

IN THE MATTER OF ARBITRATION BETWEEN

Wright County Deputies Association,
Union,

and

Wright County, Minnesota,
Employer.

OPINION AND AWARD

Grievance of Lance Hellerud
BMS Case No. 09-PA-1012

ARBITRATOR:

Gerald E. Wallin, Esq.

DATE OF AWARD:

April 18, 2010

HEARING SITE:

Buffalo, Minnesota

HEARING DATES:

October 28 and December 4, 2009

RECORD CLOSED:

March 8, 2010

REPRESENTING THE UNION:

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REPRESENTING THE EMPLOYER:

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JURISDICTION

The hearing in this matter was held on October 28 and December 4, 2010. The undersigned was selected to serve as arbitrator pursuant to the parties' collective bargaining agreement ("Agreement") and the procedures of the Minnesota Bureau of Mediation Services. The parties submitted an employment termination issue to arbitration. The provision of their Agreement calling for Award issuance in thirty days was waived to allow for a sixty-day period. The Employer challenged the arbitrability of the grievance. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs and reply briefs, duly received on or before March 8, 2010, which closed the record, and the matter was taken under advisement.

ISSUES

The parties stipulated to the following statement of the issues:

1. Whether the grievance filed on behalf of Lance Hellerud is substantively arbitrable given the terms of the Last Chance Agreement?
2. Whether the Grievant Lance Hellerud violated the terms of the Last Chance Agreement?

BACKGROUND AND SUMMARY OF THE EVIDENCE

As the Jurisdiction and Issues sections indicate, the posture of the instant dispute is a bit unusual. The propriety of Grievant's termination on February 12, 2009, while vigorously in dispute, does not involve a traditional just cause analysis. Rather, the propriety of the Grievant's termination depends upon the validity and/or scope of a Last Chance Agreement ("LCA") signed in mid-2006. It reads, in full, as follows:

LAST CHANCE AGREEMENT

This Last Chance Agreement is entered into between Wright County ("County"), Law Enforcement Labor Services, Inc. ("Union"), and Lance Hellerud ("Hellerud"),

a Deputy employed by the County and represented by the Union.

WHEREAS, the County and the Union are parties to a collective bargaining agreement;

WHEREAS, on or about February 12, 2006, Hellerud engaged in off-duty misconduct while under the influence of alcohol which constituted Conduct Unbecoming a Peace Officer and violated the Code of Ethics; and

WHEREAS, Hellerud has conveyed his desire to continue his employment as a Deputy with the County.

AGREEMENT

NOW, THEREFORE, the parties enter into this Last Chance Agreement in lieu of proceeding with the termination of Hellerud's employment.

1. Chemical Dependency Assessment. Hellerud shall complete a chemical dependency assessment and evaluation. Thereafter, Hellerud shall successfully complete all requirements and recommendations issued by the evaluator as a result of the chemical dependency assessment and evaluation.
2. Suspension. Hellerud shall serve an 18 day suspension without pay effective on dates established by the County.
3. Last Chance. By signing this Agreement, Hellerud understands and acknowledges that he may be terminated, without pre-disciplinary notice or the right of any type of post-termination appeal, grievance, arbitration or litigation in any forum, for any conduct that is the same or similar to the conduct described in this Agreement which occurred on or about February 12, 2006, including any supportive documentation related to that incident, or Conduct Unbecoming a Peace Officer as described in General Order G101 of the Sheriff's Office Directive Manual. In the case of criminal conduct, it will be sufficient if probable cause has been established. Hellerud understands and acknowledges the very high standards applicable to all individuals employed as police officers as well as the potential job-related nature of an employee's off-duty conduct.
4. Waiver of Grievance. The union and Hellerud hereby waive with prejudice the right to file a grievance on behalf of Hellerud with reference to the February 12, 2006 incident and the 18 day suspension.
5. Non-Precedent. It is understood that the terms of the Agreement are without precedent or prejudice to future cases involving other employees. This Agreement

is based upon the unique circumstances of the present case and shall not constitute a precedent with respect to any other claim, grievance, or dispute arising between the County and the Union or any member of the bargaining unit covered by the collective bargaining between the County and the Union.

6. Voluntary and Knowing Action. The Union and Hellerud acknowledge that they have read this Last Chance Agreement, understand its terms and conditions, and enter into this Agreement knowingly and voluntarily. Hellerud acknowledges that he has had the opportunity to consult with the Union regarding this Agreement. By signing below, the Union and Hellerud agree to be bound by the terms and conditions of this Last Chance Agreement.

7. Entire Agreement. This constitutes the entire agreement between the parties. The parties agree that here were no inducements or representations leading to the execution of this Agreement other than those contained in this document.

