

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-1431

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**MARK R. HOERMAN, DONALD A. SCHROEPFER, JOHN A.
KONDZELA AND KEVIN E. ISON,**

PETITIONERS-APPELLANTS,

V.

**EMPLOYE TRUST FUNDS BOARD AND LANGLADE
COUNTY,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
ANGELA B. BARTELL, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

DYKMAN, P.J. The plaintiffs in this case are all current or former Langlade County correctional officers. They appeal from a circuit court order affirming a decision of the Employee Trust Funds Board. The board had determined that the correctional officers were not “protective occupation

participants” as that term is defined in § 40.02(48), STATS. The correctional officers argue that the board erred in: (1) concluding that the officers’ principal job duties did not involve active law enforcement; (2) concluding that the officers failed to prove that their position required frequent exposure to a high degree of danger or peril; and (3) reversing the hearing examiner’s findings of fact without consulting the examiner. We conclude that the board did not err in concluding that the officers’ principal job duties did not involve active law enforcement. This issue is dispositive of the appeal because the officers cannot be classified as “protective occupation participants” under § 40.02(48)(a) when their principal job duties do not include active law enforcement. Accordingly, we affirm.

BACKGROUND

Langlade County hired its first correctional officer in March 1986. From March 1986 through April 1992, the County classified its correctional officers as protective occupation participants under the Wisconsin Retirement System (WRS). In May 1992, however, the County changed the WRS employment category of its correctional officers from the protective occupation category to the general employe category.

On November 9, 1993, four Langlade County correctional officers—Mark Hoerman, Donald Schroepfer, John Kondzela and Kevin Ison—appealed the county’s action to the Employe Trust Funds Board. The county subsequently submitted corrective reports to the Department of Employe Trust Funds to change the WRS employment category for all of its correctional officers from the protective occupation category to the general employe category for the time period March 1986 to April 1992.

The Employe Trust Funds Board conducted a joint hearing on the appeals of the four correctional officers. The issue on appeal was whether the County erred in failing to report the four correctional officers' employment to the WRS as being in the employment category of "protective occupation participant" as defined by § 40.02(48), STATS. "Correctional officer" is not one of the occupations whose participants are classified as "protective occupation participants" under § 40.02(48)(am).¹ Therefore, the correctional officers sought to be classified as "protective occupation participants" under § 40.02(48)(a). This paragraph reads in relevant part: "Protective occupation participant' means any participant whose principal duties are determined by the participating employer ... to involve active law enforcement ..., provided the duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning."

In his proposed decision on each officer's appeal, the hearing examiner found that "[t]he greater weight of the credible evidence in the appeal record establishes that the duties of correctional officers employed at the Langlade

¹ Section 40.02(48)(am), STATS., provides:

"Protective occupation participant" includes any participant whose name is certified to the fund as provided in s. 40.06(1)(d) and (dm) and who is a conservation warden, conservation patrol boat captain, conservation patrol boat engineer, conservation pilot, conservation patrol officer, forest fire control assistant, member of the state patrol, state motor vehicle inspector, police officer, fire fighter, sheriff, undersheriff, deputy sheriff, county traffic police officer, state forest ranger, fire watcher employed by the Wisconsin veterans home, state correctional-psychiatric officer, excise tax investigator employed by the department of revenue, special criminal investigation agent in the department of justice, assistant or deputy fire marshal, or person employed under s. 61.66(1).

County Jail frequently expose them to a high degree of danger or peril.” The proposed decisions also stated that “[t]he greater weight of the credible evidence in the appeal record establishes that the duties of correctional officers employed at the Langlade County Jail require them to maintain a high degree of physical conditioning.” However, the hearing examiner also found that “[t]he appeal record does not support a finding that at least 51% of the appellant’s duties as a correctional officer involve active law enforcement.” Because the correctional officers’ principal job duties did not involve active law enforcement, the hearing examiner concluded that the correctional officers did not qualify as protective occupation participants under § 40.02(48), STATS.

