BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
BROWN COUNTY SHERIFF'S DEPARTMENT NONSUPERVISORY EMPLOYEES	:	Refusal to Bargain Decision to Use Civilians as Jailers
and	:	WERC Case 372 No. 40898 MA-5218
BROWN COUNTY	:	

Appearances:
Mr. Frederick J. Mohr, Mohr & Beinlich, S.C., 415 South Washington Street, PO Box 1098, Green Bay, WI 54305, appearing on behalf of the Association.
Mr. Kenneth J. Bukowski, Corporation Counsel, PO Box 1600, Green Bay, WI 54305-5600, appearing on behalf of the County.

ARBITRATION AWARD

The Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and determine the above-noted dispute pursuant to the grievance arbitration provisions of the 1987-1988 collective bargaining agreement (herein Agreement) between the County and the labor organization noted above and referred to variously herein as the Association or the Union.

The parties presented their evidence and arguments to the Arbitrator at a hearing held in Green Bay, Wisconsin on September 28, 1988. By agreement of the parties, the Arbitrator recorded the hearing on cassette tape for his exclusive use in award preparation. Briefing was initially completed on October 27, 1989. Thereafter, on February 17, 1989, the Arbitrator wrote the parties requesting additional briefing on two issues arising out of the parties' initial briefs. Specifically, the Arbitrator requested the Union's response to the County's argument, first made in its brief, that the Sheriff's statutory and inherent Constitutional rights preclude a ruling in favor of the Union in this matter. The Arbitrator also requested the County's response to the Union's submission, as a part of its initial brief, of a Sheriff's memorandum dated October 20, 1988 concerning the Sheriff's views as to the status of certain Rules and Regulations of the Department. The parties completed their supplemental briefing addressing those questions on March 20, 1989.

ISSUES

At the hearing, the parties stipulated to the following issues:

1. Did the County violate the Agreement by deciding to hire civilian correctional officers without first bargaining collectively with the Union on that decision.

2. If so, what shall the remedy be?

PERTINENT PORTIONS OF THE AGREEMENT

Article 2. RECOGNITION

The County agrees to recognize the bargaining unit as the bargaining agent for the enforcement personnel of the Brown County's Sheriff's Department in the matter of wages, hours of work, and working conditions, except in situations wherein this contract is in conflict with existing Wisconsin

Statutes. In the case of conflict, the statute will apply.

Article 3. MANAGEMENT RIGHTS RESERVED

Except as herein otherwise provided, the management of the department and the direction of the working forces is vested exclusively in the Employer.

It is further agreed, except as herein otherwise provided, that the responsibilities of management include, but are not limited to those outlined in this Agreement. In addition to any specified herein, the Employer shall be responsible for fulfilling all normal managerial obligations, such as planning, changing or developing new methods of work performance, establishing necessary policies, organizations and procedures, assigning work and establishing work schedules and of applying appropriate means of administration and control; provided however, that the exercise of the foregoing rights by the County will not be used for the purpose of discrimination against any member of the Association or be contrary to any other specific provisions of this Agreement, and provided that nothing herein shall be construed to allow management to affect wages, hours and conditions of employment of Association members as outlined in Section 111.70.

. . .

LETTER OF AGREEMENT

A study has been completed on the Sheriff's Department by the consulting firm of Cresap, McCormick and Paget. The study includes sixty (60) recommendations for changes within the Sheriff's Department.

The parties hereby agree to continue good faith negotiations on negotiable items that are contained in the study's (60) recommendations.

. . .

FACTUAL BACKGROUND

The Union has, for many years, represented the bargaining unit described in the Agreement Recognition clause, above.

For many years prior to the actions giving rise to the instant dispute, the County operated a single jail facility including Huber, Juvenile and other prisoners. During that period, the County maintained a nonsupervisory staff in the jail consisting exclusively of deputy sheriffs in the bargaining unit represented by the Union.

After experiencing several years of jail overcrowding and associated needs to regularly transport some of its prisoners to other Counties' jails, the County expanded its jail capacity by converting portions of another building into separate Juvenile and Huber jail areas thereby freeing up additional space in the old jail facility for regular prisoner population.