IN WITNESS WHEREOF, the parties hereto have executed this Last Chance Agreement on the dates indicated by their respective signatures.

LAW ENFORCEMENT LABOR
SERVICES, INC.

WRIGHT COUNTY

/s/ Terry Herberg 5-22-06

/s/ Richard W. Norman 6/7/06

/s/ Lance Hellerud 5-26-06

/s/ Gary L. Miller 6/7/06

At arbitration, the Employer presented evidence to support the validity and scope of the LCA. Based on its text, the Employer maintains the LCA precludes an arbitrator from considering the merits of the dispute. For its part, the Union focused its evidence on paragraph 3 of the LCA to show that its scope was limited to alcohol-related misconduct. In addition, in its post-hearing brief, the Union contended, for the first time, that the LCA had expired and was of no effect at the time of Grievant's termination for two principal reasons: First, because there was a change of exclusive representative on December 16, 2008, which was after the LCA was signed but before Grievant was terminated, and, second, the LCA should be deemed to have expired due to the passage of time of approximately 30 months without any alcohol-related misconduct.

According to the record, Grievant had just under ten years of service at the time of his

termination. His work history contained several entries for disciplinary action and/or verbal counseling. On September 21, 2005, Grievant was counseled about the amount of his sick leave usage for dealing with personal problems. According to the file note, Grievant was having difficulty emotionally dealing with a recent relationship problem. He was counseled to keep his personal life separate from his job duties and responsibilities. On October 24, 2005, Grievant was found to have engaged in Conduct Unbecoming a Peace Officer per General Order G101 (sometimes hereinafter "Conduct Unbecoming") in connection with walking into the residence of an ex-girlfriend uninvited at 1:30 a.m. when allegedly intoxicated. The Conduct Unbecoming was sustained and Grievant was again counseled. Still later in 2005, Grievant was again found culpable for Conduct Unbecoming in connection with a call to a local middle school about a possible suicidal student. School officials complained about him flirting with one of the female administrators who had previously declined his requests to see her socially. This incident led to an 8-day disciplinary suspension on December 29, 2005 which was not grieved.

The incident that led to the LCA occurred on February 11 and 12, 2006. According to the Internal Affairs Investigation, Grievant reported for work at 6:00 p.m. and went home sick one-half hour later. At approximately 4:00 a.m. on February 12, 2006, Grievant was arrested for DWI by another deputy sheriff. In between those times, Grievant sought to borrow cold or flu medicine from a female friend and drove to her residence about 10:30 p.m. After taking some of the medicine, he began drinking vodka and coke. He left for home about 2:30 a.m. but lost control of his truck which ended up in a roadside ditch. After walking back to the friend's residence, he drank more vodka and returned to his truck with the friend. An Annandale Police Officer at the scene detected the odor of alcohol and reported this to the Employer's Watch Commander. In this same time frame, Grievant "hinted" to the friend that she should tell the police he had nothing to drink until after he put his truck in the ditch. After the Watch Commander arrived at the scene, Grievant tried to avoid taking a field sobriety test. Grievant eventually plead guilty to DWI. During the investigation, he also admitted to having given the "hint" to his female friend.

After the LCA was signed, Grievant did not experience any more allegations about Conduct Unbecoming until December 2, 2008. On that date, a resident of an apartment complex called to complain about a squad car being parked there two to three times per week for extended periods of

time for the past five months. The caller was concerned that the deputy was engaged in personal business while on duty. The complaint led to another Internal Affairs Investigation that resulted in Grievant's termination.

The Employer's investigator pursued leads wherever they led him. He obtained recorded statements from several individuals. Eventually, Grievant's first recorded statement was taken on December 19, 2008. The initial concerns about Grievant's conduct were generally twofold: Whether he had engaged in Conduct Unbecoming by spending an inordinate amount of time on personal business while on duty and whether he had also consumed alcohol while in uniform. The investigation did not substantiate any alcohol consumption while in uniform. That facet of the investigation was discontinued.

The Conduct Unbecoming portion of the investigation was sustained. Some of the results of that portion of the investigation are the subject of an objection by the Union. During his first recorded statement, Grievant had counsel present to advise him. In connection with the questions and answers, Grievant mentioned the first name of a woman, JB, who had an apartment in the same complex. The session concluded without identifying the full name of the woman. Either the next day or shortly thereafter, the investigator telephoned Grievant and asked for the last name of the woman. Grievant provided it without any objection nor did he question the propriety of the investigator's phone call to him when he did not have counsel present. At arbitration, however, the Union contended that the investigator's call violated the Peace Officer Discipline Procedures Act, Minn. Stats. Ch. 626.89. In its post-hearing brief, the Union also contended that the investigator's call violated Section 10.5 of the parties' Agreement. Section 10.5 reads as follows:

10.5 Employees will not be questioned concerning an investigation of disciplinary action unless the Employee has been given an opportunity to have a Union Representative present at such questioning.

