

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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WISCONSIN PROFESSIONAL POLICE ASSOCIATION, Complainant,

vs.

COUNTY OF BURNETT and SHERIFF DEAN ROLAND, Respondents.

Case 109  
No. 72869  
MP-4785

DECISION NO. 34989-A

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**Appearances:**

Mr. Andrew D. Schauer, Attorney, Wisconsin Professional Police Association, 660 John Nolan Drive, Suite 300, Madison, Wisconsin, appearing on behalf of Complainant Wisconsin Professional Police Association.

Ms. Lori M. Lubinsky, Attorney, Axley Brynson LLP, 2 E. Mifflin Street, Suite 200, P.O. Box 1767, Madison, Wisconsin, appearing on behalf of Respondents County of Burnett and Sheriff Dean Roland.

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

Complainant Wisconsin Professional Police Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that the County of Burnett and Sheriff Dean Roland violated §§ 111.70(3)(a)1 and 5, Stats., by refusing to assign Officer Travis Thiex to deputy sheriff patrol duties in conflict with the Disciplinary Agreement.

On May 8, 2014, the County and Sheriff Dean Roland jointly filed their Answer and Affirmative Defenses.

On April 22, 2014, the Commission authorized Lauri A. Millot to make and issue Findings of Fact, Conclusions of Law and Order in the matter.

Hearing on the Complaint was convened on December 12, 2014, in Siren, Wisconsin.

The parties filed post-hearing briefs on March 9, 2015. The parties advised the Examiner on March 9, 2015, that neither intended to file a responsive post-hearing brief whereupon the record was closed.

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

### **FINDINGS OF FACT**

1. Complainant Wisconsin Professional Police Association (hereinafter "Association" or "Complainant") serves as the exclusive bargaining representative for the Burnett County Law Enforcement Association.

2. Respondent County of Burnett (hereinafter "County") is a municipal employer with offices located in Siren, Wisconsin. The Burnett County Sheriff's Department employs fifteen public safety deputy sheriffs including Deputy Sheriff Travis Thieux.

3. Respondent Sheriff Dean Roland (hereinafter "Roland") was elected to the position of Burnett County Sheriff for three terms, the last of which ended December 31, 2014. Roland did not seek re-election for the 2015 – 2018 term, instead choosing to retire after having served 39 years in the law enforcement profession.

4. The Association and the County are parties to a series of collective bargaining agreements, the most recent of which covered the time period 2013 – 2014. That Agreement provided in relevant part:

### **ARTICLE III – MANAGEMENT RIGHTS**

**Section 3.01:** The County possesses the sole right to operate the Law Enforcement Department and all management rights repose in it, subject to the provisions of this Contract and applicable laws. These rights include the following:

- A. To direct all operations of the Department;
- B. To establish reasonable work rules and regulations;
- C. To hire, promote, schedule and assign employees to positions within the Department in accordance with the terms of this Agreement;
- D. To relieve employees from their duties because of lack of work, lack of funds or other legitimate reasons;
- E. To maintain efficiency of Department operations;

- F. To take whatever reasonable action is necessary to comply with State and Federal Law;
- G. To introduce new or improved methods or facilities or to change existing methods or facilities, provided if such affects the wages, hours or working conditions of the employees, the Association will be notified in advance;
- H. To determine the kinds and amounts of services to be performed as pertains to Departmental operations, and the number and kinds of classifications to perform such services;
- I. To determine the methods, means and personnel by which Departmental operations are to be conducted;
- J. To take whatever reasonable action is necessary to carry out the functions of the Department in situations of emergency;
- K. To contract out for goods and services provided such action shall not result in the layoff of bargaining unit personnel.

The reasonableness of County action taken pursuant to this Article is subject to the grievance procedure.

\* \* \*

**ARTICLE IX – JOB POSTING,  
TRANSFER AND PROMOTIONS**

**Section 9.01:** A vacancy shall be defined as a job opening not previously existing, or a job created by the termination of employment, promotion, or transfer of existing personnel when the need for such a job continues to exist. For purposes of this Section, the term "vacancy" shall not include job openings due to leaves of any kind of less than six (6) months duration.

