

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**MILWAUKEE COUNTY**

and

**MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION**

Case 469

No. 57227

MA-10557

(John Paul Thompson Grievance)

---

Appearances:

Gimbel, Reilly, Guerin & Brown, by **Attorney Franklyn M. Gimbel**, 2400 Milwaukee Center, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202, on behalf of the Association.

**Mr. Timothy R. Schoewe**, Deputy Corporation Counsel, Milwaukee County, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin 53233, on behalf of the County.

**ARBITRATION AWARD**

According to the terms of the 1998-2000 collective bargaining agreement between Milwaukee County (County) and Milwaukee Deputy Sheriffs' Association (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the reassignment of Deputy John Paul Thompson. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. The hearing was held at Milwaukee, Wisconsin, on September 17, 1999. No stenographic transcript of the proceedings was made. At the hearing, the parties agreed that they would file their initial briefs on November 12, 1999, and that they would reserve the right to file reply briefs. On December 7, 1999, the County submitted a reply brief. The record was closed on December 14, 1999, when the Union advised it would not submit a reply brief.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

## ISSUES

The parties stipulated that the following substantive issue should be determined in this case:

Was there cause for reassigning Deputy Thompson out of the Criminal Investigation Bureau? If not, what is the appropriate remedy?

The parties were unable to stipulate to a procedural issue but that issue was stated by the County as follows:

Given the state of the law regarding the Sheriff's immemorial duties, is the grievance arbitrable?

Although the Union did not stipulate to the above-quoted procedural issue, I find that I must determine that issue before I proceed to the substantive issue in this case.

## RELEVANT CONTRACT PROVISIONS

### **PART 3**

#### **3.01 WAGES**

(1) Upon implementation, the following represents a merger of the ranks of Deputy Sheriff, Deputy Sheriff (Bilingual) (Spanish), Deputy Sheriff I, and Deputy Sheriff II (Pay Ranges 17S, 18A, and 21B). This new range consolidates the four classifications into two and creates the classifications of Deputy Sheriff I and Deputy Sheriff I (Bilingual) (Spanish) and a single pay range of 17BZ.

(2) After implementation, all new hires in the classification of Deputy Sheriff I and Deputy Sheriff I (Bilingual) (Spanish), pay range 17BZ shall be hired in step one of pay range 17BZ.

(3) Upon implementation of this agreement, the rate of pay of each employe who has received a 1997 step increase (adjustment) shall be further adjusted to the next highest step in pay range 17BZ which is closest to their current rate of compensation providing a minimum \$20 biweekly pay increase. All other employes (i.e. those not having received a 1997 step increase prior to the implementation of this agreement) shall have their current rate of compensation

increased to the next highest pay step in pay range 17BZ which is closest to their current rate of compensation providing a minimum \$20 biweekly pay increase retroactive to the first pay period of the year 1997. No further step increases shall be granted in 1997.

(4) After January 1, 1998, movement from one step in the new pay range to the next highest step shall be based upon meritorious performance and upon satisfactory completion of a satisfactory performance appraisal by the appointing authority of his/her designee as indicated below:

(a) upon completion of 2,080 straight time hours paid after receipt of an increment processed in 1997 prior to the implementation of this agreement.

(b) upon completion of 4,160 straight time hours paid after the receipt of an increment processed in 1996.

(c) employees who received a rate of pay at the maximum of the previous pay range prior to January 1, 1997 shall receive an increment upon completion of 2,080 straight time hours paid after implementation of the 1997 agreement.

(5) The following listed employees, who are assigned to the Criminal Investigation Bureau (CIB) upon ratification of the contract, shall be paid an additional fifty cents (\$.50) per hour for all hours credited in that bureau and shall remain assigned to the CIB as long as cause does not exist for their reassignment.

**DEPUTY SHERIFF II \***

(Listed by bureau assignment)

Baldewicz, Richard  
Pautz, Michael  
White, George  
Conley, Larry  
McCabe, Lorraine  
Hanus, Lloyd  
Myler, Marie  
Norris, Mark  
Ashenhurst, Jack  
Gorecki, Kenneth  
Konkel, Dennis  
Nowotny, Michael  
Maki, Thomas

Engelhardt, David  
Plennes, Mark  
Popowski, Bryan  
Jasper, Joyce  
Otto, Gregory  
Roxbury, Ronald  
Nilsen, Jon  
Wahlen, James  
Dancker, Linda  
Wisch, Alan  
Brylow, David  
Wolfe, Steven  
Kostopulos, Mariellen

Hepp, John	Ferguson, Keith
Lent, Daniel	Mohr, Kenneth
Rutter, Fred	Fischer, Darrell
Ornelas, Daniel	Thompson, John
Estrada, Robin	Eder, Frank
Schattschneider, Robert	VACANT
Stewart-Hankins, Diana	Fisenne, Kathleen
Dumke, Dennis	Olson, Joyce
Simon, Gary	

\*Subject to adjustment for oversight of encumbent in such assignment.