Upon contacting the woman, the investigator learned that they had dated and that Grievant had stopped in to her apartment on several occasions to spend his lunch and break time. According to policy, deputies are allowed to combine their paid lunch periods and two 15-minute breaks into a one-hour continuous period while on duty. They are not, however, allowed to exceed that one-hour

time limit. They are also required to remain in uniform during their break time to be able to promptly respond to any emergency calls that might require their presence.

According to the record, among other things, on one occasion, Grievant stopped in to watch the movie, Talladega Nights, with the woman. He stayed for the whole movie. Its running time was one hour and fifty minutes. During the movie, he also removed several of his uniform items for comfort.

Because of the combination of several reasons explained in her recorded statement and her testimony at arbitration, JB eventually ended her relationship with Grievant in approximately the same time frame as the Employer's investigation began.

The Union objected to the arbitrator's consideration of any evidence obtained from the woman because of the asserted statutory violation and the Agreement violation.

The other statements obtained by the investigator revealed another incident with a different woman at the same apartment complex. In this case, it was a consensual dating relationship Grievant had with the woman, LB, from January of 2008 through August 5, 2008. Because of the relationship, she had given Grievant a key to her apartment. He would often spend his break time with her in the evenings. According to her testimony, she wanted Grievant to be able to lock up her apartment when he departed at the end of his break if she fell asleep. She could not recall even a single time when he appeared at her apartment uninvited.

Because of the 17-year difference in their ages and for certain other reasons, LB decided to break off the relationship. On August 5, 2008, while she was at her workplace, Grievant stopped in. She told him she did not want to see him anymore. She had been making indications along that line for some time prior to August 5th. She also asked him to return her key at that time. Grievant did not return the key to her. She could not recall why he did not. It may have been that he did not have it with him at the time.

After midnight that evening, LB was in bed with another man. Her apartment was locked and the lights were off. They heard someone, who turned out to be Grievant, enter the apartment and then her bedroom and confront her and the other man. He shined his flashlight on them and asked if the man would care to identify himself. The man declined. At the time, Grievant was on duty, not on break, in uniform with his weapon, and he had not checked in with the dispatcher to report his

whereabouts as required by policy. He had no law enforcement purpose for being where he was doing what he was doing at the time. Grievant eventually turned and left. He may also have left LB's key on the kitchen counter.

During his testimony at arbitration, Grievant claimed that the Sheriff made certain representations to him to persuade him to sign the LCA. According to that testimony, the Sheriff specifically told him that the scope of the LCA would be limited to alcohol-related misconduct. Non-alcohol-related conduct would not be within the scope of the LCA.

According to the testimony of Sheriff Miller, he denied ever telling Grievant that the scope of the LCA was limited only to alcohol-related misconduct.

Grievant's exclusive representative was a different union at the time the LCA was signed. The Union representing him at arbitration requested subpoenas for two of the officials of the former exclusive representative to obtain their testimony at the hearing. Those subpoenas were signed by the undersigned arbitrator and were promptly returned to the Union to accomplish service of them. However, neither of the two former union officials were called by the Union to provide testimony about the LCA.

During his testimony at arbitration, Grievant also admitted that it would constitute Conduct Unbecoming for a deputy to enter the apartment of an ex-girlfriend for personal reasons while on duty and in uniform without permission. He also admitted that confronting an ex-girlfriend in bed with another man for personal reasons while on duty would also constitute such Conduct Unbecoming. Grievant qualified his responses, however, by asserting that LB was not an ex-girlfriend at the time.

OPINION AND FINDINGS

At issue in this dispute is the substantive arbitrability of Grievant's termination. Although the Employer maintains the matter is not substantively arbitrable, it recognizes that the matter is procedurally arbitrable for the limited purpose determining whether it is substantively arbitrable. As the issues have been framed by the parties, it is clear that the arbitrability question depends entirely upon the efficacy of the LCA. As a result, there are two facets to the arbitrability question that must be addressed: First, was the LCA still valid and in force for the purpose of Grievant's

termination, as the Employer maintains, or had it expired, as the Union contends; second, if valid, was the scope of the LCA limited to alcohol-related misconduct or did it also proscribe other forms of Conduct Unbecoming?