**Section 9.02:** Whenever a vacancy occurs or a new job is created, it shall be posted on a bulletin board for a period of ten (10) working days, each employee interested in applying for the job shall endorse his/her name upon such notice, in the space provided. At the end of ten (10) working days, the notice shall be removed and the position shall be filled within thirty (30) days. The notice shall state the prerequisites for the position to be

filled, and said prerequisites shall be consistent with the requirements of the job classification. The Employer shall take account of both seniority and qualifications in filling vacancies hereunder. In determining qualifications, the Employer may administer applicable written and oral examinations, and conduct interviews. In cases where qualifications are relatively equal, seniority shall prevail. If there is any difference of opinion as to the qualifications of an employee, the Association Grievance Committee and/or Association Representative may take the matter up for adjustment under the grievance procedure.

Regular full time probationary employees who have exhibited satisfactory performance will be considered (either prior to or in conjunction with external candidates) eligible to post for a vacant or newly created position if no other regular full-time employees post for the position and the decision is made to recruit externally.

If a probationary employee posts and receives a different position in the department the employee will be granted a 15 day trial period (an extension to the probationary period) – at the end of the 15 day trial period the Sheriff and/or the employee may elect to return to their previous position held and continue to progress through their probationary period.

**Section 9.03:** The Employer shall have the right to make temporary appointments to vacant positions subject to their being filled pursuant to Section 2.

\* \* \*

### **ARTICLE XIII – WORK DAY, WORK WEEK, OVERTIME**

**Section 13.01:** The normal work schedule for the Deputies assigned to work as Investigators shall be five days on, two days off

The normal work schedule for regular full time and part time Deputies shall be 10 hour days, existing of 4 days on/4 days off; and 4 days on/3 days off.

The work period for full time and part-time Deputies shall be a designated twenty-eight (28) day period as provided in the Federal Fair Labor Standards Act (FLSA).

The work shifts shall be as follows:

Patrol Division

6:00 a.m. – 4:00 p.m.

10:00 a.m. – 8:00 p.m.

6:00 p.m. – 4:00 a.m.

8:00 p.m. - 6:00 a.m.

The Forestry/Recreational Officer will maintain a flexible working schedule that includes weekends and evening hours.

It is understood by the parties that Deputies performing work in Drug Enforcement, Criminal or Juvenile Investigations, whether on full time or part-time status, that the above listed work shifts may be modified, upon approval of the Employer, to meet the needs of the service.

By mutual agreement between the Sheriff and the Union a flexible schedule may be created and agreed upon for the rotation of shifts in order to provide enhanced public safety to the general public.

**Section 13.02:** The work shifts shall include a one-half (½) hour lunch and two (2) fifteen (15) minute breaks.

**Section 13.03:** Work schedules shall be posted for two (2) months in advance. Employees may, upon request, check the work schedules further in advance. If changes in the posted schedule are necessary, employees shall be notified as far in advance as possible, but in no event less than twenty-four (24) hours in advance, except in cases of sickness or emergency.

**Section 13.04:** Overtime shall be paid for all hours, required by the Employer to be worked (at the rate of one and one-half (1-½) times the hourly rate) outside the regularly assigned work shift with the exception of required travel for training and training time which shall be at the regular rate of pay unless such hours exceed 171 hours during the designated 28 day work period.

**Section 13.05:** No part-time or seasonal employee shall work overtime unless all regular employees are working overtime, or are unavailable to work.

**Section 13.06:** Overtime shall be divided as equally as possible.

**Section 13.07:** In the event that an employee is called for work or to appear in court before or after his/her assigned work shift, or on his/her day off: the employee shall receive a minimum of two (2) hours pay at one and one-half (1-½) times his/her regular rate of pay, or the actual number of hours worked, whichever is greater.

The Sheriff may schedule staff meetings on a voluntary or mandatory basis. If attendance is mandatory, time spent at staff meetings will be in pay status. Voluntary staff meetings will be in non-pay status if held at a time other than an employee's regularly scheduled shift. The two (2) hour minimum call-in time will not apply to the above.

**Section 13.08 Political Action:** No member of the Law Enforcement Department shall conduct him/herself in partisan or non-partisan political affairs while on official duties and the use of the department's vehicles shall be prohibited for such use.

5. The parties stipulated that:
  1. At all times material to this dispute, the Association has been and is a "labor organization" within the meaning of Wis. Stats. §111.70(1)(h), and at all times material to this dispute, the County has been and is a "municipal employer" within the meaning of Wis. Stats. §111.70(1)(j). At all times material to this dispute, the Sheriff has been the duly-elected Sheriff of the County. The Sheriff heads the County's Sheriff's Department (the "Department") and has the power to sign documents on behalf of the County relating to the Department.
  2. The County and the Association are parties to a 2013-2014 Collective Bargaining Agreement (the "CBA," Joint Exhibit 1) which is in full force and effect.