...

## COUNTY ORDINANCE

### **RULE VII SEPARATIONS; SUSPENSIONS**

#### **RULE VII, Section 1 DEMOTION AND DISMISSAL; SUSPENSIONS; PROCEDURES**

Whenever a person possessing appointing power in the county, as to employees under their respective jurisdictions, believes that an employee in the classified service in his department has acted in such a manner as to show him to be incompetent to perform his duties or have merited demotion or discharge, he shall report in writing to the Civil Service Commission, setting forth specifically his complaint, and may suspend the officer or employee without pay at the time such complaint is filed. Nothing in this section shall limit the power of the department head to suspend a subordinate for a reasonable period not exceeding ten(10) (sic) days. In case an employee is again suspended within 6 months for any period whatever, the employee so suspended shall have the right of hearing by the Commission on the second suspension or any subsequent suspension within said period the same as herein provided for in demotion or dismissal proceedings. All suspension (sic) shall be immediately reported in writing to the Commission. The Commission may, in its discretion, investigate any such suspension and in the case of its disapproval, the suspended employee shall be immediately reinstated, and any part or all of the pay which he may have lost may be restored to him by order of the Commission.

...

**RULE VII, Section 4**  
**CAUSES FOR DISCHARGE, SUSPENSION OR DEMOTION AND/OR**  
**REEVALUATION**

(1) The following are declared to be cause for discharge, suspension or demotion and/or the approval of or the imposition of an employee reevaluation period as provided in Rule VI, Section 8, of the rules of the Milwaukee County Personnel Review Board, of any officer or employee from the classified service of the County of Milwaukee, though charges may be based upon causes and complaints other than those here enumerated, namely:

- (a) Theft of private or county property.
- (b) Unauthorized use, misuse, destruction of or damage to any property including vehicles, said damage occurring because of neglect while on county business.
- (c) Unauthorized use of county premises.
- (d) Violation of rules or practices relating to security of county property or county premises.
- (e) Unauthorized use, duplication or possession of county keys, or electronically controlled access cards.
- (f) Distributing or posting handbills, pamphlets or other written or printed material in any work area without authorization.
- (g) Posting, removing or tampering with county bulletin board material without authorization.
- (h) Failure to observe parking or traffic regulations as established by ordinance, statutes, or departmental rules while on county business.
- (I) Violation of rules or practices relating to safety.
- (j) Littering, creating or contributing to unsanitary or unsafe conditions on county premises.
- (k) Refusing or failing to obey orders of supervisor (sic) whether written or oral.
- (l) Refusing or failing to comply with departmental work rules, policies or procedures.
- (m) Threatening, intimidating, coercing or harassing employees or supervision at any time.
- (n) Making false or malicious statements, either oral or written, concerning any employee, the county or its policies.
- (o) Unexcused, unauthorized or excessive absence.

. . .

- (q) Leaving early and/or failure to be at assigned work area at the start or end of shifts, breaks and/or meal periods.
- (r) Leaving place of work during working hours without authorization, wasting time or loitering.

