

IN THE MATTER OF ARBITRATION BETWEEN

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LAW ENFORCEMENT LABOR)	
SERVICES, INC.,)	
)	ARBITRATION
Union,)	AWARD
)	
and)	
)	LEIGH DEMOTION
)	GRIEVANCE
)	
STEARNS COUNTY,)	
)	
Employer.)	BMS CASE NO. 08-PA-0806
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Arbitrator: Stephen F. Befort

Hearing Date: January 8, 2009

Date post-hearing briefs received: January 24, 2009

Date of decision: February 19, 2009

APPEARANCES

For the Union: Christopher K. Wachtler

For the Employer: Scott M. Lepak

INTRODUCTION

Law Enforcement Labor Services, Inc. (Union) is the exclusive representative of a unit of peace officers employed by the Stearns County Sheriff's Office (Employer). The Union claims that the Employer violated the parties' collective bargaining agreement by demoting Sergeant David Leigh without just cause and by requiring to him to serve a new probationary period in the Senior Deputy job class. The grievance proceeded to an

arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

1. Did the Employer have just cause to demote the grievant? If not, what is the appropriate remedy?
2. Did the Employer violate the parties' collective bargaining agreement when it required the grievant to serve a probationary period in his demoted capacity as a Senior Deputy?

RELEVANT CONTRACT LANGUAGE

ARTICLE VIII SENIORITY

- 8.7 All newly hired or rehired employees shall be required to serve a period of job probation. Additionally, any employee moving to a different position likewise shall be subject to a new probationary period. Probationary periods shall be 2,080 hours worked.

ARTICLE IX DISCIPLINE

- 9.1 The Employer will discipline employees for just cause only. Discipline will be in the form of:

- Oral reprimand
- Written reprimand
- Suspension
- Demotion
- Discharge

FACTUAL BACKGROUND

David Leigh worked as a peace officer for the Stearns County Sheriff's Office for more than 20 years. In 1999, the Employer promoted Leigh to the rank of sergeant. Eight years later, on November 19, 2007, the Employer demoted Leigh to a Senior

Deputy position for allowing his list of unapproved reports to grow to an unacceptable level. Nine days later, the Employer notified Leigh that his appointment to the Senior Deputy position was subject to a probationary period of 2080 hours (approximately one year of full-time service). The Union grieved both of the 2007 decisions.

As a sergeant, Leigh supervised four patrol deputies. One of the primary responsibilities of the sergeant position, per the County's job description, is to "review and evaluate written reports for completeness and accuracy." According to the testimony of Chief Deputy Bruce Bechtold, this review function serves two primary purposes. First, it is the principal means by which sergeants can oversee the work of the deputies while they are working in the field. Second, the review ensures that reports are properly formulated prior to being submitted into the criminal justice system.

Sergeant Leigh testified that he reviewed deputy reports via the County's Records Management System (RMS) computer database. Using this system, a sergeant can pull up a deputy's list of unapproved reports. The sergeant can click on a given report, review it, and then either approve it or request the deputy to provide any missing information.

Lieutenant Jon Lentz served as Sergeant Leigh's immediate supervisor. Lieutenant Lentz testified that Sergeant Dickhaus approached him in 2007 and expressed a concern that Deputy Lehmkuhl might be handling too many matters on a no-report basis. Lieutenant Lentz proceeded to check the status of Lehmkuhl's reports on the RMS system on October 16, 2007 and discovered that he had 110 pending reports that had not yet been approved. Since Lehmkuhl reported to Sergeant Leigh, Lentz then checked the status of the other three deputies supervised by Leigh. He discovered that the four deputies supervised by Leigh had a combined total of 432 unapproved pending reports.

On that same day, Deputy Jode Boldt, another deputy supervised by Leigh, contacted Captain Pamela Jensen and self-reported that she had not completed most of her written work since May 2007 due to some personal issues. As it later became clear, Boldt had been involved in 89 incidents for which no written report had been prepared. Both Leigh and Boldt testified that they never had any discussions concerning this work backlog. The Employer issued Boldt a two-day suspension for this work deficiency.

