MEMORANDUM

TO: Co-Employer of Burgin and Hopper

FROM: Thomas F. McGuire

SUBJECT: **Is the County and Sheriff entitled to Setoff as to the monies owed Burgin and Hopper due to their termination of employment being reversed.**

DATE: July 7, 2014

1. The answer is Yes!

Such is said because there is **NOTHING** in the Contract that limits/prohibits the County from seeking Setoff from Burgin/Hopper. Could the Union have negotiated with the County Board and Sheriff a provision in the Contract that Setoff with interest would not be allowed and **IF** the Sheriff and County Board agreed to such **THEN** the County would be required to respect such a provision. **HOWEVER, NO SUCH PROVISIONS ARE FOUND IN THE CONTRACT!**

Based upon the following words from the Illinois Supreme Court there is no need for the County Board to follow that which could have been put in the Contact – **BUT WAS NOT!** See the following words from the Illinois Supreme Court in Ehlers v. Jackson Cnty. Sheriff's Merit Comm'n, 183 Ill. 2d 83, 93, 697 N.E.2d 717, 722-23 (1998), in which Ehlers was represented by the FOP Labor Council and this writer represented the Sheriff:

> "A union is allowed a great deal of flexibility in serving its bargaining unit during contract negotiations. It makes concessions and accepts advantages it believes are in the best interest of the employees it represents. [Citations.] This flexibility includes the right of the union to waive some employee rights, even the employee's individual statutory rights."

2. Even though the Contract does not prohibit Setoff/Interest could not the County give up its right to such?

Yes! But at what price? **Yes,** but what a precedent it would be creating? Today Setoff – tomorrow what else? Why have a Contract if **BOTH** sides will not follow the terms of the Contact?

3. Has the Arbitrator to date said the County is entitled to Setoff and Burgin/Hopper are not entitled to Interest on the Monies?

No! But such is because **AFTER** this writer, on behalf of the Sheriff, made the Arbitrator aware of the Public Policy of Illinois that the Employers are entitled to Setoff and not required to pay interest on the monies. The Union **twice** was asked to respond to such position and the Union **TWICE** asked for more time to respond. Apparently, the Union knows the Employer is entitled to Setoff and not required to pay interest on the monies but in an effort to

avoid the law Burgin and Hopper apparently with the urging of the Union now seek to avoid the judicial and arbitration law; see the attached precedents which I furnished the Arbitrator and the Union!

4. Since Burgin/Hopper and the Union are allowing some Setoff and not asking for interest could not the County Board settle with them anyway?

Yes! But such would be Penny Wise – Pound Foolish. Why are Burgin and Hopper so amendable to the County? Because they know that **IF** the issue of how much money is owed by the County goes to the Arbitrator the County will receive more than that offered by Burgin/Hopper. Note well that Hopper after having been hired and after he was employed by the Sheriffs' Office told the then Sheriff that he would not seek overtime **IF** he received a some $7,000.00 bump in his salary. Further, note that neither Burgin or Hopper are entitled to Overtime due to such being speculative, i.e. they may not have been on duty, they may not have been available to be on duty, if on duty they may have had other commitments which caused them to refuse the overtime, etc.

5. Should not this matter be settled without the need for the County to pay your legal fees – would it not be cheaper?

I normally charge $250.00 an Hour based upon 37 years of law experience dealing with subjects such as this. If I felt that it would be cheaper to settle I would recommend such – **But I Do Not**! As just stated it can be shown that Hopper gave up overtime in return for a some $7,000.00 bump in salary after he was hired. Burgin has been employed by the City of Newman Police Department while he was not working of the Sheriff due to being terminated from his employment. Hopper is presently working for the Illinois Department of Corrections and has been since approximately January 1, 2014. As such the County can deduct from monies owed Burgin/Hopper the monies **BOTH** individuals made while not working for the Sheriff/County; see the attached authorities.

Finally, I ask that you put off voting on the Burgin/Hopper offer until the Arbitrator issues an Order allowing us to definitively determine what monies were received by Hopper/Burgin during the time they were terminated from their employment with the Sheriffs' Office.

REMEMBER YOU ARE HANDLING PUBLIC MONIES PAID BY THE CITIZENS OF EDGAR COUNTY. TO NOT INSIST ON SETOFF AFTER AN ANALYSIS OF THE EMPLOYMENT OF BURGIN/HOPPER WHILE AWAY FROM THEIR EMPLOYMENT WITH THE SHERIFFS' OFFICE WOULD BE ___?___. I LEAVE IT TO EACH MEMBER OF THE COUNTY BOARD TO FILL IN THE BLANK BY YOUR VOTE ON THE ISSUE.

