

IN THE CIRCUIT COURT OF FIFTH JUDICIAL CIRCUIT  
COUNTY OF EDGAR, STATE OF ILLINOIS

**FILED**

NOV 13 2012

*Karen D. Halloran*  
Circuit Clerk, 5th Judicial Circuit Edgar County

Edward B. Motley- Sheriff of Edgar County,  
Illinois,

Petitioner/Plaintiff

v.

Steven Bierig-Arbitrator and the Illinois  
Fraternal Order of Police Labor Council,

Respondents/Defendants

NO: 12 MR 24

PETITIONER'S/PLAINTIFF'S  
RESPONSE  
TO MOTION TO DISMISS

Now comes the Sheriff of Edgar County, Illinois through Thomas F. McGuire, his Attorney in this matter, and for his Response states:

1. As To #1 – Admitted!
2. As To #2 – Admitted! Note in particular that the Sheriff is both a unit of local government and a public employer; see Carver v. Sheriff of LaSalle County, 203 Ill. 2d 497, 515, 787 N.E.2d 127 (2003).
3. As To #3 – Admitted! Further answering, the Sheriff asks this Court to take note that no Special And Limited Appearance was filed by the Labor Council. Instead, a Motion To Dismiss was filed. Consequently, the Labor Council has submitted itself to the jurisdiction of this Court as to the Sheriff's Petition; see Pearson v. Lake Forest Country Day School, 262 Ill. App.3d 228, 232, 633 N.E.2d 1315 (2nd Dist. 1994).
4. As To #4 – Admitted!

5. As To #5 – That there is an Agreement is Admitted! However, that the Agreement is lawful is DENIED due to the Management Rights of the Sheriff to run his Office having been usurped by the County Board and acquiesced to by the predecessor of the present Sheriff. Such is evidenced by the content of the Agreement (Attachment #1) and by the words of 315/4 of the Illinois Labor Relations Act found in 5 ILCS which states under the heading of “Management Rights”:

§ 4. Management Rights. Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives.

Further, as stated in (o) of 315/3 of the Illinois Labor Relations Act found in 5 Illinois

Compiled Statutes:

“County boards and county sheriffs shall be designated as joint or co-employers of county peace officers appointed under the authority of a county sheriff.”

(EMPHASIS ADDED)

Additionally, as stated in the aforesaid Carver ruling of the Illinois Supreme Court:

“In sum, a county sheriff is an independently elected county official who performs functions that are essential to the operation of government and whose office is funded by public funds”.

(EMPHASIS ADDED)

Add on to that stated in 55 ILCS 5/3-6018 entitled “Counties under 1,000,000; control of internal operation”; i.e.:

“In counties of less than 1 million population, the sheriff shall control the internal operations of his offices.”

All of such should cause this Court to conclude that it is the Sheriff who runs his Office; subject to the financial appropriations of the County.

6. As To #6 – Denied! Such is so in that neither Hopper nor Burgin were appointed Full-Time Deputies of the Sheriff pursuant to the terms of the Sheriff’s Merit System Law as found in 55 ILCS 5/3-8010 (entitled “Certification of applicants”) the next to last paragraph of which states:

“The sheriff shall make appointments from those persons certified by the Commission as qualified for appointment. If the sheriff rejects any person so certified, the sheriff shall notify the Commission in writing of such rejection.”

(EMPHASIS ADDED)

That just mentioned statutory provision was in full force and effect at all times mentioned in the Motion To Dismiss which causes this writing. Therefore, how long Hopper and Burgin worked, whether or not they paid Labor Council dues or acted under color of law is/was of no consequence in that:

(A) Nothing in the Agreement between the Labor Council and the Sheriff/County diminished or negated the requirements of the aforementioned 5/3-8010 of the Sheriff’s Merit System Law as found in 55 ILCS. Based on Ehlers v. Jackson County Sheriff’s Office Merit Commission, 183 Ill.2d 83, 697N.E.2d 717 (1998) the Agreement could have (but did not) negated or diminished the terms of the Sheriff’s Merit System Law found in 5/3-8001 et.seq. of 55 Illinois Compiled Statutes; specifically 5/3-8010.

(B) The Sheriff is prepared to show that when Burgin began his initial employment with the then Sheriff, Burgin had not gone through the process found in 5/3-8010 of the Sheriff’s Merit System Law as found in 55 ILCS. Upon the

Petitioner/Plaintiff becoming aware of such, the Petitioner/Plaintiff no longer used Burgin as a Full-Time Deputy. Instead, the Sheriff used Burgin only as a Part-Time Deputy; even though Burgin requested to be used Full-Time as opposed to Part-Time. Subsequently, Burgin (while a Part-Time Deputy) did go through the procedures found in 5/3-8010 and was appointed a Full-Time Deputy of the Petitioner/Plaintiff by the Petitioner/Plaintiff. In such status, there was a requirement for successful completion of a 12 month probationary period; said requirement being found in the last paragraph of the aforementioned 5/3-8010 (entitled "Certification of applicants") of the Sheriff's Merit System Law by such stating:

"The rules and regulations of a Commission shall provide that all initial appointees shall serve a probationary period of 12 months during which time they may be discharged at the will of the sheriff."