- (s) Stopping work before designated quitting time.
- (t) Failure or inability to perform the duties of assigned position.
- (u) Substandard or careless job performance.
- (v) Restricting output or engaging in any intentional slowdown, work stoppage or strike.
- (w) Engaging in any unauthorized activity which distracts or disrupts employees in the performance of their duties.
- (x) Interference with normal work flow or departmental procedures.
- (y) Falsification, modification or unauthorized alteration of any county record or report.
- (z) Knowingly punching or marking another employee's time card, having one's time card punched or marked by another, altering time card for any unauthorized reason or inaccurately recording time worked.
- (aa) Unauthorized obtaining or disclosure of confidential or privileged information.
- (bb) Commission of a criminal act which meets the non-discriminatory practices in conformance with State Statutes.
- (cc) Reporting to work or working while under the influence of intoxicating beverages and/or narcotics or other drugs or having unauthorized possession of same on county premises during working hours.
- (dd) Indecent, criminal or inappropriate conduct on county premises during working hours.
- (ee) Abusive or improper treatment toward an inmate or patient of any county facility or to a person in custody; provided the act committed was not necessarily or lawfully done in self-defense or to protect the lives (sic) others or to prevent the escape of a person lawfully in custody.
- (ff) Offensive conduct or language toward the public or toward county officers or employees.
- (gg) Sleeping, dozing or lack of attentiveness during working hours.
- (hh) Possession of unauthorized weapons on county premises or during working hours.
- (ii) Provoking or instigating a fight or fighting during working hours or on county premises.
- (jj) Engaging in horseplay or scuffling on county premises during working hours.
- (kk) Engaging in personal activities during working hours.
- (ll) Gambling on County premises during working hours.
- (mm) Vending, soliciting or collecting contributions for any purposes without authorization on county premises.
- (nn) Inducing or attempting to induce any officer or employee in the county service to commit an illegal at (sic) or to act in violation of any departmental or official regulation or order, or the Rules of the Commission.
- (oo) Soliciting or receiving from any person or participating in any fee, gift or other thing of value in the course of one's work, when such fee, gift or other

thing of value is given in the hope or expectation of receiving a favor or better treatment than that accorded other persons.

(pp) Threatening or attempting to use or using political influence, or giving or being in any way involved in giving any money or any other thing of value in return for appointment, promotion, transfer, level of absence or in (sic) change in appropriation or pay.

(qq) Engaging in pernicious political activity by making use of one's position to further the candidacy of any person or engaging in political work being done during regular work hours. Nothing in this section shall be construed to interfere with the right of any employee in the classified service to become a member of a political club, to attend political meetings, to express his or her opinion on all political subjects and to enjoy freedom from all interference in casting his or her vote.

(rr) Removal of permanent residence to some place outside of Milwaukee County, except as specifically authorized by the Commission or failure to establish permanent residence in Milwaukee County within the time limited by the Commission.

(ss) Willful violation of any of the provisions of the County Civil Service Act or of the Rules of the Commission or ordinances of Milwaukee County.

(tt) Knowingly discriminating against anyone for employment or delivery of services because of such individual's age, race, color, handicap, sex, creed, national origin or ancestry.

...

### APPLICABLE CIVIL SERVICE LAW AND RULES

...

**63.10 Demotion; dismissal; procedure.** (1) Whenever a person possessing appointing power in the county, the chief executive officer of a department, board or institution, the county park commission, county election commission, civil service commission, and county board of welfare as to officers and employees under their respective jurisdiction, believes that an officer or employee in the classified service in his or its department has acted in such a manner as to show him to be incompetent to perform his duties or to have merited demotion or dismissal, he or it shall report in writing to the civil service commission setting forth specifically his complaint, and may suspend the officer or employee at the time such complaint is filed. It is the duty of the director of personnel to file charges against any officer or employee in the classified service upon receipt of evidence showing cause for demotion or discharge of such officer or employee in cases where a department head or appointing authority neglects or refuses to file such charges. Charges may be filed by any citizen

against an officer or employee in the classified service where in the judgement of the commission the facts alleged under oath by such citizen and supported by the discharge of such officer or employee. The commission shall forthwith notify the accused officer of (sic) employee of the filing of such charges and on request provide him with a copy of the same. Nothing in this subsection shall limit the power of the department head to suspend a subordinate for a reasonable period not exceeding 10 days. In case an employee is again suspended within 6 months for any period whatever, the employee so suspended shall have the right of hearing by the commission on the second suspension or any subsequent suspension within said period the same herein provided for in demotion or dismissal proceedings.

(2) The commission shall appoint a time and place for the hearing of said charges, the time to be within 3 weeks after the filing of the same, and notify the person possessing the appointing power and the accused of the time and place of such hearing. At the termination of the hearing the commission shall determine whether or not the charge is well founded and shall take such action by way of suspension, demotion, discharge or reinstatement, as it may deem requisite and proper under the circumstances and as its rules may provide. The decision of the commission shall be final. Neither the person possessing the appointing power nor the accused shall have the right to be represented by counsel at said hearing, but the commission may in its discretion permit the accused to be represented by counsel and may request the presence of an assistant district attorney to act with the commission in an advisory capacity.