3. Deputy Thiex was hired by the County in September 2001 as a Deputy Sheriff of the County under a prior CBA. He has not been demoted or promoted since his hire date, and remains a Deputy Sheriff under the CBA. Under this CBA, the Association has been and is the sole and exclusive collective bargaining representative for the purposes of collective bargaining on matters of wages, hours and conditions of employment of a single bargaining unit (the "Bargaining Unit") containing all regular full time and regular part-time law enforcement personnel employed by Burnett County, including Deputies and Criminal Investigator, but excluding elected officials, the Undersheriff or Chief Deputy, reserve officers, project employees and confidential and managerial employees.
4. From at least 2005 until his return to work in October 2013, like other Deputy Sheriffs in the Department, Deputy Thiex normally worked a 4-on 4-off 4-on 3-off, 10-hour per day work schedule as provided in Section 13.01 of the CBA. He was a member of the "Patrol Division" as opposed to the "Forestry/Recreational Officer" who per Section 13.01 of the CBA "will maintain a flexible working schedule that includes weekend and evening hours." In contracts prior to 2011, there was also a "Jail Division" which was removed from the CBA after the passage of Act 10. However, for Patrol Division Deputies, these 4-day, 10-hour work schedules were also provided for in Section 13.01 of previous collective bargaining agreements between the parties going back to 2005. These prior collective bargaining agreements between the County and the Association are attached hereto as Joint Exhibit 2.
5. The County discharged Deputy Thiex per a letter dated August 31, 2012. The Association grieved this matter, and it was brought to arbitration on May 10-11, 2013. During the pendency of the grievance, Deputy Thiex continued to receive his normal pay at the same Deputy's rate called for by Wage Appendix A to the CBA, as though he worked the 4-day 10-hour schedule. After two days of testimony, the hearing was continued and was to resume on July 22-23, 2013. At the continued arbitration hearing on July 22, 2013, the parties settled in principal the

grievance over Deputy Thiex's termination, and the Disciplinary Agreement settling the grievance was later reduced to writing. On August 29, 2013, Deputy Thiex signed the Disciplinary Agreement (attached hereto as Joint Exhibit 3). On behalf of the Association, Attorney Andrew Schauer signed the Disciplinary Agreement on September 3, 2014, and on behalf of the Department and the County, Sheriff Dean Roland signed the Disciplinary Agreement on September 4, 2013. The parties do not dispute that the Disciplinary Agreement is binding on the County, the Department, the Sheriff, the Association, and Deputy Thiex.

6. Per the Disciplinary Agreement, Deputy Thiex's termination was reduced to a 16 work-day suspension. Deputy Thiex was returned to work on October 2, 2013. The Disciplinary Agreement is a "collective bargaining agreement" for purposes of §111.70(3)(a).
7. Deputy Thiex met with Sheriff Roland on October 3, 2013, and he informed him of his new assignment as "transport officer," and of a change in his schedule from his normal 4-on 4-off 4-on 3-off, 10 hours per day schedule to a 5-on 2-off, 8 hours per day work schedule. Deputy Thiex was also told that he would no longer be able to pick up patrol deputy overtime shifts. Deputy Thiex was told that this assignment and these restrictions were non-disciplinary and in order to meet the operational needs of the Sheriff's Office. This assignment, schedule change and restrictions were not given to him in writing.
8. Per the Sheriff's order described above, Deputy Thiex has worked as the "transport officer" and continues to do so to this day. He is also still barred by the Sheriff from working patrol deputy shifts for overtime. The Sheriff has advised Thiex that his decision is in place until the Sheriff retires effective December 31, 2014.
9. Before the implementation of 2011 Act 10, under the 2008-2010 and earlier collective bargaining agreements between the parties, transport duties were primarily handled by employees who were part of the "Jail Division" of the Bargaining Unit. In September 2012,



after the implementation of 2011 Act 10, the parties signed the 2011-2012 collective bargaining agreement, in which the Jail Division was removed.