On October 9, 1987, the Union wrote the County that it had "learned that the County is now considering replacing the sworn officers [represented by the Union] with civilians in the Brown County jail." The Union further stated in that letter that "the decision to man the jail with civilians of any sort is a decision which must be bargained. Please consider this letter a demand to bargain that decision."

The County did not respond in writing to the Union's letter until after the parties executed their 1987-88 Agreement in mid-November, 1987. Specifically, on December 7, 1987, the County wrote the Union stating that it was willing to meet with the Union regarding "the impact of utilizing non-sworn correction officers in the Huber Section of the jail. However, it is Brown County's position that the decision to use non-sworn correction officers in the Huber Section of the jail is a non-negotiable item and will not be discussed."

At some point in time thereafter, without bargaining about its decision to do so with the Union, the County created a new civilian

Correctional Officer classification, authorized several positions in that classification to be filled, treated those positions as included in a bargaining unit with other civilian employes represented by an organization other than the Union, and hired several individuals to work in those positions. The evidence establishes that the civilian Correctional Officers perform essentially the same job duties as the bargaining unit deputies assigned to work in the Jail perform and have historically performed for many years. The Correctional Officers perform their duties exclusively in the new Huber facility, such that the prisoner population they work with is somewhat less demanding than the non-Huber adult population that the jail deputies work with. The bargaining unit deputies not assigned to the jail perform a range of additional law enforcement duties not included in the Correctional Officer job.

The parties initially submitted their dispute as to whether the decision to use civilian correctional officers to the Wisconsin Employment Relations Commission for resolution by declaratory ruling on an agreed-upon record and without a hearing. After reviewing the parties' stipulations and arguments, the Commission suggested by letter that the parties "both might be better served at this juncture by having the instant petition held in abeyance while the contractual issues were resolved through a grievance arbitration process where the issue could presumably be whether the County's actions were violative of the contract." In accordance with that suggestion, the instant contract grievance arbitration proceeding was initiated by a request filed on July 22, 1988.

POSITION OF THE UNION

At a minimum, the concluding clause of Art. 3 requires the County to bargain with the Union before making decisions that "affect wages, hours and conditions of employment of Union members." In other words, the County has a contractual obligation to negotiate changes in wages, hours and conditions of employment with the Union before implementing such changes. The County's decision to employ individuals outside the Union's bargaining unit to perform essentially the same jail work that had historically been performed exclusively by employes in the bargaining unit represented by the Union adversely affected bargaining unit members' overtime opportunities, restricted the Union's membership, and was, under Wisconsin case law, a matter relating primarily to wages, hours and conditions of employment, and hence a mandatory subject of bargaining. Specifically, in Racine Schools, 81 Wis.2d 89 (1977) the Supreme Court affirmed a WERC holding that a municipal employer's decision to subcontract the same work to employes of a different employer is a mandatory subject of bargaining. In City of Green Bay, Dec. No. 18731-B (WERC, 6/83), the Commission made it clear that a decision to subcontract services to a public employer is subject to same principles as developed in Racine Schools as regards subcontracting to a private sector subcontractor. The County's refusal to bargain that decision, when requested to do so by the Union, therefore violated Agreement Art. 3.

In addition, the County's refusal to bargain the decision in question violated the parties' LETTER OF AGREEMENT concerning the Cresap study. That study contained several recommendations that have been negotiated about in good faith, some of which have resulted in a loss of jobs to members of the Union. The study does not recommend utilizing civilians in the jail, though it did recommend using them in certain dispatch and civil process server functions in the Sheriff's Department. On the contrary, the study recommended the that the number of jail officers (i.e., bargaining unit employes assigned to the jail) be increased to satisfy shift requirements and reduce overtime. The County's decision to utilize civilians in the jail without negotiating with the Union about that decision violated the LETTER OF AGREEMENT requirement that the parties continue good faith negotiations regarding the Cresap Study recommendations. For that reason, the County's refusal to bargain about that decision would violate the Agreement even if the subject matter of that decision is somehow deemed to be a permissive subject of bargaining and outside the Art. 3 proviso.