The Employe Trust Funds Board rejected the hearing examiner’s proposed finding that the duties of the correctional officers frequently exposed them to a high degree of danger or peril. Instead, the board found that “[n]otwithstanding evidence of potential dangers, the appellant[s] ha[ve] failed to meet [their] burden of proving a frequent exposure to a high degree of danger or peril.” The board adopted the remainder of the hearing examiner’s proposed findings and concluded, with regard to each correctional officer:

The appellant’s job duties as a correctional officer required a high degree of physical conditioning. However, because the appellant’s principal job duties as a correctional officer did not involve active law enforcement and because the appellant failed to prove the position required a frequent exposure to a high degree of danger or peril, the appellant does not qualify as a protective occupation participant under s. 40.02(48), Wis. Stats.

The correctional officers petitioned the circuit court for a writ of certiorari to review the board's decision.² The circuit court affirmed the board's decision. The correctional officers appeal.

DISCUSSION

On certiorari, we review the decision of the board, not the decision of the trial court. *See State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis.2d 646, 651, 275 N.W.2d 668, 671 (1979). Our review is limited to whether the board kept within its jurisdiction, whether it acted according to law, whether its action was arbitrary, and whether the evidence was such that it might reasonably make the order or determination in question. *Schmidt v. Wisconsin Employee Trust Funds Bd.*, 153 Wis.2d 35, 40-41, 449 N.W.2d 268, 270 (1990).

The correctional officers argue that the board's conclusion that their principal job duties did not involve active law enforcement was based on a capriciously narrow view of what activity constitutes law enforcement. The board defined the phrase "active law enforcement" to be consistent with several Wisconsin statutes that define "law enforcement officer" as "any person employed ... for the purpose of detecting and preventing crime and enforcing laws or ordinances" and "who is authorized to make arrests for violations of the laws or

² Section 40.08(12), STATS., provides:

COURT REVIEW. Notwithstanding s. 227.52, any action, decision or determination of the [employee trust funds] board ... in an administrative proceeding shall be reviewable only by an action for certiorari in the circuit court for Dane county that is commenced by any party to the administrative proceeding, ... and any party to the certiorari proceedings may appeal the decision of that court.

ordinances” that the person is employed to enforce. *See* §§ 102.475(8)(c), 164.01, 164.06(1), 165.85(2)(c), and 175.46(1)(g), STATS.

Defining “active law enforcement” as that term appears in § 40.02(48), STATS., is a question of statutory interpretation. Statutory interpretation is a question of law, and we defer in varying degrees to an agency’s interpretation of a statute. *Morris v. Employe Trust Funds Bd.*, 203 Wis.2d 172, 183, 554 N.W.2d 205, 210 (Ct. App. 1996). “[W]here a legal question is intertwined with factual, value or public policy determinations, courts will defer to the agency whose responsibility it is to make those determinations.” *Citizens’ Utility Bd. v. Public Serv. Comm’n*, 211 Wis.2d 537, 552, 565 N.W.2d 554, 561 (Ct. App. 1997) (quoting *Wisconsin Power & Light Co. v. Public Serv. Comm’n*, 148 Wis.2d 881, 887-88, 437 N.W.2d 888, 891 (Ct. App. 1989)).

We conclude that the board’s legal conclusion is entitled to deference under this standard. First, the legislature has given the Employe Trust Funds Board the responsibility to decide the appeals of employees seeking to be classified as protective occupation participants. *See* § 40.06(1)(d) and (e), STATS. Second, the board’s determination is intertwined with factual determinations. The board did not solely need to determine whether the correctional officers were “law enforcement officers.” It needed to determine whether their “*principal duties ... involve active law enforcement.*” *See* § 40.02(48)(a), STATS. (emphasis added). Whether “law enforcement” was a principal or secondary duty of the correctional officers, and whether the “law enforcement” engaged in by the correctional officers was “active,” as opposed to “inactive” or “passive,” are factual determinations.