10. The Association argues that this permanent assignment, schedule change, and additional restrictions on overtime are in violation of the Disciplinary Agreement, that they amount to discipline in addition to the discipline which was agreed to in the Disciplinary Agreement, and therefore that they amount to impermissible double jeopardy. The County and the Sheriff argue that these actions were taken in order to meet the operational needs of the Department and were within their Management Rights under Section 3.01 of the CBA.
11. The Association then filed the Complaint dated February 4, 2014, which is already part of the record. The County and the Sheriff filed their Answer dated May 7, 2014, which is also already part of the record. The parties bring no procedural objections to this hearing on the Complaint in front of Hearing Examiner Lauri Millot on December 12, 2014, and ask the Hearing Examiner to decide the matter on the merits as presented below.

6. The Disciplinary Agreement executed by the Association, Thiex, Roland and the County read as follows:

#### **DISCIPLINARY AGREEMENT**

Burnett County (the "County") and its Sheriff's Department (the "Department"), Deputy Travis Thiex ("Thiex"), and the Wisconsin Professional Police Association (the "Association") enter into this Disciplinary Agreement (the "Agreement"). Thiex is an employee of the County working in the Department, and is a member of the Association. The Association and the County are parties to a Collective Bargaining Agreement ("CBA") which is in full force and effect. The parties hereby agree as follows:

1. Thiex will serve a sixteen (16) work-day unpaid suspension, to be served consecutively starting on September 2, 2013. The parties agree that Thiex shall return to active duty on or around October 2, 2013.

During this suspension, the County agrees that it will continue to provide health and dental insurance to Thiex, subject to normal payroll deductions and other terms and conditions in the CBA and the plan documents, as it provides to all of the Association's members employed by the County. The County agrees that Thiex will be able to use vacation, compensatory or other banked time to supplement income lost during this unpaid suspension.

2. The parties agree that upon completion of this suspension Thiex will be returned to active duty as a Deputy Sheriff.
3. The parties agree that the County is not imposing discipline through this Agreement for untruthfulness.
4. Upon the signing of this document, the parties will jointly withdraw the grievance from the arbitrator as a voluntarily settled matter, with prejudice.
5. Thiex and the Association agree that, upon Thiex's return to work on or around October 2, 2013, Thiex will retain his title as Deputy Sheriff, and will retain all rights under the CBA.
6. From the date of this Agreement and then for a period of eighteen (18) months following completion of Thiex's disciplinary suspension, Thiex shall serve a "Last Chance Period." During this Last Chance Period, all parties agree that in the event Thiex engages in any conduct which violates any of the same policies and procedures listed and attached to the termination letter (a copy of which is attached hereto), such violation shall be "cause" for termination pursuant to the CBA and Chapter 59 of the Wisconsin Statutes, if the Sheriff deems such penalty appropriate.

If such incident(s) occur during the Last Chance Period, the County reserves the right to terminate Thiex, and Thiex and Association reserves the right to appeal the termination to the County Board or to arbitration in accordance with the CBA. However, in the event there is a hearing or arbitration over such termination, the parties agree that the only issue will be whether Thiex did engage

in activity in violation of the provisions of this paragraph 6 of the Disciplinary Agreement. In that case, if after hearing all the evidence presented, the fact finder determines that a violation has occurred, the parties agree that the only proper penalty is discharge. The parties agree that the language of this Disciplinary Agreement modifies the CBA only for this employee, and only under these specific circumstances.

- 7. Thiex acknowledges that the Wisconsin Professional Police Association has met its Duty of Fair Representation to him in that the Union has represented his interests fairly, impartially and without discrimination.
- 8. By signing this Agreement, Thiex and the Association acknowledge that each have read this entire Agreement and understand its contents. Thiex and the Association further acknowledge that each are signing this Agreement as their free and voluntary choice after having been given the opportunity to consider all alternative courses of action and to consult with any advisers of their choice. Finally, the parties agree the terms of this Agreement are established on a non-precedent-setting basis.

The parties have read the two (2) pages of this Agreement, and agree to all the terms and conditions set forth above.

ON BEHALF OF THE DEPARTMENT AND THE COUNTY

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Sheriff Dean Roland

ON BEHALF OF THE ASSOCIATION

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Andrew D. Schauer, Staff Attorney

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Deputy Travis Thiex

- 7. During the Disciplinary Agreement negotiations, the Association proposed that the Agreement state that Thiex would be assigned to road deputy duties to which the County and Roland disagreed. Specific language to that effect was not included in the Agreement.

8. During the Disciplinary Agreement negotiations, the County and Roland proposed that the Agreement state that Thiex would be assigned to transport officer duties to which the Association and Thiex disagreed. Specific language to that effect was not included in the Agreement.