(3) If the county and a labor organization representing employees of the county enter into a collective bargaining agreement under subch. IV of ch. 111, the agreement may provide that the provisions of the agreement relating to dismissal, demotion and suspension shall supersede this section with respect to employees covered by the agreement while the agreement is in effect. This subsection does not apply to any action under sub.(1) to suspend an employee with pay.

...

### **BACKGROUND**

In January, 1995, John Paul Thompson (Grievant) was promoted to a Deputy II position and assigned to the Jail. Following a reorganization of the Jail, most Deputy II's, including Thompson, were reassigned from the Jail to the Criminal Investigation Bureau (CIB), General Investigation Section. Also in 1995, Thompson received an employe activity document (warning) for failure to perform his duties in the Jail. In May, 1995, Thompson



received a performance appraisal document which indicated he did not work well independently. In 1996, Thompson received an oral warning for incomplete paperwork. Thompson did not challenge any of these actions by the Sheriff.

In the fall of 1997, an internal investigation was conducted regarding the Grievant's alleged misconduct. Sometime in mid-November, 1997, Thompson was reassigned to the CIB's Welfare Fraud Section from the General Investigation Section and ordered to get further training in interviewing witnesses. 1/

---

*1/ The internal investigation failed to show that Thompson had committed any actionable misconduct but his transfer and retraining regarding interviewing techniques were done essentially as a response to the internal investigation and complaint that had been filed regarding Thompson's failure to properly Mirandize a suspect. Thompson essentially admitted receiving all the oral warnings described herein, but stated that he never received any written warnings.*

---

During negotiations which led to the 1998-2000 collective bargaining agreement, the County proposed to eliminate a number of job classifications such that the classification of Deputy, Deputy I, Deputy II and Sergeant would be revised to eliminate the Deputy II classification at the Criminal Investigation Bureau (CIB) and in the Jail. The County wanted this flexibility in order to assign staff more easily. The Union negotiated with the County regarding its concerns. However, the Union was concerned for the protection of the jobs of employees whose classifications would be eliminated by the County's proposal, as these employees had taken exams and been placed on eligibility lists before receiving their positions. As a compromise, the Union and the County bargained the language contained in Section 3.01(5) of the effective labor agreement regarding "cause" for reassignment.

Union President Robert Hillman stated that it was his understanding from negotiations that "cause" in Section 3.01(5) meant that employees would have to violate department rules or demonstrate that they were not properly performing their duties before they could be reassigned under this paragraph. Union Business Agent Gerald Rieder stated that the meaning of the word "cause," as contained in Section 3.01(5), meant that the Sheriff did not have the authority to remove anyone from their position without having a specific reason therefor. However, Rieder stated that from negotiations he did not understand that such a specific reason would include the supervisor not liking the employee's work.

Labor Relations Director Henry Zielinski stated that the elimination of classifications in the Sheriff's Department was a pivotal issue to the 1998-2000 contract. The language regarding "cause" to reassign was placed in the agreement, according to Zielinski, so that employees could not just be moved into different jobs without a reason. Zielinski also stated that in the 1998-2000 contract the parties struck all contractual references to transfers and put in the word "assignment" or "reassignment" indicating, in his opinion, that the Sheriff had the

power to reassign and to assign deputies subject only to the Union's right to grieve the Sheriff's decision. Zielinski also stated that there was no language inserted into the agreement which would control the movement of employees into different jobs except the use of the term "cause" for reassignment.

Prior to January, 1998, the CIB contained a Welfare Fraud division which handled cases on a case-by-case basis with no specific number of cases per month that had to be completed. Toward the end of 1997, the State of Wisconsin began implementing a new program called "W2" (Welfare to Work). The W2 program was to be effective January 1, 1998, and included drastic changes in how the CIB Welfare Fraud Section would complete its work. Under the new W2 program, old fraud cases that deputies were working on had to be sent back to a State gatekeeper who would review them for further investigation or closure and, if necessary, the gatekeeper would send cases back through the gate for investigation by County deputies. In addition, any new welfare fraud cases would be handled by the gatekeeper and distributed to County welfare fraud supervisors for distribution to deputies to investigate and process.

