STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

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

Petitioner,

v.

Case No. 2012 CV 1747
Decision No. 33853C1

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and DOUGLAS COUNTY,

Respondents.

DECISION AND ORDER ON JUDICIAL REVIEW

STATEMENT OF THE CASE

Local 441A, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division (the "Union") petitions this court pursuant to § 227.52, Stats., for judicial review of a written decision by the Wisconsin Employment Relations Commission (the "Commission") declaring that jailers in Douglas County (the "County") are not "public safety employees" within the meaning of § 111.70 (1) (mm), Stats., because they are not "deputy sheriffs" under § 40.02 (48) (am) 13 and (b) 3, Stats. The Commission and the County are the respondents in this action[1].

The certified administrative record has been filed with the court, and all parties have submitted briefs on the issues. Since no party has requested oral argument, this judicial review is ripe for decision.

[1] A bit of procedural confusion occurred at the outset of this action when the County filed a motion to intervene. As the Commission's counsel notes in his May 21, 2012 letter, the County's timely notice of appearance and statement of position had already secured it a seat at the table, and a motion to intervene was unnecessary. The County is appropriately considered a respondent in this judicial review.

For the following reasons, the Commission's declaratory ruling is REVERSED on a finding that, as a matter of law, the jailers at issue here are "deputy sheriffs" within the meaning of § 40.02 (48) (am) 13 and (b) 3, Stats.

STANDARD OF REVIEW

There are no material factual issues in dispute. Indeed, the parties agree that the Douglas County jailers satisfy all prerequisites for classification as "public safety employees" under §111.70 (1) (mm) except whether or not they are properly designated "deputy sheriffs" within the meaning of § 40.02 (48) (am) 13 and (b) 3, Stats. Thus, a purely legal issue of statutory construction is presented for this court to decide.

Although statutory interpretation is ordinarily a question of law determined independently by a court, this court could accord the Commission's legal interpretation great weight deference or due weight deference. *See e.g. Racine Harley-Davidson, Inc. v. State Division of Hearings and Appeals*, 292 Wis. 2d 549, 559 *et seq.* (2006). Footnote 5 of *Racine Harley-Davidson* is particularly instructive on the general principles:

> *Kemp v. DHFS*, 2004 WI 16, ¶ 12, 269 Wis.2d 59, 675 N.W.2d 755 ("This issue involves statutory interpretation, which is a question of law that this court reviews de novo. Thus, we are not bound by an administrative agency's determination. Nevertheless, we have generally used one of three standards of review, with varying degrees of deference, to review an agency's conclusions of law or statutory interpretation." (citations omitted)); *Brown v. LIRC*, 2003 WI 142, ¶¶ 11-13, 267 Wis.2d 31, 671 N.W.2d 279 ("The interpretation of a statute presents a question of law. The application of a statutory standard to a fact situation is ordinarily a question of law for the courts.... Nevertheless, labeling an issue as a question of law does not mean that a court may disregard an agency's determination.... The appropriate level of scrutiny a court should use in reviewing an agency's decision on questions of law depends on the comparative institutional capabilities and qualifications of the court and the agency to make a legal determination on a particular issue"); *Dodgeland Educ. Ass'n v. WERC*, 2002 WI 22, ¶ 22, 250 Wis.2d 357, 639 N.W.2d 733 ("Whether WERC properly interpreted Wis. Stat. § 111.70 is a question of law and we are not bound by WERC's interpretation. In certain circumstances, however, courts should defer to an administrative agency's interpretation of a statute." (citations omitted)); *Ide v. LIRC*, 224 Wis.2d 159, 166, 589 N.W.2d 363 (1999) ("Whether the facts, as found by LIRC, fulfill a particular legal standard is a question of law which we review de novo.... When reviewing questions of law, we apply one of three levels of deference to the agency's interpretation...."); *La Crosse Queen, Inc. v. DOR*, 208 Wis.2d 439, 445-46, 561 N.W.2d 686 (1997) (court "review[s] questions of law de novo" and "may substitute [its] judgment for that of the [Tax Appeals] Commission" but will accord deference when agency possesses particular expertise in an area of law); *UFE Inc. v. LIRC*, 201 Wis.2d 274, 284,