When the board's legal conclusion is intertwined with factual determinations, we will affirm its interpretation if it is reasonable, even if another conclusion would be equally reasonable. *See Shoreline Park Preservation, Inc. v. Wisconsin Dep't of Admin.*, 195 Wis.2d 750, 761-62, 537 N.W.2d 388, 392 (Ct. App. 1995). We will review the correctional officers' arguments under this standard.

The officers first argue that they are "law enforcement officers" within the definition used by the board. They assert that they are law enforcement officers because they are employed for the purpose of detecting criminal activity on the part of the prisoners, detecting other criminal activity that comes to their attention, and preventing crime by ensuring the secure confinement of the prisoners. The officers also mention that they enforce the specific rules that govern the conduct of those who are confined to the county jail.

The officers' argument is unpersuasive because § 40.02(48)(a), STATS., does not provide that any person who performs some duties consistent with the duties of a law enforcement officer must be classified as a "protective occupation participant." Under § 40.02(48)(a), the employee's "principal duties" must involve "active law enforcement" before that person is classified as a protective occupation participant. In order for an officer's principal duties to involve active law enforcement, the individual must devote at least fifty-one percent of his or her time to active law enforcement. *See County of La Crosse v. WERC*, 170 Wis.2d 155, 167, 488 N.W.2d 94, 98 (Ct. App. 1992), *rev'd on other grounds*, 180 Wis.2d 100, 508 N.W.2d 9 (1993).

The record does not establish that the correctional officers spent more than fifty percent of their time enforcing the law and preventing crime. The board found that:

Correctional officers at the Langlade County Jail are clearly engaged in work that is part of the state's criminal justice system. They occasionally attend training classes in areas that are within the scope of law enforcement. The appellant has shown that occasionally, and perhaps periodically, his duties as a correctional officer involve the detection or prevention of crime or the enforcement of laws, and therefore that he sometimes engaged in activity that can be characterized as active law enforcement. ... [A] reclassification request of May 1991, specifies various duties of correctional officers at the Langlade County Jail and the percentage of time spent on each duty. This exhibit indicates that approximately 50% of a correctional officer's time is spent with the jail computer system and that a significant percentage of the remainder of a correctional officer's time is spent on photographing or fingerprinting inmates, serving meals to inmates, handling visitation between inmates and their visitors and other duties that cannot be characterized as active law enforcement. The appeal record does not support a finding that at least 51% of the appellant's duties as a correctional officer involve active law enforcement.

The correctional officers contend that the board arbitrarily limited its consideration to activities directly associated with the investigation of crimes and the arrest of wrongdoers. They argue that under the board's limited view, most law enforcement officers would not be considered to be involved in law enforcement activity. For example, they contend that a patrol deputy who spent time making out reports, a bailiff who spent an uneventful day in court, or a patrol deputy directing traffic or patrolling a beat, but without investigating criminal activity or making arrests, would not be considered to be engaged in active law enforcement under the board's definition.

Again, we disagree with the officers' assertion. The definition used by the board does not require that an individual must be investigating crimes or making arrests at all times to be involved in active law enforcement. Rather, the definition provides that law enforcement officers are those individuals employed "for the purpose of detecting and preventing crime and enforcing laws or ordinances." (Emphasis added.) The bailiff in court and deputy directing traffic or patrolling the beat are still employed for the purpose of detecting and preventing crime and enforcing the law, even when they are not called upon to investigate crime or make an arrest. And police officers must fill out reports as part of their law enforcement function. We do not agree that the definition used by the board excludes traditional law enforcement personnel from the definition of "active law enforcement."

The correctional officers contend that the board should have taken into account the definitions of "law enforcement officer" contained in §§ 51.01(11) and 967.02(5), STATS. These sections define "law enforcement officer" as "any person who by virtue of the person's office or public employment is vested by law with the duty to maintain public order or to make arrests for crimes while acting within the scope of the person's authority."

Using this alternative definition of "law enforcement officer," the officers first contend that they are "vested by law with the duty to maintain public order," and therefore, engaged in "active law enforcement." They argue that they maintain public order by controlling the activities of the prisoners and preventing them from returning to society.