(EMPHASIS ADDED)

Note also that Article 13 Section 1 entitled "Probationary Period" of the Agreement states:

"Any new employees shall serve a probationary period of twelve (12) months. During the probationary period the employee may be discharged without further recourse; provided, however, the Employer may not discharge or discriminate for the purpose of evading this Agreement or discriminating against Union members. Upon completion of the twelve (12) month probationary period, the employee shall be granted seniority rights from his or her most recent date of hire."

Consequently, Burgin was eventually lawfully employed as a Full-Time Deputy pursuant to the terms of the aforementioned 5/3-8010 and Article 13, Section 1 of the Agreement. However, (repeated for emphasis), the probationary period found in 5/3-8010 of 55 ILCS was not negated by the terms of the Agreement- even though it could have been, based upon the Ehlers ruling of the Illinois Supreme Court mentioned on Page 3 of this writing.

It was during his probationary period that Burgin was terminated from his employment as a Full-Time Deputy of the Sheriff. Based upon Romanik v. Board of Fire and Police Commissioners of the City of East St. Louis, 61 Ill.2d 422, 338 N.E.2d 397, the Sheriff could and did terminate the employment of Burgin as a Full-Time Deputy of his Office. He did so as the result of Burgin's actions described in Angelina Cianfaglione v. Terry Rogers, No. 10-2170 of the United States District Court for the Central District of Illinois.

(C) Based upon Vanko v. Sheahan, 278 Ill.App.3d 302, 662 N.E.2d 512 (1st Dist. 1996), a Sheriff can lawfully terminate the employment of a Full-Time Deputy who has not been appointed to the position of Full-Time Deputy pursuant to the terms of the Sheriff's Merit System Law. That is what the Petitioner/Plaintiff did in the case at hand when he became aware that Burgin had not gone through the process of 5/3-8010 of 55 Illinois Compiled Statutes and had not been lawfully appointed as a Full Time Deputy by the Sheriff pursuant to the requirements of 5/3-8010.

(D) Hopper was not lawfully employed as a Full-Time Deputy by the Sheriff pursuant to the terms of the aforementioned 5/3-8010 of 55 Illinois Compiled Statutes. Instead he occupied the position of Drug Task Force Coordinator of Edgar County, Illinois. He occupied such position as the result of a Resolution enacted by the County Board on May 16, 2001; see Attachment # 2 to this writing consisting of two (2) Pages. Note the content of the last three (3) Paragraphs on Page 1 of the Resolution. Then take note that the position of "special deputy" by the terms of 5/3-6011 of 55 Illinois Compiled Statutes (entitled "Special deputies") states:

"A sheriff may appoint a special deputy to serve any summons issued out of a court, by indorsement thereon, substantially as

follows: "I hereby appoint .... my special deputy, to serve the within process," which shall be dated and signed by the sheriff."

Consequently, the functioning of a "special deputy" is restricted to the service of civil process. Further, to have the unrestricted powers of a Deputy of the Sheriff (see 5/3-6015 of 55 Illinois Compiled Statutes entitled "Powers of deputies" which states:

"Deputy sheriffs, duly appointed and qualified, may perform any and all the duties of the sheriff, in the name of the sheriff, and the acts of such deputies shall be held to be acts of the sheriff."

(EMPHASIS ADDED)

the individual would have to abide by the Sheriff's Merit System Law (i.e., 55 ILCS 5/3-8010) and the Sheriff would have to appoint a Full-Time Deputy pursuant to the terms of 5/3-8010. Note that the Sheriff is prepared to prove that did not occur.

Note that the just mentioned Resolution was followed by the attached two (2) Page Drug Task Force Coordinator Intergovernmental Agreement signed on July 13, 2005 (Attachment #3 to this writing). Such shows that while the position of Drug Task Force Coordinator was authorized by Resolution in 2001, the Intergovernmental Agreement allowing such occurred in 2005. Regardless of the gap in time, the County Board had no authority to create the position of Drug Task Force Coordinator, for the management of the Sheriff's Office was in the hands of the Sheriff subject to the Financial appropriation of the County Board; see Carver v. Sheriff of LaSalle County, 203 Ill.2d 297, 322 (2003). Even if all of that just stated is of no consequence to be a Full-Time Deputy required following the terms of 5/3-8010 of the Sheriff's Merit System Law found in 55 Illinois Compiled Statutes.