9. During the Disciplinary Agreement negotiations, the Association proposed the removal of the Brady Letter from Thiex's personnel file to which the County and Roland disagreed. The letter was not removed from Thiex's personnel file.

10. Thiex's primary duties as Transport Officer are intrastate prisoner transports, monitoring of Huber prisoners, and irregular service as the court officer.

11. Tom Howe, dispatcher/jailer, held the position of Transport Officer prior to Thiex. Howe's work schedule was Monday through Thursday, ten hours per day.

12. Prior to his permanent assignment to perform transport officer duties, Thiex and other deputies periodically performed transport duties.

13. Roland exercised the constitutional authority vested with the duly elected Sheriff of Burnett County when he signed and thereby agreed to the terms and conditions of the Disciplinary Agreement.

14. For approximately 13 months, the Sheriff's Department was short-staffed due to injuries and the investigation of Thiex and two other deputies. To address staffing coverage, the County and the Association met and agreed to temporarily change the work schedule for deputy sheriffs from 4-on, 4-off, 4-on 10-hour shift to a 12-hour shift.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following:

### CONCLUSIONS OF LAW

1. Wisconsin Professional Police Association is a labor organization within the meaning of § 111.70(1)(h), Stats.

2. Travis Thiex was a "municipal employee" within the meaning of § 111.70(1)(i), Stats.

3. The County is a "municipal employer" within the meaning of § 111.70(1)(j), Stats.

4. Dean Roland was the duly elected Sheriff of the County of Burnett within the meaning of Article VI, Section 4, of the Wisconsin Constitution and exercised said constitutional authority when he signed the Disciplinary Agreement.

5. Dean Roland was the authorized signatory on behalf of the County of Burnett when he signed the Disciplinary Agreement.

6. Because the parties stipulated that there were no procedural objections, the Commission asserts jurisdiction over Complainant WPPA's claims against the Respondents County of Burnett and Sheriff Dean Roland for violations of § 111.70(3)(a)5, Stats., and derivatively, § 111.70(3)(a)1, Stats.

7. Respondents violated the terms of the 2013-2014 Collective Bargaining Agreement thereby violating § 111.70(3)(a)5, Stats., and derivatively, § 111.70(3)(a)1, Stats., when Roland permanently assigned Travis Thix to the Transport Officer position working a 5-on, 2-off, 8-hour per day schedule.

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

### ORDER

IT IS ORDERED that the County of Burnett and Sheriff Dean Roland, its officers and agents, shall immediately:

1. Cease and desist from violating the terms and conditions of the 2013-2014 Collective Bargaining Agreement.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

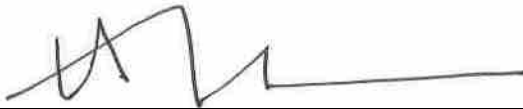
(a) Meet with the WPPA representatives to address whether a back pay remedy is appropriate. In the event that the parties are unable to reach agreement, and upon request of a party, the Examiner will receive evidence to establish the appropriate remedy.

(b) Notify all of its employees by posting, in conspicuous places on its premises where the employees are employed, copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by a County official and shall be posted immediately upon receipt of a copy of this order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this order as to what steps the County has taken to comply with this order.

Signed at the City of Rhinelander, Wisconsin, this 20th day of July 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in black ink, appearing to read 'Lauri A. Millot', written over a horizontal line.

Lauri A. Millot, Examiner

**APPENDIX "A"**

**NOTICE TO ALL EMPLOYEES**

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL NOT violate the terms and conditions of the 2013-2014 Collective Bargaining Agreement.

2. WE WILL comply with the terms of the Disciplinary Agreement entered into by Travis Thiex, Wisconsin Professional Police Association, Burnett County and Sheriff Dean Roland.

**FOR THE COUNTY OF BURNETT**

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**THIS NOTICE MUST BE POSTED FOR  
THIRTY (30) DAYS FROM THE DATE HEREOF.**

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

The Association maintains that the County and Roland violated the Disciplinary Agreement and the 2013-2014 Collective Bargaining Agreement (hereinafter “CBA”) when Thiex was assigned to the Transport Officer position, when Thiex’s work schedule was inconsistent with the labor agreement, and when Thiex was denied patrol overtime opportunities. Respondents deny having violated either the Disciplinary Agreement or the collective bargaining agreement and assert that Sheriff Roland acted consistent with his constitutional authority.