On October 17, 2007, Lieutenant Lentz observed Sergeant Leigh working at what was commonly known as the sergeants' computer. During the course of about five or six hours, Sergeant Leigh approved 248 deputy reports on the RMS system. An exhibit offered by the Employer at the hearing indicated that many reports were approved within a few seconds.

Lieutenant Lentz and Lieutenant Nohner met with Sergeant Leigh on October 30, 2007 and asked for an explanation of the numerous unapproved reports. According to Lieutenant Lentz, Sergeant Leigh explained that the Employer's clerical support staff had fallen behind in transcribing reports resulting in a backlog of unreviewed reports, and that, after a while, he had gotten out of the habit of undertaking a daily review of pending reports. According to Lieutenant Lentz, Sergeant Leigh also stated that "he was comfortable enough with his officer's report style to approve them with minimal review." Based on his investigation and interview, Lentz prepared a report and submitted it to Chief Deputy Bechtold.

Stearns County Sheriff John Sanner testified that he and his administrative team reviewed the report and made the decision to demote Sergeant Leigh. In a memorandum

directed to Leigh on November 19, 2007, Sheriff Sanner explained the basis for the demotion decision as follows:

Over the past several months you have allowed the officers under your direct supervision to build their unapproved report case load to an unacceptable and unmanageable level. While checking unapproved reports, on 10-16-07, of all officers it was discovered that all the officers on your shift had numerous reports that had not been approved by you. Three of these officers had a total of 408 unapproved reports. It was later determined that the fourth officer on your shift had not completed the majority of her report work since late May early June of 2007. That officer had 24 unapproved reports and 89 where nothing at all had been done. The total number of unapproved reports for your team was 521. In addition on October 17, 2007 between the hours of 0700 and 1354 hours you approved approximately 248 reports, at one point clearing 21 reports in one minute. As a result of your failing to complete one of the most basic and important functions of a Patrol Sergeant the following action will occur:

- You will be demoted from Patrol Sergeant to Senior Deputy as of 11-19-2007 at 0900 hours.

On November 28, 2007, Acting Human Resources Director Martha Cole issued a letter appointing Leigh to the position of Senior Deputy. The letter stated that “this appointment is subject to 2080 hours probationary period.” The Union objected to this requirement because Leigh had already completed a probationary period when he previously served in the Senior Deputy position. Leigh now has successfully completed the one-year probationary period.

At the arbitration hearing, the Union established that the Employer has not adopted or communicated any formal limit on the number of unapproved reports that is acceptable for sergeants. Sheriff Sanner testified that while there was no specific maximum, a common sense limit would be in the range of 30-40 unapproved reports per officer in the event of a very busy period. Sergeant Leigh, in contrast, testified that he was aware of situations where sergeants had returned from vacation to find approximately 300 reports awaiting review.

Leigh also testified that he used a selective approach in reviewing reports that enabled him to identify and approve many reports in a relatively rapid fashion. He testified that he would bring up reports by type of occurrence, review the cases and make notes on any cases needing further work, and then go back and approve the remaining cases en masse.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to demote the grievant due to his failure to review the written reports submitted by officers that he was assigned to supervise in a timely manner. As of October 16, 2007, this lack of diligence resulted in a total backlog of 521 unapproved reports. The Employer maintains that this conduct warrants a demotion to a non-supervisory deputy position because: 1) Sergeant Leigh was well aware that the timely approval of reports was an essential function of his supervisory position; 2) this conduct constituted such a serious breach of supervisory responsibility that the use of lesser progressive discipline was not appropriate; and 3) Leigh's prior work record, while perhaps militating against discharge, does not warrant his retention of a supervisory position.

