

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION**, Complainant,

vs.

**MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)**, Respondent.

Case 739  
No. 70000  
MP-4600

**Decision No. 33238-B**

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**MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION**, Complainant,

vs.

**MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)**, Respondent.

Case 745  
No. 70113  
MP-4611

**Decision No. 33240-B**

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**Appearances:**

**Graham Weimer**, Attorney at Law, 2360 North 124th Street, Suite 200, Wauwatosa, Wisconsin 53226, for the labor organization

**Roy M Williams**, Principal Assistant Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, for the municipal employer.

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

On July 12, 2010, the Milwaukee Deputy Sheriffs' Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the Milwaukee County

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Sheriff's Department had committed prohibited practices within the meaning of Sec. 111.70(3)(a) 1 and 4, Wis. Stats., by offering civilian correctional officers assignments and opportunities for overtime which previously had been reserved for members of the Association. On August 23, 2010, the Association filed a similar, related complaint. The Association later moved, with the County's concurrence, that the Commission consolidate the complaints for hearing and decision, which the Commission did on February 3, 2011. On March 8, 2011, the Association filed an Amended Complaint reflecting the consolidation. Hearing in the matter was held before Examiner Stuart D. Levitan, a member of the Commission's staff, on April 25, 2011, with a stenographic transcript being made available to the parties on May 19. The parties filed written arguments, the last of which was received on August 17, 2011.<sup>1</sup>

### **FINDINGS OF FACT**

1. The Milwaukee Deputy Sheriffs' Association ("the Association") is a labor organization, certified as the exclusive representative for collective bargaining for all law enforcement employees of the Milwaukee County Sheriff's Office (MCSO) holding the rank of Deputy Sheriff and Deputy Sheriff Sergeant, all of whom are municipal employees with the power of arrest.

2. Milwaukee County is a municipal employer, organized under the laws of the State of Wisconsin, and the employer of the Deputy Sheriffs and Deputy Sheriff Sergeants referenced in Finding of Fact 1. Since 2002, David A. Clarke, Jr., has served as the Sheriff of Milwaukee County.

3. Milwaukee County and the Milwaukee Deputy Sheriffs' Association are parties to a collective bargaining agreement which expired on December 31, 2008. Negotiations for a successor agreement have commenced and are continuing.

4. In 2004-2005, the MCSO began to implement an agreement that had been negotiated with the Association to replace sworn law enforcement officers at the Milwaukee County Jail with civilian correctional officer. Correctional officers are municipal employees without the power of arrest, are not represented by the Association, and are paid less than deputy sheriffs.<sup>2</sup> As of the spring of 2011, there were about 100 deputies still performing detention services.

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<sup>1</sup> Milwaukee County informed the examiner it would not be filing a reply brief on September 14, 2011.

<sup>2</sup> The record does not include the correctional officer's pay scale. The unrebutted testimony was that their pay scale is lower than that of the deputies.

5. In January, 2009, the Sheriff assumed control of what was formerly known as the Milwaukee House of Corrections, adding between 300 and 500 correctional officers to the Sheriff's Office roster.

6. The Sheriff's Office began 2011 with a structural deficit of between \$1.3 million and \$1.6 million. Among other strategies to reduce the deficit, the department sought to expand the use of civilian correctional officers.

7. On June 15, 2010, MCSO Deputy Inspector Tobie Weberg issued the following memorandum:

To: All Correctional Officers

Re: **Park and Ride Security Operation (Summerfest)**

In order to enhance public safety at Milwaukee County owned Park and Ride lots during Summerfest, the Sheriff's Office will be conducting a security patrol operation that will employ **UNIFORMED** correctional officers to provide deterrence from criminal activity by making continuous patrols of the park and ride lots. The Officer's responsibility for this assignment will be to actively patrol these lots with the responsibility of being the "eyes and ears" during their tour of duty and report any suspicious activity to Sheriff's Communications for appropriate law enforcement response. Officers working this assignment will not engage suspicious persons or attempt to take police action.

**The assignment will be from 1200-0000 hours.**

ANY Correctional Officer wishing to work this assignment shall complete the attached form in its entirety and return to **Sergeant Dobson** (Patrol Division) by **NO LATER THAN WEDNESDAY, JUNE 23 @ 0800 hours. Requests for 6/24-6/27 are due by SUNDAY, JUNE 20<sup>th</sup>.** (All emphases in original).