548 N.W.2d 57 (1996) ("Although we are not bound by LIRC's interpretation, we do defer to agency interpretations in certain situations."); *Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 659, 539 N.W.2d 98 (1995) ("The guiding principle is that statutory interpretation is a question of law which courts decide de novo. Furthermore, a court is not bound by an agency's interpretation of a statute. As important, however, is the principle that courts should defer to an administrative agency's interpretation of a statute in certain situations." (citations omitted)); *State ex rel. Parker v. Sullivan*, 184 Wis.2d 668, 699, 517 N.W.2d 449 (1994) ("The interpretation of a statute presents a question of law, and the 'blackletter' rule is that a court is not bound by an agency's interpretation. Nevertheless courts frequently refrain from substituting their interpretation of a statute for that of the agency charged with the administration of a law.... [C]ourts frequently give deference to the interpretation of statutes by administrative agencies charged with their enforcement."); *Marris v. City of Cedarburg*, 176 Wis.2d 14, 32, 498 N.W.2d 842 (1993) (same); *Richland School Dist. v. DILHR*, 174 Wis.2d 878, 890-91, 498 N.W.2d 826 (1993) (same); *Lisney v. LIRC*, 171 Wis.2d 499, 505, 493 N.W.2d 14 (1992) (same); *West Bend Educ. Ass'n v. WERC*, 121 Wis.2d 1, 11-12, 357 N.W.2d 534 (1984) ("Generally questions relating to interpretation and application of statutes are labeled questions of law, and the blackletter rule is that a court is not bound by an agency's conclusions of law. Courts, however, frequently refrain from exercising the power to substitute their interpretation or application of a statute for that of an agency charged with the administration of the law.").

Both the County and the Union argue that the standard of review this court should apply is *de novo*, i.e. owing no deference to the Commission's legal interpretation. The Commission essentially punts, contending that under any of the three standards of review, its decision is correct and must be affirmed.

Because this judicial review, at its heart, involves an agency's interpretation of statutes which are not commended to its expertise and regulation by our legislature (particularly the interplay, if any, between chapter 59 relating to county sheriffs and chapter 40, which is the bailiwick of the Department of Employee Trust Funds), the Commission's declaratory ruling in this case is entitled to no persuasive weight. Rather, review is *de novo*, without deference to the Commission. *See e.g. County of LaCrosse v. WERC*, 180 Wis. 2d 100, 107 (1993):

> Before proceeding with our analysis, we note that normally, WERC's rulings with respect to the bargaining nature of proposals are entitled to "great weight." *West Bend*, 121 Wis.2d at 13, 357 N.W.2d 534. That deference is predicated on the commission's perceived expertise in collective bargaining matters. *Id.* at 12, 357 N.W.2d 534. Yet, courts of this state have held that such deference is unwarranted when the proposal in question requires harmonization of the Municipal Employment Relations Act (MERA) (secs. 111.70–111.77, Stats.) with other state statutes. See, *City of Brookfield v.*

WERC, 87 Wis.2d 819, 826–27, 275 N.W.2d 723 (1979) ("*Brookfield I* "); *Glendale Professional Policemen's Assn. v. City of Glendale*, 83 Wis.2d 90, 100–01, 264 N.W.2d 594 (1978). Such legal questions fall within the special competence of courts. *Glendale*, 83 Wis.2d at 100–01, 264 N.W.2d 594.

ANALYSIS AND DECISION

The parties correctly agree that, to qualify as "public safety employees" within the meaning of § 111.70 (1) (mm), Stats., the Douglas County jailers must satisfy the definition of "deputy sheriff" in § 40.02 (48 (b) 3, Stats.,:

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

(All emphasis added).

It is undisputed, indeed stipulated, that the subject jailers are regularly employed by the Douglas County Sheriff's office in "active law enforcement". Accordingly, there is no dispute that, under the plain wording of the first sentence of the above definition, the Douglas County jailers are "deputy sheriffs". The Commission's erroneous conclusion to the contrary rests on the second sentence and particularly the word "qualifying". The Commission, in a 2-1 split decision, concludes that the phrase "[d]eputy sheriff... includes any person ... qualified as a deputy sheriff... even if temporarily assigned to other duties" means that a deputy sheriff must be appointed by the sheriff and sworn on oath under statutes not referenced in the § 40.02 (48) (b) 3. The Commission majority states:

> In our view, the Sec. 40.02 (48) (b) (3), Stats., definition of deputy sheriff has two basic components: 1) being "qualified" to be a deputy sheriff; and 2) having principal duties that involve active law enforcement. As to the "qualified" component, the Court's decision in *Mattila v. Employee Trust Fund Board*, 2001 WI App 79, 243 Wis. 2d 90, 625 N.W.2d 33 provides significant guidance. The Court's decision indicates that being appointed as a "deputy" by a sheriff is a necessary qualification to be a "deputy sheriff" within the

meaning of Sec. 40.02 (48) (am) 13 and (b) 3, Stats. Thus, we find "qualified" to mean having been appointed as a "deputy sheriff" pursuant to Sec. 59.26 (2), Stats.