Due to the W2 program, the State of Wisconsin committed itself to essentially funding the Welfare Fraud work of the County, if County deputies processed a sufficient number of welfare fraud cases during the calendar year 1998. During 1998, the State indicated to the Sheriff's Department that it would have to complete 1,308 cases in order to continue to receive W2 State funding for welfare fraud case processing. As of August 21, 1998, there were seven welfare fraud investigators in the CIB, including the grievant, John Paul Thompson. 2/ After the imposition of W2, the County CIB welfare fraud deputies were given a 90-day time limit in which to process their cases and send them back through the gatekeeper for evaluation and payment.

---

*2/ As of June, 1999, the number of County deputies handling welfare fraud cases in the CIB had declined to four deputies due to a decrease in caseload in this area.*

---

### FACTS

There are 40-50 employees in the CIB, in various divisions: General Investigations, Witness Protection, Drug Unit, Special Investigations and the Welfare Fraud Unit. The Welfare Fraud Section was supervised overall by Detective Inspector Misko until July, 1998, when Detective Inspector Delaney took over in that Section following Misko's transfer.

Between January, 1998 and March, 1998, Sergeant Moore gathered statistics which showed that no cases were being completed by Welfare Fraud Deputies during this timeframe. Moore shared her findings with Deputy Inspector Misko. Sergeants Moore and Zens then

counseled all Welfare Fraud Deputies that W2 funding would be withdrawn by the State if cases were not processed in a timely fashion and if the number of completed cases did not increase.

During this timeframe, Thompson admitted that Moore and Zens counseled him more than once regarding his productivity. Specifically, Moore told Thompson that he should let clerical employees type his reports because he was taking too much time to type his reports and that he was behind in his cases. Moore also told Thompson that if he did not get more cases completed, he would be issued a disciplinary warning. Moore told Thompson that he was not to ride in the squad car he shared with Deputy Schattschneider. Rather, Moore instructed Thompson that the two officers should share the car, one using it in the mornings and the other using it in the afternoons.

In July, 1998, Deputy Inspector Delaney took over the Welfare Fraud Section. At this time, Sergeant Moore again studied the statistics of case completions and found that there were few cases being processed and completed by the Welfare Fraud Section. Moore shared her findings with Delaney. At this time, Delaney counseled all Welfare Fraud Deputies that under W2, funding for Welfare Fraud cases would be withdrawn if Deputies did not process and complete 16 cases per month during the remainder of the calendar year. By memo dated August 18, 1998, to all Welfare Fraud Deputies, Captain Moore advised all Welfare Fraud Deputies as follows:

. . .

As we have embarked on a mission to accomplish the goal of completing 654 3/ welfare fraud investigations as a unit for the remainder of the 1998 year, I am hereby notifying you that **you are responsible for completing 16 cases per month.** It is expected that you will make every effort to attain this goal and if at any time you experience some difficulty in doing so, you will consult with your immediate supervisory (sic) as soon as possible to resolve any issues or problems that impede your progress.

Also, you are hereby ordered to complete and turn in to Sgt. Zens any welfare investigations that were assigned to you prior to August 6, 1998, no later than Friday, August 28, 1998. Be advised that failure to do so may result in disciplinary action. (Emphasis in original)

. . .

---

*3/ In July, 1998, Delaney gave Welfare Fraud investigators a grace period to complete 1,308 cases, requiring that only one-half that number be completed by the end of 1998.*

---

Thompson admittedly received a copy of this memo. Thompson also admitted that at this time, Moore told him he was behind in his cases and that he had to complete 16 cases per month. At some point during this period, Sergeant Moore urged Welfare Fraud detectives to use overtime in order to complete the required 16 cases per month. Thompson refused to use overtime to increase the number of cases he completed per month and Thompson suggested that Moore would have to force him to work overtime. Moore also told Thompson in July, 1998, that his reports were still not well-drafted, that he was behind in his case numbers and that he should no longer type his reports. 4/

---

*4/ Thompson was still attempting to type his own reports when he received this warning.*

---

On August 21, 1998, Sergeant Zens issued the following memo to Deputy Inspector Delaney regarding Welfare Fraud investigation statistics:

. . .

The following number of cases have been sent to us from the Gatekeeper Jackie Trice:

8/06/98	13
8/14/98	13
8/18/98	6
8/20/98	10

---

<b>Total:</b>	<b>42 cases</b>
---------------	-----------------

The following number of cases have been submitted to the Gatekeeper:

Detective Kostopulos	9
Detective Maki	3
Detective Pautz	2
Detective Schattschneider	0
Detective Stewart-Hankins	1

Detective Thompson	3
Detective Wisch	1
<b>Total:</b>	<b>19 cases</b>

...