8. On June 22, 2010, MCSO Lieutenant John R. Nelson posted the following memorandum:

TO: All M.C.S.O. Correctional Officers

RE: July 3<sup>rd</sup> Fireworks – Overtime

The US Bank July 3<sup>rd</sup> Fireworks annually draws nearly 100,000 people to the Milwaukee County Lakefront. This poses a number of challenges for public safety including traffic and crowd control. The fireworks display will begin at

approximately 2130 hours. Citizens will be utilizing Veteran's Park beginning the evening of Friday, July 2<sup>nd</sup> to campout throughout the night and throughout the entire day on Saturday, July 3<sup>rd</sup> and to reserve their areas for viewing the fireworks in the evening of July 3<sup>rd</sup>. Because the event occurs on a Saturday, the possibility of higher than normal attendance may occur.

Overtime opportunities exist for **ALL Correctional Officer staff**. This position will be in full duty uniform during the designated listed time. This will be a traffic control post partnered with a Deputy Sheriff. Correctional Officers shall have a full charged flashlight and whistle, traffic vests and radio will be provided. ANY Officer wishing to work this assignment please complete this form in its entirety and return it to me, **NO LATER THAN SUNDAY JUNE 27<sup>TH</sup> @ 0800 hours**. (all emphases in original)

9. On July 29, 2010, Lt. Nelson posted the following memorandum:

**TO: All Correctional Officers**

**RE: Park and Ride Security Operation (State Fair)**

In order to enhance public safety at Milwaukee County owned Park and Ride lots during State Fair, the Sheriff's Office will be conducting a security patrol operation that will employ **UNIFORMED** correctional officers to provide deterrence from criminal activity by making continuous patrols of the park and ride lots. The officer's responsibility (sic) for this assignment are to actively patrol these lots with the responsibility of being "eyes and ears" during their tour of duty and report any suspicious activity to Sheriff's Communications for appropriate law enforcement response. Officers working this assignment will not engage suspicious persons or attempt to take police action. Officers will **NOT** be armed with an Agency firearm.

**This assignment will be from 1200-0000\* hours.**

**ANY** Correctional Officer wishing to work this assignment shall complete the attached form in its entirety and return it to **Lieutenant John R. Nelson** (Patrol Division), **NO LATER THAN WEDNESDAY, AUGUST 4, 2010 @ 0800 HOURS**. (all emphases in original).

10. The responsibility of patrolling the Summerfest and State Fair Park and Ride lots and the July 3<sup>rd</sup> Fireworks had been held by deputy sheriffs, and correctional officers had never previously been employed as security patrol in this manner.

11. Milwaukee County did not notify the Association before issuing the memoranda cited in Facts 7-9. Association President Roy Felber made a timely request of the Sheriff's Office that it bargain as to the changes and the impact on the wages, hours and conditions of employment of Association members. Inspector Kevin Carr, the second-highest ranking MCSO officer at the time, denied the request.

12. In performing their duties relative to the June 15, June 22 and July 29 memoranda, correctional officers were not charged with law enforcement responsibility or authority, were not armed, and did not have the power to arrest.

13. The decision to transfer certain security-related duties at the State Fair and Summerfest Park and Ride lots and the July 3<sup>rd</sup> fireworks, reflected in the memoranda of June 15, June 22 and July 29, 2010, eliminated overtime opportunities, affected vacation scheduling and otherwise had an impact on the wages, hours and conditions of employment of municipal employees represented by the Milwaukee Deputy Sheriff's Association.

14. The decision to transfer certain security-related duties at the State Fair and Summerfest Park and Ride lots and the July 3<sup>rd</sup> fireworks, reflected in the memoranda of June 15, June 22 and July 29, 2010, was primarily related to the formulation of public policy rather than the wages, hours and conditions of employment of municipal employees represented by the Milwaukee Deputy Sheriff's Association.

Based on the above and foregoing Findings of Fact, I hereby make and issue the following

### CONCLUSIONS OF LAW

1. Milwaukee Deputy Sheriffs' Association is a labor organization as defined in Sec. 111.70(1)(h), Wis. Stats.

2. Milwaukee County is a municipal employer as defined in sec. 111.70(1)(j), Wis. Stats.

3. Milwaukee County did not violate sec. 111.70(3)(a)4, Wis. Stats., by transferring certain security-related duties at the State Fair and Summerfest Park and Ride lots and the July 3<sup>rd</sup> fireworks from deputy sheriffs to civilian correctional officers, as reflected in the memoranda of June 15, June 22 and July 29, 2010.

