

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**BROWN COUNTY SHERIFF'S DEPARTMENT  
NON-SUPERVISORY LABOR ASSOCIATION AND  
JAMES WIESNER, Complainants,**

vs.

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

Case 757  
No. 66629  
MP-4324

**Decision No. 32014-C**

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**Appearances:**

**Rachel L. Pings**, Cermele & Associates, S.C., Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53213, appearing on behalf of the Complainants.

**John C. Jacques**, Corporation Counsel, Brown County, 305 East Walnut Street, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, appearing on behalf of the Respondent.

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

On January 16, 2007, Complainants filed a complaint of prohibited practices in which they alleged that Respondent had violated Sec. 111.70(3)(a)4, and derivatively Sec. 111.70(3)(a)1, Stats., by discharging James Wiesner without just cause during a contract hiatus period. On February 8, 2007, Respondent filed a Motion to Stay Proceedings until discovery and fact-findings are made in a Fair Employment claim before the Equal Rights Division, Wisconsin Department of Workforce Development that was filed by James Wiesner against Brown County. On February 9, 2007, Complainants filed a Brief in Opposition to Motion to Stay Proceedings. On February 12, 2007, Attorney JoAnne Breese-Jaeck filed a written response in opposition to Respondent's Motion. On February 14, 2007, the Wisconsin Employment Relations Commission appointed Coleen A. Burns, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Wis. Stats. On February 14, 2007, the Examiner issued an Order denying Respondent's Motion to Stay Proceedings. On February 26, 2007, the County filed an Answer to the Complaint. The matter was heard in Green Bay, Wisconsin on

No. 32014-C

March 1, 8, and 9, 2007. The proceedings were transcribed and the parties filed written argument; the last of which was received on May 16, 2007. On October 12, 2007, the Commission amended its prior Order appointing the undersigned as Examiner to provide that the Examiner has final authority to issue a decision in this case on behalf of the Commission pursuant to Sections 111.07(5) and (6), 111.70(4)(a) and 227.46(3)(a), Stats.

Having considered the record as a whole and being advised in the premises, the Examiner hereby makes and issues the following

### **FINDINGS OF FACT**

1. Brown County Sheriff's Department Non-Supervisory Labor Association, hereafter the Association, is a labor organization maintaining offices at 300 East Walnut Street, Green Bay, Wisconsin 54301. The Association is the sole and exclusive bargaining agent with respect to hours, wages and other conditions of employment for all regular law enforcement employees employed by Brown County that have the power of arrest including Patrol Officer and Sergeants, but excluding the Sheriff, Chief Deputy, Captains and Lieutenants and all other department supervisors.

2. Brown County (Sheriff's Dept), hereafter the Respondent, is a municipal employer maintaining its principal place of business at 300 East Walnut Street, Green Bay, Wisconsin 54305.

3. At all times material hereto, the collective bargaining agreement between the parties covering the period January 1, 2002 to December 31, 2003 had expired and the parties had not bargained a successor contract. Article 46 of the expired agreement contains a grievance procedure that culminates in final and binding arbitration. Article 12 of the expired agreement includes the following statement:

No regular employee shall be disciplined or discharged except for just cause. Written notice of the discipline, suspension, or discharge and a description of the incident warranting the action shall be given to the employee with a copy to the bargaining unit.

4. Respondent hired Complainant James Wiesner as a Deputy Sheriff in March, 2001. Following attendance at recruit academy and successful completion of standard Field Training, Deputy Wiesner was assigned as a regular full-time Deputy Sheriff with patrol duties until March, 2003, when he was recalled to active duty in Iraq as a military policeman. Wiesner returned to the Sheriff's Department in late August, 2004. In September, 2004, Deputy Wiesner began patrol re-certification training and, on November 19, 2004, Field Training Officer (FTO) Flannery prepared a written report in which he advised Field Training Coordinator (FTC) Lt. Patrick Shrift that Deputy Wiesner had issues that adversely affected his job performance and stated that he could not in good conscience approve passing Deputy Wiesner from the training program to solo patrol. In a "Report on Jim Wiesner patrol re-certification training," dated November 22, 2004, Lt. Shrift stated that the Field Training

section believed that Deputy Wiesner was having personal problems that interfered with his ability to concentrate at work; expressed his opinion that Deputy Wiesner was exhibiting sub-standard performance that could not be corrected through training; and recommended that Deputy Wiesner be reassigned from training status until such time as Deputy Wiesner successfully identified and corrected the cause of his personal problems. Deputy Wiesner, who does not dispute that he was having problems that adversely affected his job performance, went on a leave and sought medical treatment. In May, 2005, Deputy Wiesner received a medical release to return to non-patrol work on light duty. In December, 2005, while on light duty status, Deputy Wiesner "bulletined," on the basis of seniority, into an Officer/Court/Transportation position for 2006, with the duty hours of 8:00 a.m. to 4:00 p.m. In December, 2005, Wade Schmechel, the Benefit Program Coordinator in Respondent's Department of Human Resources, referred Wiesner to a clinical psychologist for a Fitness for Duty evaluation. Following this evaluation, the clinical psychologist provided Schmechel with a written report that includes the following statement:

Mr. Wiesner is released to full time duty as a police officer for Brown County, contingent upon successful completion of standard Field Training.

While aware that other information could be of assistance in evaluating Deputy Wiesner, the clinical psychologist did not condition Deputy Wiesner's release to work on any factor other than successful completion of standard Field Training. Respondent acted upon this evaluation by requiring Deputy Wiesner to undergo standard Field Training. Complainants did not object to this requirement and Deputy Wiesner began this standard Field Training on January 31, 2006.

5. As set forth in Respondent's "Field Training Unit Recruit Manual," the standard Field Training consists of Steps 1 through 5; with Step 4 commonly referred to as the "Shadow Step." Movement from one Step to another Step indicates that the trainee has satisfactorily completed the previous step. Inasmuch as Deputy Wiesner was not a probationary employee, the standard Field Training required by the Respondent in January, 2006 did not include a Step 5. As set forth in Respondent's "Field Training Unit Recruit Manual," during Steps 1 through 4, the FTO prepares "Daily Observation Reports" (DOR) in which the FTO uses ten (10) performance categories to assess the recruit's work quality, *i.e.*, Category 1 - Motor Vehicle Operation; Category 2- Orientation Skill/Jurisdictional Geography; Category 3 - Written Communication; Category 4 - Field Performance/Cognitive Abilities; Category 5 - Patrol/Investigative:Tactical-Procedural; Category 6 - Telecommunications/Information Systems; Category 7 - Criminal Statutes-Ordinances; Category 8 - Department Policies and Procedures; Category 9 - Traffic Enforcement/Accident Investigation; and Category 10 - Interpersonal Relationships; an assessment of "1, 2, or 3" is "Not Acceptable;" an assessment of "4" is "Acceptable;" and an assessment of "5" "Exceed Standards." The "Field Training Unit Recruit Manual" includes the following statements:

## **DAILY OBSERVATION REPORT (D.O.R.)**

This is the formal record and report of your daily training and assessment. The F.T.O. will review and debrief you on the content of this report at the end of each shift or just prior to the next shift. The purpose is to assist you in correcting areas of deficient performance and further strengthen those areas rated at minimally acceptable. There are no secrets in this process and you will be kept fully informed. The ratings listed on the D.O.R. are averages in each category for the day. Ratings are not “given”, they are “earned”. Areas/tasks not covered during the shift will be listed as “Not Observed” (N.O.). A “Not Responding To Training” (N.R.T.) will be noted if training has been provided to a level where your F.T.O. believes you should now be performing at an acceptable standard and yet you consistently do not. Remedial training efforts will follow N.R.T. ratings. Other uses of the D.O.R. will be explained by your F.T.O. Your signature on the D.O.R. indicates it was reviewed by you and your F.T.O. and does not necessarily indicate you agree with the ratings. You must complete a D.O.R. for each workday whether evaluated or not. As with all field training documents, the original must be forwarded to an F.T.S. and then F.T.C. (Training Section office) for review prior to being added to your Field Training File. You are encouraged to keep a copy.

...

### **Not Responding To Training**

When instructions and additional coaching have been provided but you are still unable to satisfactorily perform, demonstrate or explain the knowledge/skill area(s), an NRT (Not Responding to Training) notation (x) will be made on the front side of the DOR. Chronic NRT (in spite of additional coaching and training effort) is an indication that a performance problem exists that has the potential to place your continued employment in jeopardy. A notation of NRT generally results in an extension of training to further assist you get back on track. Persistent NRT without any corresponding improvement in job skills/performance may result in a Field Training Unit recommendation that an Employment Status review occur in order to reassess your continued employment.

...

### **Extension of Training**

Your FTO and FTS/FTC will meet on a regular basis to review your progress in satisfactorily meeting the Field Training and Evaluation Process's requirements. They can recommend an extension of your training beyond the minimum

number of scheduled days in each training and evaluation step. This extension is granted by the Field Training Unit Commander when problems are identified which would hinder your performance or if you are behind schedule to the extent that you could not be expected to catch-up under normal circumstances. The extension of training allows the Department's Field Training Unit to work with you on specific problems. You should view the extension, if it occurs, as if you have been placed in a holding pattern for a short period of time. No stigma is attached to an officer who receives a Field Training Process extension. The extension of training should be viewed as a positive decision to assist you to get back on track.

6. Deputy Wiesner completed Steps 1 and 2 of the standard Field Training that commenced in January, 2006 and, on April 1, 2006, Lt. Shrift ordered that Deputy Wiesner be advanced to Step 3 of this Field Training. Deputy Wiesner received this Step 3 training on third shift, which is 11 p.m to 7 a.m., from FTO Bryan Clevin. On DOR #49, dated April 16, 2006, Deputy Wiesner received his first Step 3 assessment from FTO Clevin. On DOR #75, prepared by FTO Clevin and dated May 26, 2006, Deputy Wiesner was assessed an "NRT," Not Responding to Training, in Category 5. In response to the "NRT" of May 26, 2006, Captain Randy Schultz, Director of the Patrol Division and Field Training Coordinator, met with Deputy Wiesner, FTO Clevin and a representative from the HR Department and issued a "Field Training Unit Performance Improvement Plan" that includes the following:

**Subj: STEP THREE EXTENSION OF TRAINING.**

F.T.O. Clevin has informed me that as of 06-01-06 you have received one "NRT" in a critical Task area (Handcuffing Procedures)

Performance Assessment Averages indicate the need to improve in only this area. Due to the safety impact of this procedure, competency will need to be displayed prior to advancing to the Shadow Step.

In order to correct this deficiency we will apply the following efforts:

#1-Stabilization, handcuffing and search procedure training under U.T.T. Kastelic at the BCSD In-door range on 06-05-06 from 0600 to 0800 hours. Officer Kastelic may extend that training period if he sees need and value.

#2-Complete a one week (6 day) Step Three Extension under the evaluation of FTO Clevin, 06/9-14/06.

...

Complainants did not object to this "Field Training Unit Performance Improvement Plan." The "Field Training Unit Recruit Manual," in addressing "Extension of Training," states that

. . . If your performance is the issue a **“Performance Improvement Plan”** (P.I.P) will be designed to provide the team with resources and direction during the extension period. The length of an extension is determined by the need and measurable progress. This is not uncommon and should not be viewed with any stigma, but as evidence of the department’s commitment to training.

On June 5, 2006, Deputy Wiesner met with Officer Kastelic and completed the training required by the P.I.P of June 1, 2006. During this training, Deputy Wiesner was assessed an “Acceptable” in 26 skill areas and an “Unacceptable” in 2 skill areas. Officer Kastelic and Lt. Shrift signed a written “Remedial Training Report” which includes the following:

**Summary & Recommendation**

In view of this 4 hour period of training, Officer Wiesner appears able to operate and make correct decisions under the induced stress of scenario training. Officer Wiesner was able to amend any mistakes made and displayed a desire to improve his skills. Officer Wiesner stated to Lt. Shrift and I, as the end of training, that he identified the fact that he has increased performance anxiety in the presence of a FTO. This “stresses” him more than the actual threats posed by public duty. Lt. Shrift and I both informed Officer Wiesner that he must focus on the real tasks and goals and not be distracted by what his FTO may say about performance.

Accordingly, the Training Section recommends that Officer Wiesner resumes his field training with FTO Cleven as soon as possible.

Deputy Wiesner continued his Step 3 training with FTO Cleven. On or about June 16, 2006, Respondent received notification that Deputy Wiesner’s treating physician recommended that Deputy Wiesner work a “day schedule/shifts.” Respondent concluded that this was a recommendation and not a request for a reasonable accommodation and Deputy Wiesner continued his Step 3 training on third shift.

7. On June 22, 2006, Capt. Schultz signed a document that includes the following:

Subj: **STEP THREE EXTENSION OF TRAINING.**

To update the training schedule for Officer Wiesner:

Current through June 23: Step 3 with FTO Cleven

June 23: Complete Step 3

June 24-26: Off

June 27-29: Shadow with FTO Meisner (Suamico/A Shift/Group 3)

June 30: Shadow with FTO Kinnard

July 1 & 2: Off

July 3: Assume bulletin position\*

This agency is committed to assisting you in successfully addressing all Field Training and Evaluation Process requirements. \*Successful completion of the above outline is required for advancement.

I have read the entirety of this Performance Improvement Plan and agree that it accurately represents the conditions discussed during the meeting on 06-01-06.

Deputy Wiesner received a copy of the above document on June 22, 2006. Deputy Wiesner and FTO Cleven worked the night shift, which began on June 23 and ended on June 24, 2006. At approximately 2:00 a.m. on June 24<sup>th</sup>, their squad was dispatched to a scene involving a vehicle that had crashed into a house, with injuries to the driver and passenger of the vehicle. The house was the residence of Chief Deputy John Gossage; hereafter referred to as the June 23<sup>rd</sup> incident. Sgt. Monica Jossart responded to the vehicle/house crash as supervising Sergeant. At the scene, Chief Deputy Gossage told Sgt. Jossart that he recognized Deputy Wiesner's inability to function at the incident. Sgt. Jossart responded that this was not an isolated incident and that there have been past performance problems with Deputy Wiesner. At the end of the shift, Sgt. Jossart and FTO Cleven had a discussion regarding Deputy Wiesner's work performance. On DOR #89, prepared by FTO Cleven and dated June 23, 2006, Deputy Wiesner was assessed an NRT in Performance Assessment Categories' 4, 5, 8 and 10. On June 24, 2006, FTO Cleven signed an "End of Step Evaluation" of Deputy Wiesner. In this "Evaluation," FTO Cleven had the option to recommend Advancement, Extension or Status Hearing. FTO Cleven recommended "Status Hearing." Sgt. Jossart prepared a written report, dated June 24, 2006, that is addressed to Lt. Shrift. This report includes the statements "I do not believe that Deputy Wiesner should be advanced to the shadow portion of training" and "I agree with FTO Cleven's recommendation for a Status Review on the End of Step Evaluation dated 06-24-06." Chief Deputy Gossage, Capt. Schultz and Lt. Wickman were cc'd on Sgt. Jossart's report. On June 25, 2006, Lt. Shrift, who was not present at the June 23<sup>rd</sup> incident, signed the "End of Step Evaluation" that had been prepared by FTO Cleven; ordered a "Status Hearing;" and stated, *inter alia*, "Officer Wiesner is not responding to training despite remediation efforts. Conference with Patrol Div Director Capt Schultz to recommend termination of training."

