STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

DOUGLAS COUNTY

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

LOCAL 441A, WISCONSIN PROFESSIONAL POLICE ASSOCIATION/ LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

Case 302
No. 70836
DR(M)-712

Decision No. 33853

Appearances:

Mindy Dale, Weld, Riley, Prenn & Ricci, S.C., P.O. Box 1030, Eau Claire, Wisconsin, 54702-1030, appearing on behalf of Douglas County.

Roger Palek, Staff Attorney, WPPA/LEER Division, 660 John Nolen Drive, Suite 300, Madison, Wisconsin, 53713, appearing on behalf of Local 441A, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On June 29, 2011, Douglas County filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling over the scope of its duty to bargain with Local 441A, Wisconsin Professional Police Association/ Law Enforcement Employee Relations Division as to County jailers represented by Local 441A. On August 9, 2011, the County amended its petition to add Sec. 227.41(2), Stats., as a jurisdictional basis for the petition.

Hearing on the petition was held on August 11, 2011, in Superior, Wisconsin by Commission Examiner Peter G. Davis. The parties filed post hearing briefs – the last of which was received October 10, 2011.

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

FINDINGS OF FACT

1. Douglas County, herein the County, is a municipal employer.

2. Local 441A, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, herein Local 441A, is a labor organization that serves as the collective bargaining representative of jailers employed by the County.

3. None of the County jailers have been appointed as a "deputy sheriff" by the County Sheriff pursuant to Sec. 59.26(2), Stats.

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

CONCLUSIONS OF LAW

1. Jailers employed by Douglas County are not "deputy sheriffs" within the meaning of Secs. 40.02(48)(am)13 and (b)3, Stats.

2. Jailers employed by Douglas County are not "public safety employees" within the meaning of Sec. 111.70(1)(mm), Stats., but are "general municipal employees" within the meaning of Sec. 111.70(1)(fm), Stats.

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

DECLARATORY RULING

Douglas County has a duty to bargain with Local 441A, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division over the base wages of jailers employed by the County and represented for the purposes of collective bargaining by Local 441A.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of April, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

I dissent

Judith Neumann /s/
Judith Neumann, Commissioner

Douglas County

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

The dispute between the parties is over the scope of Douglas County's duty to bargain with Local 441A, WPPA/LEER Division as to County jailers represented by Local 441A. If the jailers are "general municipal employees", as argued by the County, then the scope of the duty to bargain is limited to base wages. If the jailers are "public safety employees", as argued by Local 441A, then the scope of the duty to bargain is much broader.

Section 111.70(1)(mm), Stats., defines "public safety employee" as:

> . . . any municipal employee who is employed in a position that, on July 1, 2011, is one of the following:
>
> 1. Classified as a protective occupation participant under any of the following:
>
> a. Section 40.02(48)(am)9., 10., 13., 15., or 22.
>
> b. A provision that is comparable to a provision under subd. 1.a. that is in a county or city retirement system.
>
> 2. An emergency medical service provider for emergency medical services departments.

The County and Local 441A both agree that it is the "Section 40.02(48)(am)9., 10., 13., 15., or 22." language found in Sec. 111.70(1)(mm)1, a., Stats., that is applicable herein and further agree that "public safety employee" status turns on whether the jailers are "deputy sheriffs" within the meaning of Sec. 40.02(48)(am)13, Stats. The parties' arguments as to the meaning of Sec. 40.02(48)(am)13, Stats., also bring the following statutory provisions into play:

Section 40.02(48)(a), Stats., provides:

> (48)(a) "Protective occupation participant" means any participant whose principal duties are determined by the participating employer, or, subject to s. 40.06(1)(dm), by the department head in the case of a state employee, to involve active law enforcement or active fire suppression or prevention, provided the duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning.

Section 40.02(b)(3), Stats., provides:

> (b) Each determination of the status of a participant under this subsection shall include consideration, where applicable, of the following factors:
>
> . . .