In addition, the Employer argues that it did not violate the parties' collective bargaining agreement in requiring the grievant to serve a one-year probationary period following his demotion because the applicable provision expressly states that "any employee moving to a different position shall be subject to a new probationary period."

Union:

The Union acknowledges that Sergeant Leigh fell behind in his review of deputy reports, but asserts that the circumstances do not justify the demotion imposed by the Employer. The Union argues that the demotion penalty is too severe for four reasons: 1) the Employer never put the grievant or any other employee on notice that the accumulation of unapproved reports beyond some specified threshold would result in the forfeiture of a supervisory position; 2) the Employer did not counsel the grievant with respect to delinquent reports or utilize the progressive disciplinary steps contemplated in the parties' collective bargaining agreement; 3) the Employer made no showing that anyone suffered harm as the result of Sergeant Leigh's conduct; and 4) the demotion is not warranted in light of Sergeant Leigh's long and good work record.

As to the matter of the probationary period, the Union contends that the issue is moot since the grievant has now satisfied the period imposed. In the alternative, the Union argues that the probationary period should not have been required since Leigh previously had completed this requirement during an earlier stint in the Senior Deputy position.

OPINION AND DISCUSSION

I. The Disciplinary Demotion

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is

established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* Elkouri & Elkouri, HOW ARBITRATION WORKS 948 (6th ed. 2003).

A. The Alleged Misconduct

The parties do not dispute that Sergeant Leigh fell significantly behind in reviewing the reports submitted by the four officers he supervised. As of October 16, 2007, the RMS system indicated 432 unapproved reports. In addition, Deputy Boldt had failed to document most of her work during a stretch from May to October 2007, with 89 delinquent reports as of October 16, 2007. Thus, the record shows a total of 521 unapproved reports for the deputies under Sergeant Leigh's supervision.

The parties also do not dispute that Sergeant Leigh approved 248 of these reports on October 17, 2007. They disagree, however, as to Sergeant's Leigh's motivation in rapidly approving this large number of reports. The Employer contends that Sergeant Leigh was trying to cover his tracks through a pro forma mass approval without any meaningful review of the reports in question. The Union, in contrast, argues that Sergeant Leigh was able to accomplish a bona fide approval of such a large number of reports due to his selective method of prior review.

I believe that the Employer has the better of this issue. I do not think that it is feasible for a supervisor to undertake a genuine substantive review of 248 reports in one five or six hour stretch. Moreover, it is doubtful that he reviewed some of these reports on previous days without hitting the approval button, since he testified that he was "surprised" on October 17 at the size of his unapproved report list.

Accordingly, the Employer has adequately carried its burden of establishing that the grievant engaged in the misconduct alleged as the basis for its disciplinary action.

B. The Appropriate Remedy

The Employer claims that a disciplinary demotion is an appropriate sanction in this matter because the grievant basically failed to perform essential supervisory functions during the summer and fall of 2007. As evidence of this failure of supervision, the Employer points out that Sergeant Leigh failed to review deputy reports in a timely manner, and that he was unaware of Deputy Boldt's failure to submit reports relating to her activities. Having failed to perform crucial supervisory duties for a significant stretch of time, the Employer argues that Leigh should no longer be entrusted to perform these functions in the future.

The Union contends that a demotion is too severe of a sanction for a number of reasons. The various contentions asserted by the Union are addressed in the following sections.

1. Notice

The Union first argues that the Employer did not put supervisors on notice that they would be subject to discipline for falling behind in their approval of subordinate reports. In addition, the Union points out that the Employer did not communicate any numerical standard of how many delinquent reports would constitute an unacceptable level of performance. In this instance, the Employer acknowledges that it has not articulated a specific numerical threshold, but Chief Sanner testified that a total of 30 to 40 unapproved reports per officer constitute the outer limits of acceptability. Sergeant Leigh, in contrast, testified that it was not uncommon for a supervisor to return from

vacation with approximately 300 unapproved reports, and that a backlog of this magnitude had not previously resulted in discipline.