We reject such a broad definition of "active law enforcement." In *County of La Crosse*, 170 Wis.2d at 167-68, 488 N.W.2d at 98, we stated that

§ 40.02(48)(a), STATS., limits the “protective occupation participant” classification “to a narrow class of employees meeting stringent standards.” We would not limit the “protective occupation participant” classification to a narrow class of employees meeting stringent standards were we to extend the classification to any person whose job duties were in any way related to maintaining public order.

Even if we accepted the correctional officers’ proposed interpretation, we still believe that the board’s conclusion that the officers are not protective occupation participants is reasonable. Section 40.02(48)(a), STATS., does not provide that all law enforcement officers are protective occupation participants. In order to be classified as a protective occupation participant, the participant’s principal duties must involve active law enforcement. The board found that approximately fifty percent of a correctional officer’s time is spent with the jail’s computer system and that a significant percentage of the remainder of a correctional officer’s time is spent on photographing or fingerprinting inmates, serving meals to inmates, and handling visitation between inmates and their visitors. When engaged in these duties, the correctional officers are not actively maintaining public order. Therefore, the board’s conclusion that the correctional officers’ principal duties do not involve active law enforcement is also reasonable under the officers’ proposed interpretation.

The correctional officers also argue that they are “law enforcement officers” within their proposed interpretation because they have a duty to make arrests for crimes while acting within the scope of their authority. But again, the question is whether their *principal duties* involve active law enforcement. The officers do not contend that more than fifty percent of their time is devoted to making arrests.

Finally, the correctional officers contend that the board erred in treating the definitions of “jail officer” contained in § 165.85(2)(bn), STATS.,³ and “law enforcement officer” as mutually exclusive. We agree with the officers that the terms are not mutually exclusive. In 1985, thirty-four Wisconsin counties classified their jailers as protective occupation participants, while twenty-nine counties did not. See *County of La Crosse*, 170 Wis.2d at 169, 488 N.W.2d at 99. A county may classify its jailers as protective occupation participants when it has determined that the jailers meet the requirements of § 40.02(48)(a), STATS. *Id.* at 173, 488 N.W.2d at 101.⁴ This would include a finding that the jail officer’s principal duties involve active law enforcement.

But our conclusion that the terms “jail officer” and “law enforcement officer” are not mutually exclusive does not lead us to conclude that the board’s determination was unreasonable. The board conclusion that the correctional officers’ principal duties did not involve active law enforcement was independent of its conclusion that the terms “jail officer” and “law enforcement officer” are mutually exclusive. And we have already determined, without consideration of the definition of “jail officer” contained in § 165.85(2)(bn), STATS., that the board’s conclusion that the correctional officers are not protective occupation participants is reasonable.

³ Section 165.85(2)(bn), STATS., defines “jail officer” as “any person employed by any political subdivision of the state for the purpose of supervising, controlling or maintaining a jail or the persons confined in a jail.”

⁴ Counties apparently place their jail officers in differing classifications because the jailers’ job requirements differ from county to county. See *County of La Crosse v. WERC*, 170 Wis.2d 155, 170, 488 N.W.2d 94, 99 (Ct. App. 1992), *rev’d on other grounds*, 180 Wis.2d 100, 508 N.W.2d 9 (1993).

The correctional officers also argue that the board erred in reversing the hearing examiner's proposed finding that the duties of a correctional officer require frequent exposure to a high degree of danger or peril. We do not need to address this argument, however, because our decision on the "active law enforcement" issue disposes of the appeal. See *Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983). In order to be classified as "protective occupation participants" under § 40.02(48)(a), STATS., the correctional officers needed to establish that: (1) their principal duties involve active law enforcement; (2) their duties require frequent exposure to a high degree of danger or peril; *and* (3) their duties require a high degree of physical conditioning. We have already upheld the board's conclusion that the correctional officers' principal duties do not involve active law enforcement. Therefore, the correctional officers cannot be classified as protective occupation participants, even if their duties require frequent exposure to a high degree of danger or peril.

By the Court.—Order affirmed.

Not recommended for publication on the official reports.