> 3. A "deputy sheriff" or a "county traffic police officer" is any officer or employee of a sheriff's office or county traffic department, except one whose principal duties are those of a telephone operator, clerk, stenographer, machinist or mechanic and whose functions do not clearly fall within the scope of active law enforcement even though such an employee is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active law enforcement. Deputy Sheriff or county traffic police officer includes any person regularly employed and qualifying as a deputy sheriff or county traffic police officer, even if temporarily assigned to other duties.

We begin our analysis by noting that Sec. 111.70(1)(mm)1, Stats., requires that a "public safety employee" be "classified as a protective occupation participant". The jailers in Douglas County are currently so classified. The second part of the definition requires that the "participant" be "any of the following":

> 13. A deputy sheriff.

Local 441A argues that the jailers are "deputy sheriffs" within the meaning of Sec. 40.02(48)(b)3, Stats., because they are "regularly employed" as an employee of the sheriff's office, engaged in "active law enforcement" as evidenced by their protective occupation status, and are not one of the specifically excluded listed occupations. We disagree.

In our view, the Sec. 40.02(48)(b)3, Stats. definition of deputy sheriff has two basic components: (1) being "qualified" to be a deputy sheriff; and (2) having principal duties that involve active law enforcement. As to the "qualified" component, the Court's decision in Mattila v. Employee Trust Fund Board, 2001 Wi. App. 79, 243 Wis.2d 90, 626 N.W.2d 33 provides significant guidance. The Court's decision indicates that being appointed as a "deputy" by a sheriff is a necessary qualification to be a "deputy sheriff" within the meaning of Secs. 40.02(48)(am)13 and (b)3, Stats. Thus, we find "qualified" to mean having been appointed as a "deputy sheriff" pursuant to Sec. 59.26(2), Stats.

As indicated in Finding of Fact 3, none of the County jailers have been appointed as a "deputy sheriff." Because they have not been so appointed, they are not "qualified" to be and thus do not hold the position of "deputy sheriff" within the meaning of Secs. 40.02(48)(b)3 and 40.02(48)(am)13, Stats. Therefore, the jailers are not "public safety employees" within the meaning of Sec. 111.70(1)(mm), Stats., but are instead "general municipal employees" within the meaning of Sec. 111.70(1)(fm), Stats. As a consequence, the County's duty to bargain with Local 441A is limited to the base wages of the jailers.[1]

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[1] It is important to note that our decision does not hold that jailers cannot be "deputy sheriffs". The County has advised the Wisconsin Department of Employee Trust Funds that the jailers are "protective occupation participants" within the meaning of Sec. 40.02(48)(a), Stats. By so doing, the County has determined that the jailers' "principal duties" "involve active law enforcement." By doing so, the County has also satisfied us that the principal duties of the jailers involve active law enforcement within the meaning of Sec. 40.02 (48)(am)13 and (b)3, Stats. Thus, if the jailers were to be sworn by the Sheriff, they would qualify as a "deputy sheriff" under Secs. 40.02(48)(am)13 and (b)3, Stats.

In response to our dissenting colleague, we note that in determining who would be included within the definition of "public safety employee" under Sec. 111.70(1)(mm)1, a, Stats., the Legislature chose to utilize five of the twenty-two categories of "protective occupation participants" set forth in Sec. 40.02(48)(a), Stats. Those identified are:

9. A police officer.
10. A firefighter.
13. A deputy sheriff.
15. A county traffic police officer.
22. A person employed under 60.553(1), 61.66(1) or 62.13(2e)(a).

The remaining seventeen protective occupation participants are excluded from the collective bargaining definition of "public safety employee".

The dissent goes through a convoluted analysis in attempting to circumvent the clear legislative directive as to who is included in the definition of "public safety employee" for purposes of collective bargaining. Clearly the term "deputy sheriff" is largely self-defining. Under Sec. 59.26(1), Stats. the sheriff, upon beginning his term of office is entitled to appoint deputy sheriffs. Those individuals take an oath of office and are authorized to perform the functions described in Sec. 59.27, Stats. They have the power to arrest and enjoy various statutorily conferred benefits. For example, under Sec. 59.26(8), Stats., deputy sheriffs have the benefit of significant limitation on the power to discipline or discharge them from their employment.

