. The County's Sheriff's Department is responsible for, among other things, patrolling the approximately one hundred and forty-five square miles of highway in Milwaukee County. These highway duties are handled by the deputies assigned to what is commonly known as the Patrol Division.¹ The deputies in the Patrol Division enforce traffic laws, respond to accidents or other emergencies, direct traffic as needed in special circumstances, monitor the structural condition of the highways, and perform any other duties that are necessary to ensure the safety of those who use the highways under the County's jurisdiction.

5. The work hours in the Patrol Division are divided into first, second, and third shifts, each of which is staffed with approximately seven deputies and each of which has two waves of overlapping starting and ending times. Prior to a change that took effect on June 4, 2007, the Patrol Division shift hours were structured as follows: typically, three of the first shift deputies worked from 6:00 a.m. to 2:00 p.m., and the remaining first shift deputies worked from 7:00 a.m. to 3:00 p.m.; three of the second shift deputies worked from 2:00 p.m. to 10:00 p.m., and the remaining second shift deputies worked from 3:00 p.m. to 11:00 p.m.; and three of the third shift deputies worked from 10:00 p.m. to 6:00 a.m., and the remaining third shift deputies worked from 11:00 p.m. to 7:00 a.m. These shift hours had been in place since at least 1997.

6. On May 21, 2007, the Sheriff's Department issued a memorandum to Patrol Division employees announcing a change in third shift hours. Consistent with the memorandum and effective June 4, 2007, the early wave of third shift deputies would work from 8:00 p.m. to 4:00 a.m., rather than 10:00 p.m. to 6:00 a.m. as they had done in the past.

7. In response to the memorandum announcing the change in shift hours, Association President Deputy Felber hand-delivered, on or about May 22, 2007,

¹ The Patrol Division is also referred to as the Police Services Bureau.

correspondence to Milwaukee County Director of Labor Relations Greg Gracz, as well as Sheriff's Department Inspector Kevin Carr. The correspondence sent to Mr. Gracz and Inspector Carr stated as follows:

On or about May 21, 2007, this Association became aware that the Department is contemplating a unilateral change to the shifts/hours of members assigned to the Patrol Division. This is a mandatory subject of bargaining within the meaning of §§ 111.70(1)(a) and (3)(a)(4), Wis. Stats. This also in [sic] violation of the contract between Milwaukee County and the Milwaukee Deputy Sheriffs' Association, Part 1, 1.01 Recognition.

As you know, we are currently in contract hiatus, which requires that the status quo be maintained as to wages, hours, and conditions of employment. Therefore, you are required to bargain with the Association before any changes be made. This letter constitutes the Association's formal demand to bargain immediately if the Department does, in fact, wish to discuss changes to the shifts/hours of members assigned to the Patrol Division.

8. Upon receiving Deputy Felber's correspondence on May 22, 2007, Mr. Gracz indicated to Deputy Felber that he would discuss the matters raised therein with Inspector Carr.

9. Sometime after May 22, 2007, but prior to the May 29, 2007 filing of the instant complaint, Deputy Felber raised the subject of the change in third shift hours with Inspector Carr. Deputy Felber recounted that conversation with Inspector Carr, as follows:

I said, oh, yeah, about this, can we talk about this and he said, Roy, just give us a chance. We are trying to do a different system to see if it works. We are trying to do a different system to see if – for staffing issues because they were short on the freeway and that's why they were looking at doing – trying this for staffing, give it a shot. If it doesn't work out, we might go back to the old way. I said, well, that's not – why can't we talk about it and he said this is what we are going to do and I said fine, and you got to do what you got to do and we will do what we got to do and he said that was fine.

10. Following the May 29, 2007 filing of the complaint in this matter, the Association and the County had no further exchange regarding either the change to the Patrol Division shift hours or the impact of the change on employee wages, hours, and conditions of employment.

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

CONCLUSIONS OF LAW

1. Milwaukee County is a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats.

2. The Milwaukee Deputy Sheriffs' Association is a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats.

3. Milwaukee County did not violate Sec. 111.70(3)(a)4, Stats., or, derivatively, Sec. 111.70(3)(a)1, Stats., by refusing to bargain with the Association regarding the change to Patrol Division shift hours. Determining the ways and means of how patrol services are provided, through the setting of shift hours, is an immemorial principal and important duty that that gives character and distinction to the office of a sheriff, and it is, therefore, a prohibited subject of bargaining between the County and the Association.