As indicated in Finding of Fact 3, none of the County jailers have been appointed as a "deputy sheriff." Because they have not been so appointed, they are not "qualified" to be and thus do not hold the position of "deputy sheriff" within the meaning of Secs. 40.02 (48) (b) 3 and 40.02 (48) (am) 13, Stats. Therefore, the jailers are not "public safety employees" within the meaning of Sec. 111.70 (1) (mm), Stats., but are instead "general municipal employees" within the meaning of Sec. 111.70 (1) (fm), Stats.

...

Clearly the term "deputy sheriff" is largely self-defining. Under Sec. 59.26 (1), Stats. the sheriff, upon beginning his term of office is entitled to appoint deputy sheriffs. Those individuals taken oath of office and are authorized to perform the functions described in Sec. 59.27, Stats. They have the power to arrest and enjoy various statutorily conferred benefits. For example, under Sec. 59.26 (8), Stats., Deputy sheriffs had the benefit of significant limitation on the power to discipline or discharge them from their employment.

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

The outcome in this judicial review is controlled by the rules of statutory construction enunciated by our Supreme Court, per Justice Diane Sykes:

It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination **124 of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.

[24] *663 ¶ 45 Thus, we have repeatedly held that statutory interpretation

"begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Seider,* 236 Wis.2d at 232, 612 N.W.2d 659; *see also Setagord,* 211 Wis.2d at 406, 565 N.W.2d 506; *Williams,* 198 Wis.2d at 525, 544 N.W.2d 406; *Martin,* 162 Wis.2d at 893-94, 470 N.W.2d 900. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Bruno v. Milwaukee County,* 2003 WI 28, ¶¶ 8, 20, 260 Wis.2d 633, 660 N.W.2d 656; *see also* Wis. Stat. § 990.01(1).

¶ 46 Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. *State v. Delaney,* 2003 WI 9, ¶ 13, 259 Wis.2d 77, 658 N.W.2d 416; *Landis v. Physicians Ins. Co. of Wis.,* 2001 WI 86, ¶ 16, 245 Wis.2d 1, 628 N.W.2d 893; *Seider,* 236 Wis.2d 211, ¶ 43, 612 N.W.2d 659. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. *Martin,* 162 Wis.2d at 894, 470 N.W.2d 900; *Bruno,* 260 Wis.2d 633, ¶ 24, 660 N.W.2d 656. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Bruno,* 260 Wis.2d 633, ¶ 20, 660 N.W.2d 656. Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. *Id.,* ¶ 7; ***664** *Cramer,* 236 Wis.2d 473, ¶ 18, 613 N.W.2d 591; *Seider,* 236 Wis.2d 211, ¶ 50, 612 N.W.2d 659; *Martin,* 162 Wis.2d at 893-94, 470 N.W.2d 900. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *State v. Pratt,* 36 Wis.2d 312, 317, 153 N.W.2d 18 (1967).

State ex rel. Kalal v. circuit Court for Dane County, 271 Wis. 2d 633, 662-667 (2004) (footnotes omitted).

The Commission's declaratory ruling errs because it fails to apply the legislature's plain, unambiguous wording in § 40.02 (48) (b) 3 to define "deputy sheriff". The statute requires application of the definition of "deputy sheriff" in § 40.02 (48) (b) 3 as stated "unless the context requires otherwise". Nothing in the context of § 40.02 (48) (b) 3 even suggests, let alone requires, that the definition be augmented in any way, either through importing chapter 59 requirements, resorting to "self-definition" theory, reaching for a "test [that] is simple"[2], invoking "clear intentions of the Legislature" from another source, or from anything beyond the statutory language itself. Section 40.02 (48) (b) 3 is complete and clear as is.

[2] While a simple test is certainly a laudable goal, nothing in chapter 40 suggests that it was a concern of the legislature when addressing this complex area of law and the subtle distinctions it entails. Here again the Commission errs in applying a rule of construction – a preference for simplicity – that is not appropriate to the task, which first and foremost is to discern the intent of the legislature from the language it adopts.

There is nothing ambiguous, confusing, or particularly mysterious about the second sentence in § 40.48 (b) 3's definition of "deputy sheriff". The County concedes this to be true, and correctly discerns its meaning:

> The second sentence is clear enough. It provides that "deputy sheriffs" remain "deputy sheriffs" even if they are temporarily assigned non-deputy duties.