While it is true that the Employer would be on firmer ground if it had adopted a work rule establishing a specific numerical expectation with respect to unapproved reports, the absence of such a rule is not fatal in this instance. The job description for the sergeant position expressly identifies the review of written reports as an essential job function. In addition, it is clear that the grievant was on notice that the supervision of the deputies to which he was assigned constituted a key component of his job responsibilities. Finally, regardless of whether the unstated ceiling on unapproved reports was 160 or 300, the accumulation of 521 unapproved reports clearly constituted an unacceptable failure or performance.

2. Progressive Discipline

The Union additionally argues that the Employer failed to utilize progressive discipline in this case. Section 9.1 of the parties' collective bargaining agreement contains the following list of potential disciplinary steps:

- Oral reprimand
- Written reprimand
- Suspension
- Demotion
- Discharge

According to the Union, the order in which these forms of discipline are listed suggests that attempts to correct behavior by means of a reprimand or a suspension should occur prior to the Employer's recourse to the heavier sanction of a demotion. In this instance, however, the Employer failed to utilize any lesser discipline and did not even counsel the grievant in an attempt to correct his behavior.

It is true that progressive discipline generally is the preferred method of correcting errant behavior. But, it is well recognized that progressive discipline is not required as a prelude to redressing misconduct or nonperformance that is “material to the employment bargain.” THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF THE ARBITRATORS § 6.7 (Theodore St. Antoine, ed., 2nd ed. 2005). In this case, Sergeant Leigh’s almost total abdication of supervisory duties constituted a material level of nonperformance. An employer need not tolerate successive periods of nonperformance in such a core function before taking meaningful action.

3. Prior Work Record

The Union finally argues that a demotion is too severe in light of Sergeant Leigh’s long and generally good work record. Leigh has worked for more than 20 years as a peace officer for Stearns County. For the last eight of those years (1999 to 2007), he worked as a sergeant. Although Leigh has been subject to some minor discipline over the years, he generally has amassed a good work record with the County.

The Union is correct in pointing out that arbitrators frequently cite an employee’s work record as a mitigating factor in reducing discipline. In each case, however, the grievant’s work record must be balanced against the seriousness of the offense. Here, the Employer properly tailored the remedy to reflect that balance. While Sergeant Leigh’s failure to supervise outweighs his work record in terms of justifying a removal from supervisory responsibilities, it does not necessarily mean that Leigh is unfit to perform other peace officer functions so as to warrant a termination of all employment with the County.

Based on the above, the Employer has demonstrated that the demotion sanction is appropriate under the circumstances.

II. The Probationary Period

Following the demotion of Sergeant Leigh, the Employer required Leigh to serve a one-year probationary period in the Senior Deputy position. In doing so, the Employer relied on the language of Section 8.7 which states that “any employee moving to a different position shall be subject to a new probationary period.” The Union objected to this decision on the ground that Leigh previously had completed a probationary period in the Senior Deputy position.

At the hearing, the Employer acknowledged that Leigh now has successfully completed the probationary period. In its post-hearing brief, the Union modified its position on this issue and made the following procedural request:

Both the demotion and the probationary period were presented as issues at arbitration; however the County stipulated prior to the start of the hearing that Leigh has satisfied this probationary period. If the arbitrator finds the demotion was improper and reinstates Leigh to the rank of sergeant, the probation issue is moot. If the arbitrator finds the demotion was appropriate, the union asks that the arbitrator find pursuant to the County’s stipulation, that the probation has been served, and make no further ruling on the issue.

In essence, with the grievance denied on the demotion issue, the Union has chosen to withdraw that portion of its grievance challenging the Employer’s imposition of a probationary period. Accordingly, I will not rule on that issue other than to conclude that the grievant has served the probationary period as required by the November 28, 2007 appointment letter.

AWARD

The grievance is denied.

Dated: February 19, 2009

Stephen F. Befort
Arbitrator