

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
DOOR COUNTY DEPUTY SHERIFF'S ASSOCIATION

and

COUNTY OF DOOR

Case ID: 669.0000

Case Type: MA

(Drug Interdiction Grievance)

AWARD NO. 7998

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**Appearances:**

Brendan P. Matthews, Attorney, MacGillis Wiemer, LLC, 11040 W. Bluemound Road, Suite 100, Milwaukee, Wisconsin, appearing on behalf of the Door County Deputy Sheriff's Association.

Sean P. Donohue, Door County Corporation Counsel, Government Center, 421 Nebraska Street, Sturgeon Bay, Wisconsin, appearing on behalf of Door County.

**ARBITRATION AWARD**

The Door County Deputy Sheriff's Association, hereinafter referred to as the Association, and County of Door were parties to a 2022-2024 collective bargaining agreement (CBA). On November 6, 2023, the Association filed a grievance arbitration request with the Wisconsin Employment Relations Commission. Pursuant to that request and the terms of the applicable collective bargaining agreement that provides for final and binding arbitration of unresolved grievances, the Commission assigned me to serve as arbitrator to decide the instant grievance. On January 23, 2024, the County filed an objection to the power of the arbitrator, citing the constitutionally protected power of the sheriff. On February 9, 2024, the Association filed a response to the County's objection. On February 12, 2024, I concluded the need for a factual record and hearing before deciding the arbitrability issue raised by the County. A hearing was held in Sturgeon Bay on April 8, 2024. The hearing was transcribed. Afterwards, the Association filed its initial brief on November 22, 2024, and an amended brief on November 23, 2024. The County filed a response on December 20, 2024. On January 10, 2025, the Association filed a reply brief. On January 13, 2025, the County submitted the hearing transcript. Having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned issues the following Award.

### ISSUE

The parties did not stipulate the issues to be decided. I find that the issues to be decided herein are as follows:

1. Does the Door County Sheriff have constitutional authority to assign deputies to the Drug Interdiction Special Assignment? If so, is the grievance filed by the Association therefore, not substantively arbitrable and outside the authority of the Arbitrator?
2. If the grievance is substantively arbitrable, did the County violate the CBA and/or binding past practice when it assigned deputies to the Drug Interdiction Special Assignment? If so, what is the appropriate remedy?

### DISCUSSION

There is strong legislative policy favoring arbitration in municipal collective bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes. *See* Wis. Stat. §§ 111.70(3)(a) 5, 111.70(6), *see also Joint School District No. 10 v. Jefferson Ed. Ass'n*, 78 Wis.2d 94 (1977).

The question of substantive arbitrability is a threshold issue for the arbitrator. The great weight of authority supports a conclusion that having the arbitrator initially decide the issue of substantive arbitrability is favored, even though the decision is subject to de novo review by the courts. In *Joint School District No. 10 v. Jefferson Ed. Ass'n*, the Wisconsin Supreme Court opined:

If the parties submitted the merits to the arbitrators and at the same time challenged the arbitrability of the question and reserved the right to challenge in court an adverse ruling on arbitrability, the court would decide the issue of arbitrability de novo. This procedure is similar to court procedure where a party challenges the court's jurisdiction. The court considers the question and may hold that it has jurisdiction. The parties then proceed to the merits of the case maintaining their right to continue the jurisdictional challenge on appeal. If we were to hold that under these circumstances the parties are bound by the arbitrators' decision on arbitrability, the party alleging nonarbitrability would be forced to enjoin arbitration or to refrain from participation in arbitration. Such a judicial procedure entails time and cost. If meaningful arbitration were thus indefinitely delayed, the purpose of sec. 111.70, Stats. and of the collective bargaining agreement could be defeated. *In contrast, allowing the arbitrator to make the initial determination of arbitrability, which is subject to de novo judicial determination, is desirable since it economizes time and effort.* The evidence bearing upon questions of arbitrability are very often relevant to the merits. An evaluation of the arbitrability issue may demand substantially the same expertise and experience with employment relations as a decision on the merits.

Numerous cases in other jurisdictions have endorsed this procedure of allowing the courts to determine arbitrability de novo after an arbitrator's initial determination. We find nothing in the development of "common law arbitration" in this state or in ch. 298, Stats., to bar the use of this procedure in Wisconsin.

At 106-108 (footnotes omitted, emphasis added).

In this case, the County maintains that the matter is not arbitrable and objected to the Arbitrator's power or authority to enforce the applicable collective bargaining agreement, citing the Door County Sheriff's constitutional authority. The County contends that the Sheriff's Office assignment of deputies to the Drug Interdiction Special Assignment cannot be constrained by the collective bargaining agreement or otherwise. In support of their objection, the County argues that the Wisconsin Constitution provides the Door County Sheriff with certain powers and duties that cannot be limited by a collective bargaining agreement. *See Dunn County v. Wisconsin Employment Relations Com'n*, 293 Wis.2d 637, 646-647 (2006). *See also, Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 301 Wis.2d 266, 281 (2007).