Brief of Intervenor Douglas County, p. 12. Viewing § 40.02 (48) (b) 3 as a whole, the second sentence merely mirrors the end of the first sentence, which provides that non-deputy sheriffs remain non-deputy sheriffs even if occasionally called upon to perform active law enforcement duties.[3]

Nor does "qualifying as a deputy sheriff" either explicitly or implicitly contemplate appointment by the Sheriff under chapter 59 or being sworn on oath. *See Mattila v. Employee Trust Fund Board*, 243 Wis. 2d 90, 106 (Ct. App. 2001) Rather, the term "qualifying as a deputy sheriff" when properly read within the context and structure of the statutory definition itself as *Kalal* requires, merely refers to "deputy sheriffs" as defined in the first sentence. In other words, those qualified as deputy sheriffs under the definition set forth in the first sentence of § 40.02 (48) (b) 3 (as do the Douglas County jailers) do not lose that qualification when temporarily assigned to non-deputy duties. To graft further statutory requirements onto § 40.02 (48) (b) 3's definition of "deputy sheriff" which were not adopted by our legislature, as the Commission majority does with chapter 59, misapplies the rules of statutory construction set forth above, and frustrates the legislative intent as expressed in the statute's clear wording.

Moreover, even if the Commission majority were correct that "qualifying as a deputy sheriff" in the second sentence of § 40.02 (48) (b) 3 means appointed by the Sheriff under chapter 59, the Commission's declaratory ruling is still incorrect. This is because the plain meaning of the statute does not provide that only those "qualifying as a deputy sheriff" are deputy sheriffs within the meaning of the first sentence. Rather, those "qualifying as a deputy sheriff" are merely "included" within the group defined as deputy sheriffs in the first sentence. If the legislature had intended the definition to include only those "qualifying" by appointment and oath under chapter 59, it could have done so easily enough, and presumably would have.

Perhaps the most unsupportable rationale adopted by the Commission in support of its declaratory ruling is that "[c]learly the term 'deputy sheriff' is largely self-defining". To say the least, defining a term by reference to itself is an unusual

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[3] Although immaterial to this court's holding here, these mirroring provisions apparently reflect the legislature's choice, to accord the Sheriff flexibility to temporarily reassign personnel duties as events and staffing issues require, while otherwise keeping with the overall legislative scheme in chapter 40.

position to take when the task at hand is interpreting a term the legislature deliberately chose to expressly define. Even if "deputy sheriff" were "self-defining"[4], — and it is difficult to see how that could be true, or even what it means —, it is entirely irrelevant. The legislature may define any term any way it sees fit for whatever constitutionally legitimate purpose it wants, whether the term is "largely self-defining" or not. *See Wisconsin Concerned Citizens for Cranes and Doves v. Wisconsin DNR*, 270 Wis. 2d 318, 329 (2004) *citing Beard v. Lee Enters.*, 225 Wis.2d 1, 23 (1999) (words that are defined in the statute are given the definition that the legislature has provided). So if the legislature chooses to define "dogs" to include "cats", then for purposes of the statute incorporating the definition, a "cat" qualifies as a "dog", irrespective of common sense, self-definitions, or the fact that we all know that a "cat" is decidedly not a "dog".

Also untenable is the Commission majority's interpretation of *Mattila v. Employee Trust Fund Board*, 243 Wis. 2d 90 (Ct. App. 2001) as holding "that being appointed as a 'deputy' by a sheriff is a necessary qualification to be a 'deputy sheriff' within the meaning of Sec. 40.02 (48) (am) 13 and (b) 3, Stats." *Mattila* says nothing of the sort. In fact, it states the exact opposite and supports this court's conclusion here:

> ¶ 21 Finally, we note that the parties, as well as the circuit court, have discussed whether and how certain provisions of chapter 59 regarding deputy sheriffs apply to the determination of participant status under WIS. STAT. § 40.02(48). Neither § 40.02(48)(am) nor (b)3 makes reference to the requirements and limitations set forth in WIS. STAT. § 59.26 for the appointment of deputy sheriffs. We thus conclude that whether the Douglas County Sheriff complied with the technical requirements for making deputy appointments, and whether the county board **42 properly limited the number of deputy sheriffs by resolution instead of "by ordinance," are not relevant to the proper classification of Mattila and Law under § 40.02(48). As we have discussed, the key determining factor under the statute is not what the sheriff or the county board has or has not done with respect to appointing Mattila and Law as deputies, but what the two men themselves do as employees of the Douglas County Sheriff's Department.