8. On June 26, 2006, Capt. Schultz telephoned Chief Deputy Gossage, who was out of the office, and advised Chief Deputy Gossage that Deputy Wiesner was not responding to training; that there was nothing more that could be done as far as remedial training; and that it was a safety issue to Deputy Wiesner, other officers, and the public. Chief Deputy Gossage responded by suspending Deputy Wiesner's Field Training and placing Deputy Wiesner on paid administrative suspension. On June 27, 2006, Lt. Shrift, with the assistance of Capt.

Schultz, prepared a "Second report on Officer Jim Wiesner/Patrol re-certification training." Prior to presenting this report to Capt. D. Konrath, Lt. Shrift reviewed this report with Capt. Schultz, who agreed with this report. This report includes the following:

**Summary:**

This memo will report on the status of the retraining effort for Officer Jim Wiesner and make the recommendation that the training be terminated. Officer Wiesner has been assigned to remedial training since returning to duty on January 31, 2006 from a medical leave. He has been in training approximately 78 workdays during this period.

**Overview:**

Officer Jim Wiesner was returned to the training session on January 31, 2006, but after being cleared for return to duty by the Veteran's Administration. Because he was absent from patrol for so long it was agreed by department administration and training office that he should complete an entire rotation in the FTO program to ensure he was up to date and competent to assume independent field duties.

During the months that followed Wiesner progressed through Step 1 and 2 of the Field Training process with only minimal difficulty although, as in the past, there were incidents of significant substandard behavior. This behavior was addressed by remedial training but never actually corrected as evidenced by repetitive substandard behavior. At times this behavior became so unsound that FTO's were forced to intervene to ensure that safety and service delivery were maintained. Later, in Step 3, Officer Wiesner began to fail repeatedly at the same tasks and responsibilities even after the remedial training efforts of the FTO's and UTTU instructors. Wiesner's performance deficiencies continue to occur in the same performance categories, namely *4-Field Performance/Cognitive Abilities*, and *5-Patrol Tactics and Procedures*. The incidence of substandard performance continue, as in the past, during times of increased stress or workload when several tasks compete for attention and must be mentally processed, prioritized and handled with safety, efficiency and sound procedures. This explains why Wiesner can accomplish several workdays of ostensibly acceptable performance then have such significant failures. When one analyzes the daily reports one sees that "routine" work is not the problem. Dynamic workload that demands decisive action tends to overwhelm him, causing hesitation, under-response or even inaction.

Officer Wiesner has cooperated fully with this retraining effort and, to the best of my knowledge, he believes it was a necessary step in preparing him for return to duty. On the other hand, he has not been helpful in identifying what



he believes his needs are. During training cadre meetings he is very quiet, even stoical, and only ever suggests that he needs more experience. However, the training records show that he has not improved with remedial training and he has experienced as much or more than most officers of his tenure, especially when one factors in his military experiences.

**Conclusion:**

As I wrote in my first report (November 22, 2004) I do not believe that the substandard performance of Officer Wiesner can be remedied through continued training. Wiesner has shown that he knows what to do, and how and when to do it. His performance failure appears to be the result of cognitive matters the nature of which the training office is not qualified to assess or address. His continued substandard field performance is inefficient to the operation of this department and potentially unsafe to both him and others.

In consultation with Patrol Division Director, Capt. R. Schultz, I recommend that the training of Officer Wiesner be discontinued and that this action be reported to the Sheriff and Chief Deputy. I further recommend that we request a meeting with the Chief and Sheriff to answer questions and discuss the status of Officer Wiesner.

**Note:**

An oral summary of this memo was communicated to the Chief Deputy on Monday, June 26 and he did direct that Officer Wiesner be removed from training and placed on suspension. A written order to that effect was delivered to Jim Wiesner same date at approximately 1500 hours by Capt. Konrath and Lt. Shrift.

On June 28, 2006, Chief Deputy Gossage met with representatives of the Human Resources Department, Capt. Schultz and Lt. Shrift for an administrative review of Deputy Wiesner's Field Training performance. Everyone at this meeting shared the same opinion, *i.e.*, that there was no remedial training available and that the Department had exhausted all the possibilities. On June 29, 2006, Sheriff Dennis Kocken, under the signature of Chief Deputy Gossage, issued a letter to Deputy Wiesner that includes the following:

Please be advised that your employment as a Deputy with the Brown County Sheriff's Department will terminate effective today, June 29, 2006. A determination has been made through the Field Training Process that you have not met the standards for this position. Your final payroll check will be available to you on July 21, 2006 and will be mailed to you. You are required to return all County property (such as keys/keycard entry fob) issued to you as soon as practicable upon receipt of this letter.

Sheriff Kocken, who was out of town on June 29, 2006, based his decision to discharge Deputy Wiesner upon Chief Deputy Gossage's opinion that Deputy Wiesner did not successfully complete the Field Training and Capt. Schultz' recommendation that the Field Training of Deputy Wiesner be discontinued.

9. At the time of his discharge, Deputy Wiesner was a member of the collective bargaining unit represented by the Association and was subject to the just cause for discharge provisions of Article 12 of the expired collective bargaining agreement between the Association and Brown County Sheriff's Department. The Association filed a grievance challenging Deputy Wiesner's discharge and processed this grievance through the contractual grievance procedure in a timely manner. Respondent has refused the Association's request to submit this grievance to arbitration.

10. The basis for Respondent's June 29, 2006 discharge of Deputy Wiesner from his employment with the Brown County Sheriff's Department is Sheriff Kocken's conclusion that "A determination has been made through the Field Training Process that you have not met the standards for this position." A determination was made through the Field Training Process that Deputy Wiesner had not met the standards for his position. This determination was not reasonable. Respondent's June 29, 2006 discharge of Deputy Wiesner is without just cause.

Based upon the above Findings of Fact, the Examiner makes and issues the following

### **CONCLUSIONS OF LAW**

1. Complainant Brown County Sheriff's Department Non-Supervisory Labor Association is a labor organization within the meaning of Section 111.70(1)(h), Stats.

2. Respondent Brown County (Sheriff's Department) is a municipal employer within the meaning of Section 111.70(1)(j), Stats., and Sheriff Kocken, Chief Deputy Gossage and Capt. Schultz act on its behalf.

3. Complainant James Wiesner is a municipal employee within the meaning of Section 111.70(1)(i), Stats.

4. Complainant Brown County Sheriff's Department Non-Supervisory Labor Association has exhausted the contractual grievance procedure with respect to the grievance challenging Complainant James Wiesner's June 29, 2006 discharge from his employment as a Brown County Deputy Sheriff.

5. On June 29, 2006, Respondent Brown County (Sheriff's Department) discharged Complainant James Wiesner without just cause.

6. By discharging Complainant James Wiesner without just cause, Respondent Brown County (Sheriff's Department) has failed to maintain the *status quo* on a mandatory

subject of bargaining during a contract hiatus period and, therefore, Respondent Brown County (Sheriff's Department) has refused to bargain in good faith in violation of Sec. 111.70(3)(a)4 and, derivatively, Sec. 111.70(3)(a)1, Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

### **ORDER**

As a remedy for the violation noted in Conclusion of Law 6, *supra*, Respondent Brown County (Sheriff's Department), its officers and agents, shall immediately take the following actions:

1. Cease and desist from refusing to bargain in good faith with Complainant Brown County Sheriff's Department Non-Supervisory Labor Association by unilaterally changing the *status quo* on a mandatory subject of bargaining during a contract hiatus period by discharging an employee without just cause in violation of Sec. 111.70(3)(a)4 and 1, Stats.
2. Restore the *status quo ante* by reinstating Complainant James Wiesner to his position of Deputy Sheriff and returning Complainant James Wiesner to his Step 3 Field Training.
3. Expunge all references to the June 29, 2006 discharge from Complainant James Wiesner's personnel record and make him whole for all wages and benefits lost as a result of his June 29, 2006 discharge, with interest at 12% (twelve percent) per year.<sup>1</sup>
4. Notify all employees represented for the purposes of collective bargaining by Complainant Brown County Sheriff's Department Non-Supervisory Labor Association by posting copies of the notice attached hereto as "Appendix A" in conspicuous places on its premises where said employees are employed. That notice shall be signed by a representative of the Brown County Sheriff's Department and shall remain posted for thirty (30) days. Reasonable steps shall be taken by Respondent Brown County Sheriff's Department to ensure that said notices are not altered, defaced or covered by other material.

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<sup>1</sup> As reflected in WILMOT ASSOCIATION HIGH SCHOOL, DEC. NO. 18820-B (WERC, 12/83) and BROWN COUNTY, DEC. NO. 20857-D (WERC, 5/93), the Commission has long held that simple interest on back pay at the statutorily established rate of 12% is a standard part of a make-whole remedy. BROWN COUNTY provides guidance as to the applicable calculation methodology.

5. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply with this Order.

Dated at Madison, Wisconsin this 15<sup>th</sup> day of October, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

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Coleen A. Burns, Examiner

## “APPENDIX A”

**NOTICE TO ALL EMPLOYEES OF BROWN COUNTY**  
**REPRESENTED BY THE BROWN COUNTY SHERIFF'S DEPARTMENT**  
**NON-SUPERVISORY LABOR ASSOCIATION**

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify all employees in the bargaining unit represented by the Brown County Sheriff's Department Non-Supervisory Labor Association that:

1. WE WILL NOT refuse to bargain in good faith with the Association by unilaterally changing the *status quo* during a contract hiatus period by discharging employees without just cause, in violation of Sec. 111.70(3)(a)4 and 1, Stats.
2. WE WILL immediately restore the *status quo ante* by reinstating James Wiesner to his position with the Brown County Sheriff's Department and returning James Wiesner to his Step 3 Field Training.
3. WE WILL immediately expunge the June 29, 2006 discharge from James Wiesner's personnel record and make him whole for all wages and benefits lost as a result of his unjust discharge, with interest at twelve percent (12%) per year.

Date this            day of            2007.

**BROWN COUNTY SHERIFF'S DEPARTMENT**

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE  
HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER  
MATERIAL.

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

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

**Pleadings**

In its complaint, Complainants allege that Respondent violated its statutory duty to maintain the *status quo* during a contract hiatus period by terminating the employment of Deputy James Wiesner without just cause. Complainants further allege that, by this conduct, Respondent has violated Sec. 111.70(3)(a)4, and derivatively Sec. 111.70(3)(a)1, Stats.

Respondent denies that it has committed the alleged statutory violations and requests that the complaint be dismissed on its merits. Respondent asserts, as Affirmative Defenses, the following:

1. That the Complaint may fail in one or more respects to allege facts sufficient to constitute a claim for any prohibited practice against Complainant Wiesner based on the cited statutes and Wisconsin law.

2. That Complainant Wiesner's claimed disability is reasonably related to his lack of ability to adequately and safely undertake his job-related responsibilities as a Brown County employee working in the assigned position of Patrol Officer/Deputy Sheriff in the Brown County Sheriff's Department, and Brown County had just cause to terminate Wiesner and further that it did not violate the status quo or the labor agreement as against Wiesner as to his conditions of employment or in terminating his employment.

3. That in evaluating whether Complainant Wiesner could adequately and safely undertake the job-related duties and responsibilities of his assigned position of Patrol Officer/Deputy Sheriff in the Brown County Sheriff's Department considering his alleged disability, Brown County has considered the present and future safety of Wiesner, his co-workers and the general public and further that Brown County had just cause to terminate Wiesner and did not discriminate against Wiesner as to his conditions of employment or in terminating his employment, because the Respondent Brown County is an employer with a special legal duty of care for public safety as set forth in Sec. 111.34(2)(c), Stats.

4. That Respondent Brown County made extensive evaluations of Wiesner's present ability to perform his job-related responsibilities as a Brown County employee working in his assigned position of Patrol Officer/Deputy Sheriff in the Brown County Sheriff's Department and Brown County's decision to terminate his employment was based on these evaluations of Wiesner's

inability to perform his assigned position and there was just cause and were nondiscriminatory reasons for termination related to Wiesner's failure to safely meet applicable minimum acceptable standards in the safe performance of his job-related duties of special care for public safety.

5. That Complainant Wiesner at present is a party in a separate proceeding currently pending in either forum, including as follows:

*ERD Case No. CR 200604441 (Wiesner v. Brown County).*

That the ERD proceeding arises out of the same set of circumstances which are the subject matter of Complainant Wiesner's claim against respondent Brown County Sheriff's Department in this proceeding; that in the ERD proceeding, Wiesner is requesting an order from the ERD to, among other things, restore Wiesner to his employment and make him whole financially and that Wiesner's discrimination claim before the Equal Rights Division should have preclusive effect as to finds as to the disputed fact issues.

6. As and for a further affirmative defense, it is alleged that the Complainant Wiesner, upon information and belief, has asserted claims inconsistent with this claim that he was terminated for unjust cause by claiming the present ability to safely perform all essential job duties of a Patrol Officer/Deputy Sheriff and has asserted inconsistent claims to be permanently disabled/unable to safely perform all the essential job duties of a police officer in other forums; and that these inconsistent claims cannot be reconciled and Complainant must choose legal theories whether he is permanently disabled from safely performing police officer duties or whether he is presently able to safely perform all the essential job duties and functions of a Patrol Officer/Deputy Sheriff.

7. As and for an affirmative defense, the Complainant Wiesner is equitably estopped and barred from asserting this claim which is inconsistent with other claims that he may be permanently disabled from performing police officer duties in other forums, but is claiming in this forum to be able to safely perform similar or identical police officer duties of a Brown County Patrol Officer/Deputy Sheriff.

8. As and for affirmative defense, the Complainant Wiesner has claimed the right to an accommodation to be able to work a "day shift" only, contrary to Wisconsin Statutes and public safety considerations that 24 hour shifts are essential requirements of a Patrol Officer/Sheriff Deputy and which accommodation demand would violate the labor contract's seniority posting and bulletin provisions and the further there are seniority rights of numerous union members (56) with greater seniority than that of Wiesner.

9. As and for an affirmative defense, the Complainant Wiesner has failed to demonstrate over an extended time period that he would be able to safely perform all essential job functions as part of the Field Training Program required of all Patrol Officers/Deputy Sheriffs and that requiring an accommodation to allow a return to work to Wiesner as a Patrol Officer/Deputy Sheriff without demonstrating such abilities would be both unreasonable and unsafe, considering the Respondent employer's special statutory duty of care for the public safety under Sec. 111.34(2)(c), Stats.

### **POSITIONS OF THE PARTIES**

#### **Complainants**

Respondent's fitness-for-duty evaluation cleared Deputy Wiesner to return to full duty upon successful completion of standard Field Training. Deputy Wiesner successfully completed Step's 1 and 2 of this field training. With respect to Step 3 field training, FTO Cleven's testimony establishes that, from April 16, 2006 through May 25, 2006, any performance deficiency was corrected by using FTO training techniques.

On May 26, 2006, Deputy Wiesner received an NRT in Category 5. Consistent with the Department's "Field Training Unit Recruit Manual," this NRT was followed by retraining. The manual confirms that mistakes are to be expected and remedial training does not mean that the employee cannot safely perform the job.

This NRT also resulted in an extension of training. As the training manual recognizes, such an extension is not uncommon and is not to be viewed with any stigma. The extension of training notice confirmed that Deputy Wiesner's Performance Assessment Averages indicated a need to improve in only the task of handcuffing procedures.

Following this retraining, Lt. Shrift and Officer Kastelic signed the recommendation that Deputy Wiesner resume his Field Training as soon as possible. As of June 22, 2006, Deputy Wiesner's Step 3 Field Training performance was well within expected Field Training norms.