Sheriffs, pursuant to Sec. 59.27(1), Stats. are responsible to "take the charge and custody of the jail" and to "keep the persons in the jail personally or by a deputy or jailer." That responsibility may be exercised by deputy sheriffs, jailers, civilian corrections officers or various combinations thereof. There is however a clear statutory distinction between "deputy sheriffs" and people who work in the office of the sheriff who are not deputy sheriffs. We believe the test is simple and reflects the clear intentions of the Legislature. If a county chooses to classify an employee as a protective occupation participant and the sheriff choses to designate the employee as a "deputy", he or she is a "public safety employee" for purposes of Sec. 111.70. No tortuous legal analysis beyond the above designation is necessary.

Dated at Madison, Wisconsin this 18th day of April, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

Douglas County

DISSENTING OPINION OF COMMISSIONER NEUMANN

Today the Commission issues two decisions, one arising in Winnebago County and the other in Douglas County, where we interpret for the first time the newly-created statutory category of "public safety employee" in Sec. 111.70(1)(mm), Stats. The interpretation has enormous significance for the affected employees, given the continuing broad-based bargaining rights that apply to "public safety employees" in contrast with the extremely limited rights for those outside that category, as a result of Act 10.

The new legislation establishes two requirements for inclusion in the new category: first, the employee must be "classified as a protective occupation participant" in Sec. 40.02(48) and second (as to these jailers) the employee must fall within the category of "deputy sheriff" in Sec. 40.02(48)(am).

Regarding the first element, we all agree that, by defining "public safety employee" in MERA solely with reference to the ETF statute (Sec. 40.02(48)), the Legislature has bound the Commission to apply and abide by the ETF criteria for protective status. Here, each of the counties has determined that its jailers' "principal duties ... involve active law enforcement [and] frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning" within the meaning of Sec. 40.02(48)(a), Stats. That determination is subject to review by ETF and/or ETFB, but not by the WERC. County of La Crosse v. WERC, 170 Wis.2d 155 (App. Ct. 1992). See also La Crosse County, Dec. No. 52775 (WERC, 6/96) (protective status for ETF purposes is not a mandatory subject of bargaining, because the Commission should not be "in the role of evaluating the statutory eligibility criteria under Sec. 40.02(48), Stats.") Therefore neither WERC nor the Counties can contest the conclusion that the jailers in both cases have sufficient law enforcement duties to meet the ETF criteria.

The next inquiry is whether the jailers in question are also "deputy sheriffs." We all agree that we are not free to develop our own criteria but must apply the definition of "deputy sheriff" that appears in Sec. 40.48(b)3, Stats.:

> A "deputy sheriff" is ***any*** **officer or employee of a sheriff's office** ... except one whose principal duties are those of a telephone operator, clerk, stenographer, machinist or mechanic and whose functions do not clearly fall within the scope of active law enforcement even though such an employee is subject to occasional call, or is occasionally called upon, to perform duties within the scope of active law enforcement. Deputy sheriff ... includes any person regularly employed and qualifying as a deputy sheriff ... even if temporarily assigned to other duties.

(emphasis added).

In applying this definition the majority and I part company. The majority reads into the foregoing definition a requirement that employees must be "appointed" (formally sworn) as deputies by the County Sheriff within the meaning of Sec. 59.26(2), Stats. Because the Winnebago jailers have all been sworn, this issue does not affect the outcome of that case, and I concur that those jailers are "public safety employees" and should remain in the existing bargaining unit. However, none of the jailers in Douglas County have been sworn, even though the County has determined that they have the requisite law enforcement duties and working conditions to have "protective status" for ETF purposes. Therefore, the majority has concluded that they are not "public safety employees" under MERA.

I recognize the superficial intuitive concept that a "deputy sheriff" must in fact have been formally "deputized." However, upon careful examination, I think the Legislature intentionally avoided limiting the ETF definition in that manner, for the several reasons explained below, including legislative history specifically addressing paragraph (48)(b)3.[2] I therefore dissent from the Douglas County holding and would conclude instead that the Douglas County jailers satisfy the definition of "deputy sheriff" in paragraph (48)(b)3 and are public safety employees for purposes of MERA.