Thomas F. McGuire
Attorney for the Sheriff in this Matter

BEFORE ARBITRATOR STEVEN M. BIERIG

Illinois Fraternal Order of Police Labor Council (FOP)	**Grievants:**	**Roger Hopper and/or Dee Burgin**
And		
Sheriff of Edgar County, Illinois		

SHERIFF'S MEMORANDUM IN SUPPORT OF HIS REQUEST FOR SET-OFF AND/OR MITIGATION IN THE CASE AT HAND

Now comes the Sheriff of Edgar County, Illinois, through Thomas F. McGuire, his Attorney in the matter at hand, and for his Memorandum In Support Of His Request For Set-Off And/Or Mitigation In The Case At Hand states:

On May 27, 2014 the Illinois Fraternal Order of Police Labor Council (FOP) submitted its Back pay calculations for the consideration of the Arbitrator in the case at hand. On May 28, 2014 the Sheriff, through Thomas F. McGuire, his Attorney in this matter, submitted his Objection to the Back pay calculations of the FOP based upon said calculations not including any Set-Off of salary and/or fringe benefits Roger Hopper and/or Dee Burgin received after their termination of employment from the Edgar County Sheriff's Office (which this Arbitrator found to be without justification). Further, the Sheriff requires time to carefully scrutinize the calculations submitted by the FOP.

The Union takes the position that the Sheriff is not entitled to Set-Off and/or Mitigation, while the Sheriff maintains that, pursuant to the Law of the State of Illinois, he is indeed entitled to such.

been incompatible with performance of his duties to his erring employer."

In Kelly v. Chicago Park Dist., 409 Ill. 91, 97-98, 98 N.E.2d 738, 742 (1951), the Court held:

> "In addition they [Plaintiffs] advance the argument that the rules relating to the mitgation and reduction of damages are not applicable, because their salaries are fixed by law and not by contract, and that there being no contract there can by no damages for its breach, thus giving no occasion for the application of the offset rule. This was the contention made in the case of State ex rel. Dresskell v. City of Miami, 153 Fla. 90, 13 So.2d 707, 709, where the salary claimant was considered to be an employee rather than an officer. The court said: 'The principle of 'avoidable consequences' upon which the **reduction of damages rule** is grounded is not confined entirely to the narrow limits suggested by the appellant. It **finds its application in virtually every type of case in which the recovery of a money judgment or award is authorized**. Sedgwick on Damages, 9th Ed., s 204, p. 390; 15 Am.Jur., s 27, p. 420; 25 C.J.S., Damages, s 33, p. 499. It addresses itself to the equity of the law that a plaintiff should not recover for those consequences of defendant's act which were readily avoidable by the plaintiff. Sutherland on Damages, (1884) Vol 1, p. 226 et seq.' ... **We see no basis for a finding that plaintiffs are entitled to be paid for their services twice, when none were rendered**. It is our view that the Appellate Court erroneously held that plaintiffs' salaries could not be reduced by earnings from outside employment.
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> (EMPHASIS ADDED)

See also:

A) Thaxton v. Walton, 106 Ill. 2d 513, 515, 478 N.E.2d 1350, 1351 (1985), in which the Court held: [i]t has long been recognized, however, that where an employee is reinstated following a determination that his suspension or discharge was illegal, he is entitled to recover his salary for the period that he was prevented from performing his duties, reduced by what he earned in other employment.";

B) Bd. of Educ., Springfield Pub. Sch., Dist. No. 186, Sangamon Cnty. v. McCoy, 123 Ill. App. 3d 1065, 1071, 463 N.E.2d 1308, 1312 (4th DIST. 1984), in which the Court

Hopper and Burgin after their termination of employment from the Edgar County Sheriff's Office which was not a normal part of Hopper's and/or Burgin's income prior to the discharge. Further, the Lost Wages should be reduced if it is found that Hopper and Burgin failed to mitigate their damages (see below as to a discussion of mitigation). To allow Hopper and Burgin to be fully paid their Back Salary without deducting any Set-Off would be a form of double dipping and/or punitive damages.

2. MITIGATION:

In "How Arbitration Works", Seventh Edition, Elkouri & Elkouri, Page 18-37, Ch. 18.3.I states in pertinent part:

> "Many arbitrators hold that an employee who has been wronged by an employer has an affirmative duty to mitigate, so far as reasonable, the amount of the loss. The duty to mitigate has been explained as follows:
>
> > A discharged employee should be required to make a reasonable effort to mitigate "damages" by seeking substantially equivalent employment. .... His burden is not onerous, ...
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> Even where an agreement provided that an unjustly discharged employee "shall be ... paid for all time lost", an arbitrator explained that a duty to attempt to mitigate damages existed:
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> > It is commonly and generally recognized that the purpose of a contract provision calling for payment of "all time lost," when disciplinary action or discharge has been found to be without justifiable cause is to compensate and indemnify the injured employee and make him whole for loss of earnings suffered by him as a result of the inappropriate exercise of judgment by the Company. The loss of earnings is usually to be measured by the wages he would have earned for the period they were improperly denied to him, subject, however, to a recognized duty and responsibility reposed in the employee to mitigate, so far as reasonable, the amount of the loss. If, as a result of employee's action or inaction, he has filed to mitigate the