**Legal Framework.**

The complaint alleges a violation of § 111.70(3)(a)5, Stats., and a derivative violation of § 111.70(3)(a)1, Stats. Pursuant to § 111.70(3)(a)5, Stats., it is a prohibited practice for a municipal employer:

To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting public safety employees or transit employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them or to violate any collective bargaining agreement affecting general municipal employees, that was previously agreed upon by the parties with respect to wages.

The parties stipulated that the Disciplinary Agreement is a “collective bargaining agreement” for purposes of § 111.70(3)(a), Stats.

While the complaint pled an employer violation of § 111.70(3)(a)1, Stats., that is the only reference to same in the record. It was not mentioned at the hearing or in the Association’s brief. As a result, it is presumed that the Association is claiming a derivative violation of § 111.70(3)(a)1, Stats.

**Thiex’s Disciplinary Agreement.**

Thiex was terminated by Roland and the County. In advance of the arbitration hearing, the parties negotiated and entered into an agreement which returned Thiex to work. The Disciplinary Agreement provided that Thiex would return “to active duty as a Deputy Sheriff” and that upon his return to work Thiex “will retain his title as Deputy Sheriff, and will retain all rights under the CBA.” Ex.3. Roland and the County returned Thiex to work on October 2,



2013. Thiex currently holds the title Deputy Sheriff and is compensated at the deputy sheriff rate. The question is whether Thiex has retained all his rights pursuant to the terms and conditions of the CBA. The Association argues those rights have been breached inasmuch as Thiex was permanently assigned to Transport Officer, Thiex's work schedule was changed to 5-on, 2-off, 8-hours per day, and Thiex was denied eligibility for overtime patrol shifts.

### **Does Thiex's Transport Officer Assignment Violate the CBA?**

Roland permanently assigned Thiex to transport officer duties when he returned to work. Those duties were previously performed by a dispatcher/jail officer. The collective bargaining agreement does not contain any reference to a Transport Officer position. Respondents take the position that Roland exercised "management rights" and assigned Thiex the duties. Since Article III, Management Rights, grants the County the authority "[t]o direct all operations of the Department," "[t]o determine the kinds and amounts of services to be performed as pertains to Department operations, and the number and kinds of classifications to perform such services," and "[t]o determine the methods, means and personnel by which Departmental operations are to be conducted," Respondents were well within their contractual authority to assign Thiex to transport responsibilities unless that assignment violated another clause of the collective bargaining agreement.

Article IX, Job Posting, Transfer and Promotions, addresses new positions and positions that have been vacated due to the exodus of the prior incumbent. Section 9.02 dictates that when "a vacancy occurs or a new job is created," the position is posted and filled based on seniority and qualifications. Respondents argue that since it isn't labeling the transport officer duties as a Transport Officer position, then a position does not exist. Respondents' argument is disingenuous and fails. The record establishes that prior to Thiex, Howe held the position and performed the duties of Transport Officer. Upon Howe's retirement, Roland testified that Thiex was "permanently" working the duties of the Transport Officer. The position exists and should have been posted.

### **Does Thiex's 5-on, 2-off, 8 Hour per Day Schedule Violate the CBA?**

Looking next to Thiex's work schedule, Article XIII, – Work Day, Work Week, Overtime, addresses the work schedule for Patrol Division deputies, the Forestry/Recreational Officer, and deputies assigned to Drug Enforcement, Criminal and Juvenile Investigations, and provides:

**Section 13.01:**                      The normal work schedule for the Deputies assigned to work as Investigators shall be five days on, two days off

The normal work schedule for regular full time and part time Deputies shall be 10 hour days, existing of 4 days on/4 days off; and 4 days on/3 days off.

The work period for full time and part-time Deputies shall be a designated twenty-eight (28) day period as provided in the Federal Fair Labor Standards Act (FLSA).

The work shifts shall be as follows:

Patrol Division

6:00 a.m. – 4:00 p.m.

10:00 a.m. – 8:00 p.m.

6:00 p.m. – 4:00 a.m.

8:00 p.m. - 6:00 a.m.

The Forestry/Recreational Officer will maintain a flexible working schedule that includes weekends and evening hours.

It is understood by the parties that Deputies performing work in Drug Enforcement, Criminal or Juvenile Investigations, whether on full time or part-time status, that the above listed work shifts may be modified, upon approval of the Employer, to meet the needs of the service.

By mutual agreement between the Sheriff and the Union a flexible schedule may be created and agreed upon for the rotation of shifts in order to provide enhanced public safety to the general public.