On June 23, 2006, FTO Cleven assessed four (4) NRTs in four separate categories. Those NRTs were not warranted under the training manual and FTO Cleven could not provide any persuasive justification for his assessment of these NRTs.

The June 23, 2006 incident was not the debacle that Respondent claims. In fact, Deputy Wiesner's performance was consistent with his training and well within the confines of a trainee working with a supervisory FTO. Assuming *arguendo*, that any of these NRTs were justified, under the training manual, the correct response would be remedial training.



As of June 23, 2006, Respondent had a recommendation from FTO Cleven for a Status Hearing on Deputy Wiesner. At that point, Respondent should have determined whether or not Deputy Wiesner was a “qualified individual” under either the Wisconsin Fair Employment Act or the Americans with Disabilities Act and, if so, provide reasonable accommodation.

Respondent contends that, on June 23, 2006, Deputy Wiesner was unable to assess a safety risk, could not calm an agitated subject, and did not properly obtain a witness statement. Assuming *arguendo*, that these contentions are true, this single incident presents an insufficient basis to evaluate Deputy Wiesner’s Field Training experience or ability to adequately perform his job.

Deputy Wiesner is entitled to a fair and impartial decision. In discharging Deputy Wiesner, Respondent was required to follow its own “Field Training Unit Recruit Manual;” but failed to do so.

In making the decision to discharge, Chief Deputy Gossage relied upon his personal observations of Deputy Wiesner’s conduct on June 23, 2006 and the recommendations of Lt. Shrift and Capt. Schultz; reduced to writing in the June 27, 2006 memorandum. Chief Deputy Gossage’s observations were limited. The June 27, 2006 memorandum was fraught with inaccurate and incomplete information and many positive factors were not reflected in this memorandum. Not all of the Department’s witnesses to the incident of June 23, 2006 were interviewed. Capt. Schultz acknowledges that these other witnesses may have had relevant observations. Chief Deputy Gossage’s residence was the scene of the June 23, 2006 incident and, thus, he had a personal interest in this incident.

Deputy Wiesner was held to a higher standard than other trainees. Deputy Wiesner was not provided with an opportunity to review, must less respond to the June 27, 2006 memorandum, prior to receiving his termination letter on June 29, 2006.

Complainants agree that an employer has the right to ensure that employees meet the Department’s training and employment standards. Complainants further agree that employers are permitted to discharge an employee when that employee cannot safely perform his or her job. In the present case, however, Respondent made a hasty decision based upon deficient, and sometimes blatantly inaccurate, information.

Assuming *arguendo*, that Deputy Wiesner was not able to adequately perform his job as of June 23, 2006, then Respondent still lacks just cause because Respondent did not provide additional training or reasonable accommodation and failed to provide Deputy Wiesner with adequate due process prior to the termination. The appropriate make-whole remedy for the unjust discharge is to reinstate Deputy Wiesner to his former position; reimburse Deputy Wiesner for all lost wages and benefits, with interest; and remove all references to his discharge from his files. Additionally, Respondent should be ordered to cease and desist from such violations in the future and post a notice to that effect. The Examiner also has the authority to specify reinstatement into training.

**Respondent**

The parties agree that a pre-condition for Deputy Wiesner's continued employment was successful completion of the Field Training Program. Deputy Wiesner and the Union's agreement to the Field Training Program did not provide for the granting of extensions.

The decision to discharge Deputy Wiesner was based upon his failure to meet applicable minimum acceptable standards in the performance of the job-related duties of Patrol Officer/Deputy Sheriff. The termination of the Field Training Program was solely for the reason that Deputy Wiesner was not responding to the training after 78 days into the program. The Sheriff has the statutory authority to require training and employment standards.

Arbitral authority recognizes that an employer has the right to discharge an employee who is unable to safely perform the employee's job. In this case, the training period was a "trial period" to determine whether or not Deputy Wiesner could safely perform his job.

There can be no reasonable accommodation to day shift hours or to respond only to non-stressful police calls. The nature of police work requires that police officers be able to respond at all times and to all types of violent situations.

Deputy Wiesner has received a permanent disability benefit from the US Department of Veteran Affairs. Deputy Wiesner cannot claim that he has a disability that precludes the performance of military police work and also claim to be able to perform police work.

The Sheriff's decision that Deputy Wiesner was not responding to training and that his performance problems were chronic and persistent is supported by the testimony of FTO Cleven, Sgt. Monica Jossart, and FTO Kinnard, who evaluated Deputy Wiesner's performance of job-related duties of Patrol Officer/Deputy Sheriff. The evaluation of FTO Cleven was fair and objective. Chief Deputy Gossage, Capt. Schultz and Lt. Shrift made the same evaluation and judgment as to Deputy Wiesner's failure to meet minimally acceptable performance standards. Chief Deputy Gossage had no "personal interests at stake."

The record provides no reasonable basis to conclude that the "NRTs" assessed for the June 23, 2006 incident were not warranted. Deputy Wiesner's poor performance cannot be excused by his stating that he was only "following orders." The purpose of Step 3 training is for the employee to demonstrate that he/she is able to take control without an override by his/her FTO.

Complainants called no qualified witness, including other witnesses to the events of June 23, 2006, to rebut the testimony of FTO's Kinnard, Cleven, Flannery, Sgt. Jossart, Lt. Shrift, Capt. Schultz and Chief Deputy Gossage. Deputy Wiesner was asked to present "his side" of the facts, but declined.

The decision to terminate Deputy Wiesner was not pretextual, but rather, was fairly conducted based on job performance evaluations and Deputy Wiesner's failure to minimally perform and respond to the Field Training given. Respondent has just cause to terminate the employment of Deputy Wiesner.

## **DISCUSSION**

### **Applicable Legal Principles**

Sec. 111.70(3)(a)4, Stats., makes it a prohibited practice for a municipal employer "(t)o refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit." To violate Sec. 111.70(3)(a)4, Stats., is to derivatively violate Sec. 111.70(3)(a)1, Stats.

Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

As the Commission has stated in KETTLE MORAINES SCHOOL DISTRICT, DEC. NO. 30904-D (4/07):

. . . It is a fundamental tenet of Commission law, and labor relations law in general, that, where employees are represented by a union, an employer may not change the existing wages, hours, or working conditions without exhausting its obligation to bargain in good faith with the union about those subjects. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS.2D 671 (CT. APP. 1994); JEFFERSON COUNTY V. WERC, 187 WIS.2D 647 (CT. APP. 1994); MAYVILLE SCHOOL DIST. V. WERC, 192 WIS.2D 379 (CT. APP. 1995); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS.2D 352 (CT. APP. 1997). The Commission summarized the reasons for this rule long ago as follows:

Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. In addition, an employer unilateral change evidences a disregard for the role and status of the majority representative which disregard is inherently inconsistent with good faith bargaining.

SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85) at 14, citing CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), GREEN COUNTY, DEC. NO. 10308-B (WERC, 11/84). See also NLRB V. KATZ, 396 U. S. 736 (1962).

The concept underlying this longstanding principle is that the purposes of the Municipal Employment Relations Act (MERA) – effective bargaining and labor peace – are best effectuated by maintaining stability regarding wages, hours, and working conditions while these matters are under negotiation.

This duty to maintain the “status quo” applies whenever there is a duty to bargain, including the period between the expiration of one contract and the execution of its successor. During this “hiatus,” while the parties are negotiating over the terms of the successor agreement, the Commission has long required the employer to maintain the existing wages, hours, and working conditions until the new contract is finalized. GREEN COUNTY, DEC. NO. 10208-B (WERC, 11/84); OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04). Either party may negotiate for changes, including a proposal to make those changes retroactive to the beginning of the hiatus. However, during the hiatus, while the bargaining process is ongoing, no changes may be implemented without the other party’s consent. VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96), at 21.

A primary element in a unilateral change violation is establishing what the existing wages, hours, and working conditions were at the time the employer allegedly changed them. Under the Commission’s traditional approach, this determination is based upon relevant language (if any) in the expired contract, bargaining history that may shed light on such contract language, and the parties’ actual practices on the topic. SEE, E.G., CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). While the expired contract plays an important role, “[I]t is crucial ... to observe that, since the contract no longer exists, the duty to maintain the status quo is not contractual in nature. Rather, it is a function of the collective bargaining law.” SUN PRAIRIE AREA SCHOOL DISTRICT, DEC. NO. 31190-B (WERC, 3/06) at 17.

The parties’ expired contract contains a grievance procedure culminating in final and binding arbitration. In DODGELAND SCHOOL DISTRICT, DEC. NO. 31098-C (2/07), the Commission, relying upon SCHOOL DIST. NO. 6, CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77), reaffirmed that arbitration is not part of the *status quo* in effect during a contract hiatus period, but that the steps in the grievance procedure that precede arbitration remain part of the *status quo* during a contract hiatus period. Relying upon RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29203-B (WERC, 10/98), the Commission in DODGELAND, also reaffirmed that, during a hiatus between contracts, a union must exhaust the grievance procedure in the expired contract before the Commission will assert jurisdiction over a unilateral change claim based upon alleged departures from terms and conditions set forth in the expired contract.

A just cause standard for discipline primarily relates to wages, hours and conditions of employment and, thus, is a mandatory subject of bargain. BELOIT EDUCATION ASSOCIATION V.

WERC, 73 Wis. 2D 43 (1976). The parties have stipulated that, under the terms of the expired agreement, no employee may be discharged except for just cause. Respondent's *status quo* obligation includes the duty to not discharge except for just cause.

It is undisputed that Deputy Wiesner was discharged during a contract hiatus; that the Association has filed a grievance on this discharge; that the Association has exhausted the grievance procedure of the expired contract with respect to this grievance; and that Respondent has refused Complainants' request to arbitrate this grievance. It is appropriate for the Examiner to assert the Commission's jurisdiction over Complainants' claim that Respondent has violated its statutory duty to maintain the *status quo* during a contract hiatus by discharging Deputy Wiesner without just cause. Respondent bears the burden of proof in a "just cause" case, including one that is before the Commission in the guise of a prohibited practice. BROWN COUNTY, DEC. NO. 31511-D (WERC, 8/07).

### **Merits**

This case involves the challenge to a discharge during a labor contract hiatus period. The *status quo* established by the relevant expired labor contract is that the discharge must be supported by just cause.

The June 29, 2006 letter that was issued by Sheriff Kocken and Chief Deputy Gossage effectuated Deputy Wiesner's discharge. (Jt. Ex. #2) This letter states only one basis for the discharge, *i.e.*, "A determination has been made through the Field Training Process that you have not met the standards for this position."

Deputy Wiesner had work performance problems after he returned from military duty in Iraq. Deputy Wiesner and the Respondent addressed these problems through a variety of means, *e.g.*, medical treatment, leaves of absence, and light duty. When Deputy Wiesner sought to return to full-time duty at the end of 2005, Respondent responded by having Deputy Wiesner undergo a Fitness for Duty evaluation.

Under this evaluation, Deputy Wiesner was released to full time duty as a police officer for Brown County subject to only one condition, *i.e.*, successful completion of standard Field Training. (Resp. Ex. #2; T. 71) It follows, therefore, that the only conduct that is relevant to the determination of whether or not Deputy Wiesner has met the standards of his position is that which occurred during the "Field Training Process" required by Respondent's Fitness for Duty Evaluation. This conclusion is consistent with the parties' mutual understanding that Deputy Wiesner was to enter this "Field Training Process" with a "clean slate." (T. 469, 511, 759)

The "Field Training Process" required by Respondent's Fitness for Duty Evaluation commenced in January, 2006. As confirmed by Capt. Schultz' memo of June 22, 2006, this "Field Training Process" was comprised of Four, rather than Five, Steps. (Comp. Ex. #7)

On February 18, 2006, FTO Ann Grinkey recommended that Deputy Wiesner be advanced from Step 1 to Step 2; on March 30, 2006, FTO Kevin Kinnard recommended that Deputy Wiesner be advanced from Step 2 to Step 3; and on April 1, 2006, FTC Lt. Patrick Shrift ordered that Deputy Wiesner be advanced to Step 3. (Comp. Ex. #4 and 5) Respondent's advancement of Deputy Wiesner to Step 3 reasonably establishes that Deputy Wiesner had "met the standards" at Step 1 and Step 2 of the Field Training Process that had commenced in January, 2006.

On May 26, 2006, during Step 3 of the "Field Training Process," FTO Cleven assessed an NRT (Not Responding to Training) in Category 5 – Patrol Tactics & Procedures. (Comp. Ex. #6) FTO Cleven assessed the "NRT" because, while arresting an individual with an active warrant, Deputy Wiesner permitted the individual to empty his own pockets prior to handcuffing the individual and started to place this individual in the patrol car without searching the individual. (T. 248)

In response to this NRT, on June 1, 2006, FTC Capt. Schultz issued a "Field Training Unit Performance Improvement Plan;" which plan required Deputy Wiesner to undergo additional training with Officer Kastelic and extended Deputy Wiesner's Step 3 Field Training by one week. (Resp. Ex. #13) The "Field Training Unit Recruit Manual" states that extensions to training are not uncommon and should not be viewed with any stigma, but as evidence of the department's commitment to training. (T. 349; Resp. Ex. #11, Tab 1, pg. 4-5)

Deputy Wiesner did not object to this plan. (T. 767) Statements contained in the June 1<sup>st</sup> "Field Training Unit Performance Improvement Plan" reasonably indicate that, as of June 1, 2006, Deputy Wiesner had "met the standards" of his Step 3 field training, with the exception of the performance that was the subject of the NRT.

On June 5, 2006, Deputy Wiesner attended the training required by the June 1<sup>st</sup> plan. (Resp Ex. #15) During this training, Deputy Wiesner was assessed an "Acceptable" in 26 skill areas and an "Unacceptable" in 2 skill areas and, upon completion of this training, FTC Lt. Shrift and Officer Kastelic signed a written "Remedial Training Report" which states that the "the Training Section recommends that Officer Wiesner resumes his Field Training with FTO Cleven as soon as possible." (Id.) Given the "Field Training Unit Performance Improvement Plan" provision that "Officer Kastelic may extend that training period if he sees need and value," the Training Section recommendation reasonably indicates that Deputy Wiesner "met the standards" of his training with Officer Kastelic.

On June 14, 2006, Deputy Wiesner's physician provided Respondent with a letter that recommended that Deputy Wiesner work a day schedule/shifts. (Comp. Ex. #1a) Respondent reasonably concluded that this letter was not a request for reasonable accommodation of a disability/handicap, but rather was only a recommendation. (T. 623)

Deputy Wiesner continued his Step 3 Field Training with FTO Cleven. On June 22, 2006, FTC Capt. Schultz signed a "Field Training Unit Performance Improvement Plan" that

anticipated that Deputy Wiesner would complete his Step 3 Field Training on June 23, 2006 and that, following his days off, would start Step 4 Field Training (Shadow Step) on June 27, 2006. (Comp. Ex. #7)

FTO Cleven's testimony, as well as his DORs, confirm that, for at least one week prior to June 23, 2006, Deputy Wiesner had been assessed all "4s" in each category observed and that, under the Field Training Unit Recruit Manual, if Deputy Wiesner's Step 3 training had ended on June 22, 2006, he would have progressed to Step 4. (Comp. Ex. #6, T. 348) These DORs, the statements contained in the June 22, 2006 "Field Training Unit Performance Improvement Plan," and FTO Cleven's testimony reasonably establish that, as of June 22, 2006, Deputy Wiesner had "met the standards" at Step 3 of the "Field Training Process."

