STATE OF WISCONSIN
EMPLOYEE TRUST FUNDS BOARD

In re appeal of:	NOTICE OF FINAL DECISION
[redacted], [redacted], [redacted], [redacted] and [redacted]	**Appeal Nos. 2013-007-ETF, 2013-043-ETF, 2013-049-ETF, 2013-050-ETF and 2013-054-ETF**

TO:

[redacted]

[redacted]

On this date, on behalf of the Employee Trust Funds Board, I am hereby mailing to each of the above-named parties an attached copy of the final decision of the Board in the above captioned matter. Please see the notice of rights below.

Dated and mailed this 5th day of July, 2016.

FOR THE BOARD:

By: Kim C. Esselman
Kim C. Esselman
Appeals Coordinator

NOTICE OF RIGHT TO PETITION FOR REHEARING
AND TO PETITION FOR JUDICIAL REVIEW

A party has the right to petition the Board for a rehearing pursuant to s. ETF 11.14, Wis. Adm. Code. A written petition for rehearing, naming the Board as respondent, may be made within 20 days of the date of this notice. A rehearing may only be granted on the basis of material error of fact or law, or the discovery of new evidence which could not have been previously discovered by due diligence and is sufficiently strong to reverse or modify the Board's decision. A rehearing petition must describe the particular alleged errors or the new evidence which is the basis for the request and cite any supporting legal authorities.

Judicial review of the Board's final decision is by an action for certiorari in the Dane County Circuit Court commenced within 30 days of the date of this notice, or the notice of the Board's decision on a petition for rehearing, as provided in s. 40.08(12), Wis. Stats. The Board must be named as the respondent or defendant. The above-named addressees, to whom this notice is sent, are the parties to the underlying proceedings.

STATE OF WISCONSIN
EMPLOYEE TRUST FUNDS BOARD

In the Matter of the Appeals of	Appeal Nos.
[redacted]	2013-007-ETF 2013-043-ETF 2013-049-ETF 2013-050-ETF 2013-054-ETF

FINAL DECISION AND ORDER

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1. On March 22, 2013, the Department of Employee Trust Funds received an appeal on behalf of [redacted], [redacted], [redacted], [redacted], and [redacted].

2. By letter dated March 7, 2014, the appeals were referred to the Division of Hearings and Appeals for hearing, as provided by Wis. Admin. Code §§ ETF 11.01 and 11.04(1). The Division's authority to serve as the Board's hearing examiner is conferred by Wis. Stat. § 227.43(1m).

3. A hearing was held May 18–21 and 28–29, 2015, Jeffrey D. Boldt, administrative law judge, presiding. The parties submitted written briefs, and the last filing was received on November 7, 2015.

4. The issue to be decided is whether the appellants should be classified as protective occupation participants under Wis. Stat. § 40.02(48)(a) since December 23, 2012, when their employer began treating them as general occupation employees.

FINDINGS OF FACT

5. This case involves the appeals of five individuals who work for [redacted] County in the [redacted] County Jail. The parties agreed to proceed with the case through a combined hearing. All have been employed by the County for all times relevant to these proceedings. [redacted] is employed as a Jail Lieutenant, [redacted] as a Jail Sergeant, [redacted] as a

Jailer, [redacted] as a Transport Deputy, and [redacted] as a Huber/Electronic Monitoring Deputy.

6. Each of the appellants has, for most of the tenure of his employment with the County, been continuously reported by the County to the Department of Employee Trust Funds (Department) as a protective occupation employee.

7. Every employee who has held the positions of [redacted] County Jail Lieutenant, Jail Sergeant, Jailer, Transport Deputy, and Huber/Electronic Monitoring Deputy has been continuously categorized as a protective occupation participant since sometime in the late 1980s.

8. On or about December 12, 2012, the County notified the appellants that it was changing their employment classification for Wisconsin Retirement System (WRS) purposes from protective occupation to general employee, effective December 23, 2012.