The bottom line is that if "deputy sheriff" in chapter 40 was already either "largely self-defining" or defined by chapter 59, as the Commission concludes, there was no need for the legislature to enact a definition under § 40.02 (48) (b) 3. Worded differently, that a definition was adopted by the legislature to be applied "unless the context requires otherwise" necessarily means the legislature did not find the term "deputy sheriff " to be already appropriately defined for purposes of chapter 40, or "largely self-defined". Indeed, expressly including § 40.02 (48) (b) (3) in § 111.70 (1) (mm) must be viewed as a deliberate choice by the legislature that chapter 59's requirements do not control the definition of "public safety employees".

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[4] For a term that is supposedly "largely self-defining", the Commission majority spends a good bit of its discussion seeking statutory bases for the definition it crafts.

Douglas County urges this court to hold that jailers can never be sheriff's deputies under § 40.02 (48) based on *Mattila*, *supra*, and the court of appeals decision in *County of LaCrosse v. WERC*, 170 Wis. 2d 155 (Ct. App. 1992) *rev'd on other grounds*, 180 Wis. 2d 100 (1993).

Like the Commission, the County reads far more into *Mattila* than the case actually supports. In a highly fact-specific case, *Mattila* simply held that the jailers at issue in that case, although deputized by the sheriff, were not entitled to "protective occupation participant" status but were properly classified by the County as "general employees", because fifty-one per cent (51 %) or more of their duties did not involve "active law enforcement". In the words of the *Mattila* majority:

> Being a "deputy sheriff" is a necessary qualification to be deemed a protective occupation participant under § 40.02(48)(am), but, contrary to the employees' contention, it is not a sufficient one.

Thus, *Mattila* had no occasion to address the issue raised by the Union here, i.e. the statutory definition of "deputy sheriff", because jailer Mattila's status as a "deputy sheriff" was conceded. *Mattila*'s holding does not determine the fate of the Union jailers in the case at bar, because it is materially distinguishable on the facts. Here the County has done precisely what was lacking in *Mattila* -- it has classified the jailers as "protective occupation participants" whose principal duties involve "active law enforcement." Thus, *Mattila* is entirely beside the point.

The County's reliance on *County of LaCrosse* is problematic, since the case was reversed by the Supreme Court, and thus has questionable precedential value. *See Blum v. 1st Auto & Casualty Insurance Co.*, 326, Wis. 2d 729, 750 *et seq.* (2010); *but cf. State v. Stevens*, 343 Wis. 2d 157 (2012). Regardless, it is no more on point than *Mattila.* Both cases concerned employees who were concededly "deputy sheriffs" under § 40.02 (48) (b) (3), unlike the disputed status of the Union jailers in the case at bar. The central holding of *County of LaCrosse* is that it is up to the County, not the collective bargaining process, to determine whether a deputy sheriff acting as a jailer satisfies the other prerequisites to obtain "protective occupation participant" status or not. The analysis has no relevance here, because the Union and County have stipulated that the Union jailers satisfy all conditions of "protective occupation participant" except whether or not they are "deputy sheriffs" under § 40.02 (48) (b) (3), Stats. Just as being a deputy sheriff is a necessary, but not sufficient condition for "protective occupation participant" status, so too are the other qualifications for "protective occupation participant" status necessary, but not sufficient. Our case addresses the former, not the latter, while *County of LaCrosse* and *Mattila* address the latter but not the former.

CONCLUSION

The legislature could have declined to enact an explicit definition of "deputy sheriff" specific to chapter 40, or to expressly incorporate that definition into § 111.70 (1) (mm), Stats. Had the legislature done so, the Commission would have been justified to apply other statutes and rationales to define "deputy sheriff". However, once the legislature chose to adopt § 40.02 (48) (b) (3) and make it a part of § 111.70 (1) (mm), the definitional inquiry begins and ends at that point. Because the Douglas County jailers are "deputy sheriffs" within the meaning of § 40.02 (48) (am) 13 and (b) 3, Stats., and therefore meet the definition for "public safety employees" under §111.70 (1) (mm), Stats., the declaratory ruling of the Commission is REVERSED.

Dated this 10 day of October, 2012.

BY THE COURT:

Richard G. Niess
Circuit Judge

CC: Attorney Roger W. Palek
Assistant Attorney General David S. Rice
Attorney Mindy K. Dale