On DOR #89, prepared by FTO Cleven and dated June 23, 2006, Deputy Wiesner was assessed four (4) NRTs. (Comp. Ex. #6) FTO Cleven states that he discussed what had happened at the June 23<sup>rd</sup> incident with Sgt. Jossart, but that she did not recommend anything and that it was his own decision to assess NRTs on June 23<sup>rd</sup>. (T. 315-316) On June 24, 2006, FTO Cleven signed an "End of Step Evaluation" for Deputy Wiesner in which FTO Cleven did not recommend advancing Deputy Wiesner to Step 4, but rather recommended a "Status Hearing." (Resp. Ex. #29)

#### **FTO Cleven's Assessment of NRTs on June 23, 2006**

On DOR #89, dated June 23, 2006, FTO Cleven assessed an NRT in Performance Assessment Categories' 4, 5, 8 and 10. (Comp. Ex. #6) Based on the narrative, FTO Cleven states that he assessed a "3" in Category 4, a "2" in Category 5, a "4" in Category 8, and a "2" in Category 10. (T. 303) According to FTO Cleven, he applied the "Field Training Unit Recruit Manual" to Deputy Wiesner as if he were a new recruit and he assessed the NRTs consistent with the "Field Training Unit Recruit Manual." (T. 285; 306-7)

FTO Cleven agrees that, if there were no other assessments of less than "4" in a category, then there would not be a consistent failure to perform at an acceptable level in that category. (T. 307) FTO Cleven defines "consistent" as more than one occasion and within close proximity. (T. 307-08) When asked to explain how the June 23<sup>rd</sup> NRTs correlated to the numbers assessed in each category, FTO Cleven states that he took into consideration all of Step 3 and not just from the May 26<sup>th</sup> NRT. (T. 314-315)

#### **Step 3 Assessments in Categories 4, 5, 8 and 10 Prior to June 23, 2006**

##### **Category 4-Field Performance/Cognitive Abilities**

As discussed above, on June 23, 2006, Deputy Wiesner was assessed a "3" in Category 4. Under the "Field Training Unit Recruit Manual," an assessment of "4" is an acceptable performance level. (Resp. Ex. #11, Tab 2, pg. 6) FTO Cleven states that an assessment of less than "4" does not, in and of itself, signify that you can't pass to the next

step and that the assessment is a training tool used to correct a problem, but that if the problem continues, then you do not pass to the next level. (T. 340-1)

Prior to June 23, 2006, Deputy Wiesner was assessed at less than a “4” in Category 4 on two occasions, *i.e.*, April 27 and 28, 2006 and, in each instance, he received 5 minutes of field training. (Comp. Ex. #6) From April 29, 2006 through June 22, 2006, Deputy Wiesner was assessed at least a “4” in Category 4. (Comp. Ex. #6) It is not evident that conduct for which Deputy Wiesner was assessed less than a “4” on April 27 and 28<sup>th</sup> is the same conduct for which he was assessed less than a “4” on June 23, 2006.

#### Category 5-Patrol Investigative:Tactical-Procedural

As discussed above, on June 23, 2006, Deputy Wiesner was assessed a “2” in Category 5. At Step 3, Deputy Wiesner was assessed at less than a “4” in Category 5 on April 16, 18, 21, and 25 and May 18 and 26, 2006. From May 27 through June 22, 2006, Deputy Wiesner was not assessed at less than a “4” in Category 5. (Comp. Ex. #6)

With respect to the DOR of April 16, 2006 (#49), FTO Clevon recalls that he assessed less than a “4” in Category 5 because, while doing a building security check, Deputy Wiesner stood in front of a window as he shined his flashlight, when the proper procedure would be to not expose his body to the window; that he discussed why Deputy Wiesner’s practice was not safe and explained the proper practice; that Deputy Wiesner corrected his unsafe practice; and that there were no further problems in this area. (T. 262-3; 289) DOR #49 indicates that FTO Clevon provided five minutes of training in response to this incident.

With respect to the DOR of April 18, 2006 (#51), FTO Clevon recalls that he assessed less than a “4” in Category 5 because of unsafe positioning of Deputy Wiesner’s body at a traffic stop, *i.e.*, Deputy Wiesner had placed his right hand on the roof and his left hand on the door which the driver was opening, providing too much exposure to the driver; that FTO Clevon gave an FTO lecture regarding unsafe positioning of Deputy Wiesner’s body; and that, thereafter, Deputy Wiesner did not have trouble with traffic stops. (T. 263-4; 290) DOR #51 indicates that FTO Clevon provided five minutes of training in response to this incident.

With respect to the DOR of April 21, 2006 (#54), FTO Clevon recalls that he assessed less than a “4” in Category 5 for unsafe conduct when Deputy Wiesner began the search of an individual with an active arrest warrant prior to handcuffing the individual. (T. 264-5) FTO Clevon further recalls that he lectured Deputy Wiesner to handcuff a party before searching and that this problem did not reoccur. (T. 290-1)

FTO Clevon states that, for the weekly summary of April 16 through April 21, 2006, Deputy Wiesner averaged a 3.8 in Category 5, which was not acceptable. (T. 265) Confirming that this summary was for the first week of Deputy Wiesner’s Step 3 training, FTO Clevon stated that he did not disagree with the “Field Training Recruit Manual’s”



statement that “It is common for a recruit to earn less than satisfactory assessments in the initial stages of each step.” (T. 291-2)

With respect to the DOR of April 25, 2006 (#55), FTO Cleven recalls that he assessed less than a “4” in Category 5 for unsafe conduct, *i.e.*, lack of thorough search of an in-custody party and briefly letting go of handcuffs as he was uncuffing a person at the Brown County Mental Health Center. (T. 250-1, 266) FTO Cleven further recalls that he had Deputy Wiesner practice some tactical handcuffing for approximately fifteen minutes and that this practice involved role playing at the Bellvue Village Hall with Deputy Belleau. (T. 251-2, 293) FTO Cleven considers such role-playing to be standard FTO training. (T. 332)

With respect to the DOR of May 18, 2006 (#72), FTO Cleven recalls that he assessed less than a “4” in Category 5 for unsafe handcuffing in two separate calls; that the unsafe handcuffing involved a failure to close and ratchet the handcuff as it was removed from one individual; and improperly handcuffing another individual, with the result that this individual’s arm was twisted. (T. 273-6; 295) According to FTO Cleven, he responded to the handcuffing issues with a five-minute FTO lecture as reflected in the DOR and he does not recall that the handcuffing issues of May 18 2006 reoccurred. (T. 296-7)

According to FTO Cleven, he assessed the “NRT” in Category 5 on May 26, 2006 because, while arresting an individual with an active warrant, Deputy Wiesner permitted the individual to empty his own pockets prior to handcuffing the individual and started to place this individual in the patrol car without searching the individual. (T. 248-9) FTO Cleven states that it is extremely dangerous to allow a party who knows they are going to be arrested to reach into his own pockets and pull out items; that Deputy Wiesner should have handcuffed the individual and then searched the individual; and that this incident, as well as Deputy Wiesner’s prior performance in handcuffing and searching, lead FTO Cleven to conclude that Deputy Wiesner was not responding to training and may need some additional or remedial training. (T. 297-99)

Following the incident of May 26, 2006, FTO Cleven recommended an extension in training. (T. 283) FTO Cleven was aware of, but did not participate in, the June 5, 2006 training with Officer Kastelic. (T. 280, 283)

From May 26, 2006 through June 22, 2006, Deputy Wiesner was not assessed at less than a “4” in Category 5. (Comp. Ex. #6) FTO Cleven states that Deputy Wiesner has improved with handcuffing and searching. (Resp. #29; T. 258-9)

#### Category 8-Department Policies and Procedures

As discussed above, on the June 23<sup>rd</sup> DOR, FTO Cleven assessed a “4” in Category 8; which indicates an acceptable level of performance. According to FTO Cleven, this assessment had to do with Deputy Wiesner’s failure to obtain a statement and the assessment of a “4” was a mistake. (T. 304-5)

Prior to June 23, 2006, FTO Cleven had not assessed less than a “4” in Category 8. (Comp. Ex. #6) On April 25, 2006, Deputy Wiesner received thirty minutes of training; in Category 8, but this was training from the task list rather than a response to substandard performance. (T. 293-4)

#### Category 10-Interpersonal Relationships

As discussed above, on the June 23, 2006 DOR, Deputy Wiesner was assessed a “2” in Category 10. Prior to June 23, 2006, FTO Cleven had not assessed less than a “4” in Category 10. (Comp. Ex. #6)

#### Conduct on June 23, 2006

In the narrative section of the June 23<sup>rd</sup> DOR, FTO Cleven assessed three FTO overrides. (Comp. Ex. #6) According to FTO Cleven, the overrides were for intervening on two occasions to calm the agitated passenger and for advising Deputy Wiesner to return to the hospital and obtain the passenger’s statement. (T. 256) Under the “Field Training Process,” an FTO override is an indicator that the FTO has had to step in because of a safety issue or a significant delivery problem. (T. 112) These were the first overrides assessed by FTO Cleven against Deputy Wiesner. (T. 331)

According to FTO Cleven, all four of the NRTs assessed on June 23, 2006 resulted from FTO Cleven’s conclusion that, at the scene of a car/house accident, Deputy Wiesner had not displayed the ability to control/calm the agitated male passenger or recognize that the agitated male passenger was a safety risk; and that, after the passenger had been transported to the hospital, Deputy Wiesner had initially failed to make an attempt to obtain a statement from this passenger. (T. 252-6, 304, 318) FTO Cleven states that his biggest concern was Deputy Wiesner’s proximity to an agitated individual because Deputy Wiesner was in the passenger’s personal space, which was not safe. (T. 320-21) FTO Cleven states that, after this call, he explained to Deputy Wiesner that he was too close to the agitated passenger and provided a ten minute FTO lecture. (T. 321)

In the narrative portion of the June 23<sup>rd</sup> DOR, FTO Cleven indicates that when he and Deputy Wiesner first arrived at the scene, the male passenger was pacing back and forth and appeared extremely agitated; that FTO Cleven asked the male passenger to sit down because he may be injured; that the male passenger sat down and Deputy Wiesner remained with the passenger; that, subsequently, FTO Cleven observed that the male passenger was standing up, very agitated, pacing back and forth; that Deputy Wiesner was standing near the male passenger, but was not able to calm down the passenger; that FTO Cleven walked back to the passenger and, after FTO Cleven talked briefly with the passenger, the passenger calmed down; that Deputy Wiesner kept the male from walking back to the other side of the vehicle where the driver lay; that, subsequently, Sgt. Jossart approached FTO Cleven and advised him that Deputy Wiesner needed assistance in controlling the male passenger; that FTO Cleven

walked over, advised the male he needed to calm down or he would be placed in handcuffs; and that the male passenger calmed down. (Comp. Ex. #6)

On June 24, 2006, Sgt. Jossart, who was present at the June 23<sup>rd</sup> incident, prepared a written report of her observations. (Resp. Ex. #49) In this report, Sgt. Jossart made statements that include the following:

. . . FTO Cleven and Deputy Wiesner made contact with a male passenger, who appeared intoxicated, was highly emotional and appeared physically agitated. The passenger was instructed to sit on the ground, which he did. He was observed to have a cut on his forehead and unknown other injuries. FTO Cleven came over to the driver on the ground and began assisting Deputy Bilgo until rescue arrived. I was able to step back and observe the scene. I heard the male passenger begin yelling, looked over and observed that the passenger was standing, began pacing, becoming increasingly agitated and yelling about rescue. Deputy Wiesner was standing between the male and the crash scene, but was not speaking with the male or attempting to calm him, allowing the male to further work himself up. FTO Cleven approached the male with Deputy Wiesner, spoke with him briefly and the male calmed down immediately. FTO Cleven again returned to the downed driver to assist Deputy Bilgo and rescue personnel. I again observed the male passenger begin to pace, raising his voice at Deputy Wiesner and making fists as he paced, as if setting for an attack posture. The male again became increasingly agitated, I observed Deputy Wiesner standing within a few feet of the male, with pen and paper in his hands, looking down and appearing oblivious to the threat in front of him. I did not observe Deputy Wiesner speaking with the male or in any way attempting to calm him. This was all occurring within close proximity to the crashed vehicle, police, fire, and rescue personnel. I pulled FTO Cleven away from the downed driver, advised him that Deputy Wiesner needed assistance, and that the passenger should be moved to a squad and seated to remove him from the crash scene area where emergency personnel were working. I approached the male with FTO Cleven, advised him to walk to a squad to sit down. He stated he was worried about his friend, I reassured him and he was fine, walked over to the squad without further incident. Deputy Wiesner followed. Upon reaching the squad, the male was going to enter the passenger back side. Deputy Wiesner made no attempt to search the male for weapons prior to his entering the squad. I told the male not to get in the car yet, and Deputy Wiesner then appeared to remember to search him for weapons. Rescue personnel approached and began attending to the passenger and I returned to the crash scene.

. . .

According to Sgt. Jossart, Deputy Wiesner's failure to calm the agitated passenger was not acceptable because agitated individuals need to be separated from other responders to keep everyone safe; if there is an escalation in agitation, other responders may be unnecessarily pulled away from their duties to assist with the agitated individual; and Deputy Wiesner did not appear to be aware that his close proximity to the agitated passenger presented a threat to Deputy Wiesner's safety. (T. 643-48)

Deputy Wiesner recalls that, when he and FTO Cleven arrived at the scene of the car/house accident, they encountered the male passenger, who was injured; that the male passenger was upset; that he was told by FTO Cleven to stay with the male passenger; that he did not observe any weapon and the passenger's hands remained outside of his pockets; that the male passenger was concerned about his injured friend (the driver); that Deputy Wiesner asked if the male passenger wanted medical attention and the male passenger refused; that Deputy Wiesner talked to the male passenger in a calm voice, in an attempt to calm the passenger down; that the passenger calmed a little bit, but continued to pace; that the passenger's conversation was not threatening; that he never observed the passenger making fists or assuming a pre-attack posture; that he was in close proximity to the passenger because the passenger was injured and he wanted to be able to provide assistance; that Deputy Wiesner told the passenger to calm down and stand still, but the passenger continued to pace; that, a minute or two after FTO Cleven had left Deputy Wiesner with the male passenger, FTO Cleven returned; Deputy Wiesner understood that FTO Cleven returned because FTO Cleven did not consider the passenger to be complying with whatever Deputy Wiesner had said to the passenger; that FTO Cleven told the male passenger that, if he did not calm down and sit down, then FTO Cleven would handcuff and arrest the passenger; that the male passenger, who appeared stunned, stopped pacing; that the male passenger then became more upset and questioned why he would be arrested; that Deputy Wiesner responded that the male passenger would not be arrested and that "we" just needed information and to get the male passenger to seek medical attention; that a minute or a minute and a half after FTO Cleven had left, Sgt. Jossart came over, followed by FTO Cleven; and they made the decision to take the passenger to the squad. (T. 773-80) Deputy Wiesner confirms that the male passenger did not comply with Deputy Wiesner's instruction to stop pacing. (T. 778-9)

The three accounts are not entirely consistent. However, there is sufficient consistency to reasonably conclude that FTO Cleven had to intervene on two occasions because Deputy Wiesner was not able to control/calm the agitated male passenger and did not recognize that the agitated male passenger posed a safety threat and, thus, his assessments of the two overrides are reasonable.