The Sheriff is aware of the one (1) Page document entitled "Certification Of Representative" issued by the Illinois Labor Relations Board on February 13, 2003; see

Attachment # 4 to this writing. Note the words "...found to be appropriate for the purposes of collective bargaining." Note also that after the word "Includes" are the words "All full time deputies...". The Sheriff submits that since Hopper and Burgin were not appointed by the Sheriff pursuant to the terms of 5/3-8010 of the Sheriff's Merit System Law, neither were covered by the words "...full time deputies..". Note also when the Agreement between the Labor Council and the County/Sheriff of Edgar County became effective on December 1, 2008, as of said date, neither Hopper nor Burgin were lawfully appointed Deputies pursuant to the terms of 5/3-8010 of 55 Illinois Compiled Statutes.

Finally, the Sheriff requests the Court to take note that the Merit Commission had no authority to create the position of Drug Task Force Coordinator and conduct testing for such position. Such is said due to Schalz v. McHenry County Sheriff's Department Merit Commission, 113 Ill.2d 198, 497 N.E.2d 731 (1986) which is cited for the proposition that an administrative agency has only the powers the Illinois General Assembly conferred upon it or those powers reasonably inferred from the statute by which the administrative agency was created. That legislation is the Sheriff's Merit System Law as found in 5/3-8001 of 55 Illinois Compiled Statutes. So too neither did the County Board have the authority to create the position based upon the Carver v. Sheriff of LaSalle County case found on Page 6 of this writing.

7. As To #7 – Denied- in that Hopper was never legally appointed as a Full-Time Deputy pursuant to the terms of the Sheriff's Merit System Law. Further, the Sheriff adopts that found in this writing as the basis for his denial.

8. As To #8 – Admitted – but further answering, the Sheriff states that he lawfully terminated the employment of Burgin pursuant to the terms of Romanik v. Board of Fire and Police Commissioners of the City of East St. Louis, 61 Ill.2d 422, 338 N.E.2d 397, because at the time of his termination of employment Burgin was a probationary Full-Time Deputy of the Sheriff.

9. As to #9 – the Sheriff admits all EXCEPT that the Sheriff did not authorize the State’s Attorney to select an Arbitrator and the State’s Attorney at no time consulted with the Sheriff or sought the Sheriff’s authorization to select an Arbitrator. Further, while the Sheriff recognizes the State’s Attorney is the legal advisor for both the County Board and the Sheriff, the fact that the County Board and the Sheriff did not have uniform interests or positions as to the dispute, such should have (as a matter of elementary fairness) necessitated the State’s Attorney to have the Sheriff involved in the selection of an Arbitrator; such not occurring in the case at hand.

10. As To #10 – Admitted!

11. As To #11 – Denied! The Petition/Complaint of the Sheriff contends that the Arbitrator lacks jurisdiction/authority as to the matter at hand due to neither Burgin nor Hopper being lawfully appointed as Full-Time Deputies. Since they were not lawfully appointed as Full-Time Deputies, the terms of the Agreement do not pertain to them; particularly the Grievance Article of the Agreement. Note that 315/8 upon which the Union relies contains the words

“... which shall apply to all employees in the bargaining unit.”

(EMPHASIS ADDED)

Clearly, by the content of this writing, the Sheriff contends that neither Hopper nor Burgin were lawfully within the bargaining unit due to non-compliance with the terms of 5/3-8010 of the



Sheriff's Merit System Law.<sup>1</sup> As to Sections 15, 16, 17 and 18 of the Uniform Arbitration Act , the present posture of the case does not allow such to be applied by the Court, for what is before this Court is Respondents'/Defendants' Motion To Dismiss.

12. As To #12 – Denied! The denial of the Sheriff is based upon the principle of law found in School District #46, Kane, Cook and DuPage Counties v. Del Bianco, 68 Ill.App.2d 145, 215 N.E.2d 25 (4th Dist. 1966); i.e., if the dispute is not clearly within the clause of the Agreement requiring arbitration, the Court should deny Arbitration. Such view is supported by Orenic v. Illinois State Labor Relations Board, 127 Ill.2d 453, 462, 537 N.E.2d 784 (1989), which allows this Court to issue a Writ of Prohibition.

13. As To #13 – Denied! While the claim is emotional, the fact and law applicable to the mater necessitate the conclusion that what the Union seeks is to have Hopper and Burgin as Full-Time Deputies even though the terms of the Sheriff's Merit System Law were not followed (5/3-8010), and Burgin was dismissed while on Probation.

**WHEREFORE**, the Sheriff requests this Court to deny the pending Motion To Dismiss.

Respectfully submitted,



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Petitioner/Plaintiff Sheriff

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<sup>1</sup> Note that while Burgin eventually was appointed as a Full-Time Deputy, pursuant to the terms of the Sheriff's Merit System Law, after being lawfully terminated by the Sheriff due to being a probationary Full-Time Deputy (Romanik v. Board of Fire and Police Commissioners of the City of East St. Louis, 61 Ill.2d 422, 338 N.E.2d 397, such termination of employment was allowed by both 5/3-8010 of 55 Illinois Compiled Statutes and Article 13 section 1 of the Agreement. Therefore no arbitration was required or authorized.