At this time, Deputy Inspector Delaney met again with all Welfare Fraud investigators and specifically stated that each investigator would have to complete 16 cases per month; that productivity had not increased since his last meeting with the investigators and that employes would be let go or reassigned if productivity did not increase. Thereafter, Delaney looked at case numbers, employe personnel files, hours worked on Welfare Fraud cases by each investigator and decided to transfer Thompson, Pautz and (later) Denker. None of these employes received the \$.50 per hour premium after their transfers. No grievances were filed by Pautz or Denker.

It should be noted that Detective Wisch and Stewart-Hankins did not work full-time on Welfare Fraud cases during 1998. Wisch was off due to an injury for an extended period in early 1998 and Stewart-Hankins was assigned part-time to Welfare Fraud in 1998. On August 28, 1998, Sergeant Moore generated the following statistics showing the number of hours per month Thompson had worked on Welfare Fraud cases:

...

**Subject: Welfare Fraud/Tracking Form Totals  
Detective Thompson**

Month	January	February	March	April	May	June	July	August
Total	5.0	0.5	12.5	44.0	43.0	43.1	39.1	39.2

...

During all times relevant hereto, Thompson was assigned to work full-time on Welfare Fraud cases.

Sometime in September, 1998, Thompson was reassigned to the Court and Auxiliary Bureau from his position in Welfare Fraud. At this time, Sergeant Moore told Thompson that he was being transferred because of his poor job performance. Thompson stated he never received written notification regarding the reasons for his transfer.

## POSITIONS OF THE PARTIES

### County

The County argued initially that the grievance is not arbitrable given the law on the immemorial powers of the Sheriff. In this regard, the County urged that the constitutional powers of the Sheriff cannot be limited under the case law. Investigatory work such as that done at the CIB is part of the immemorial powers or duties reserved to the Sheriff under the constitution. As the Sheriff is not a party to the collective bargaining agreement, he is free to exercise his powers without regard to that agreement, in the County's view. Thus, the County urged that the Sheriff's assignment of Thompson to the Court Bureau, being a part of the Sheriff's constitutional powers to maintain law and order and preserve the peace by assigning employes, cannot be overturned by the Arbitrator and cannot be limited by the collective bargaining agreement.

Even assuming the immemorial duties or powers of the Sheriff are not implicated in this case, the County urged that it had cause to reassign Thompson to the Court Bureau from the CIB. In this regard, the County noted that Thompson had exhibited low performance during his time at the CIB. In his testimony, the County observed, Thompson admitted that he was counseled on several occasions by his supervisors at the CIB while he was working in the Welfare Fraud Section. 5/ The County also noted that the record showed that Thompson had been formally reprimanded and required to take additional training prior to his transfer to the Welfare Fraud Section.

---

*5/ The County noted that Thompson did not testify in this own behalf, but only testified adversely, as a witness called by the County.*

---

At Welfare Fraud, Thompson proved himself unable to perform the work. In this regard, the County urged that Thompson and others had been notified that they must process more cases or State funding would cease. Even after formal notification that improvement had to be made, Thompson failed to improve in his numbers, failed to follow his supervisor's instructions (such as making greater use of clerical staff to type his work) and refused to work overtime to complete his assignments. Ultimately, the County cut two employes from the Welfare Fraud Section due to a loss of State funding for the program. The County urged that Thompson did not prove that he had a satisfactory job performance and urged the Arbitrator to deny and dismiss the grievance in its entirety.

### Union

The Union argued that the Sheriff failed to comply with Article 3, Section 3.01(5) when he demoted Thompson from CIB to the Court Bureau. In this regard, the Union noted that Sec. 59.25(8)(b), Stats., defines "cause" as being incompetent to perform one's duties. In

addition, this section of the statutes also requires the Sheriff to report to a grievance committee with a specific complaint regarding a deputy's conduct and that only after such complaint is filed may the Sheriff suspend or demote a deputy. The Sheriff failed to do either of these things in this case, essentially denying Thompson due process.

The Union argued that the evidence is insufficient to prove that Thompson was incompetent to perform his duties at CIB-Welfare Fraud. In this regard, the Union noted that all cases were completed by Thompson on or before their due date; that no performance standards were promulgated by the CIB to fairly judge the level of competence of any of the detectives in that Section. Thus, the Union urged that the Sheriff improperly reassigned/demoted Thompson from CIB to the Court Bureau and the Union sought an award reinstating Thompson to the CIB with full back pay.