First, I note that if the Legislature had intended to impose a formal "sworn" requirement, it would have been exceedingly simple to have said so: for example, "Any *sworn* employee of a Sheriff's office. . . ." Or, "Anyone *appointed as a deputy by the Sheriff."* Instead the statute uses the very broad term *"any employee of the Sheriff's Department."* The Legislature must have been aware that not all employees of a sheriff's department are sworn or deputized. It seems significant, then, that it nonetheless chose – counter intuitively – to use the broad language that would encompass non-sworn employees. And, indeed, we have legislative history supporting this intentionally broad construction. In 1983, the Legislature created Sec. 895.46(1)(d), Stats., adding "deputy sheriffs" to the set of employees for whose action municipalities would be liable so long as the employees acted in the scope of their employment. Like the new provision of MERA, 895.46(1)(d) also defined "deputy sheriffs" by reference to the definition in the ETF statute. The accompanying legislative note makes clear that the Legislature considered that definition to encompass all jailers and makes no reference to formal deputizing. After quoting from (48)(b)3, the note states:

> This definition of "deputy sheriff" is sufficiently broad to include persons serving as undersheriffs and jailers. However, it would exclude employees not serving in a law enforcement capacity even though those persons may occasionally be "deputized" to perform law enforcement duties.

Legislative Note to 1983 Wisconsin Act 6 (copy included in the record as Ex. 16).

[2] I am sorry that the majority finds the following analysis "convoluted" and "tortuous." It was not my intention to tax my colleagues' patience or legal stamina. Unfortunately for all of us, "simple" is not always synonymous with "correct," especially when it comes to harmonizing statutes.

A look at the legislative purposes of the ETF definition reinforces the conclusion that being formally "sworn" is not pivotal to ETF status as a deputy sheriff. The general purpose of the definition is to put parameters around who can be given the special and more costly protective category retirement status. The definition's specific two-fold goals are clear in its two respective sentences: the first sentence ensures that employees who perform only incidental law enforcement work are not entitled to the special status; the second sentence addresses the obverse goal, that employees who do "regularly" perform law enforcement work are included, even though they occasionally or temporarily may be assigned to other *nonqualifying* assignments.

The focus of the difference of opinion between me and the majority lies in our different readings of the word "qualifying" in the second sentence of (48)(b)3. The majority reads it to mean "sworn" or "appointed." To the contrary, the context makes clear that the term "qualifying" was shorthand for the longer phrase "capable of performing law enforcement duties" (even though temporarily or incidentally handling non-law enforcement duties for whatever reason). The purpose of the second sentence, in other words, was to permit counties to maintain employees in the ETF protective category if their normal duties "qualified" them for that status, despite temporary or intermittent periods of non-"qualifying" work. The sentence allows counties to avoid the bookkeeping gyrations of moving employees back and forth between retirement plans.

If the majority is correct that "qualifying" means "sworn" or "appointed," then one could substitute the word "sworn" for the word "qualifying" in the second sentence of (48)(b)3 and still accomplish the statutory purpose of the sentence. Plainly, that does not work. The goal of the sentence is to permit temporarily-reassigned employees who usually perform law enforcement work to remain in the ETF system pending their return to their normal duties. "Regularly employed and qualifying" accomplishes that goal, if a bit awkwardly. "Regularly employed and sworn" does not identify or narrow the target group of employees. In fact, it could include the clerical, mechanics, etc., that the first sentence is attempting to exclude, as some sheriffs administer the oath to every department employee. In short, substituting the term "sworn" could create nonsense and would not serve the purpose of the sentence.

Here it is clear that Douglas County, with ETF approval, has determined that its jailers perform "qualifying" law enforcement work for purposes of Section 48.02(48)(a). Hence, they fully meet the definition of deputy sheriff in (b)3: they are "employees of the Sheriff's Department" and, based on their duties, "regularly employed and qualifying as a deputy sheriff" for ETF purposes. It follows that they are "deputy sheriffs" and "public safety employees" for MERA purposes as well.