Thiex works five days per week, eight hours per day. That schedule does not exist in Section 13.01. Roland testified that Thiex was working the 5-on, 2-off schedule to accommodate the court schedule. While it may be more efficient for Thiex to work 5-on, 2-off, Roland does not have the authority to unilaterally set this schedule for Thiex. Moreover, since Howe worked the “normal” 4-on, 4-off, 4-on, 3-off schedule, and there is no evidence which indicates that Howe’s obligations were different than Thiex’s, Roland’s assertion that the responsibilities of the position dictate that it coincide with the court’s schedule is misleading and violates the labor agreement.

Respondents argue that even though the “normal” work schedule for deputies is 10-hour days, 4-on, 4-off followed by 4-on, 3-off, that was not followed for greater than one year when the County investigated Thiex and two other deputies. The record establishes that when the Department was reduced by three deputies due to a disciplinary investigation, the County and Association agreed that it was necessary to modify the work schedule contained in

the labor agreement in order to meet the needs of the public with reduced staff. That modification was intended to be for a limited amount of time and was negotiated. That is not the case with Thiex's permanent assignment to a 5-on, 2-off, 8-hour per day work schedule.

### **Does Thiex's Denial of Overtime Violate the CBA?**

The Association next argues that Roland's decision to deny Thiex patrol overtime shifts violates that CBA. Section 13.06 states that "[o]vertime shall be divided as equally as possible," but the labor agreement does not indicate how overtime is "divided." Section 13.05 recognizes that part-time and seasonal employees may work overtime when "all regular employees are working overtime, or are unavailable to work." The equitable division of overtime is therefore a desired outcome but not mandated since employees have the option to decline.

Roland justified his decision to deny Thiex patrol overtime shifts with Roland's determination that Thiex was untruthful and that Thiex's untruthfulness would have placed the County in jeopardy pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The Association is correct that Roland's autarchic decision in this regard lacked checks and balances, an independent review, or appeal, but Roland's determination does not, in and of itself, establish that Section 13.06 was violated. This record does not address available overtime, overtime earned, overtime turn-downs, or any other relevant data which would allow for analysis to resolve whether Thiex was actually denied his equal part to overtime.

Having found that the Respondents violated the Disciplinary Agreement by violating the 2013-2014 CBA when Thiex was assigned the Transport Officer position working a 5-on, 2-off, eight hours per day schedule, the issue turns to whether the actions taken by Roland are protected by the Wisconsin Constitution and interpretive case law.

### **Was Roland's Action Protected by His Constitutional Authority?**

Respondents assert that even if the collective bargaining agreement was violated, the assignment of Thiex to the Transport Officer position is not subject to the terms and conditions of the collective bargaining agreement because it was a valid exercise of Roland's constitutional authority. The Wisconsin Constitution, Article VI, section 4 provides:

Sheriffs...shall be chosen by the electors of the respective counties once every two years...Sheriffs shall hold no other office; they may be required by law to review their security from time to time, and in default of giving such new security their office shall be deemed vacant, but the county shall never be made responsible for the acts of the sheriff. The governor may remove any [sheriff]...giving to [him/her]...a copy of the charges against him and an opportunity of being heard in his defense. All

vacancies shall be filled by appointment and the person appointed to fill a vacancy shall hold only for the unexpired portion of the term to which he shall be appointed and until his successor shall be elected and qualified.

The constitution does not define the powers of the elected sheriff office. It is well-settled law that the “sheriff has the power and prerogatives which that office had under the common law, among which were a very special relationship with the courts. These powers may not be limited by a collective bargaining agreement entered into by the county and a labor union representing deputy sheriffs.” *Wisconsin Prof'l Police Ass'n v. Dane County*, 106 Wis.2d 303, 312, 316 N.W.2d 656 (1982).

The Commission addressed the constitutional authority of a Sheriff in *Milwaukee County*, Dec. No. 30431 (WERC, 7/29/2002) explaining:

... the Court has held that duties which “gave character and distinction” to the office of sheriff at common law are constitutionally protected and thus cannot be infringed upon by a collective bargaining agreement. Duties which are “mundane and commonplace” do not give “character and distinction” to the office of sheriff and thus are not constitutionally protected. BROWN COUNTY SHERIFF’S DEPT. V. EMPLOYEES ASS’N, 194 WIS.2D 265 (1995); HEITKEMPER V. WIRSING, 194 WIS.2D 182 (1995); WASHINGTON COUNTY VS. DEPUTY SHERIFF’S ASS’N, 192 WIS.2D 728 (CT.APP. 1995); MANITOWOC COUNTY VS. LOCAL 986B, 168 WIS.2D 819 (1992); WISCONSIN PROFESSIONAL POLICE ASSN. VS. DANE COUNTY, 149 WIS.2D 699 (CT.APP. 1989) (WPPA II); WPPA I; SUPRA.