9. Employees have a right of direct appeal to the Board regarding an employer's classification of their employment status. The appellants each sought review of [redacted] County's decision to reclassify them. (R. 8393-8415.)

[redacted]

10. [redacted] testified that he has been employed as the jail lieutenant in [redacted] County for sixteen years and is second in command in the jail operation. He is part of the command staff and is one of two supervisors in the jail.

11. [redacted] job duties generally do not involve currently, actively, or directly detecting or preventing crime and enforcing laws and ordinances. In a survey, he described the major purpose and objectives of his job: "To ensure the safe and effective management of all jail operations. To comply with all State and Federal guidelines while protecting the Public and the rights of the inmate population." [redacted] listed his "operational responsibilities" in the jail to include supervising the jail division, reviewing jail staff documents, enforcing inmate policies and procedures, preparing jail division payroll, developing and maintaining the jail division schedule, and completing annual performance evaluations.

12. [redacted] testimony confirmed the supervisory nature of his position. [redacted] testified that his supervisory responsibilities include overseeing the work of the jail staff and conducting evaluations of the staff. He testified about his "typical day:"

> Q. Can you walk us through a typical day, tell us what your typical duties would be, what you do during the day, try to list all the various duties that might be included within a typical day.
>
> A. Well, it can vary from day to day. But typical would be to check with booking, see who came in during the night. Why they're being held. Check with medical. See if there's any inmates with current health issues that need to be addressed. Review reports. Go over scheduling. Check with the staff. I help out with court escorts, if staff is not available to do that. Meet with the captain over new policies. Talk about procedural changes. Attend meetings for different projects we have going on.

(R. 1088–89.)

13. [redacted] testified that he also "occasionally" performs jailer duties such as filling in shifts as a jailer, conducting rounds, and distributing meals.

14. [redacted] explained how an investigation would be conducted if contraband were discovered in the jail and how charges would be forwarded to the District Attorney if the case had merit. He testified it is "very seldom" that he is involved in any actual arrests or referrals of charges to the District Attorney.

15. [redacted] admitted that his job description provides an accurate description of his job duties, with the limited exception of those duties that have been transferred to others. [redacted] offered no testimony about the percentage of time he spends on any one activity.

16. [redacted] provided no evidence that his job involves frequent exposure to a high degree of danger or peril or that it requires a high degree of physical conditioning.

[redacted]

17. [redacted] is a supervisor on the second shift. He testified that he is responsible for overseeing the work of the jail staff and ensuring that it is done properly.

18. [redacted] job duties generally do not involve currently, actively, or directly detecting or preventing crime and enforcing laws and ordinances. [redacted] acknowledged that he performs the duties described in his job description, which include supervision and direction of the workforce, preparing shift schedules, ensuring adherence to procedures and schedules for meals, laundry and cleaning, ensuring that rounds are completed, inspections of staff, equipment and documentation of activities, performance evaluation of employees, and training of employees. He testified that his job description and the post order about the jail sergeant position reflect his job responsibilities.

19. [redacted] testified about occasional activities that are more similar to what police officers do, such as investigating potential criminal misconduct in the jail, investigating fights that have occurred in the jail, and requesting arrest warrants for escapees. [redacted] testified that he responded to one incident in which the circuit court judge purportedly called the jail for assistance in dealing with a disruptive person; he could remember only one such incident. [redacted] testified that he was involved in a drug bust in the church in the jail "quite a while ago." [redacted] testified to another incident in which an out-of-control inmate damaged a cell. [redacted] provided no evidence about the percentage of time he spends on activities such as these, and the evidence does not support a conclusion that he spends 51 percent or more of his time so engaged.

20. [redacted] provided no evidence that his job involves frequent exposure to a high degree of danger or peril or that it requires a high degree of physical conditioning.