It is also troubling that adding the "sworn" requirement would give each county Sheriff unreviewable power to confer "public safety" status upon employees. Given the now enormous ramifications of conferring that status (general municipal employees have exceedingly more limited bargaining rights), it seems especially poor policy to interpret

(48)(b)3 in that manner. Contrary to the majority's reading of Mattila v. ETF, 243 Wis.2d 90 (Ct. App. 2001), that decision does not state that an employee must be "sworn" to meet the definition of "deputy sheriff" in (48)(b)3.[3] Instead, it suggests the contrary: that being sworn is not only an irrelevant but an inappropriate consideration in terms of ETF coverage, precisely because it is an unreviewable action by the Sheriff:

> Permitting a sheriff's unilateral action in deputizing a department employee to bind the County, the department and the Board [ETFB] to classifying the employee as a protective occupation participant would nullify the classification and review scheme the legislature enacted in chapter 40.

Mattila, at 103.

I suspect that the Commission majority is interposing the formality of being "sworn" because that concept had become ingrained in Commission case law prior to Act 10 as the primary method for distinguishing law enforcement units from other municipal units. See, for example, County of Waukesha, Dec. No. 14830 (WERC, 8/76). Prior to Act 10, law enforcement employees had similar rights to other municipal employees although subject to a somewhat different dispute resolution procedure. The law did not define "law enforcement employee," and over the years the Commission found the sworn/non-sworn distinction a serviceable proxy for "law enforcement." However, when the Legislature enacted Act 10 and gave enormously greater bargaining rights to "public safety employees," it quite clearly chose not to utilize the Commission's pre-existing constructs. Act 10 did not even continue the use of the term "law enforcement." It discarded the criteria the Commission had previously used and removed from the Commission any discretion in determining who was a "public safety employee." Instead, the Legislature used the ETF statute and the ETF definitions – presumably with foreknowledge of the precedent (La Crosse, *supra*) requiring the Commission to defer to ETF's interpretation of Section 48.02(48). As explained, above, the ETF statute does not employ the sworn/non-sworn distinction, but rather relies upon an assessment of actual law enforcement duties and working conditions – which the jailers in Douglas County have met.

To summarize, I believe that the Legislature, in creating a new category of "public safety employee" and directing the Commission to refer to Sec. 40.02(48), has established a clear inclusion/exclusion principle that mirrors ETF's protective occupation status. For ETF purposes, the jailers in Douglas County have sufficient law enforcement duties to warrant protective occupation status. Like all other known protective status employees, the jailers also fit within one of the subcategories of (48)(am), namely "deputy sheriff." They do so because, within the plain language of subparagraph (48)(b)3, they are "employees of the

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[3] We all agree that Mattila holds that jailers must be both "deputy sheriffs" within (48)(b)3 and have been determined by their county to have sufficient law enforcement duties to be "protective service" within (48)(a). However, Mattila tells us nothing about how to construe the term "deputy sheriff" in (b)3, as that issue was not presented in Mattila. It certainly does not state or imply that being formally "sworn" is inherent, though unstated, in that definition.

Sheriff's office" and regularly perform the "qualifying" duties of law enforcement. The Commission has no authority to narrow the ETF categories or inject a criterion (such as being sworn) that is not an element of the ETF definition.[4]

For the foregoing reasons I concur in the outcome of Winnebago County, Dec. No. 33854, but dissent from the holding in Douglas County, Dec. No. 33853.

Dated at Madison, Wisconsin this 18th day of April, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Commissioner

[4] If the Commission were correct that "any employee of a Sheriff's department" had to be formally sworn in order to satisfy (48)(b)3, then the Commission in effect would have interpreted the ETF law to create two distinct groups of law enforcement employees within a sheriff's department, both having "protective" status for purposes of ETF. There would be the non-sworn law enforcement people who would have protective status under (48)(a) but not under (48)(am)13, and the sworn law enforcement people who would have protective status under both (48)(a) and (48)(am)13. It would also create what appears to be unique, i.e., a protective service job classification that exists only as a function of (48)(a) and not also enumerated in (48)(am). What conceivable ETF purpose would this jumbled situation serve? It is notable that ETF's regulations do not appear to contemplate any such separate categories I suspect ETF might be a bit dismayed about the Commission twisting ETF law into unnecessary convolutions.

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