The County's use of civilians to do jail work also violated the County's own Rules and Regulations of the Department. Those Rules and Regulations, provide that applicants for promotions and appointments to positions in the Jail "will be picked by seniority from the roster of

patrolmen of the Sheriff-Traffic Department. Anyone choosing this position must serve satisfactorily to the Sheriff." The civilian correctional officers obviously were not picked from the roster of patrolmen in what is now called the Sheriff's Department. While the Rules and Regulations are antiquated in various respects, they have never been formally repealed following their adoption by the County Board in 1965. On the contrary, they were enforced by the County over Union objections as recently as 1982 in what turned out to be the Haney grievance arbitration in which the County argument that the Rules remained in effect prevailed over Union arguments to the contrary. Indeed, in a memo issued on October 20, 1987, i.e., after the hearing in this proceeding was conducted (which memo was forwarded to the Arbitrator by the Union by letter during the period for submission of initial briefs) the Sheriff confirmed his understanding that the Rules and Regulations, although they appear outdated, "have been held up under litigation through the grievance process." The County cannot have it both ways: if the Rules and Regulations were in effect for the Haney case and the Sheriff says they remain in effect generally, they must be in effect for this case as well.

The evidence also shows that all changes in the Rules and Regulations and all other operational changes affecting wages hours and working conditions of the bargaining unit have historically been negotiated. The County negotiated the change to civilian process servers prompted by a Cresap study suggestion that such alternatives be considered. In that bargaining, the County attained its objective but there was a give and take in the process. The County recently requested negotiations concerning a possible change to one man cars. The parties' uniform history of negotiating about changes that affect wages, hours and working conditions is further proof that the County's refusal to do so in advance of its decision to use civilians jail officers violated the parties' Agreement.

By way of remedy, the Union asks that the County be ordered to restore the status quo in effect prior to the County's improper refusal to bargain (either by creating sworn law enforcement personnel of the civilian correctional officers or by replacing the civilian correctional officers with deputies bargaining unit personnel) and to bargain with the Union concerning any decision to utilize individuals outside the Union's bargaining unit to perform jail work. In that regard, the Union states in its brief, "In an attempt to continue a good bargaining relationship with the County, . . . [the Union] is not asking to be made whole for all past losses as the result of the County's decision. The [Union] is requesting only that the County return to the status quo and negotiate this decision as it should have."

In its Supplemental Brief, the Union argues that the County's reliance on the Supreme Court's decision in Wisconsin Professional Police Association v. Dane County, 106 Wis.2d 303 (1982)(referred to herein as WPPA) is misplaced. The Union argues that the instant dispute is different from that addressed in WPPA. In WPPA, the union was challenging the Sheriff's having chosen to appoint a supervisor rather than a WPPA bargaining unit member to perform the task in question, bringing the collective bargaining agreement, grievance, arbitration award and judicial compliance order into possible conflict with what the Supreme Court concluded were inherent Constitutional rights of the Sheriff. In the instant case, the authority of the Sheriff is not in dispute since the Union takes issue only with the fact that the individuals the Sheriff has appointed are not members of the Union's bargaining unit. Moreover, in WPPA, the Sheriff entered an appearance separate and apart from the County and clearly expressed an unwillingness to abide by collective bargaining agreement terms that would have had the effect of limiting his selection personnel to perform the task in question to individuals within the Union's bargaining unit. In the instant case, the County has produced no evidence that the Sheriff objects to having jail officer work performed exclusively by Union bargaining unit personnel. Indeed, as the newspaper article submitted with the Union's brief reveals, the Sheriff would prefer to use deputies in the jail. Moreover, as noted above, his Rules and Regulations specifically provide that jail personnel are to be deputies. It is the County that has limited his ability to continue to use deputies exclusively, through its budget procedure. In WPPA, the Court relied in part on the fact that the Sheriff took no part in the negotiations leading to the collective bargaining agreement involved. In Brown County, however, the fact is that the Sheriff or his Chief Deputy have been in constant attendance and agreement during contract negotiations with the Union. At a

minimum, there is no evidence that the Sheriff objects to or will refuse to comply with any provision of the Agreement as interpreted by the Arbitrator. Finally, nothing in the Constitution would prohibit inclusion in the Union's bargaining unit of the individuals the Sheriff assigns to work in the jail. As far as the Sheriff's statutory rights to operate the jail are concerned, they can and must be harmonized with the rights of deputy sheriff employes under the collective bargaining statute.