4. Milwaukee County violated sec. 111.70(3)(a)4, and, derivatively, Sec. 111.70(3)(a)1, Wis. Stats., by transferring certain patrol duties at the State Fair and

Summerfest Park and Ride lots and the July 3<sup>rd</sup> fireworks from deputy sheriffs to civilian correctional officers, as reflected in the memoranda of June 15, June 22 and July 29, 2010, without bargaining the impact of that decision with the Milwaukee Deputy Sheriff's Association.

Based on the above and foregoing Conclusions of Law, I hereby make and issue the following

**ORDER**

To remedy its violation of Sec. 111.70(3)(a)1 and 4, Wis. Stats., Milwaukee County shall:

1. Cease and desist from refusing to bargain with the Milwaukee County Deputy Sheriffs' Association over its decision to transfer certain security-related duties at State Fair Park, the Summerfest grounds and the Park and Ride lots from deputy sheriffs to civilian correctional officers.
2. Notify the employees represented by the Association by posting in conspicuous places in District facilities where employees are employed copies of the Notice marked "Appendix A". The Notice shall be signed by the Sheriff of Milwaukee County, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the County to insure that said notices are not altered, defaced, or covered by other material.
3. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, on what steps have been taken to comply with it.

Dated at Madison, Wisconsin, this 10th day of October, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

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Stuart D. Levitan, Examiner

**APPENDIX "A"**

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

WE WILL bargain in good faith with the Milwaukee County Deputy Sheriffs' Association over the impact of the decision to transfer certain security-related duties at the State Fair and Summerfest Park and Ride lots and the July 3<sup>rd</sup> fireworks from deputy sheriffs to civilian correctional officers, as reflected in the memoranda of June 15, June 22 and July 29, 2010.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

MILWAUKEE COUNTY SHERIFF'S DEPARTMENT

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David A. Clarke, Jr.  
Milwaukee County Sheriff

**MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)**

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

**POSITIONS OF THE PARTIES**

In support of its position that the County committed prohibited practices, the Association asserts and avers as follows:

The department's decision to replace deputies with correctional officers was primarily related to the deputies' wages, hours and conditions of employment, and as such was a mandatory subject of bargaining. Replacing one set of workers with another who are providing the same services primarily relates to the first set of workers' wages, hours and conditions of employment. That is the case here, as the same work will be performed in the same place and in the same manner, only by different workers who are being paid less. The department's action does not reflect a choice among alternate social or political goals, but rather a way to address a financial situation. The association requested that the parties bargain as to the change and impact on deputies, but the department refused. In so doing, it violated MERA.

The department also violated MERA by refusing to bargain the impact of its action. Even if a subject or action is reserved exclusively to the employer as a management right, the employer must still bargain over the action's or subject's impact on employee's wages, hours and conditions of employment. The department's action replacing deputies with correctional officers reduced overtime opportunities and the ability to use seniority in picking vacations for Association members, and reduced the scope of the bargaining unit, all of which relate primarily to wages, hours and conditions of employment. Accordingly, the employer was required to bargain the impact of its decision. The Association made a timely demand to bargain this impact, which the employer refused, in violation of sec. 111.(3)(a) 4, and, derivatively, sec. 111.(3)(a)1, Wis. Stats.

In support of its position that it did not commit prohibited practices, the County asserts and avers as follows:

The County's actions were a proper exercise of management rights, utilizing correctional officers in new roles without having them perform law enforcement functions. This deployment was a matter of budgetary constraints; it makes



more financial and common sense to have correctional officers serve as “eyes and ears,” and save the deputies for actual law enforcement functions.

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In response, the Association posits further as follows:

The County’s argument that it engaged in a proper exercise of management rights overlooks its duty to bargain and proves the allegations in this case. The County has used deputies on overtime assignments to patrol and provide surveillance since at least 1998, and as such is an “existing practice” as referenced in the collective bargaining agreement. Provisions in the collective bargaining agreement also confirm that the county must still bargain the impact of its decision.