4. Milwaukee County violated Sec. 111.70(3)(a)4, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats., by refusing to bargain with the Association regarding the impact of the change to Patrol Division shift hours on employee wages, hours, and conditions of employment.

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 hereby ORDERED that

1. The complaint of prohibited practices, as to Milwaukee County's failure to bargain the change to the Patrol Division shift hours, is hereby dismissed;
2. Milwaukee County shall cease and desist from refusing to bargain the impact of the change to the Patrol Division shift hours on employee wages, hours, and conditions of employment;
3. Milwaukee County shall take the following affirmative actions, which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:
 - (a) Upon request by the Association, immediately engage in collective bargaining with the Association concerning the impact of the change to the Patrol Division shift hours on employee wages, hours, and conditions of employment;

- (b) Notify bargaining unit employees by posting, in conspicuous places where employees are employed by the Milwaukee County Sheriff's Department, copies of the notice attached hereto and marked as "Appendix A". The notice shall be signed by a representative of Milwaukee County and shall remain posted for thirty (30) days thereafter. Milwaukee County shall take reasonable steps that said notices are not altered, defaced, or covered by other material;
- (c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 16th day of September, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/

Danielle L. Carne, Examiner

APPENDIX A

**NOTICE TO ALL EMPLOYEES REPRESENTED
FOR PURPOSES OF COLLECTIVE BARGAINING
BY THE MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION**

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

Milwaukee County will cease and desist from refusing to bargain the impact of the change to the Patrol Division shift hours on employee wages, hours, and conditions of employment;

Milwaukee County will, upon request, immediately engage in collective bargaining with the Association concerning the impact of the change to the Patrol Division shift hours on employee wages, hours, and conditions of employment.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2008.

By _____

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY THE MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED, OR OBSCURED IN ANY WAY.

MILWAUKEE COUNTY

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER**

In its complaint, the Association alleges that the County violated Sec. 111.70(3)(a)4, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats., when it unilaterally changed the third shift hours for the Patrol Division of the Sheriff's Department, without bargaining as to the change or its impact on employee wages, hours, and conditions of employment. The County denies any alleged violation. It asserts that the Sheriff was acting within his constitutionally conferred authority when he changed the Patrol Division shift hours, that the Sheriff's actions were consistent with the provisions of the Agreement between the County and the Association, and that the Association pursued bargaining in an inappropriate fashion and then filed the instant complaint before bargaining could occur.

Does the ability to set Patrol Division shift hours fall within the Sheriff's constitutional powers?

The County argues that it was under no duty to bargain with the Association prior to the change to the Patrol Division shift hours, because the ability to set such hours falls within the Milwaukee County Sheriff's constitutional authority. This argument rests on the basic principle that the constitutional authority of a sheriff cannot be infringed upon by legislative mandate. STATE EX REL. KENNEDY V. BRUNST, 26 WIS. 412, 1 (1870); *See also*, STATE EX REL. MILWAUKEE COUNTY ET AL. V. BUECH, 171 WIS. 474, 177 N.W. 781 (1920), WISCONSIN PROFESSIONAL POLICE ASSOCIATION V. COUNTY OF DANE (WPPA I), 106 WIS. 2D 303, 316 N.W.2D 656 (1982), HEITKEMPER V. WIRSING, 194 WIS. 2D 182, 533 N.W.2D 770 (1995), CRAWFORD COUNTY, DEC. NO. 20116 (WERC, 12/82), SAUK COUNTY, DEC. NO. 26658 (WERC, 10/90). Thus, if the setting of shift hours for patrol deputies falls with the constitutional powers of the sheriff, the ability to set such hours cannot be infringed upon by the duty to bargain established by the Municipal Employment Relations Act and alleged to have been violated by the County in the present case. ID.