[redacted]

21. [redacted] has been employed as a jailer with [redacted] County for sixteen years. His job duties generally do not involve currently, actively, or directly detecting or preventing crime and enforcing laws and ordinances. [redacted] testified that his job description, marked as Exhibit 45, lists the essential duties and responsibilities of his position. That description describes booking inmates, making rounds, maintaining discipline, conducting surveillance of inmates, monitoring and operating jail equipment, controlling

access to the jail, interpreting bond conditions and commitment orders, maintaining communication between shifts with other jail staff, completing required paperwork, providing for medical attention needed by the inmates, assisting with the food service program, delivering food and linens, handling visitors, maintaining Huber inmate compliance, and transporting inmates.

22. [redacted] testified about occasional work that is more similar to what a police officer does. [redacted] testified that he was a member of the SWAT team for 13 years, but jailers are no longer allowed to participate on SWAT. He was the commander of the Correctional Emergency Response Team, and recalled a riot in the jail 11 years ago, but it has not been called out for the past five years. [redacted] testified to investigating some crimes in the jail at times during his sixteen-year career, including theft, obstructing, resisting, disorderly conduct, battery to an inmate, and battery to law enforcement. [redacted] testified that he occasionally listens to inmate phone calls. [redacted] provided no evidence about the percentage of time he spends on activities such as these, and the evidence does not support a conclusion that he spends 51 percent or more of his time so engaged.

23. [redacted] provided no evidence that his job involves frequent exposure to a high degree of danger or peril and requires a high degree of physical conditioning.

[redacted]

24. [redacted] has been employed as [redacted] County's transit officer for 15 years. On occasion, he fills in and does the duties of a jailer.

25. [redacted] duties transporting inmates generally do not entail currently, actively, or directly detecting or preventing crime and enforcing laws and ordinances. As set out in the post order for his position, [redacted] duties and responsibilities include coordinating all incoming orders of the court for transportation of all inmates, patients and others for scheduled court appearances; transporting inmates; processing all extraditions to and from [redacted] County, including processing all paperwork associated with the extradition; conducting fleet inspections to make sure all cars are serviced and equipped to department standards; and assisting the Huber officer with Huber checks and tasks.

26. [redacted] described the principal duties of his position:

Q Right. And your job is to take, as at least in the case of an inmate, to take someone who's in custody, and maintain them in custody in a motor vehicle from point A to point B, whatever point [B] may be?

A. My job is to bring the prisoner from point A to point B.

(R. 1066.) [redacted] also performs jailer duties when needed and does court escort work, including using an electronic shock device.

27. [redacted] testified that his job may require him to engage in activities that are similar to those performed by a police officer. If there is an escape or the transportee commits a crime or rule violation, [redacted] conducts an investigation. He testified that if an arrest is warranted, he executes the arrest. [redacted] provided no evidence about the percentage of time he spends on activities such as these, and the evidence does not support a conclusion that he spends 51 percent or more of his time so engaged.

28. [redacted] provided no evidence that his job involves frequent exposure to a high degree of danger or peril. While the transport environment is less controlled than the jail, his testimony did not support a finding that he is frequently exposed to a high degree of danger. He offered no testimony that his position requires a high degree of physical conditioning.

[redacted]

29. [redacted] has been employed as the Huber Deputy in [redacted] County since 2001. [redacted] supervises inmates who are granted Huber work release privileges, as well as inmates placed on electronic monitoring.

30. [redacted] duties running the Huber program generally do not involve currently, actively, or directly detecting or preventing crime and enforcing laws and ordinances. As described in the relevant post order (Jt. Exh. 9:41), [redacted] duties and responsibilities include managing the Huber and electronic monitoring program; coordinating and conducting transport and court scheduling in the absence of the transport officer; adhering to all written Huber ordinances, policies and procedures; maintaining a weekly Huber roster; periodically checking on Huber inmates in the field; answering voicemail and return phone calls; investigating Huber and electronic monitoring client complaints and violations; conducting discipline hearings for Huber violations; reviewing requests for child care; reviewing Huber transfers; approving Huber deviations; reviewing requests for electronic monitoring; making home visits

on electronic monitoring clients as needed; and maintaining electronic monitoring equipment.