POSITION OF THE COUNTY

Article 3 expressly provides that the County is responsible for changing or developing new methods of work performance, establishing necessary policies, organizations and procedures, assigning work and establishing work schedules. The County's decisions to create a new classification of civilian correctional officers and to create and fill a number of positions in that classification are therefore decisional matters reserved to County management in Art. 3.

The decisions at issue do not fall within the Art. 3 proviso regarding matters that "affect wages, hours and conditions of employment of Association members as outlined in Section 111.70." The decision whether sworn or non-sworn personnel should be hired to staff the jail is a policy choice primarily related to public policy and only secondarily related to wages, hours and conditions of employment. Since no deputy unit employe has been displaced, demoted or laid off, the decision to use civilian correctional officers did not and does not affect wages, hours and working conditions of members of the Union bargaining unit. Thus, contrary to the Union's contentions, the County's decision in that regard is a permissive subject decision, not a mandatory one, under the case law developed by WERC and the Courts. Specifically, in Dane County, Dec. No. 22681-A (Honeyman, 11/85) the Examiner held that Dane County's decision to use civilian process servers to do work previously performed exclusively by deputies unit employes was a permissive subject of bargaining where affected deputies were displaced but assigned other duties. Moreover, in Racine Schools, above, the Wisconsin Supreme Court stated that decisions that primarily relate to public policy and only secondarily to wages, hours and conditions of employment would be permissive subjects of bargaining. In City of Waukesha (Fire Department), Dec. No. 17830 (WERC, 5/80) the Commission held permissive a proposal which would have required the municipal employer to bargain over the minimum qualifications needed to hold a position or classification. Finally, in Brown County (Department of Social Services) Dec. No. 19042 (WERC 11/81) the Commission ruled that decisions as to number of classifications within Department or minimum qualifications applicable to said classifications are also permissive subjects of bargaining.

The Union's contention that County work rules require exclusive use of sworn personnel to perform the jail work at issue must be rejected. The "promotions and appointments" language relied on by the Union does not apply herein since there simply are no applicants to be chosen from the bargaining unit for these new correction officer positions. Furthermore, that quoted Rule language is no longer in effect. The Sheriff's October 20, 1988 memorandum which the Union unilaterally submitted during briefing has not been properly offered or received into evidence in this proceeding and, hence, must be considered not to exist for purposes of this proceeding. Moreover, unlike the numbered Rules and Regulations preceding it in Exhibit 5, the promotions and appointments language in question was expressly adopted "in association with the Brown County Civil Service Ordinance" which was entirely repealed in 1978. In any event, the award in the Haney grievance arbitration was narrowly applicable to a different Rule, and it relied on an express "work rules" article that has since been eliminated from the parties' agreements such that it is not contained in the 1987-88 Agreement governing the instant dispute. Indeed, since the Haney award, the parties specifically agreed to abide by that particular Rule, whereas the Agreement is silent as to the other Rules contained in Exhibit 5.

In any event, the Supreme Court has made it clear that neither the County Board nor the Union, nor an arbitrator, nor the courts can deprive the Sheriff of his constitutional and statutory authority to run the jail as he sees fit. The inherent constitutional right of the Sheriff in that regard was recognized in Police Association v. Dane County, 106 Wis.2d 303

and Sec. 59.23(1), Stats., confers such powers, as well. The Union's demand to bargain would unlawfully deprive the Sheriff of his inherent power to opt to use civilian personnel to perform the jail work in question.

It should also be noted that when other counties have utilized civilian correctional officers, the WERC has clearly held that such employes who lack the power of arrest belong in a different bargaining unit from that of the county's "law enforcement personnel" as that term is used in Sec. 111.77, Stats. Citing, Waukesha County (Sheriff's Department), Dec. No. 14534-A (WERC, 11/76) and Kenosha County (Sheriff's Department) 21910 (WERC, 8/84). The Union offers no evidence or support for its suggestion that this principle be overturned in this case by merely swearing in the existing correctional officers and then including them with the power of arrest personnel comprising the balance of the Union's bargaining unit.