Inasmuch as FTO Cleven and Deputy Wiesner had the responsibility to process the OWI, they also had the responsibility to take the statement of the passenger. (T. 663) Deputy Wiesner recalls that he waited to take the male passenger's statement because, in the past, they had obtained statements at the hospital, rather than interfering with medical treatment. (T. 782) Deputy Wiesner recalls that, at the scene, the passenger had told Deputy Wiesner and FTO Cleven that he had been asleep and did not recall anything that had happened, but that, as

Deputy Wiesner was completing the paper work at the hospital, he overheard a conversation between the passenger and his doctor in which the passenger told the doctor that he had been awake and that he knew his friend was going too fast. (T. 787) Deputy Wiesner states that, at the time, FTO Cleven and Sgt. Jossart had left the area, and he was unsure as to whether or not he had overheard a confidential doctor-patient communication. (T. 787-8) Deputy Wiesner states that, due to the time interval between overhearing this conversation and the return of FTO Cleven, he had forgotten the conversation; that when FTO Cleven returned and asked if his paperwork was ready, FTO Cleven responded "Yeah;" that, as they were driving away from the hospital, he notified FTO Cleven of the overheard conversation; and that FTO Cleven responded that they should go back to the hospital and try to get a statement. (T. 788-89) Deputy Wiesner states that they returned to the hospital and obtained the statement. (T. 789)

In his DOR of June 23, 2006, FTO Cleven confirms that the passenger initially told Deputy Wiesner and FTO Cleven that he had been asleep. According to FTO Cleven's DOR, after leaving the hospital, Deputy Wiesner advised FTO Cleven that the male passenger had admitted to Deputy Wiesner that he had been awake at the time of the crash and that the driver was traveling too fast for the curve in the roadway; FTO Cleven responded that Deputy Wiesner should have obtained a written statement from the passenger; that Deputy Wiesner responded "I don't think he would give me one, he said he didn't want to get his friend in trouble;" that FTO Cleven told Deputy Wiesner to return to the hospital and ask the passenger for a statement; that they returned to the hospital and that Deputy Wiesner obtained the statement. (Comp. Ex. #6)

At hearing, FTO Cleven recalled that, as they were leaving the hospital, he asked Deputy Wiesner if the male passenger had given him information about what had happened and Deputy Wiesner said that the passenger told him he didn't want to rat on his friend and that Deputy Wiesner advised FTO Cleven that he didn't think the male would give him a statement anyway, so he didn't ask him for it. (T. 255) FTO Cleven further recalled that they returned to the hospital; FTO Cleven asked for a statement and the passenger gave the statement. (Id.) In her written report of June 24, 2006, Sgt. Jossart states "FTO Cleven advised me that he asked Deputy Wiesner why he didn't take a written statement from the passenger, and that Deputy Wiesner indicated that he didn't think the passenger would give a statement because he didn't want to get his friend in trouble."

Deputy Wiesner's statements explaining how he was informed of the fact that the passenger was not asleep and that he was confused about how to respond to this information are credible. Deputy Wiesner's confusion reasonably explains why Deputy Wiesner would wait to talk to FTO Cleven prior to asking the passenger for a statement. It seems unlikely, however, that Deputy Wiesner's memory of the overheard conversation would not have been triggered by FTO Cleven asking if his paperwork was ready; which suggests that there was another reason why FTO Cleven did not make an attempt to take the passenger's statement prior to leaving the hospital.

FTO Cleven's testimony that Deputy Wiesner reported that he did not make an attempt to obtain the passenger statement because he did not think that the passenger would provide a statement is credible. The record provides a reasonable basis to conclude that FTO Cleven had to intervene by telling Deputy Wiesner to return to the hospital and make an attempt to obtain the passenger's witness statement and, thus, his assessment of an FTO override was reasonable.

### Summary

The record provides a reasonable basis to conclude that FTO Cleven's assessment of the three FTO overrides was reasonable; as were his conclusions that Deputy Wiesner displayed an inability to control/calm the agitated male passenger or recognize that the agitated male passenger posed a safety risk; and that, after the passenger had been transported to the hospital, Deputy Wiesner had failed to make an attempt to obtain a statement from this passenger. Thus, the issue becomes whether or not, under Respondent's standard "Field Training Process," it was reasonable for Deputy Cleven to respond to these performance deficiencies by assessing the 4 NRTs.

The "Field Training Unit Recruit Manual" includes, under "Daily Observation Report," the following statement: 'A "Not Responding to Training," (N.R.T.) will be noted if training has been provided to a level where your F.T.O. believes you should now be performing at an acceptable standard and yet you consistently do not. Remedial training efforts will follow N.R.T. ratings.' (Resp. Ex. #11, Tab 1, pg. 5-6)

This "Field Training Unit Recruit Manual" also includes the following:

### NOT RESPONDING TO TRAINING

When instructions and additional coaching have been provided but you are still unable to satisfactorily perform, demonstrate or explain the knowledge/skill area(s), an NRT (Not Responding to Training) notation (x) will be made on the front side of the DOR. Chronic NRT (in spite of additional coaching and training effort) is an indication that a performance problem exists that has the potential to place your continued employment in jeopardy. A notation of NRT generally results in an extension of training to further assist you to get back on track. Persistent NRT without any corresponding improvement in job skills/performance may result in a Field Training Unit recommendation that an Employment Status review occur in order to reassess your continued employment. (Resp. Ex. #11, Tab 2, pg.4)

FTO Cleven states that Deputy Wiesner's failure to calm the male passenger and to obtain this male passenger's statement while at the hospital is behavior that is different from the previous conduct that fell below standards. (T. 318) FTO Cleven states that this was the first time that Deputy Wiesner had failed to obtain a statement. (T. 318-19) FTO Cleven states

that it is possible that Deputy Wiesner could have benefited from remedial training in taking statements. (T. 318-19)

FTO Cleven could not recall another time during Step 3 Field Training in which Deputy Wiesner had dealt with an agitated individual. (T. 318-19) FTO Cleven states that he is not aware of any set in-service program or training on how to deal with agitated individuals and that recruits commonly learn how to deal with agitated individuals by experiencing agitated people. (T. 320) It is reasonable to conclude that training on how to deal with agitated individuals includes training on the safety threats posed by agitated individuals and how to appropriately respond to these safety threats.

FTO Cleven further states that he was unaware of whether or not Deputy Wiesner had encountered any agitated individuals in Step 1 or Step 2 of his training; knew that Deputy Wiesner's Step 1 and 2 training was conducted on day shifts; and knew that an officer is likely to encounter more agitated people on night shift. (T. 349-50) Wiesner states that his Step 1 and Step 2 training did not provide him with the opportunity to deal with "No" people and that this was discussed at an end of Step 2 meeting with Lt. Shrift and Capt. Schultz. (761-2)

FTO Cleven recalls that, after the call on June 23, 2006, he provided a ten-minute FTO lecture regarding Deputy Wiesner's proximity to the agitated person. (T. 321) FTO Cleven states that Deputy Wiesner may have been able to learn from this FTO lecture and that it is possible that some retraining in dealing with agitated people could have been beneficial to Deputy Wiesner. (T. 318; 321-22, 329)

On June 23, 2006, FTO Cleven did not have a reasonable basis to suppose that Deputy Wiesner had consistently failed to perform at an acceptable standard with respect to obtaining required statements. Nor did FTO Cleven have a reasonable basis to suppose that Deputy Wiesner had been provided training in handling agitated individuals, including responding to the safety threats posed by agitated individuals, to a level where Deputy Wiesner should have been performing at an acceptable level but consistently had not. FTO Cleven's assessment of the four NRTs on June 23, 2006 is inconsistent with the standard Field Training Process and, thus, is not reasonable.

#### **FTO Cleven's "End of Step Evaluation"**

On June 24, 2006, FTO Cleven signed an "End of Step Evaluation" for Deputy Wiesner in which FTO Cleven did not recommend advancing Deputy Wiesner to Step 4, but rather recommended a "Status Hearing." (Resp. Ex. #29) FTO Cleven states that, based on his Step 3 observations of Deputy Wiesner, FTO Cleven does not believe that Deputy Wiesner can safely perform the duties of a patrol officer and that he recommended a status hearing and against advancement and extension of training because he had concluded that administration needed to review Deputy Wiesner's status as an employee within the Sheriff's Department and that he felt that an extension in training would not help. (T. 259; 325; 351)

FTO Cleven understood that his recommendation of a status hearing would result in Lt. Shrift and Capt. Schultz reviewing the DORs and Deputy Wiesner's status and that it was their decision to extend training or to do something different. (T. 329) FTO Cleven states that, after completing his "End of Step Evaluation," that he had no further involvement with Deputy Wiesner or Deputy Wiesner's job status. (T. 332)

Under the "Field Training Unit Recruit Manual," a Field Training Unit recommendation of a "Status Hearing" is discretionary upon the Field Training Unit, but presupposes that there has been "Persistent NRT without any corresponding improvement in job skills/performance." (Resp. Ex. #11, Tab. 2, pg. 4) As discussed above, FTO Cleven's assessment of the four NRTs on June 23, 2006 was not reasonable.

Notwithstanding any Respondent argument to the contrary, the record does not establish that the problems that lead to Deputy Wiesner's first NRT, on May 26, 2006, continued after Officer Kastelic provided remedial training. Rather, FTO Cleven confirms that, after his training with Officer Kastelic, Deputy Wiesner did not have problems with searching or cuffing. (T. 299-300) FTO Cleven's testimony, as well as his Step 3 reports, reasonably indicate that following instructions and coaching, Deputy Wiesner has been able to correct the deficiencies for which he had been assessed at less than a "4" and, thus, improve in job skills/performance.

In the "End of Step Evaluation," FTO Cleven wrote the following comments:

Deputy Wiesner has displayed difficulty in multi-tasking and decision making. Deputy Wiesner did not experience dealing with many agitated persons in Step 3. On 6-24-06 at 201 am, Deputy Wiesner dealt with a agitated male. Deputy Wiesner displayed inability to control/calm this person. This person was agitated. Deputy Wiesner did not recognize this person was a safety risk and used poor tactics dealing with him. FTO have discussed Deputy Wiesner's inability to focus on the whole call and his experience with "tunnel vision" because he is concerned about one certain factor in the call. Deputy Wiesner has improved with his handcuffing and searching. When an incident or task does not go as trained, Deputy Wiesner has difficulty adapting and adjusting to this change as experienced in handcuffing & searching after his extended training. The training dealt with handcuffing and searching.

According to FTO Cleven, his "End of Step Evaluation" was based solely on his Step 3 observations. (T. 337) FTO Cleven confirms that his Step 3 DORs do not reflect that Deputy Wiesner has displayed difficulty in multi-tasking and decision-making. (T. 326) According to FTO Cleven, his comments regarding Deputy Wiesner's inability "to focus on the whole call" and his "tunnel vision" did not deal with the call of June 23<sup>rd</sup>; but rather, dealt with other calls; that, although these concerns should be reflected in the Step 3 DORs, they are not; and that these concerns were just small things that FTO Cleven felt did not need to be recorded at the time. (T. 326-7)



The “Field Training Unit Recruit Manual” states that the DOR “is the formal record and report of your daily training and assessment,” the purpose of which is “to assist you in correcting areas of deficient performance and further strengthen those areas rated at minimally acceptable. There are no secrets in this process and you will be kept fully informed.” (Resp. Ex. #11, Tab 1, pg. 5-6) Lt. Shrift confirms that DORs are the “guts of the program” and tells the Department where the officer has been; who he was with; what occurred; what the performance was, at standard or not; and what was done to correct performance. (T. 114) Given the function of the DOR, one may reasonably conclude that, if, during Step 3 training, Deputy Wiesner had displayed any significant “difficulty in multi-tasking and decision making;” an “inability to focus on the whole call; and/or experienced ‘tunnel vision,’” it would have been documented in his DORs.

When asked for an explanation of his comments “When an incident or task does not go as trained, Deputy Wiesner has difficulty adapting and adjusting to this change as experienced in handcuffing & searching after his extended training.,” FTO Cleven stated that he was referring to the fact that, after remedial training, Deputy Wiesner followed his training, but did not adapt this training to deal with intoxicated or drugged individuals; and that when FTO Cleven told Deputy Wiesner to keep the instructions simple, so that they could be understood, Deputy Wiesner complied with these instructions. (T. 328) These comments of FTO Cleven are preceded by the statement “Deputy Wiesner has improved with his handcuffing and searching.” When asked if his comments were intended to be negative or positive, FTO Cleven responded, “Just the observation I saw after the remedial training.” (T. 329)

As discussed above, Deputy Wiesner confirms that, after the remedial training with Officer Kastelic, Deputy Wiesner did not have further problems in handcuffing and searching. Regardless of intent, FTO Cleven’s written comments regarding handcuffing and searching give a false impression that Deputy Wiesner has failed to respond to training in handcuffing and searching.

In summary, under the “Field Training Process,” a recommendation for a “Status Review” presupposes “Persistent NRT without any corresponding improvement in job skills/performance.” The 4 NRTs assessed on June 23, 2006 were not reasonable. The NRT assessed on May 26, 2006 was remedied by the training of June 5, 2006 and the performance deficiencies that gave rise to this NRT did not reoccur.

The record fails to establish that Deputy Wiesner had persistent NRT without any corresponding improvement in job skills/performance. FTO Cleven’s recommendation of a “Status Hearing” is inconsistent with the “Field Training Process.” This inconsistency with the “Field Training Process,” as well as the inclusion of criticisms that are not substantiated in the DORs, warrant the conclusion that FTO Cleven’s “End of Step Evaluation” is not reasonable.

**Sgt. Jossart**

As discussed above, Sgt. Jossart, who was present at the incident of June 23, 2006, was critical of Deputy Wiesner's performance. Sgt. Jossart expressed criticism of Deputy Wiesner verbally to Chief Deputy Gossage and FTO Cleven on June 23, 2006 and in writing to Lt. Shrift in her report of June 24, 2006. (Resp. Ex. #49) Sgt. Jossart's report was addressed to Lt. Shrift, with ccs to Chief Deputy Gossage, Capt. Schultz and Lt. Wickman.

In this report, Sgt. Jossart states, "I do not believe Deputy Wiesner should be advanced to the shadow portion of training." This report, portions of which are quoted above, also states:

. . . I approached the male with FTO Cleven, advised him to walk to a squad to sit down. He stated he was worried about his friend, I reassured him and he was fine, walked over to the squad without further incident. Deputy Wiesner followed. Upon reaching the squad, the male was going to enter the passenger back side. Deputy Wiesner made no attempt to search the male for weapons prior to his entering the squad. I told the male not to get in the car yet, and Deputy Wiesner then appeared to remember to search him for weapons. Rescue personnel approached and began attending to the passenger and I returned to the crash scene.

. . .

Chief Deputy Gossage was on scene as his residence was the one struck by the vehicle. C.D. Gossage recognized Deputy Wiesner's inability to function at the incident and mentioned it to me. I advised C.D. Gossage that this was not an isolated incident, and there have been past performance problems with Deputy Wiesner. I later spoke with Lt. Wickman about the incident. Lt. Wickman stated C.D. Gossage also spoke with him about Deputy Wiesner.