31. Although he enjoys more autonomy in the field than the jailers in the jail, [redacted] offered no testimony regarding the percentage of time he spends on any one activity. The evidence does not support a finding that he spends 51 percent or more of his time actively detecting or preventing crimes committed by these inmates.

32. [redacted] provided no evidence that his job involves frequent exposure to a high degree of danger or peril and that it requires a high degree of physical conditioning. The offenders qualifying for Huber are the least dangerous offenders. [redacted] only altercations with offenders occurred in the jail, not with offenders on release. As to the physical demands of the job, [redacted] did not say that a high degree of physical conditioning was required; instead, he indicated that "you just have to be in – I would say in shape or conditioned." (R. 1200.)

CONCLUSIONS OF LAW

33. The appellants seek classification as protective occupation participants. Wisconsin Stat. § 40.02(48)(a) defines "protective occupation participant:"

> [A]ny participant whose principal duties are determined by the participating employer, or, subject to s. 40.06(1)(dm), by the department head in the case of a state employee, to involve active law enforcement or active fire suppression or prevention, provided the duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning.

The Board has interpreted "principal duties" to require that 51 percent or more of the employee's duties to be spent in active law enforcement. *See Mattila v. Emp. Trust Funds Bd.*, 2001 WI App 79, ¶¶ 14 n.3 & 15, 243 Wis. 2d 90, 626 N.W.2d 33. The Board has defined "active law enforcement" to include being "actively, currently and directly involved in detecting and preventing crime and enforcing laws or the ordinances of a participating employer." *Mattila*, 243 Wis. 2d 90, ¶ 14 n.3.

34. Because protective occupation participants can retire at age 50 and enjoy other significant employment benefits over general occupation employees, the test is a strict one. The Wisconsin court of appeals recognized that the designation is limited to a "narrow class" of employees who meet

"stringent standards." *Cty. of La Crosse v. WERC*, 170 Wis. 2d 155, 167, 488 N.W.2d 94 (Ct. App. 1992), *rev'd on other grounds*, 180 Wis. 2d 100, 508 N.W.2d 9 (1993).

35. An employee cannot qualify for protective occupation status simply through his employer's decision to so classify him in the past. The employee's job duties must meet the statutory definition of active law enforcement. *Mattila*, 243 Wis. 2d 90, ¶¶ 14-15. Just an an employee cannot definitively qualify as a protective occupation participant by having his employer deputize him, he also cannot definitively achieve that status by reaching an agreement with his employer to so report him.

36. The question of whether jailers meet the three-part requirements of Wis. Stat. § 40.02(48)(a) has been litigated on a number of occasions, including in *Mattila*. As the record reflects (R. 243-479), this Board has consistently held over a number of decades that jailers do not meet the definition of protective occupation participants. The Board has concluded that 51 percent of their duties do not consist of active law enforcement.

37. To the extent these cases were appealed, the court of appeals has affirmed the Board's decisions. The court of appeals decision in *Mattila* does not squarely address the issue because the jailers in that case decided to rely on their status as deputy sheriffs, not their actual job duties. *Mattila*, 243 Wis. 2d 90, ¶¶ 14-15 & n.3. The court of appeals did reach the question of whether jailers with duties similar to those of [redacted], [redacted], and [redacted] in *Hoermann v. Employee Trust Funds Board*, 216 Wis. 2d 112, 573 N.W.2d 899 (Ct. App. 1997), in an unpublished opinion. It concluded that the jailers' principal duties did not constitute active law enforcement because they did not devote at least 51 percent of their time to active law enforcement.

38. Further, the appellants must satisfy the second and third parts of the test. If an employee meets the principal duties test, he still must show that his job entails frequent exposure to a high degree of danger and peril and requires a high degree of physical conditioning. Wis. Stat. § 40.02(48)(a). This is a fact-specific inquiry. In prior appeals by jailers, the Board has reached varying conclusions, depending on the facts presented, about whether the jobs met these tests. *Compare* R. 477-47 and 292 (concluding jailers did not meet those requirements) *with* 274 (concluding that they did).