> "Plaintiff also contends that the Board erred in not including overtime and extra duty pay in the award. Plaintiff testified that from 1981 through 1984 he earned from $270 to $1,382 per year for overtime; and $240 to $455 per year in extra duty pay. The Board's decision on remand states that plaintiff is not entitled to any pay for overtime, or extra duty. **We agree with the Board that the collective bargaining agreement "makes no guarantee of overtime or extra duty assignments and [plaintiff] has failed to present any competent evidence establishing [that] he is entitled to overtime or extra duty pay."** Plaintiff's evidence was speculative and not a basis for an award. The Board correctly noted that there was no evidence with regard to how overtime is assigned or whether plaintiff would in fact have been assigned overtime or extra duty during that period of time.
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> (EMPHASIS ADDED)

Had the Union wished to guarantee overtime, such should have been placed in the CBA between the parties – yet it was not! Consequently, waiver and the Ehlers case cited below are applicable.

4. PUBLIC POLICY

In Board of Trustees of Community College Dist. No. 508, Cook County v. Cook County College Teachers Union, Local 1600, AFT, AFL/CIO, 74 Ill.2d 412, 421 - 424, 386 N.E.2d 47 (1979), the Court held that:

> "An arbitration award may not stand, however, if it results in the contravention of paramount considerations of **public policy**."
>
> (EMPHASIS ADDED)

"There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, **in its judicial decisions**" (EMPHASIS ADDED); see Palmateer v. International Harvester Co., 85 Ill.2d 124, 130, 421

only one conclusion; i.e., the lack of such words in the CBA makes the Illinois Supreme Court case of Ehlers v. Jackson County Sheriff's Merit Commission, 183 Ill.2d. 83, 93, 697 N.E.2d 717 (1998), applicable to the matter at hand. Note that the Ehlers Court stated that:

> "A union is allowed a great deal of flexibility in serving its bargaining unit during contract negotiations. It makes concessions and accepts advantages it believes are in the best interest of the employees it represents."
>
> *Id.* at 93

Based on such, if the Union wanted to limit the Employer's right to Set-Off and/or Mitigation, it would have put such in the CBA – **BUT IT DID NOT!** Note that in the Ehlers case the Illinois Supreme Court ruled that the Union contractually waived its right to have a desired provision placed in the applicable CBA.

Thus, the issue of Waiver exists in the Sheriff's favor; waiver being a voluntary relinquishment of a known right, claim or privilege; see Vaughn v. Speaker 126 Ill.2d 150, 161, 533 N.E.2d 885, (1988). Had the Union wished to negate the Set-Off and/or Mitigation requirements it could have put such language in the CBA. Yet it did not do so! Consequently, the Union has waived its argument that Set-Off and/or Mitigation do not apply to the case at hand.

Please note that because the law is clear that Back Pay is limited by Set Off, Mitigation and Overtime such was not placed in the CBA by the Employers. Such was not placed in the CBA because it was the Public Policy in the State of Illinois as shown by the aforementioned cases

6. INVASION OF PRIVACY

The FOP argues that being required to answer the Sheriff's Interrogatories and the Subpoenas requested by the Sheriff constitutes an Invasion of Privacy of Burgin and/or Hopper.

In "How Arbitration Works", Seventh Edition, Elkouri & Elkouri, Page 18-39, Ch. 18.3.J states in pertinent part:

> "When an arbitrator concludes that the grievant's outside compensation is to be deducted in the computation of back pay, the grievant has a duty to reveal the facts concerning his or her outside income."

CONCLUSION

For the reasons stated in this Memorandum, the Back Pay/Lost Wages owed to Hopper and Burgin should be Set-Off by any compensation earned by Hopper and Burgin after their termination of employment from the Edgar County Sheriff's Office which was not a normal part of Hopper's and/or Burgin's income prior to the discharge. Further, should it be found that Hopper and/or Burgin failed to mitigate their damages, the Back Pay/Lost Wages should be wholly or partially denied. Lastly, overtime should not be included in the Back Pay/Lost Wage calculation as it was not guaranteed by the CBA.

To restrict the Set-Off in any way would be volatile of Public Policy of the State of Illinois.

Respectfully Submitted,

Thomas F. McGuire

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Jolanta A. Zinevich

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Attorneys for the Sheriff of Edgar County in this matter