The County also completely disregards established case law that replacing one set of workers with another primarily relates to the first set of workers’ wages, hours and conditions of employment. The County’s reliance on budgetary issues is misplaced; it cannot resolve its obligation to bargain simply because its decision saves it money. The County cannot replace deputies with correctional officers without first bargaining with the Association.

The County waived its right to file a reply brief.

### DISCUSSION

The analytical framework for this controversy is not complex. In the public employment setting, it is well-established that collective bargaining is required with regard to matters “primarily” related, or “fundamentally,” “basically” or “essentially” related to wages, hours and conditions of employment. *BELOIT EDUCATION ASSO. V. WERC*, 73 WIS. 2D 43, 54 (Sup. Ct. 1976). Where “governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people.” *UNIFIED S.D. NO. 1 OF RACINE COUNTY V. WERC*, 81 WIS. 2D 89, 102 (SUP. CT. 1977). Drawing the line between matters which are plainly bargainable and those matters which are reserved to the exclusive discretion of the governmental unit “is not easy.” *BELOIT EDUCATION ASSO.*, at 53.

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. *OAK CREEK-FRANKLIN SCHOOL DISTRICT NO. 1, DEC. NO. 11827-O (WERC, 1/74), AFF’D DANE CO. CIRC. CT. (1975)*.

Here, there is no question that the deputies’ wages, hours and conditions of employment were affected by the county’s decision to transfer the duties to correctional officers, in that it reduced their opportunities for overtime and limited their use of seniority in

scheduling vacations. The association made a timely demand to bargain these impacts, which the County refused. In so doing, it violated sec. 111.70(3)(a) 4., and, derivatively, Sec. 111.70(30(a)1, Wis. Stats.

The Association is correct that replacing one set of workers with another set of workers who are performing the same duties does primarily related to wages, hours and conditions of employment and as such is a mandatory subject of bargaining. If, as the Association asserts, the correctional officers performed the same work in the same manner as did the deputies, the county would have indeed committed a prohibited practice in ignoring the Association's demand to bargain over the matter.

But I do not believe that to be the case. Deputies are sworn law enforcement personnel with the power of arrest. Civilian correctional officers are not sworn, and do not have the power of arrest. While it is true that both groups of workers were generally engaged in providing security at the various sites, the difference between the power and authority of sworn and unsworn personnel is so significant it cannot be said that correctional officers are now performing the same duties in the same manner as did the deputies. The civilian correctional officers were explicitly ordered to "not engage suspicious persons or attempt to take police action", but merely "report any suspicious activity" to dispatch. That is certainly a lower level of service than the deputies formerly provided.

In *CITY OF BROOKFIELD v. WERC*, 87 Wis. 2d 819 (Sup.Ct. 1979), the court overturned a Commission order finding the city had committed a prohibited practice in not collectively bargaining its decision to lay off five fire fighters. The court held that "the economically motivated layoffs of public employees resulting from budgetary restraints is a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government." *Id.*, at 830. The public, the court explained, has a "vital interest in the continued fiscally responsible operation of its municipal services." Although neither party mentioned this decision in their briefs, I believe it must inform my analysis.

That is, while cutting costs by subcontracting for an identical level of service is a mandatory subject of bargaining (the *RACINE* case), cutting costs by reducing the level of service (the *BROOKFIELD* case) is not. More recently, the Commission has harmonized the two decisions to hold that, "where a layoff decision affects only wage costs and does not effectuate a reduction in services, the decision is primarily related to wages, hours and conditions of employment rather than managerial policy and is therefore a mandatory subject of bargaining." *EDGERTON FIRE PROTECTION DISTRICT*, Dec. No. 30686-B (WERC, 2005), p. 31. <sup>3</sup>

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<sup>3</sup> A series of cases has held that a public employer must negotiate over decisions that do not affect the level of

Sheriff Clarke made a conscious decision to provide a lower level of public safety in exchange for cost savings. Deciding to risk public security as a cost-saving strategy is a public policy choice which is properly entrusted to the governmental entity.

Accordingly, while the County was required to bargain the impact of its decision to transfer the duties from deputies to correctional officers, it did not have to bargain the underlying decision itself.

Dated at Madison, Wisconsin, this 10th day of October, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

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Stuart D. Levitan, Examiner

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services but merely achieve a less costly means of providing them. CITY OF GREEN BAY, Dec. No. 18731-B at 8-10, and the cases cited therein.

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