"A collective bargaining agreement cannot detach from the office of the sheriff those constitutional duties that the people have elected the sheriff to undertake." *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 301 Wis.2d 266, 303 (2007) (Dissent of Justice P. Roggensack). "A sheriff cannot be constrained by a collective bargaining agreement if he acts on his constitutional powers." *Washington Cnty. v. Washington Cnty. Deputy Sheriff's Ass'n*, 320 Wis. 2d 570, 576. (2009) "[W]hen the citizens of a county elect a sheriff, they empower that person to perform certain traditional functions free of other interference." *Manitowoc County v. Local 986B, AFSCME, AFL-CIO*, 186 Wis.2d 819, 829 (1992).

"The Wisconsin Constitution does not delineate the powers, rights, and duties of the office of sheriff." *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 301 Wis.2d 266, 281 (2007). "The case law has given meaning to the powers, rights, and duties of the office of sheriff protected by the state constitution." *Id.* "[P]owers, rights and duties recognized and clearly accepted by the courts as within the constitutional prerogative of the office of the sheriff are maintaining law and order and preserving the peace."<sup>1</sup> *Id.* at 292.

If the duties performed by an individual designated by the sheriff are among the constitutionally protected duties of a sheriff, the sheriff may not be restricted as to whom he or she appoints to perform the functions. *Id.* at 290-291. When determining if an assignment is constitutionally protected, the focus of the inquiry is not on the sheriff's power of appointment or the sheriff's ability to assign a task generally, but rather on the nature of the task assigned. *Id.* at 294, 298, and footnote 37. It is the "nature of the job assigned [to the appointee] rather than the general power of job assignment which must be analyzed in light of the sheriff's constitutional

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<sup>1</sup> See also: *Washington County v. Washington County Deputy Sheriff's Ass'n*, 192 Wis.2d 728, 739 (1995) ("[T]he supreme court has held that law enforcement and preserving the peace are duties that gave character and distinction to the office of sheriff at common law."); *Washington County v. Washington County Deputy Sheriff's Ass'n*, 320 Wis.2d 570, 580 (2009) ("The Wisconsin courts have determined that maintaining law and order and preserving the peace are parts of the sheriff's constitutionally protected duties.").

powers.” *Id.* at footnote 37 (see *Manitowoc County v. Local 986B, AFSCME, AFL-CIO*, 168 Wis.2d 819, 829 (1992), citing *Wis. Prof’l Police Ass’n v. Dane County*, 106 Wis.2d 303 (1982)). Therefore, if the nature of the job assigned is related to maintaining law and order or preserving the peace, the assignment falls within the constitutionally protected power of a Sheriff and cannot be limited by a collective bargaining agreement.

Two primary cases deal with a Sheriff’s constitutionally protected authority to assign duties involving maintaining law and order and preserving the peace.

First, *Manitowoc County v. Local 986B, AFSCME, AFL-CIO* involved the Manitowoc County Sheriff temporarily assigning a specific patrol deputy to undercover drug enforcement assignment. *Manitowoc County v. Local 986B, AFSCME, AFL-CIO*, 168 Wis.2d 819 (1992). The union complained that the Sheriff violated the collective bargaining agreement by creating and awarding a new position without posting the position as required by the collective bargaining agreement. *Id.* at 821-822. The Wisconsin Supreme Court found that undercover drug enforcement implicated both law enforcement and peace-preserving functions of the Sheriff, and therefore the assignment fell within the scope of the Sheriff’s constitutionally protected powers and could not be limited by the collective bargaining agreement. *Id.* at 829-830. The Court held the arbitrator exceeded their authority by enforcing the CBA provision that limited the Sheriff’s constitutional power to assign the chosen deputy. *Id.* at 831.

Second, in *Washington County v. Washington County Deputy Sheriff’s Ass’n*, in response to a large public event in the area (Harleyfest), the Washington County Sheriff created a special unit of two extra squad cars, each staffed with a Washington County deputy and a non-union municipal officer from a local police department. *Washington County v. Washington County Deputy Sheriff’s Ass’n*, 192 Wis.2d 728, 731 (1995). The special unit was not to respond to routine calls but only to disturbance calls, and would be the first to travel outside the county in the event of a request for assistance. *Id.* The Washington County Sheriff decided it was better to assign non-union municipal officers and keep the deputies in reserve and available for backup within the County as they are more familiar with the County as a whole *Id.* A deputy filed a grievance when he requested to take the place of a municipal police officer to obtain overtime, and was denied. *Id.* at 732. The deputy’s grievance alleged that the sheriff’s use of law enforcement personnel from outside the collective bargaining unit violated the collective bargaining agreement. *Id.* at 732-733. The Court determined that the work to be performed by the special unit, responding to and stabilizing emergency situations, implicated law enforcement and preserving the peace functions of the Sheriff. *Id.* at 739-740. Accordingly, the Court concluded that the Sheriff’s assignment to the special unit could not be limited by the CBA. *Id.* at 741. It made no difference that the assignment was temporary or that any deputy could have performed the duties assigned to the municipal officers. *Id.*