I responded to Aurora/Baycare Medical Center to meet with FTO Cleven. Upon clearing from Aurora, I observed that FTO Cleven and Deputy Wiesner cleared shortly after I did. I stayed in the parking lot to complete paperwork. A short time after they cleared, I heard Deputy Wiesner radio HQ that they were enroute back to Aurora. Upon their arrival, I asked FTO Cleven why they had returned. He stated that upon leaving the hospital, Deputy Wiesner advised FTO Cleven that he was speaking with the passenger of the crashed vehicle in the hospital, and the passenger advised him (Deputy Wiesner) that he was not asleep in the car just prior to the crash as he had stated earlier, but rather he was awake and knew that the driver was traveling too fast, losing control and crashing. Deputy Wiesner reported to FTO Cleven that the passenger stated he had originally lied because he didn't want to get his buddy in trouble. FTO Cleven advised me that he asked Deputy Wiesner why he didn't take a written statement from the passenger, and that Deputy Wiesner indicated he didn't think the passenger would give a statement because he didn't

want to get his friend in trouble. FTO Cleven sent Deputy Wiesner back into the hospital and he was able to obtain a written statement without difficulty from the passenger about the serious injury accident. It appears logical to me that Deputy Wiesner was aware of the procedure of taking statements at serious injury accidents because of the statement he made to FTO Cleven as to why he did not attempt to secure the statement. It would appear he simply opted not to try. FTO Cleven had informed me that Deputy Wiesner has been trained and has taken statements at injury accidents in step 3 during previous calls.

I know from experience working with Deputy Wiesner that the above incidents are not the result of a "bad night". Several years ago, I was a Sgt on the afternoon shift and Deputy Wiesner was working Village of Allouez 2p-10p position. During that time, I observed that he was unable to multi-task and/or make rapid and sound decisions when necessary, placing himself and others in unnecessary danger as a result. Two incidents that come to mind both involved simple two vehicle 10-50's. One of the crashes occurred on STH 172EB just over the Fox River, the other occurred on S. Webster near Heritage Hill in the NB lane. In both instances, traffic flow was heavy, both vehicles were movable, but Deputy Wiesner displayed the "deer in the headlights" reaction and was unable to make the decision to direct the vehicles to a nearby parking lot and out of traffic until being directed by me to do so. After both instances, I met with Deputy Wiesner to train. I attempted several times while working with him to train when I observed there to be a problem. I recognized that he was not comfortable and unprepared to be on his own on patrol, but I was unable to continue constant supervision due to call volume. It became quickly apparent that Deputy Wiesner needed remedial training that I could not provide for him. I spoke with Deputy Wiesner, asking him if he felt he could benefit from such training, he stated yes. The training was arranged and Deputy Wiesner was pulled from rotation and placed back into training. It was not long afterward that Deputy Wiesner shipped out to Iraq for a tour of duty with his unit.

It's been my experience working with Deputy Wiesner that he is capable of performing duties when advised exactly what to do. Deputy Wiesner does not function well on his own under pressure or stress. He has displayed difficulty or inability to make decisions appropriate to situations and requires supervision often. I have observed firsthand that Deputy Wiesner does not function well in confrontational situations, does not appear to recognize tactical problems or adapt to rapidly changing circumstances.

I fully understand the Field Training Program and was an active FTO prior to being promoted to Sgt in 2000. I agree with FTO Cleven's recommendation for a Status Review on the End of Step Evaluation dated 06-24-06

Sgt. Jossart states that she did not ask FTO Cleven if Deputy Wiesner had received training in calming down an agitated person. (T. 661) According to Sgt. Jossart, she assumed that, because Deputy Wiesner was in Step 3, that this subject would have been covered and,

also, Deputy Wiesner had been in the Department long enough that he not only would have been and should have been trained in that area, but he would have dealt with agitated subjects. (T. 661-62)

As discussed above, in the standard "Field Training Process," training in handling agitated individuals is provided by on-the-job exposure to such individuals. Deputy Wiesner's Step 1 and 2 training was on days, which normally does not provide exposure to such people. Step 2 FTO Kinnard's "End of Step Evaluation" includes the statement " P/should be made contact Officer on any disturbances that he responds to in Step 3 and Shadow phase so he can gain proficiency dealing with "no" people" and that "P/had numerous traffic stops and several accidents while in step 2. P/demonstrated proficiency on stops. P/did not have any aggressive and/or combative subjects on these calls or traffic stops. P/will need work with intoxicated driver stops and accidents during step 3." (Resp. Ex. 37; Comp. Ex. #5) As also discussed above, prior to June 23<sup>rd</sup>, Step 3 training had not provided Deputy Wiesner with training in handling agitated individuals. Sgt. Jossart's assumption that, during the "Field Training Process" that commenced in January 2006, Deputy Wiesner had been trained to deal with agitated subjects is erroneous.

At hearing, Sgt. Jossart recalled that she told FTO Cleven to get the passenger to the squad; that "they" walked the passenger over to the squad; that Deputy Wiesner should have taken responsibility to search the male; and that Deputy Wiesner did not make any attempt to search the passenger until she stopped the passenger from entering the squad and looked at Deputy Wiesner. (T. 646-7) According to Sgt. Jossart, Deputy Wiesner's failure to take responsibility for searching the male before putting him in the squad car was a safety issue and she would have given Deputy Wiesner an NRT. (T. 647; 649)

Deputy Wiesner recalls that Sgt. Jossart and FTO Cleven made the decision to take the male passenger to the squad car; that he followed as Sgt. Jossart lead this passenger to the back of the squad; that he stood there because FTO Cleven and Sgt. Jossart were more senior; and that, when Sgt. Jossart stepped aside and it looked like the male passenger was going into the backseat, he then searched the male passenger because it was his responsibility to check anyone who went into the car. (T. 780-1) FTO Cleven's DOR of June 23<sup>rd</sup> does not document any problem or concern regarding searching of the male passenger. In the narrative to this DOR, FTO Cleven states: "Sgt. Jossart walked over + walked the male farther away from the scene, next to our squad car. P/assisted." "P/assisted" reasonably indicates that, at that time, Sgt. Jossart had charge of the male passenger; which is consistent with the testimony of Deputy Wiesner.

The most reasonable conclusion to be drawn from the record evidence is that Deputy Wiesner understood that he has a responsibility to ensure that any individual who is placed in his squad car is searched; that he did not proceed to search the male passenger as quickly as Sgt. Jossart considered appropriate because he reasonably considered Sgt. Jossart to have charge of the male passenger; and that, when Sgt. Jossart's actions provided Deputy Wiesner with reasonable notice that she was no longer taking charge of the male passenger, Deputy

Wiesner searched the male prior to the male entering the back seat. Sgt. Jossart's written conclusion that "Deputy Wiesner made no attempt to search the male for weapons prior to his entering the squad" is unreasonable.

Sgt. Jossart confirms that she was not directly involved in obtaining the statement of the male passenger; that she asked FTO Cleven if Deputy Wiesner had been trained in taking statements at an injury accident and that FTO Cleven responded that he had been trained. (T. 650-1) Sgt. Jossart states that, if Deputy Wiesner had been trained in taking statements at an injury accident, then he should receive an NRT for failing to attempt to take a statement. (T. 661)

Under the "Field Training Process" manual, an NRT is assessed when training has been provided to a level that the FTO believes that the trainee should be performing at an acceptable level, but the trainee consistently does not. (Resp. Ex. #11, Tab 1, pg.5) Inasmuch as the record does not establish that Deputy Wiesner has consistently failed to take statements, Sgt. Jossart's conclusion that Deputy Wiesner should receive an NRT is not reasonable.

### Summary

Sgt. Jossart's observations of Deputy Wiesner's conduct on June 23, 2006, as well her conversation with FTO Cleven, provided her with a reasonable basis to conclude, as she did conclude, that Deputy Wiesner failed to calm/control the agitated passenger; failed to understand that the agitated passenger posed a safety threat; and failed to make an attempt to obtain the passenger's statement. (T. 643-48) Sgt. Jossart's observations of Deputy Wiesner's conduct on June 23, 2006 did not provide Sgt. Jossart with a reasonable basis to conclude that Deputy Wiesner made no attempt to search the male passenger for weapons prior to the passenger entering the patrol car.

Sgt. Jossart's stated "belief" that Deputy Wiesner should not be advanced to Step 4 is based, in significant part, upon conduct that occurred prior to the 2006 "Field Training Process," *e.g.*, that Deputy Wiesner's performance on June 23, 2006 was not the result of a "bad night;" that Deputy Wiesner is capable of performing duties when advised exactly what to do, but does not function well on his own under pressure or stress; that Deputy Wiesner has displayed difficulty or inability to make decisions appropriate to situations and requires supervision often; and that Deputy Wiesner does not function well in confrontational situations, does not appear to recognize tactical problems or adapt to rapidly changing circumstances, as well as upon an unfounded assumption regarding the nature of Deputy Wiesner's 2006 Field Training and an erroneous conclusion regarding Deputy Wiesner's conduct on June 23, 2006. Sgt. Jossart's evaluation of Deputy Wiesner does not provide a reliable assessment of Deputy Wiesner's 2006 Field Training performance.

## **Lt. Shrift**

### **End of Step Evaluation**

Lt. Shrift and Capt. Schultz are co-leaders of the Field Training Unit; with Lt. Shrift acting as the Field Training Coordinator and Capt. Schultz acting as the Field Training Commander. (T. 99-100) As a result of his rank, Capt. Schultz has the tie-breaking vote. (T. 99)

On June 25, 2006, Lt. Shrift signed the June 23<sup>rd</sup> DOR that had been prepared by FTO Cleven; which report reflected that Deputy Wiesner had been assessed NRTS in Categories 4, 5, 8 and 10. (Resp. Ex. #16) On that same date, Lt. Shrift signed the “End of Step Evaluation” that had been prepared by FTO Cleven. (Resp. Ex. #29) In this document, Lt. Shrift ordered a “Status Hearing” and commented as follows:

Officer Wiesner is not responding to training despite remediation efforts. Conference with Patrol Div Director Capt Schultz to recommend termination of training. Issue memo to Prof Stds Capt Konrath and C.D. Gossage re: justification for terminating training.

Lt. Shrift states that he was not present at the incident of June 23<sup>rd</sup>; that he has no first hand information about the incident; that he just knows what was on the DOR; and that the DOR documents that significant failures were observed by the FTO. (T. 123)

FTO Cleven’s DOR of June 23, 2006 assesses 4 NRTs. Lt. Shrift states that an assessment of NRT is up to the trainer and others do not typically question it. (T. 179) Lt. Shrift confirms that he relied upon FTO Cleven to be accurate and evaluate Deputy Wiesner on an objective basis. (T. 232)

According to Lt. Shrift, NRTs confirm that the problem with performance is not a training issue. (T. 185) The Field Unit Training manual states “Chronic NRT (in spite of additional coaching and training effort) is an indication that a performance problem exists that has the potential to place your continued employment in jeopardy.” (Resp. Ex. #11; Tab 2, pg. 4)

Sgt. Jossart’s written report of June 24, 2006 is addressed to Lt. Shrift. Lt. Shrift does not state to what degree, if any, he relied upon Sgt. Jossart’s report when he signed the “End of Step Evaluation.”

### **Summary**

Lt. Shrift confirms that, in ordering a “Status Hearing” and stating that “Officer Wiesner is not responding to training despite remediation efforts,” Lt. Shrift relied upon FTO Cleven’s DOR of June 23, 2006. Given his reliance upon a document that includes the

unreasonable assessment of 4 NRTS, neither Lt. Shrift's conclusion that "Officer Wiesner is not responding to training despite remediation efforts," nor his decision to order a "Status Hearing" provide a reliable basis to evaluate Deputy Wiesner's 2006 Field Training performance.

June 27, 2006 Report

On June 27, 2006, Lt. Shrift prepared a "Second report on Officer Jim Wiesner/Patrol re-certification training;" addressed to Capt. Konrath, who is Lt. Shrift's supervisor. (Resp. Ex. #17, T. 172) In this report, Lt. Shrift reached the following:

**Conclusion:**

As I wrote in my first report (November 22, 2004) I do not believe that the substandard performance of Officer Wiesner can be remedied through continued training. Wiesner has shown that he knows what to do, and how and when to do it. His performance failure appears to be the result of cognitive matters the nature of which the training office is not qualified to assess or address. His continued substandard field performance is inefficient to the operation of this department and potentially unsafe to both him and others.

In consultation with Patrol Division Director, Capt. R. Schultz, I recommend that the training of Officer Wiesner be discontinued and that this action be reported to the Sheriff and Chief Deputy. I further recommend that we request a meeting with the Chief and Sheriff to answer questions and discuss the status of Officer Wiesner.

Under the "Field Training Unit Recruit Manual," an assessment of an NRT, *per se*, does not require that Field Training be discontinued; rather a notation of NRT generally results in an extension of training to assist the trainee to get back on track. (Resp. Ex. #11, Tab 2, pg. 4) Lt. Shrift states that retraining in response to the NRTs assessed on June 23, 2006 was not an option because "the word I got through the patrol captain was training is going to stop and Jim is going to be told that he's suspended until the chief could get back to the office and decide what to do next." (T. 191)

Although the above testimony suggests that Lt. Shrift's recommendation to stop the training of Deputy Wiesner was in response to a direction by Capt. Schultz, Lt. Shrift states that his report was based upon Deputy Wiesner's 2006 performance, as reflected in the training documentation, as well as Lt. Shrift's observations of the remedial training provided by Sgt. Kastelic. (T. 124) Lt. Shrift does not reference Sgt. Jossart's report.

Lt. Shrift further explains his rationale for recommending the termination of training:

Well, the substandard performance was becoming repetitive to the extent that the training officers were unable to correct it, and it was becoming, in our view, unsafe for Officer Wiesner, and our training officers, and in fact the general public for him to be continuing in the training mode with his performance so substandard in the areas of awareness and safety issues and general field performance. (T. 125)

. . .

Well, the rationale was failure to meet the program standards. The program, as I said earlier, is a packaged deal. You have to perform consistently all the way through to the end of it. This failure occurred towards the end of it, but it occurred nevertheless. And the field training officers were very concerned that there were safety issues involved with the Field Performance/Cognitive Abilities of Officer Wiesner to appreciate his environment and adequately assess his own safety, and of course, the safety of the other officers and the general public. So with repeated attempts to address that behavior, and not seeing any progress in it, I'm obligated to make a recommendation to the patrol captain and ultimately the chief deputy that we don't see any further progress in this. So having someone in the field performing at this level is inappropriate for everyone involved. (T. 132-3)

The statement "This failure occurred towards the end of it, but it occurred nevertheless," indicates that Lt. Shrift was reacting, in significant part, to the incident of June 23, 2006.

In the "Overview" section of his June 27, 2006 report, which precedes the "Conclusion" section, Lt. Shrift states as follows:

During the months that followed Wiesner progressed through Step 1 and 2 of the Field Training process with only minimal difficulty although, as in the past, there were incidents of significant substandard behavior. This behavior was addressed by remedial training but never actually corrected as evidenced by repetitive substandard behavior. At times this behavior became so unsound that FTO's were forced to intervene to ensure that safety and service delivery were maintained. . .

The above statements reasonably indicate that significant substandard behavior occurred in Steps 1 and 2 and that this significant substandard behavior was addressed, but never corrected, by remedial training.

Lt. Shrift states that, if there were significant substandard behavior, the FTOs should have indicated this at the "End of Step Evaluation;" that there was no such indication at either Step 1 or Step 2; and, therefore, he must have been referring to other performance. (T. 169; 171) According to Lt. Shrift, his statement is poorly worded. (T. 173)



Lt. Shrift's report continues:

Later, in Step 3, Officer Wiesner began to fail repeatedly at the same tasks and responsibilities even after the remedial training efforts of the FTO's and UTTU instructors. Wiesner's performance deficiencies continue to occur in the same performance categories, namely *4-Field Performance/Cognitive Abilities*, and *5-Patrol Tactics and Procedures*. The incidence of substandard performance continue, as in the past, during times of increased stress or workload when several tasks compete for attention and must be mentally processed, prioritized and handled with safety, efficiency and sound procedures. This explains why Wiesner can accomplish several workdays of ostensibly acceptable performance then have such significant failures. When one analyzes the daily reports one sees that "routine" work is not the problem. Dynamic workload that demands decisive action tends to overwhelm him, causing hesitation, under-response or even inaction.