39. [redacted], [redacted], and [redacted] are jailers or jailer supervisors for [redacted] County. They make out no case that their duties are meaningfully different from those of the earlier jailer appellants.

40. Like the appellants in the consolidated 2015 appeals of local airport workers, 14-ETF-008 –011, the appellants contend that it is the qualitative importance of their duties, not the quantity of time, that matters. (R. 81; 113; 116.) As this Board has previously concluded, this reading does not square with *Mattila*. The "principal duties" test is based on the way an employee spends his or her time, not the qualitative importance of a particular duty.

41. The appellants also suggest that crime detection and prevention is built into everything they do. [redacted], for example, testified that custodial duties such as delivering laundry, medication, and food provide an opportunity to see whether inmates are engaged in any illegal activity—so that, in a general way, that task is "law enforcement." The appellants' premise reads the statutory definition too broadly. To be principally engaged in "active law enforcement," the employee must primarily be engaged in actively detecting or preventing crime. Delivering laundry, food and medication may provide an opportunity to enforce the law at times, but that is not the primary purpose of the role, and it is not active law enforcement. There are many professions, such as the district attorney investigator position at issue in the *Triolo* appeal, that involve enforcing the law in a broader sense. But it is only a narrow band of active law enforcement positions that qualify for classification as protective occupation participants.

42. Even if the appellants could meet the 51 percent requirement, they do not satisfy two other requirements of the definition.

43. First, the appellants' duties do not expose them to "frequent" exposure to a high degree of danger or peril. The appellants provide evidence that sometimes they are exposed to danger, and testified to episodic moments of danger. But that does not mean their exposure is "frequent" and of a "high degree."

44. Second, the appellants concede that the position description requires no physical conditioning, much less a "high degree" of physical conditioning.

45. In theory, a jailer could present a case that the duties of his position are significantly different from those of the jailer appellants in the Board's past cases. But [redacted], [redacted], and [redacted] do not do this. For this Board to find that [redacted], [redacted], and [redacted] are protective occupation participants, it would have to abandon the position it has taken regarding

jailers for the last twenty years and essentially ignore its own definition, accepted in *Mattila*, of active law enforcement.

46. [redacted], [redacted], and [redacted] failed to demonstrate that they meet the definition of a protective occupation participant under Wis. Stat. § 40.02(48)(a).

47. [redacted] says his job is different from that of other jailers because he spends most of his time transporting prisoners from place to place, including doctor appointments, other jail facilities, and hospitals. [redacted] does not persuasively explain how the daily work of transporting prisoners is "active law enforcement" within the meaning of the Board's definition. [redacted] duties are primarily custodial, ensuring the safe transport of inmates and others in the community. [redacted] failed to show that 51 percent or more of his time is spent in active law enforcement.

48. Further, like [redacted], [redacted], and [redacted], [redacted] also fails to meet either the exposure to danger or high degree of physical conditioning requirement. [redacted] job may be somewhat more dangerous than the jailers' because he is on the road with offenders rather than just the controlled environment of the jail. But he did not testify to being frequently exposed to a high degree of danger or peril. He testified to no requirement of a high degree of physical conditioning.

49. The hearing examiner's proposed decision would find that [redacted] meets the requirements for a protective occupation participant because [redacted] carries a weapon and wears a uniform like a police officer; is responsible for making sure that individuals do not escape; and operates "independently in the field." Those factors do not correlate with the definition of active law enforcement. Ensuring that inmates do not escape is a core duty shared by all jailers, who, as discussed above, have never been treated as engaged in active law enforcement. The independence of an employee is not what defines him or her as engaging in active law enforcement. And whether [redacted] uniform looks like those worn by police officers is irrelevant to whether he engages in particular types of duties. The hearing examiner also did not analyze the danger or physical conditioning requirements as applied to [redacted] position.