Because the Wisconsin Constitution does not define the scope of a sheriff's constitutional authority, it has been left to Wisconsin Courts to do so. They have clarified that the internal management and administrative duties performed by a sheriff are not constitutionally protected. DUNN COUNTY V. DUNN COUNTY JOINT COUNCIL OF UNIONS, AFSCME, 293 WIS. 2D 637, ¶10, 718 N.W.2D 138, 2006 WI APP 120 (WIS.APP. 2006), HEITKEMPER V. WIRSING, *supra* at 193, MANITOWOC COUNTY V. LOCAL 986B, AFSCME, AFL-CIO, 168 WIS. 2D 819, 826-27, 484 N.W.2D 534 (1992). Rather, it is only those immemorial principal and important duties that gave character and distinction to the office of the sheriff at common law that fall within a sheriff's constitutional authority. STATE EX REL. MILWAUKEE COUNTY V. BUECH, *supra* at 784, WISCONSIN PROFESSIONAL POLICE ASSOCIATION V. COUNTY OF DANE (WPPA I), *supra* at 312, DUNN COUNTY V. DUNN COUNTY JOINT COUNCIL OF UNIONS, AFSCME, *supra* at ¶10. Moreover, it has been well established by now that the duties of enforcing the law and preserving the peace are duties

which gave character and distinction to the office of sheriff at common law and are, therefore, constitutionally protected. *MANITOWOC COUNTY V. LOCAL 986B, AFSCME, AFL-CIO*, *supra* at 830, *WISCONSIN PROFESSIONAL POLICE ASSOCIATION V. COUNTY OF DANE (WPPA I)*, *supra* at 309, *WASHINGTON COUNTY V. WASHINGTON COUNTY DEPUTY SHERIFF'S ASSOCIATION*, 192 Wis. 2d 728, 739, 531 N.W.2d 468 (Wis.App., 1995).

The Courts have emphasized that it is the nature of the job assignment at issue, rather than the general power of job assignment, which must be analyzed in cases involving the constitutional powers of the sheriff. *WISCONSIN PROFESSIONAL POLICE ASS'N V. DANE COUNTY (WPPA II)*, 149 Wis. 2d 699, 710, 439 N.W.2d 625 (Ct.App. 1989), *MANITOWOC COUNTY V. LOCAL 986B, AFSCME, AFL-CIO*, *supra* at 829, *WASHINGTON COUNTY V. WASHINGTON COUNTY DEPUTY SHERIFF'S ASSOCIATION*, *supra* at 736, *DUNN COUNTY V. DUNN COUNTY JOINT COUNCIL OF UNIONS, AFSCME*, *supra* at ¶10. Here, the job assignment at issue is that of patrol deputy. The description of a patrol deputy's duties on the record in the present case makes it clear that these duties are not merely administrative. Milwaukee County patrol deputies enforce traffic laws, respond to accidents and other emergencies, direct traffic as needed in special circumstances, monitor the structural condition of the highways, and take any other steps necessary to generally ensure the safety of those who travel along County highways. These duties are directly related to a sheriff's fundamental obligation to maintain law and preserve the peace. For that reason, they fall within the scope of the sheriff's constitutional authority.

If a duty is deemed to be an immemorial principal and important duty such that it falls within the sheriff's constitutional powers, the sheriff chooses the ways and means of performing it. *WISCONSIN PROFESSIONAL POLICE ASS'N V. DANE COUNTY (WPPA II)*, *supra* at 710, *MANITOWOC COUNTY V. LOCAL 986B, AFSCME, AFL-CIO*, *supra* at 830, *WASHINGTON COUNTY V. WASHINGTON COUNTY DEPUTY SHERIFF'S ASSOCIATION*, *supra* at 738-39. Here, it is within the Milwaukee County Sheriff's constitutional authority to set the Patrol Division shift hours, because they go to the very heart of the ways and means by which the Sheriff carries out his patrol duties. By setting the shift hours, the Sheriff controls the number of deputies that patrol Milwaukee County highways at any given time. The changing of the third shift hours in the present case, to 8:00 p.m. to 4:00 a.m., has the direct effect of creating heavier patrol presence on Milwaukee County highways between the hours of 8 p.m. and 10 p.m. and lighter patrol presence between the hours of 4:00 a.m. and 6:00 a.m. While the Association disputes the prudence of such a decision, raises concerns regarding the effect it has on deputies in the Patrol Division, and asserts that similar changes have been the subject of bargaining in the past, none of these factors has any bearing on the scope of the Milwaukee County Sheriff's constitutional authority or his ability to exercise that authority in such a manner.²

² Given the conclusion that the Sheriff was acting within his constitutional authority when he changed the third shift hours in the Patrol Division, there is no need to examine the County's alternative argument that the Sheriff's actions here were consistent with the terms of the Agreement between the County and the Association.