For those reasons, the answer to ISSUE 1 should be "no," and no remedy should be ordered.

DISCUSSION

In ISSUE 1, above, the Union challenges the County's right to unilaterally decide, without first bargaining with the Union, to utilize personnel outside the Union's bargaining unit to perform some of the jail work which had previously been performed exclusively by Union bargaining unit personnel. Although the Union has expressed a willingness to expand its bargaining unit to include civilian jail personnel as one alternative means of retaining in its unit the work historically performed exclusively by its unit's personnel, the Union's demand to bargain does not necessarily entail either a demand that the County not create civilian classifications of County personnel or a demand that the County include non-law enforcement personnel in the same bargaining unit with law enforcement personnel. Rather, the essence of the Union's demand is to bargain the decision to assign what has historically been exclusively Union bargaining unit work to other than Union bargaining unit employes.

Pivotal to resolution of ISSUE 1 is a determination whether the County's decision to use other than Union bargaining unit employes to perform the jail work in question is a decision which "affect[s] wages, hours and conditions of employment of Association members as outlined in Section 111.70," within the meaning of the Art. 3. Both parties' arguments correctly recognize that the scope of the Art. 3 proviso from which that quoted language is drawn extends to (but only to) the limits of mandatory subjects under Sec. 111.70, Stats., and does not encompass the instant decision if it is a permissive or prohibited subject of bargaining under the statute. If the decision constitutes a mandatory subject of bargaining (i.e., not a permissive or prohibited subject), then the answer to ISSUE 1 would be affirmative without need of consideration of any of the Union's other arguments. For, if the decision is a mandatory subject, the proviso of Art. 3 requires, at the least, that the County engage in the bargaining demanded by the Union before implementing such a decision.

Focusing first on the question of permissive vs. mandatory, the parties have properly invoked the general standards distinguishing permissive from mandatory subjects established in Beloit Education Association v. WERC, 73 Wis.2d 43 (1976) and Racine Schools, above, to wit,

> . . . The question is whether a particular decision is primarily related to the wages, hours and conditions of employment, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representative of the people. The test can only be applied on a case-by-case basis, and is not susceptible to "broad and sweeping rules that are to apply across the board to all situations.

Racine Schools, above, Note 2, at 102.

As the Court's language above emphasizes, the general principles noted above require case-by-case application. Hence, close attention must be given to the to the facts of the cases relied upon by the parties in support of their positions.

So scrutinized, the Union's reliance on Racine Schools and City of Green Bay as directly in point is unpersuasive. In Racine Schools, the municipal employer's decision to subcontract food service operations substituted another employer's employes for those of the municipal employer with the same work performed in the same places and in the same manner, and caused the bargaining unit employes involved to lose their employment with the municipal employer. City of Green Bay involved a decision to consolidate an operation within one municipal employer's with that of another municipal employer, causing loss of employment due to position elimination within the City. Unlike those cases, Brown County's decision herein involves no second employer; it involves a transfer of work to a new location, and it does not involve elimination of any Union bargaining unit positions or the loss of any Association bargaining unit employe's job.

Similarly, the County's reliance on City of Waukesha (Fire) and Brown County (Social Services) cases, above, as directly in point is also unpersuasive. Those cases involved union efforts to bargain about how many classifications there would be in a given Department and what the minimum qualifications were to be for those classifications. Neither of those cases dealt with an effort on the part of the union to protect work historically performed by employes in its bargaining unit from being transferred to personnel outside the scope of that bargaining unit. The instant case, of course, deals squarely with an effort on the Union's part to retain for its bargaining unit, work that has historically been performed exclusively by Union bargaining unit employes.

The Examiner's Findings of Fact, Conclusions of Law and Order in the decision in Dane County, Dec. No. 22681-A (Honeyman, 11/85) cited by the County were formally set aside by Commission order in Dec. No. 22681-B (1/88) at the joint request of the parties to that proceeding, with no Commission decision on the merits of that case being issued. Hence that case does not provide precedential support for either party's position herein.