50. The retracted expert opinion of McRoberts relied on by the hearing examiner suffers from the same deficiencies: it relies on irrelevant criteria, like the employee's independence; makes no analysis of the dangerousness and

physical conditioning aspects of the job; and fails to assess how much of the employee's day is spent on active law enforcement.

51. [redacted] failed to demonstrate that he meets the definition of a protective occupation participant under Wis. Stat. § 40.02(48)(a).

52. [redacted] the Huber officer for the County, argues that his job is also meaningfully distinct from other jailers. While [redacted] spends some time investigating offenders' activities and monitoring them using GPS and alcohol-monitoring devices, [redacted] also failed to show that 51 percent or more of his time is spent engaged in active law enforcement. In the course of running the Huber program, [redacted] responsibilities are primarily administrative and supervisory, overseeing Huber inmates' needs while on work release and ensuring their compliance with the program's requirements.

53. Further, [redacted] fails to meet either the exposure to danger or high degree of physical conditioning requirement. [redacted] did not testify that he is "frequently" exposed to a "high degree of danger or peril." As the County pointed out, the offenders qualifying for Huber are the least dangerous offenders. [redacted] only altercations with offenders occurred in the jail, not with offenders on release. As to the physical demands of the job, [redacted] did not say that a high degree of physical conditioning was required.

54. In concluding that [redacted] met the requirements to be a protective occupation participant, the hearing examiner considered that [redacted] works independently in the field; as discussed above, that is not part of determining whether he is engaged in active law enforcement. The hearing examiner also noted that [redacted] may occasionally be called upon to assist police officers with an arrest, but such occasional duties cannot meet the 51 percent test; the County also asserts that even this assistance would occur while he is off duty. The hearing examiner did not analyze whether [redacted] spent 51 percent or more of his time engaged in duties that constitute active law enforcement. The hearing examiner also did not analyze whether [redacted] satisfies the frequent exposure to a high degree of danger and the physical conditioning requirement prongs of the test.

55. [redacted] failed to demonstrate that he meets the definition of a protective occupation participant under Wis. Stat. § 40.02(48)(a).

VARIATIONS FROM HEARING EXAMINER'S PROPOSED FINAL DECISION

1. The final decision discusses facts relevant to the danger/peril and physical conditioning requirements more thoroughly. Unsupported or irrelevant facts have been deleted.

2. The final decision addresses the appellants' argument that it the qualitative importance of the employee's duties, not the quantity of time, that determines whether he meets the principal duties test. The final decision also addresses their argument that daily jailer duties, such as making rounds, are active law enforcement because they may provide opportunities to detect or prevent crime and enforce the law.

3. The final decision addresses the appellants' argument that they are entitled to continue to be classified as protective participants because that is how the County classified them originally.

4. The final decision deletes conclusions that it was reasonable for the County to have classified the jailers differently in the past. That is irrelevant to the conclusions in these appeals. In theory, it is possible that a jailer would have significantly different duties than the jailers in past appeals, requiring a different outcome. But these jailers did not present such a case.

5. The final decision discusses the governing statute and case law more thoroughly.

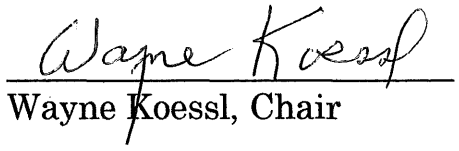
6. The final decision concludes that [redacted] and [redacted] do not meet the definition of a protective occupation participant.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that the reclassification by [redacted] County as to all five appellants is AFFIRMED.

Dated as of the 24th of March, 2016.

EMPLOYEE TRUST FUNDS BOARD:



Wayne Koessl, Chair

PARTIES FOR PURPOSES OF JUDICIAL REVIEW

Pursuant to Wis. Admin. Code §§ ETF 11.03(7) and 11.12(1)(c), the following persons or entities participated in and are certified as PARTIES to this appeal:

[redacted], by

Attorney [redacted]

[redacted] County, by

Attorney [redacted]