At hearing, Lt. Shrift confirms that the referenced Step 3 problems are in only two categories, *i.e.*, Category 4-Field Performance/Cognitive Abilities and Category 5 - Patrol/Investigative:Tactical-Procedural (T. 173-4; 212) Accordingly, for the purpose of assessing the validity of the conclusions reached in Lt. Shrift's written report, any deficiencies that Deputy Wiesner may have had in other performance categories are irrelevant.

Lt. Shrift states that his conclusion that Deputy Wiesner was continually having deficiencies in Categories 4 and 5 was based upon the DORs. (T. 177) As stated above, Lt. Shrift considers the DORs to be the "guts" of the training program and tells the Department where the officer has been; who he was with; what occurred; what the performance was, at standard or not; and what was done to correct performance. (T. 114)

According to Lt. Shrift, an assessment of less than "4" is substandard and that, when reviewing DORs, he looks at the front of the DORs and that, when there is something that is substandard, he reads the narrative of the DOR to see what was substandard and what was done to correct it. (T. 197; 209) Lt. Shrift states that Deputy Wiesner did not receive any chronic NRTs, but that he did receive persistent NRTs in one category, *i.e.*, 4. (T. 181-82)

Under the "Field Training Unit Recruit Manual," DOR assessments of a "4" or above indicate that the performance is acceptable. The Step 3 DORs in Category 4 indicate that, prior to June 23, 2006, there were two assessments of less than a "4," which occurred on April 27 and 28, 2006. (Comp. Ex. #6) On those dates, Deputy Wiesner received five minutes of training in this category. The Step 3 DORs confirm that, from April 28 through June 22, 2006, Deputy Wiesner was not assessed at less than a "4" in Category 4. The Step 3 DORs do not establish that the conduct for which Deputy Wiesner was assessed less than a "4" on April 27 and 28, 2006 was repeated on June 23, 2006.

As discussed above, the Step 3 DORs in Category 5 establish that, prior to June 23, 2006, Deputy Wiesner received an assessment of less than a “4” on April 16, 18, 21, and 25 and May 18 and 26, 2006. With respect to Category 5, Lt. Shrift states that the DOR narratives indicate that, on April 16<sup>th</sup>, Deputy Wiesner used a flashlight incorrectly; that on April 18<sup>th</sup>, Deputy Wiesner positioned his car incorrectly; that on April 21<sup>st</sup>, Deputy Wiesner began to search a suspect prior to restraining his hands; that on April 25<sup>th</sup>, Deputy Wiesner failed to search thoroughly and violated un-handcuffing procedures; that on May 18<sup>th</sup>, Deputy Wiesner had two instances of unsafe/improper handcuffing; and that on May 26, Deputy Wiesner placed an unsearched arrestee in the back of the squad. (T. 212-18) The Step 3 DORs confirm that, from May 27 through June 22, 2006, Deputy Wiesner was not assessed at less than a “4” in Category 5.

The Step 3 DORs indicate that, on and before May 26, 2006, Deputy Wiesner had performance deficiencies in handcuffing and searching. As discussed above, these deficiencies were the subject of Sgt. Kastelic’s remedial training on June 5, 2006. Lt. Shrift recalls that he observed Deputy Wiesner’s June 5, 2006 remedial training and that, during this training, there were unacceptable results. (T. 120; 129)

As discussed above, during the remedial training with Officer Kastelic, Deputy Wiesner was assessed an “Acceptable” in 26 skill areas and an “Unacceptable” in 2 skill areas and, upon completion of this training, Lt. Shrift signed a written “Remedial Training Report” which states that the “the Training Section recommends that Officer Wiesner resumes his Field Training with FTO Cleven as soon as possible.” (Resp Ex. #15) Given the June 1, 2006 “Field Training Unit Performance Improvement Plan” provision that “Officer Kastelic may extend that training period if he sees need and value,” Lt. Shrift’s recommendation that Deputy Wiesner resume his training as soon as possible reasonably indicates that, during this remedial training, Lt. Shrift did not observe any significant substandard performance.

According to Lt. Shrift, Deputy Wiesner had chronic and repeated deficiencies in “presence, “ *i.e.*, ability to assess the surrounding environment. (T. 211) According to Lt. Shrift, this lack of presence is indicated by holding things in his weapon hand after being told not to; not using lighting properly; parking the car incorrectly; underestimating the dangerousness of certain situations; and failing to control environments where people are walking around (Id.) Lt. Shrift defines “chronic” as “over a long period of time in more or less regular intervals, no more than several days in between the substandard performance” and “more than once in a while and without – never more than several days in between -- incidents.”(T. 160-61)

Under the “Field Training Unit Recruit Manual,” Deputy Wiesner is to be “trained to the standards found in the ten Performance Assessment Categories and the FTO is to objectively rate the trainees performance in response to the training in those categories. (Resp. Ex. #11, Tab 1, pg. 3) “Presence” is not one of the ten Performance Assessment Categories.

### Summary

Lt. Shrift's testimony reasonably establishes that his recommendation to discontinue Deputy Wiesner's training was based upon his conclusion that Deputy Wiesner had continued substandard performance problems that could not be remedied through continued training. Lt. Shrift's testimony also reasonably establishes that the basis for this conclusion was Deputy Wiesner's Step 3 DORs in Categories 4 and 5, including the assessment of NRTs on June 23, 2006, and Lt. Shrift's observations of the remedial training provided by Sgt. Kastelic.

The record reasonably establishes that any substandard performance observed by Lt. Shrift during this remedial training was insignificant. The record also reasonably establishes that the substandard performance that was the subject of this remedial training, as well as the other substandard performance in Categories 4 and 5 that existed on or before May 26, 2006, was remedied through the Field Training Process.

After May 26, 2006, Deputy Wiesner did not have any substandard performance assessments in Category 4 or 5 until June 23, 2006; at which time he was assessed a NRT in each of these categories. As discussed above, it was not reasonable for FTO Cleven to assess NRTs in response to Deputy Wiesner's June 23<sup>rd</sup> performance problems.

Lt. Shrift's written report of June 27, 2006 erroneously indicates that significant substandard behavior occurred in Steps 1 and 2, which was addressed by remedial training, but never corrected. Lt. Shrift's conclusions regarding Deputy Wiesner's Step 3 training performance were based, in significant part, upon FTO Cleven's unreasonable assessment of NRTs on the DOR of June 23, 2006. The reliable DOR assessments of FTO Cleven do not establish that, during his 2006 field training, Deputy Wiesner had continued substandard performance problems that could not be remedied through continued training.

Lt. Shrift's written report of June 27, 2006 does not provide a reliable evaluation of Deputy Wiesner's 2006 Field Training performance. Lt. Shrift's recommendation to discontinue Deputy Wiesner's Field Training was not reasonable.

### Captain Schultz

According to Capt. Schultz, he and Lt. Shrift discussed and agreed upon Lt. Shrift's June 27, 2006 "Second report on Officer Jim Wiesner/Patrol re-certification training" prior to presenting it to Capt. Konrath. (T. 448-49; 466) Capt. Schultz asserts that the report of June 27, 2006 indicates that Deputy Wiesner had significant substandard behavior in Steps 1 and 2 (T. 471-3)

Capt. Schultz recalls that his discussion with Lt. Shrift involved a couple of hours. (T. 455) Capt. Schultz states that, at this point, he concluded that he and Lt. Shrift had exhausted the abilities of the standardized Field Training Process to get Deputy Wiesner to an acceptable level of performance. (T. 449) Capt. Schultz confirms that he recommended to the Sheriff and

Chief Deputy Gossage that the Field Training of Deputy Wiesner be discontinued in June of 2006. (T. 453)

Prior to making this recommendation, Capt. Schultz reviewed the DORs of Deputy Wiesner's 2006 field training, including NRT assessments and the report of training with Sgt. Kastelic, with specific attention to FTO Cleven's June 23, 2006 DOR; spoke with officers on the scene of the June 23, 2006 incident, *i.e.*, Sgt. Jossart, FTO Cleven, and Chief Deputy Gossage; and reviewed Lt. Shrift's November 22, 2004 report (Resp. Ex. #44). (T. 455-6; 466-68) Capt. Schultz confirms that he was not present at the June 23<sup>rd</sup> incident. (T. 456)

Capt. Schultz states that he considered Wiesner to have a clean slate once he started the 2006 field training. (T. 469) When questioned why he reviewed Lt. Shrift's November 22, 2004 report, Capt. Schultz responded that he wanted to ensure that he was not missing something that could help Deputy Wiesner be successful and that training efforts that had not worked in the past were not being duplicated. (T. 469-70)

According to Capt. Schultz, the DORs and the November 22, 2004 report confirmed that Deputy Wiesner was duplicating the same performance failures in 2006 and that the Field Training Unit could not find a remedial training approach. (T. 467-8) Capt. Schultz identifies Deputy Wiesner's performance failures as improper decision-making and/or lack of taking control under circumstances of a rapidly evolving environment specifically when it contained any degree of threat assessment. (T. 468)

With respect to the incident of June 23, 2006, Capt. Schultz concluded that this incident was a culmination in several points of an inability to multitask leading to a failure to take control on more than one occasion, inability to properly gather information needed at that scene, and a failure to carry out basic and standard responsibilities of solo patrol officer. (T. 456-7) Capt. Schultz states that, in making this recommendation, he also considered the efforts through the past several months to improve the substandard performance in areas similar to those that occurred on June 23, 2006. (T. 456)

Capt. Schultz states that all of Deputy Wiesner's NRTs were for the same cause, *i.e.*, an inability to multi-task under a rapidly evolving environment that led to his failure to take control and/or make proper decisions that affect the safety of officers and the public. (T. 451) Capt. Schultz states that Deputy Wiesner cannot safely perform the duties of a patrol officer because a solo officer's job requires an individual who has the ability to quickly sift through priorities and make decisions and an inability to multi-task presents a danger to the officer, the public and other officers. (T. 451-2)

### Summary

Capt. Schultz' testimony reasonably establishes that his recommendation to discontinue Deputy Wiesner's Field Training was based upon two conclusions, *i.e.*, that Deputy Wiesner cannot safely perform the duties of a patrol officer and that Capt. Schultz and Lt. Shrift had

exhausted the abilities of the standardized Field Training Process to remedy the performance problems perceived by Capt. Schultz. Capt. Schultz' testimony also reasonably establishes that the above two conclusions were based upon reports of Deputy Wiesner's June 23, 2006 conduct by Sgt. Jossart, Chief Deputy Gossage and FTO Cleven, including his June 23, 2006 DOR; Capt. Schultz' review of the 2006 DORs, including the NRT assessments and the report of the training with Sgt. Kastelic; and Lt. Shrift's report of November, 2004.

As discussed above, on June 22, 2006 Capt. Schultz signed the "Field Training Unit Performance Improvement Plan" that authorized Deputy Wiesner to advance to Step 4, pending a satisfactory performance on June 23, 2006. One may reasonably conclude, therefore, that, as of June 22, 2006, Capt. Schultz did not consider Deputy Wiesner to be unable to safely perform the duties of a patrol officer or to have exhausted the abilities of the standardized Field Training Process to remedy performance problems.

Capt. Schultz' assessment that Deputy Wiesner had significant substandard behavior in Steps 1 and 2 of his 2006 Field Training is erroneous. As discussed above, the Step 3 DORs as of June 22, 2006, as well as the report of Officer Kastelic's remedial training, reasonably indicate that performance problems, including those that involved unsafe conduct, were corrected by remedial training. Thus, a review of these DORs and training report would not provide Capt. Schultz with a reasonable basis to conclude either that Deputy Wiesner cannot safely perform the duties of a patrol officer or that Capt. Schultz and Lt. Shrift had exhausted the abilities of the standardized Field Training Process to remedy Deputy Wiesner's performance problems.

FTO Cleven's DOR narrative provided Capt. Schultz with a reasonable basis to conclude that Deputy Wiesner had failed to take control of the agitated passenger and, therefore, had not safely performed the duties of a patrol officer on June 23, 2006. However, given the evidence that Deputy Wiesner's 2006 Field Training had not provided Deputy Wiesner with training in handling agitated individuals, his June 23, 2006 failure does not provide a reasonable basis to conclude that Deputy Wiesner cannot safely perform the duties of a patrol officer. Nor does it provide a reasonable basis to conclude that Capt. Schultz and Lt. Shrift had exhausted the abilities of the standardized Field Training Process to remedy Deputy Wiesner's performance problems.

FTO Cleven's DOR narrative provided Capt. Schultz with a reasonable basis to conclude that Deputy Wiesner initially failed to obtain the passenger's statement. This failure, however, does not provide a reasonable basis to conclude that Deputy Wiesner cannot safely perform the duties of a patrol officer. Given FTO Cleven's testimony that this was the first time that FTO Cleven had failed to obtain a statement, this failure does not provide a reasonable basis to conclude that Capt. Schultz and Lt. Shrift had exhausted the abilities of the standardized Field Training Process to remedy Deputy Wiesner's performance problems.

For the reasons discussed above, FTO Cleven's assessment of 4 NRTs on June 23, 2006 was unreasonable. Neither the assessment of these NRTs, nor FTO Cleven's narrative of

the incident on June 23, 2006, justify Capt. Schultz' conclusion that Deputy Wiesner cannot safely perform the duties of a patrol officer or that Capt. Schultz and Lt. Shrift had exhausted the abilities of the standardized Field Training Process to remedy Deputy Wiesner's performance problems.

In her written report, as well as in her testimony, Sgt. Jossart identified performance problems that are similar to those identified by Capt. Schultz, *i.e.*, difficulty or inability to make decisions appropriate to situations, including threat assessments, or to adapt to rapidly changing circumstances. As discussed above, Sgt. Jossart's conclusion that Deputy Wiesner has such performance problems was based, in significant part, upon Sgt. Jossart's observation of pre-2006 conduct; erroneous conclusions regarding Deputy Wiesner's conduct on June 23, 2006; and erroneous assumptions regarding his 2006 field training.

Chief Deputy Gossage states that he had not previously observed Deputy Wiesner in a similar incident to that of June 23, 2006. (T. 604) Chief Deputy Gossage's observations of Deputy Wiesner's conduct on June 23, 2006 were limited to Deputy Wiesner's attempts to obtain information from the "homeowner." (T. 571-2) Chief Deputy Gossage's observations of Deputy Wiesner's conduct on June 23, 2006, discussed more fully below, provided the Chief Deputy with a reasonable basis to conclude that Deputy Wiesner's attempts to obtain information from the "homeowner" were substandard. However, the Chief Deputy's June 23<sup>rd</sup> observations, *per se*, do not provide a reasonable basis to conclude that Deputy Wiesner cannot safely perform the duties of a patrol officer or that Capt. Schultz and Lt. Shrift had exhausted the abilities of the standardized Field Training Process to remedy Deputy Wiesner's performance problems.

In his "End of Step Evaluation," FTO Cleven reports performance problems that are similar to those identified by Capt. Schultz, *i.e.*, difficulty in multi-tasking and decision making; inability to focus on the whole call and "tunnel vision." For the reasons discussed above, FTO Cleven's "End of Step Evaluation" does not provide a reliable assessment of Deputy Wiesner's performance during Step 3 field training.