The power to dismiss or demote (HEITKEMPER, SUPRA) or to dismiss and not reappoint (BROWN COUNTY, SUPRA) are not constitutionally protected. The duties of: (1) selecting a “court officer” (WPPA I, SUPRA); (2) deciding who should perform interstate conveyance of prisoners (Wisconsin Professional Police Association II, SUPRA); (3) deciding who shall perform undercover drug law enforcement duties (MANITOWOC COUNTY, SUPRA); and (4) maintaining law and order and preserving the peace by utilizing non bargaining unit employees to provide law enforcement services (WASHINGTON COUNTY, SUPRA) have been found to be duties which give “character and distinction” to the office of the sheriff and thus are constitutionally protected from infringement

by a collective bargaining agreement. In its decisions, the Court has emphasized that it is the nature of the duty assigned – not the power of assignment – which is critical for the purposes of analysis (HEITKEMPER, SUPRA; MANITOWOC COUNTY, SUPRA.).

Thiex holds the position of Transport Officer. Thiex testified that Roland told him his duties were “transporting prisoners, Huber billing and some courtroom security.” Tr.26. Roland described that Thiex’s:

... assignment deals with the schedule of the court primarily and transporting prisoners back and forth. We’re a small jail, so a lot of our prisoners are held in Polk County; and he makes trips all over the state, so a lot of times he leaves early in the morning.

He does run a somewhat of a flex schedule, but it is also pretty standard. And because the court works Monday through Friday for the most part, that’s what his schedule is assigned.

Tr.81.

Based on Thiex and Roland’s limited description of duties, it is likely that Thiex’s duties are a combination of court officer and transporting of prisoners, both of which have been found to be duties which give “character and distinction” to the office of the sheriff. But to conclude that Roland’s decision to assign Thiex to the Transport Officer position is protected by his constitutional authority is to ignore the role that Roland played during the negotiations leading up to and his signature on the Disciplinary Agreement.

Roland was a seasoned negotiator after having participated in negotiations for not only successor collective bargaining agreements, but also the Disciplinary Agreement that returned Thiex to work. Roland testified that he was unwilling to agree to specific language proposed by the Association relative to the work Thiex would perform upon his return to work and, as a result, that language was not included in the settlement. Roland is not a County official, rather he is a constitutional officer elected by the voters of Burnett County and his signature was first and foremost in that capacity. The fact that the County authorized Roland to participate on its behalf does not negate Roland’s status as the elected Sheriff of the County. When Roland signed the Disciplinary Agreement,<sup>1</sup> he exercised his constitutional rights and agreed to the terms and conditions contained in that Agreement and, as such, waived his right to challenge its terms and conditions.

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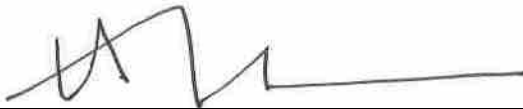
<sup>1</sup> Respondent’s position that Roland’s constitutional authority supersedes the Disciplinary Agreement and CBA appears to conflict with Respondents’ position that “[t]he parties do not dispute that the Disciplinary Agreement is binding on the County, the Department, the Sheriff, the Association, and Deputy Thiex” as contained in Stipulation of Fact #5.

In conclusion, the Association has proven by a clear and satisfactory preponderance of the evidence that Respondents violated § 111.70(3)(a)5, Stats., and derivatively, § 111.70(3)(a)1, Stats., by permanently assigning Thiex to the Transport Officer position working a 5-on, 2-off, 8-hour per day schedule in conflict with the terms and conditions of the 2013-2014 CBA.

The parties stipulated that if the Examiner determined that the County or Roland committed a prohibited practice, they would attempt to agree on whether a back pay remedy was appropriate and, if so, what was the appropriate amount.

Signed at the City of Rhinelander, Wisconsin, this 20th day of July 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in black ink, appearing to read 'Lauri A. Millot', is written above a horizontal line.

Lauri A. Millot, Examiner