Did the County violate its duty to bargain?

The finding that the County had no duty to bargain the change in Patrol Division shift hours does not entirely eliminate the County's bargaining obligation with regard to that subject. Even where an employer's action is not a mandatory subject of bargaining, the impact of that action may be a mandatory subject of bargaining where employee wages, hours, and conditions of employment are affected. *BELOIT EDUCATION ASSOCIATION V. WERC*, 73 WIS. 2D 43, 242 N.W.2D 231 (1976); *OAK CREEK-FRANKLIN SCHOOL DISTRICT NO. 1*, DEC. NO. 11827-O (WERC, 1/74), *AFF'D DANE CO. CIRC. CT.* (1975). Here, the County has an obligation to bargain with the Association regarding the impact of the change to Patrol Division shift hours on employee wages, hours, and conditions of employment.

The County argues that the Association waived its right to bargain by pursuing bargaining in an inappropriate fashion and then by hastening to file the instant complaint before bargaining could occur. Specifically, the County alleges that Association President Felber "cavalierly" raised the issue of the change in shift hours with Director of Labor Relations Greg Gracz in the inappropriate setting of a hallway conversation and then, rather than following-up with Mr. Gracz as he should have, Felber pursued the issue in a conversation with Sheriff's Department Inspector Kevin Carr. Further, the County argues that the Association cut the opportunity for bargaining short, by filing the instant complaint within days of having made its demand to bargain. For all of these reasons, the County asserts that the Association should be found to have operated with "unclean hands".

The Commission has repeatedly refused to apply the "unclean hands" doctrine in prohibited practice cases, *MADISON JOINT SCHOOL DISTRICT*, DEC. NO. 14365 (WERC, 2/76), *GREEN BAY SCHOOL DISTRICT*, DEC. NO. 9095-E (WERC, 9/71), *CITY OF PORTAGE*, DEC. NO. 8378 (WERC, 1/68), *CITY OF MILWAUKEE*, DEC. NO. 7950 (WERC, 3/67), and there is no apparent reason to depart from that tradition in the context of the present case. The County's argument that the Association's demand to bargain was made inappropriately is simply not persuasive. Although Deputy Felber's initial conversation with Mr. Gracz regarding the change in shift hours occurred in a hallway, there is no evidence on the record indicating that such contact was unusual or even objected to by Mr. Gracz or any other County representative. Further, there is nothing in the record that supports the County's argument that it was inappropriate for Deputy Felber subsequently to have raised the issue with Inspector Carr. Indeed, Mr. Gracz had signaled to Deputy Felber that Inspector Carr was the point-man with regard to the issue; and when Deputy Felber approached Inspector Carr directly, Inspector Carr made no indication that having done so was inappropriate.

There is also no evidence to suggest that the Association's filing of the complaint precluded any bargaining. Contrary to the County's assertion, Inspector Carr's response to Deputy Felber's request to discuss the change in shift hours was not bargaining. On the contrary, it was an unequivocal refusal to bargain. Based on that interaction, it was reasonable for the Association to have concluded that the County would not engage in bargaining regarding the change in shift hours and, based on that conclusion, to have proceeded immediately with the filing

of the complaint. I note that, even after the complaint was filed, the County did not offer to bargain over the impact of the change on employee wages, hours, and conditions of employment.

Having held that the County violated Sec. 111.70(3)(a)4, Stats., by refusing to bargain the impact of the change in shift hours, it follows that the County also committed a derivative violation of Sec. 111.70(3)(a)1, Stats.

Dated at Madison, Wisconsin, this 16th day of September, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/

Danielle L. Carne, Examiner