However, “not all matters related to the sheriff’s powers, rights, and duties to maintain law and order and to preserve the peace are constitutionally protected and within the total discretion of the sheriff.” *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 301 Wis.2d 266, 295 (2007). Courts have excluded from constitutional protection duties of the Sheriff that are “mundane and commonplace” or “internal management and administrative duties.” *Washington County v.*

*Washington County Deputy Sheriff's Ass'n*, 320 Wis.2d 570, 580 (2009). Examples of “mundane and commonplace” or “internal management and administrative duties” include:

- a. Food preparation for jail inmates. *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 301 Wis.2d 266, 299 (2007) (“Hiring and firing a food service provider is at best ancillary to the constitutional powers, rights and duties of the office of sheriff to operate the jail and take care of the jail inmates”);
- b. Security screening at a combined-use government building. *Washington County v. Washington County Deputy Sheriff's Ass'n*, 320 Wis.2d 570, 580 (“The nature of the job of security screening [operating the metal detector and x-ray machine at an entrance to the Washington County Justice Center, which houses offices, as well as the courts] is really administrative.” *Id.* at 580. “[W]aiving metal-detecting wand or listening for the buzzer to ring at the county’s combined-use office building is a far cry from the sheriff’s county-wide law enforcement responsibilities”... *Id.*); and
- c. Voluntary transport of federal and state prisoners for pay. *Ozaukee County v. Labor Ass'n of Wisconsin*, 315 Wis.2d 102, (Assignment of deputies to transport federal and state prisoners to and from the Ozaukee County jail under a non-mandatory money-generating contract for the rental of bed space is not a constitutionally protected duty of the sheriff’s office. *Id.* at 114.).

Thus, the question to be decided is whether the Drug Interdiction Special Assignment is a duty in furtherance of maintaining law and order and preserving the peace, or is the task “mundane and commonplace” or “internal management and administrative duties” of the Sheriff’s Office. I conclude that the Drug Interdiction Special Assignment is a duty directly in furtherance of maintaining law and order and preserving the peace.

Similar to the Manitowoc County case, the present case involves the assignment of specific deputies to a specific drug enforcement assignment, a drug interdiction operation. Also like the Washington County case, this case involves the appointment of individuals to a temporary duty without opening up the assignment to deputies wishing to obtain overtime. To determine if the job assignment falls within the scope of the Sheriff’s constitutionally protected powers, one must look to the nature of the job assigned. Clearly, the drug interdiction assignment implicates the law enforcement and peace-preserving functions of a Sheriff.

The assignment was for the specific purpose of drug interdiction on a specific day, in a specific geographical area, with a specific protocol. The primary purpose of the detail was to apprehend drug traffickers coming to the City of Sturgeon Bay, a task that can only be performed by law enforcement. Apprehending drug traffickers is not similar to the duties the courts have found to be mundane and commonplace or internal management and administrative duties of the Sheriff’s Office. The drug enforcement work assigned, to apprehend drug traffickers by stopping and searching vehicles for drugs with the support of canine deputies, is not ancillary to the Sheriff’s constitutional power of law enforcement and preserving the peace, but a direct attempt to prevent criminal activity. Apprehending drug traffickers is a duty that can only be provided by law enforcement, unlike security screening at a building entrance. Drug interdiction is not a non-

mandatory, money-generating duty, such as the transport of state and federal prisoners. The duties assigned were not ancillary, but a direct exercise of the Sheriff's law enforcement or preserving the peace power. The assigned duties were not administrative or internal management functions.

The assignment of drug interdiction duty, like undercover drug enforcement duty or mutual aid detail, involves the constitutionally protected duties of maintaining law and order and preserving the peace. As such, the Door County Sheriff's appointment to the Drug Interdiction Special Assignment falls within the constitutionally protected power of the Sheriff and cannot be limited by the collective bargaining agreement or otherwise. The Door County Sheriff cannot be restricted as to who is appointed to perform such duty. I conclude that I do not have the authority to enforce the collective bargaining agreement to the assignment because any overtime and seniority provision of the collective bargaining agreement, as applied to the Sheriff's assignment to the drug interdiction operation are illegal.

Given the foregoing, I conclude that the Association's grievance is not substantively arbitrable. Therefore, the County's objection is sustained and the grievance is denied.

Issued at the City of Madison, Wisconsin, this 27<sup>th</sup> day of March, 2025.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Anfin J. Wise, Arbitrator