However, in a more recent Dane County case, Dec. No. 25650 (WERC, 8/88), the Commission had occasion--in a declaratory ruling context--to deal with the same sheriff's deputies unit relationship as was involved in the previous Dane County case in which the Examiner's decision was set aside. (A copy of the latter Commission decision is attached to this award and incorporated by reference herein.) In that 1988 case, the Commission held that the following contract language was a mandatory subject of bargaining:

> Bargaining unit work, including that assigned on an overtime basis, shall only be performed by bargaining unit personnel unless after advance notice has been given of the opportunity to perform such work or other reasonable efforts made by the shift commander fails to provide bargaining unit personnel for such work assignments.

In so concluding, the Commission considered and rejected numerous thoroughly-argued contentions along the lines of those advanced herein by the County. The Commission stated, at page 11 of its decision in that case that it "has consistently held that a union may protect the jobs of its members by bargaining restrictions on, or prohibitions against, the subcontracting or other displacement of bargaining unit work," and it cited a lengthy series of cases to that effect. In the Arbitrator's opinion, the Commission undertook that permissive-mandatory analysis in a context that caused it to consider situations that closely parallel that at issue herein. For example, as the Commission stated was the case before it in Dane County, the Arbitrator does not find that the record developed in the instant case establishes that requiring bargaining about the instant decision would infringe on the County's ability to manage the Sheriff's Department and provide necessary service such as would warrant a finding the disputed decision to use civilians in the jail is a permissive subject of bargaining.

In sum, the Arbitrator concludes, on the basis of the Commission's rationale stated and authorities cited by the Commission at pages 11-12 in the Dane County declaratory ruling case attached, that the County's decision to utilize civilian Correctional Officers rather than continue to staff its jail facilities exclusively with Union bargaining unit personnel was not a permissive subject of bargaining. Stated another way, the Arbitrator concludes that the Union's effort herein to protect work that its bargaining unit had performed exclusively for many years, like the union's efforts to do so in Dane County by means of the above-quoted contract language, did not involve a permissive subject of bargaining in the instant circumstances.

There remain, however, the questions of whether the Union's interpretation of Art. 3 (and of Sec. 111.70, Stats.) would impose unlawful (and hence prohibited) limits on the Sheriff's statutory and inherent Constitutional rights to carry out the core functions of his office.

As the Union has argued, the Sheriff's statutory rights and the Union bargaining unit employes' MERA rights to bargain collectively must be harmonized if that is possible. Glendale Professional Policemen's Association v. City of Glendale, 83 Wis.2d 90, 103-4 (1978). In the Arbitrator's view, such a harmonization would be possible herein such that the employes' rights to bargain are not in irreconcilable conflict with the Sec. 59.23(1), Stats., powers of the Sheriff to operate the jail. Id.

Attention is now turned to the question of whether the Union's proposed interpretation of the Agreement interferes with the Sheriff's exercise of State Constitutional rights attaching to his office as recognized in WPPA, above. In that case the Supreme Court held that: County Sheriffs in Wisconsin have certain inherent rights of office derived from the State Constitutional nature of their office; that the right to select employes to perform core functions of the office of Sheriff are not subject to limitation by harmonization with statutory rights such as those of municipal employes and municipal employers to engage in collective bargaining; and that the core responsibilities of the Sheriff's position so protected include responsibilities such as "running the jail". WPPA, at 313.

Although the instant case involves employes directly involved in "running the jail", the Arbitrator is nevertheless persuaded that the instant record differs sufficiently from the WPPA situation that there has not been a conflict with Constitutional rights of the Sheriff made out on the record herein.