### **Reply Briefs**

#### **County**

The County argued that Thompson was not demoted but that he retained his Deputy I title even after he was reassigned. Even if Thompson could be considered to have been demoted in this case, such an action would not be arbitrable as the Personnel Review Board has exclusive jurisdiction over such claims under the County's ordinances. In this regard, the County noted that only Thompson's job assignment changed and that the loss of a \$.50 per hour premium due to reassignment cannot constitute a demotion. Furthermore, the County urged that demotions are not subject to the collective bargaining agreement but rather are subject to the Wisconsin Statutes (Sec. 63.10) and Chapter 33 of the County ordinances. Thus, in the County's view, the Arbitrator has no jurisdiction of the Union's claim that Thompson was demoted and arbitration cannot be had of this issue.

In any event, the County argued that the Sheriff had cause to reassign Thompson, reiterating many of its arguments in its initial brief. In the alternative, the County argued that the Sheriff had the constitutional power to reassign Thompson even if the Sheriff had no cause for reassignment. The constitutional law has reserved to the Sheriff the right to assign employees. In addition, the County argued that it is up to the Sheriff to determine, under the contract, whether cause existed for Thompson's reassignment. In either case, the County urged that the grievance should be denied and dismissed in its entirety as the Sheriff had met both his contractual and constitutional duties and properly reassigned Thompson.

#### **Union**

The Union waived its right to file a reply brief by letter received December 14, 1999.

## DISCUSSION

The County has argued that the grievance is not arbitrable because the Sheriff's constitutional powers to assign deputies cannot be limited by the collective bargaining agreement or any arbitration award. As the Arbitrator of this case, I agree that my only authority is created by the labor agreement. In addition, it is axiomatic that labor contracts are only binding on the parties thereto. Here, the County and the Union are bound by the labor contract, not the Sheriff. Furthermore, I agree with the County that it is for the courts to decide constitutional questions.

However, it does not follow from the above observations that the instant case cannot be decided in arbitration. The state of the law regarding the Sheriff's constitutional powers is not relevant to this case. This case is governed by the labor agreement and I conclude that I have jurisdiction to decide the substantive issue herein arising under the effective labor agreement.

I turn now to the issue whether the County had cause to reassign Thompson from the CIB. Under Section 3.01(5) of the labor agreement, Thompson was assigned to the CIB and paid an additional \$.50 per hour ". . . as long as cause does not exist for . . . reassignment." The County has argued that cause existed to reassign Thompson.

A review of the undisputed evidence revealed the following facts. During 1998, after the W2 program became applicable to all County Welfare Fraud cases, the State advised the County that its WF investigators would have to complete 1,308 cases in 1998 and that the State expected investigators to complete the processing of each case within 90 days. 6/ From January through March 1998, the County found that no welfare fraud cases had been completed by its seven WF investigators.

---

*6/ Ninety days can reasonably be read to mean ninety calendar days where no different notation is made.*

---

In July, 1998, after Sergeant Moore again gathered statistics showing few cases were being completed in the WF section, Deputy Inspector Delaney counseled all WF investigators that W2 funding would be withdrawn by the State if WF investigators did not meet State time targets and if case completion expectations were not met. On August 18, 1998, all WF investigators including Thompson received a memo stating that each investigator must complete 16 cases per month from August 18<sup>th</sup> through the end of 1998. An August 21, 1998 internal memo showed that Thompson failed to get 16 cases completed during August, having completed only three cases from August 6<sup>th</sup> through August 20<sup>th</sup>. An August 28<sup>th</sup> internal memo showed that although Thompson was employed full time in Welfare Fraud, his case tracking forms showed that he had worked only an average of 28.3 hours per month on WF cases from January through August 1998.



The above evidence clearly demonstrates that Thompson had problems with his productivity and that he knew that his supervisors expected improvements in his productivity. Thompson never received a formal written warning for low productivity prior to his being reassigned to the Court Bureau and all but one of the seven WF investigators had case completion numbers equal to or worse than Thompson's during the relevant period. The question then arises whether based upon the circumstances of this case, the County had cause to reassign Thompson in September, 1998.