Capt. Schultz' testimony reasonably establishes that his review of Lt. Shrift's November 22, 2004 report lead him to conclude that Deputy Wiesner was duplicating the same performance failures; that past training efforts had not remedied these performance failures; and that, therefore, the Field Training Unit could not find a training approach to remedy the perceived performance failures. For the reasons discussed above, it is not reasonable to evaluate Deputy Wiesner's 2006 Field Training performance on the basis of pre-2006 conduct.

Capt. Schultz' conclusions that Deputy Wiesner cannot safely perform the duties of a patrol officer and that Capt. Schultz and Lt. Shrift had exhausted the abilities of the standardized Field Training Process to remedy Deputy Wiesner's performance problems is based, in significant part, upon pre-2006 conduct and unreliable assessments of Deputy Wiesner's 2006 Field Training performance. Capt. Schultz' recommendation to discontinue Deputy Wiesner's Field Training was not reasonable.

### Chief Deputy Gossage

Chief Deputy Gossage recalls that, on June 26, 2006, he told Capt. Schultz to suspend Deputy Wiesner with pay. (T. 576, 595) The Chief Deputy further recalls that this decision was based upon information provided by Capt. Schultz during a telephone conversation; *i.e.*, that Deputy Wiesner was not responding to training, that there was nothing more that the department could do as far as remedial training; and that there was an issue of safety to Deputy Wiesner, other officers, and to the public. (T. 594-5)

The Chief Deputy states that, on June 28, 2006, while the Sheriff was out of town, the Chief Deputy met with Lt. Shrift, Capt. Schultz and representatives from Human Resources for an administrative review. (T. 595-6; 600) The Chief Deputy recalls that everyone at this meeting shared the same opinion, *i.e.*, that there was no remedial training available and that the Department had exhausted all the possibilities (T. 596-7)

The Chief Deputy recalls that his decision to discontinue the training of Deputy Wiesner was based upon his review of the June 27<sup>th</sup> report; his personal observations of the June 23<sup>rd</sup> incident; Lt. Shrift and Capt. Schultz' review of the DORs; and Lt. Shrift and Capt. Schultz' determination that they had exhausted all of the possibilities. (T. 569-70; 593-6) According to the Chief Deputy, his review of the June 27, 2006 report lead him to understand that there had been many efforts to correct conduct that Lt. Shrift and Capt. Schultz considered to be inadequate and that the existence of inadequate conduct was confirmed by the Chief Deputy's observations of June 23<sup>rd</sup>. (T. 603-4) Chief Deputy Gossage states that he did not base his decision to discontinue training upon the DORs because he was not privy to those DORs. (T. 593)

Chief Deputy Gossage recalls that the vehicle/garage crash involved his residence; that, initially, there was a lot of confusion; that Deputy Wiesner came to his attention about ten to fifteen minutes into the incident when Deputy Wiesner approached Chief Deputy Gossage as he was standing with a group of neighbors and, with a blank stare, blurted out "Address?;" that the Chief Deputy thought this was odd because most officers would identify themselves and ask if the owner was there; that the Chief Deputy responded "Jim" and then gave his address, thinking that would cause Deputy Wiesner to recognize him; that Deputy Wiesner wrote the address down and then walked away; that Deputy Wiesner returned a few minutes later and began to speak to a neighbor, who Deputy Wiesner thought was the homeowner; that this neighbor questioned why Deputy Wiesner was asking for his address because he did not hear or see anything; that Deputy Wiesner's persistence in obtaining information from the neighbor really threw off Chief Deputy Gossage; and that the Chief Deputy, who knew Deputy Wiesner from the job, thought that Deputy Wiesner's appearance was like he was almost oblivious to what was going on around him. (T. 571-2; 625-6) According to the Chief Deputy, Deputy Wiesner did not appear tired, but rather, appeared confused, and, in the Chief Deputy's opinion, Deputy Wiesner did not have a clue as to what he should do next. (T. 625-26) The Chief Deputy states that he does not have an independent recollection of whether or not Deputy Wiesner performed adequately in handling the passenger. (T. 572)

Deputy Wiesner recalls that FTO Cleven directed him to get information from the homeowner; that FTO Cleven stated that he thought that the homeowner was the man in the white shirt and pointed to a man in a white shirt; that Deputy Wiesner went to the man in the white shirt and said "Sir, what is the address here?;" that the Chief Deputy gave the address; that Deputy Wiesner then asked the man in the white shirt for his name and phone number; and returned to FTO Cleven. (T. 783-4) Deputy Wiesner states that he did what he was told to do by his FTO and that he was polite and respectful. (T. 820)

Chief Deputy Gossage states that he had not previously observed Deputy Wiesner in a similar incident to that of June 23, 2006 and that he did not assume from the June 27<sup>th</sup> memo that it had occurred before, but rather, obtained "factual information" from Capt. Schultz or Lt. Shrift that "there was some substandard behavior that was observed and that there was some multiphasic similar to what we had with the previous training officers or probationary officers." (T. 604) Chief Deputy Gossage further states that he does not know if he can base his decision that Deputy Wiesner has multiphasic deficiencies upon the DORs, but that based on his observations of June 23, 2006 and what Capt. Schultz told him, he does believe that Deputy Wiesner has a multiphasic problem. (T. 604-5)

When questioned whether anything else informed his opinion that Deputy Wiesner has multiphasic problems, Chief Deputy Gossage replied that, it was not only the documented things, but also that Deputy Wiesner was "under a microscope" because he had previously successfully made it through field training. (T. 605-6) Chief Deputy Gossage states that his opinion had nothing to do with a disability, but rather, was based upon the fact that, if Deputy Wiesner has already been through standard Field Training, why is he having so much difficulty; he should have been able to slide through the program. (Id.)

Chief Deputy Gossage states that, at the time of the administrative review, he was aware of the NRT that had been assessed on May 26, 2006. (T. 575) Chief Deputy Gossage further states that he knew that, in September of 2004, Deputy Wiesner was having problems performing the duties of a patrol officer; that Deputy Wiesner subsequently went on a short-term disability leave; and that, in 2005, Deputy Wiesner returned to work on light duty status. (T. 562-3)

When asked if he believed that an extension of training would have done any good, the Chief Deputy responded that he has to believe what his trainers tell him, but

If I have to give an opinion, no, I don't think that it would have done any good, based on what was conveyed to me, that it was under stress, that he can do one thing very well or he can do something and perform the task, but if it's multi-faceted, he has difficulty doing it. (T. 590)

Chief Deputy Gossage states that, at the point that Deputy Wiesner was assessed the 4 NRTS on June 23, 2006, "it was determined that, based on the observations of the officers on the scene, as well as the DORs, that Captain Schultz had said, no, it was – they had pretty



much cut their ties at that point.” (T. 618) Chief Deputy Gossage states that “we” have to take great faith in what the FTOs are observing; that FTO Cleven’s credibility has never been in doubt; and that he relies upon what his subordinates tell him when making decisions. (T. 590-3)

The Chief Deputy recalls that the termination letter of June 29, 2006 was authorized by Sheriff Kocken after “we” conferred with the Sheriff; that the Chief Deputy, based upon the information that he had received and his personal observations, advised the Sheriff that Deputy Wiesner did not successfully complete the field training; and the reason for the termination was that Deputy Wiesner failed to complete the Field Training Process. (T. 577-78) The Chief Deputy states that the Sheriff authorized the termination letter, but that the Chief Deputy signed the letter because the Sheriff was out of town. (T. 577)

The Chief Deputy states that the decision to terminate the employment of Deputy Wiesner was correct because Deputy Wiesner was a long-time employee who had previously performed and, based upon Deputy Wiesner’s experience, Deputy Wiesner should have been performing at a higher level. (T. 578-9) According to the Chief Deputy, when deciding to terminate the employment of Deputy Wiesner, the Chief Deputy considered the 2004 training records of Officers Flannery, Bilgo and Sandberg because

It’s hard to forget what happened. I mean, you can – as an employer, I can take a look at behaviors, and it’s easy for me to say, you know, I’m going to expunge this out of your record, but it’s really hard to forget what happened, and I don’t think that I would be serving the public well if I didn’t take that into consideration. (T. 628-9)

The Chief Deputy states that he took everything into consideration from the time that Deputy Wiesner was hired, including the fact that Deputy Wiesner is a good person. (T. 629)

### Summary

The Chief Deputy’s testimony reasonably establishes that his decision to advise the Sheriff that Deputy Wiesner did not successfully complete field training was based upon the Chief Deputy’s conclusion that Deputy Wiesner had a multiphasic problem that, *inter alia*, created a safety issue to Deputy Wiesner and others, and which could not be remedied by further training by the Field Training Unit. The Chief Deputy’s testimony also reasonably establishes that this conclusion, in significant part, was based upon the Chief Deputy’s observations of Deputy Wiesner on June 23, 2006; the Chief Deputy’s knowledge of pre-2006 events; and information provided to the Chief Deputy by Lt. Shrift and/or Capt. Schultz; including their opinion that the Field Training Unit had exhausted all training possibilities.

For the reasons discussed above, it is not reasonable to evaluate Deputy Wiesner’s 2006 Field Training performance upon the basis of pre-2006 conduct or information provided by Lt. Shrift or Capt. Schultz. Neither the Chief Deputy’s limited observation of Deputy Wiesner’s

conduct on June 23, 2006, nor the reliable assessments of Deputy Wiesner's 2006 Field Training performance, provides a reasonable basis to conclude that Deputy Wiesner has any performance problem that cannot be remedied by further training by the Field Training Unit.

### Conclusion

The June 29, 2006 letter, which effectuated the discharge that is the subject of this proceeding, states:

Please be advised that your employment as a Deputy with the Brown County Sheriff's Department will terminate effective today, June 29, 2006. A determination has been made through the Field Training Process that you have not met the standards for this position.

This letter provides one reason for Deputy Wiesner's discharge, *i.e.*, "A determination has been made through the Field Training Process that you have not met the standards for this position."

The Sheriff, who did not testify at hearing, made the decision to terminate Deputy Wiesner's employment. It is not evident that the Sheriff's decision to terminate Deputy Wiesner was based upon any factor other than Chief Deputy Gossage's opinion that Deputy Wiesner did not successfully complete the Field Training Process and Capt. Schultz' recommendation to discontinue the Field Training of Deputy Wiesner.

For the reasons discussed above, the only "Field Training Process" that is relevant to the determination of whether or not Deputy Wiesner has met the standards for his position is that which commenced in January of 2006. For the reasons also discussed above, it was not reasonable for the Sheriff to rely upon Chief Deputy Gossage's opinion, or Capt. Schultz' recommendation, because each was based upon pre-2006 conduct, as well as upon unreliable assessments of Deputy Wiesner's 2006 Field Training performance. The reliable assessments of Deputy Wiesner's performance during the 2006 "Field Training Process" do not provide a reasonable basis to conclude that Deputy Wiesner has not met the standards for his position.

Deputy Wiesner's June 29, 2006 discharge is without just cause. By discharging Complainant James Wiesner without just cause, Respondent Brown County (Sheriff's Department) has failed to maintain the *status quo* on a mandatory subject of bargaining during a contract hiatus period and, therefore, Respondent Brown County (Sheriff's Department) has refused to bargain in good faith in violation of Sec. 111.70(3)(a)4 and, derivatively, Sec. 111.70(3)(a)1, Stats.

### Response to Respondent's "Affirmative Defenses"

- 1) Complainants have alleged facts sufficient to constitute a claim under the Municipal Employment Relations Act.

- 2) The record does not establish that any disability claimed by Complainant Wiesner was considered by Respondent when deciding to terminate Complainant Wiesner's employment. Accordingly, any disability claimed by Complainant Wiesner cannot be reasonably relied upon by Respondent to justify its June 29, 2006 discharge.
- 3) Prior to terminating Complainant Wiesner's employment on June 29, 2006, certain of Respondent's representatives determined that Complainant Wiesner was a danger to himself, other Officers and the public. These determinations do not provide Respondent with just cause to discharge Complainant Wiesner on June 29, 2006. Sec. 111.34(2)(c), Stats., does not preclude the Examiner from finding that Respondent did not have just cause to discharge Complainant Wiesner on June 29, 2006.
- 4) Respondent's representatives made extensive evaluations of Complainant Wiesner. The evaluations relied upon by Respondent do not provide Respondent with just cause to discharge Deputy Wiesner.
- 5) Respondent's claim that Deputy Wiesner's pending claim before the ERD should have preclusive effects in this proceeding was previously considered and rejected by this Examiner. BROWN COUNTY, DEC. NO. 32014-A (2/14/07).
- 6) Relying upon CLEVELAND V. POLICY MANAGEMENT SYSTEMS CORP., 526 U.S. 795 (1999) and LEE V. CITY OF SALEM, 259 F.3d 667, 674 (7<sup>TH</sup> CIR. 2001), Respondent argues that Complainant Wiesner cannot claim to be a disabled person who cannot work as a military police officer and also claim that he has the present ability to work as a civilian police officer because the claims are inconsistent and/or require Complainant Wiesner to explain this inconsistency at hearing. Each of the cited cases involves an employee who made a claim for work accommodation under the ADA while also claiming, for the purpose of SSDI, that the employee was not able to perform the work of the position. Inasmuch as this case does not involve either type of claim, the cases relied upon by Respondent are not precedential.
- 7) Deputy Wiesner is not estopped and barred from asserting the claim that Respondent has violated its statutory duty to maintain the *status quo* during a contract hiatus by discharging Deputy Wiesner without just cause.
- 8) The record fails to establish that Deputy Wiesner made a claim to Respondent for accommodation to work a "day shift" only.

- 9) Respondent misapprehends the burden of proof in this proceeding when it alleges that Complainant Wiesner has failed to demonstrate over an extended period of time that he would be able to safely perform his essential job functions.

#### Remedy

Deputy Wiesner was denied the opportunity to successfully complete his 2006 Field Training because Respondent terminated Deputy Wiesner's employment without just cause. To return Deputy Wiesner to this Field Training is problematic because the hiatus in this training that was caused by his unjust termination has the potential to negatively impact his ability to proceed with this training. Nonetheless, under his Fitness for Duty Evaluation, which was not challenged by either Complainant Association or Complainant Wiesner, Deputy Wiesner is required to successfully complete the standard Field Training Process.

Accordingly, the Examiner is returning Deputy Wiesner to his Step 3 training so that the Field Training Unit may respond to Deputy Wiesner's June 23, 2006 performance deficiencies in a manner that is consistent with the Department's standard Field Training Process. Notwithstanding Respondent's argument to the contrary, there was no agreement between Respondent and the Complainant Association that would preclude the Field Training Unit from extending Deputy Wiesner's Step 3 training.

The appropriate remedy for Respondent's violation of its statutory duty to bargain in good faith is to order Respondent to immediately:

1. Cease and desist from refusing to bargain in good faith with Complainant Brown County Sheriff's Department Non-Supervisory Labor Association by unilaterally changing the *status quo* on a mandatory subject of bargaining during a contract hiatus period by discharging an employee without just cause in violation of Sec. 111.70(3)(a)4 and 1, Stats;
2. Restore the *status quo ante* by reinstating Complainant James Wiesner to his position of Deputy Sheriff and returning Complainant James Wiesner to his Step 3 field training;
3. Expunge all references to the June 29, 2006 discharge from Complainant James Wiesner's personnel record and make him whole for all wages and benefits lost as a result of his June 29, 2006 discharge, with interest at the statutory rate of 12% (twelve percent) per year.

4. Post the appropriate notice.

Dated at Madison, Wisconsin, this 15th day of October, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

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Coleen A. Burns, Examiner