Specifically, in WPPA, the Dane County Sheriff entered an appearance separate from that of Dane County and expressly asserted that he had not been a part of the negotiations of the collective bargaining agreement and stated a position inconsistent with the terms of the collective bargaining agreement and stated his unwillingness to be bound by the terms of the agreement. In the instant case, no separate appearance on behalf of the Sheriff was entered. The Sheriff did not attend the hearing or otherwise state his position in the matter. It therefore simply cannot be concluded from this record that the Sheriff objects or would object to the exclusive use of Union bargaining unit personnel to perform the jail work in question. While it can be inferred that the Sheriff must have taken some affirmative steps in support of the assignment of jail work to civilians, it is not clear from that inferred fact whether the Sheriff would object to a return to the arrangements previously in effect wherein Union bargaining unit employes performed that jail work exclusively or whether the Sheriff would be unwilling to abide by an arbitration award on the questions submitted to the Arbitrator herein. Furthermore, there is no record evidence regarding what role, if any, the Sheriff have played in the negotiations leading to the Agreement. _1_/

_1_/ The factual assertions and news article submitted by the Union as a part of its post-hearing written arguments--to the effects, respectively, that the Sheriff or his Chief Deputy was in attendance and agreement during Agreement negotiations and that the Sheriff would prefer that the jail work be done exclusively by Union bargaining unit personnel--have not been properly submitted as evidence and hence cannot and have not been given any consideration or weight in this award.

In the absence of clearer indications of record concerning the Sheriff's position in this matter, it would not be appropriate or justified for the Arbitrator to conclude that the Union's interpretation of the Agreement would conflict with the Constitutional powers of the Sheriff.

Accordingly, the Arbitrator concludes that, on the basis of the record developed in this case, the decision to utilize personnel outside the Union's bargaining unit to perform jail work historically performed exclusively by bargaining unit employes has not been shown in the instant record to be a decision on a prohibited subject of bargaining.

Since the decision in question was neither a prohibited nor permissive subject for the reasons noted above, it follows that it was a mandatory subject of bargaining as to which the County was obligated by Art. 3 of the Agreement, at the least, to bargain with the Union.

Turning to ISSUE 2 regarding the appropriate remedy for the above-noted violation, the Arbitrator has determined that it is appropriate, initially, to order that the County bargain about the decision in question and for the Arbitrator retain jurisdiction to determine--at the request of either party following the parties' bargaining effort--whether further remedial relief is warranted.

That remedial approach more closely replicates the result the parties would have achieved had the WERC issued a declaratory ruling in this matter as the parties had initially requested. Furthermore, it recognizes the possibility that an immediate order for a return to the status quo ante might impose substantial displacements of innocent third parties which the parties' bargaining might later establish are unnecessary. (It can be noted, for example, that a prior civilianization of certain Union bargaining unit work was ultimately agreed to between the parties on the basis of give and take on other matters.) While it calls for bargaining without the order for restoration of the status quo ante requested by the Union, this award retains jurisdiction so as not rule out the possibility of an order for further bargaining following an ordered restoration of the status quo if it appears necessary to return the parties to a bargaining environment unencumbered by the taint of the employer's premature implementation of its decision to assign jail work to civilians. Finally, because the instant remedy does not require anything of the Sheriff operationally as a pre-condition for the ordered bargaining to take place, it hopefully avoids any further pre-bargaining litigation regarding the nature and scope of application of the Sheriff's Constitutional powers.

DECISION AND AWARD

For the foregoing reasons, and based on the record as a whole, it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that

> 1. The County did violate the Agreement, and specifically Art. 3 thereof, by deciding to hire civilian correctional officers to perform jail work previously performed exclusively by Union bargaining unit personnel, without first bargaining collectively with the Union on that decision.
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> 2. By way of remedy for the violation noted in 1, above, the County shall immediately offer to bargain collectively with the Union about its decision to hire civilian correctional officers to perform jail work performed exclusively by Union bargaining unit personnel prior to the actions giving rise to this dispute. No further remedy is ordered at this time, in hopes that the bargaining that will result from this order will resolve the matter. However, the Arbitrator retains jurisdiction to determine, at the request of either party, whether additional relief such as an order for further bargaining following reestablishment the status quo in effect before

the County made its decision to hire civilian correctional officers is warranted in the circumstances.

Dated at Shorewood, Wisconsin this 21st day of July, 1989.

By /s/ Marshall L. Gratz
Marshall L. Gratz, Arbitrator