Although it is a close question, I believe that the County did have cause to reassign Thompson under the circumstances proven in this case. Close examination of Thompson's testimony indicates that he made the following significant admissions. Thompson admitted that he was informed that he had to be timely in his cases and that they had to be completed in 90 days. Thompson admitted that Sergeant Moore told him on more than one occasion not to type his own reports and that he should avoid driving together with Schattschneider in the squad to save valuable time. Thompson admitted that Zens and Moore counseled him on more than one occasion regarding his productivity; that Deputy Inspector Delaney twice counseled him and all other WF investigators regarding low productivity and stated in August that investigators would be let go or reassigned if productivity did not increase. Thompson also admitted that Zens and Moore told him that if he did not produce more cases he would be transferred; that in June, 1998, Moore told him that he had to produce more cases or he would receive a written warning; and in July, 1998, Moore and Zens told him that if there was no increase in his case numbers, action would be taken. Thompson further admitted that he refused to use overtime to get his cases completed, although Moore had urged him to do so.

Therefore, Thompson's assertion that County supervisors never revealed specific expectations for productivity is, in light of Thompson's own admissions, incredible. Furthermore, there was no evidence to support Thompson's assertion that Sergeant Zens told him not to worry about his productivity during the Summer of 1998. Rather, it is clear that Thompson knew that he had to complete his cases in the 90-day period after assignment and that he was expected to complete 16 cases per month. Thompson also clearly knew that he was not meeting these requirements prior to his reassignment. Whether Sergeant Zens instructed Thompson (as he asserted) to type his reports on the computer, is not relevant as Sergeant Moore made it clear on more than one occasion that Thompson was to have the clerical staff type his reports because he typed too slowly. Thus, the evidence supports the County's conclusion that Thompson had failed to meet his supervisors' productivity expectations.

In addition, Thompson's work record demonstrates that he has had difficulty with productivity, paperwork and the performance of expected duties intermittently since 1995. In this regard, Thompson admitted that in 1995 he received a written warning for not performing duties expected of him; that in 1996 he received a verbal warning for incomplete paperwork; that in 1997, he received a reprimand notice for failing to follow work rules and for failing to perform his assigned duties and (in the same year) Thompson was counseled for failing to properly write up a report.

The Union has argued that because the County has refused to continue to pay Thompson the \$.50 per hour he had formerly received in Welfare Fraud, that Thompson was demoted. I disagree. Thompson's classification is now as it has been in the past — Deputy I. The fact that his work has changed and he is no longer receiving premium pay does not constitute a demotion.

The Union has argued that the County should have proven that Thompson was incompetent to perform his duties, as defined under Sec. 59.25(8)(b), Stats. I disagree. In my view, the term "cause" is a term of art in labor relations, having a clear meaning to labor relations professionals. Thus, the use of this term gives rise to the presumption that in their negotiations, the parties intended to require that there be a reasonable basis for reassignment—such that reassignment could not be for arbitrary and capricious reasons. Had the parties chosen to use the higher standard of incompetence to perform duties, they could have easily referenced that standard, Sec. 59.25, Stats., or the Wisconsin Statutes in general. The parties choose not to do so. 7/

---

*7/ Both the County and the Union submitted bargaining history evidence and argued regarding what the parties intended by the use of the word "cause" in Section. 3.01(5) of the contract. For the reasons stated above, I find this evidence irrelevant.*

---

Finally, the County argued that its ordinances and Civil Service laws and rules should control this case. I disagree. The County failed to submit any evidence that Thompson had been charged under any County ordinance or the County's Civil Service laws and rules. In any event, Thompson has not been suspended, demoted, reevaluated or discharged, which appear to be prerequisites for the use of the County's ordinances and Civil Service laws and/or rules. Therefore, I find these ordinances, laws and rules to be inapposite.

In all of the circumstances of this case, the County had a rational and reasonable basis for reassigning Thompson, which was essentially due to the implementation of the W2 Program, a declining WF workload, as well as Thompson's failure to complete cases and his repeated failure to follow his supervisors' directives. Thus, the County's reasons for reassigning Thompson were not arbitrary or capricious and, I issue the following

### **AWARD**

There was cause for reassigning Deputy Thompson out of the Civil Investigation Bureau. The grievance is therefore denied and dismissed in its entirety.

Dated in Oshkosh, Wisconsin, this 18<sup>th</sup> day of January, 2000.

Sharon A. Gallagher /s/  
\_\_\_\_\_  
Sharon A. Gallagher, Arbitrator