Several considerations bear on the validity facet. The text of the LCA, itself, does not establish a discrete ending date when it would cease to be effective. This is not surprising because the prohibition against Conduct Unbecoming is a career-long boundary; the prohibition remains fully in effect for as long as a peace officer remains in active service. Second, Grievant's conduct which led to his termination all occurred before there was any change in the exclusive representative and before the current Agreement was in place. Similarly, the Internal Affairs Investigation was initiated before both of these changes. Although the new Agreement became effective January 1, 2009, apparently for retroactive pay purposes, it was not concluded and signed by the parties until March of 2009, which was after Grievant was terminated. Moreover, it is well settled that last chance agreements are specialized modifications to the otherwise applicable collective bargaining agreement. As such, they become, in essence, uniquely individualized mini-collective bargaining agreements. Like regular collective bargaining agreements, that are effectively assumed by a new exclusive representative and remain fully in force until properly changed, so, too, would last chance agreements continue on, in full force, through a change in representation until either their stated expiration date occurs, if there is one, or until changed by re-negotiation, or until they become so remote in time that they are deemed to have expired. None of those expiration criteria have application here. The instant LCA was never re-negotiated away. It has no stated expiration date, which is consistent with the recognition that the prohibition upon Conduct Unbecoming is not a subject that becomes remote with the passage of time. Finally, there was no testimony from officials of the former exclusive representative on the question of duration. Because the Union did not attempt to produce such testimony by enforcing the subpoenas it had obtained, the Employer is entitled to the adverse inference that such officials, if called, would testify that the LCA was not intended to have an expiration date.

Given the foregoing discussion, the finding is that the LCA was valid and fully effective according to its terms for the purpose of Grievant's termination.

Several different considerations are relevant to the determination of the LCA's scope. First,

the text of the LCA rather explicitly contains the conjunction “or” in Paragraph 3 to show that its scope encompasses both the DWI incident of February 12, 2006 as well as Conduct Unbecoming as described in General Order G101. In customary usage, the conjunction “or” always stands between two or more similar elements. Indeed, during his testimony, Grievance recognized that the conjunction “or” expresses alternatives. Second, prior to the signing of the LCA, Grievant’s discipline record included both alcohol-related and non-alcohol-related entries for Conduct Unbecoming. It is not surprising, therefore, that the Employer, in agreeing to a last chance arrangement, would want the LCA to apply to both kinds of Conduct Unbecoming. Third, although Grievant claims the Sheriff told him the LCA would be restricted to alcohol-related misconduct, the Sheriff denies making such representations. In this regard, it is clear from Paragraph 7 of the LCA that the written text is the entire agreement on this point. Thus, any unexpressed verbal inducements or representations may not be considered. In addition, Paragraph 6 confirms that Grievant had the opportunity to consult with his exclusive representative at the time. The paragraph also confirms that Grievant understood what he was signing. Fourth, the final sentence of Paragraph 3 makes reference to the high standards of conduct applicable to all police officers. This is a strong suggestion that Paragraph 3 included the entire body of conduct regulations contained in General Order G101. Finally, the absence of any corroborating testimony from the former officials who negotiated the LCA again entitles the Employer to the adverse inference that, if called, they would not corroborate the contention of the Grievant and the Union that the scope of the LCA was limited only to alcohol-related misconduct.

Given the foregoing considerations, the finding must be that the scope of the LCA included both alcohol-related misconduct as well as any other forms of Conduct Unbecoming described by General Order G101.

Having found that the LCA was valid and that its scope included all forms of Conduct Unbecoming, the remaining question for determination is whether Grievant committed any prohibited Conduct Unbecoming. By his own admission, he did when he entered the apartment of LB on the early morning of August 6, 2008 as he did. He was engaged in a purely personal mission at the time while he was on duty. He had not disclosed his planned activity to the dispatcher as required by departmental policy, which he admitted he knew he was required to do. There was no

law enforcement purpose associated with his personal mission. He simply had no business being where he was and doing what he was doing at the time.

Although Grievant claimed LB was not his ex-girlfriend at the time, that assertion strains reality because it flies in the face of the undisputed facts. LB saw him earlier on the evening of August 5th while she was at work. She told him then she did not want to see him any more. Her words broke off the relationship. She also asked Grievant for her key. Although Grievant did not give her the key at that time, from the moment she ended the relationship and requested the return of her key, Grievant no longer had any valid claim of right whatsoever to use the key to enter her apartment and bedroom in the manner he did without her knowledge and permission.

Because Grievant's admissions show his actions with LB did constitute Conduct Unbecoming, it is not necessary for us to address the Union's objection about the evidence pertaining to the other woman, JB. Nonetheless, the following observations are provided for the future guidance of the parties. First, on its face, Minn. Stats. Chapter 626.89 applies only to the taking of a recorded or written "formal statement" as part of an investigation. According to its terms, therefore, it would not appear to apply to the unrecorded telephone call requesting JB's full name. Second, Section 10.5 of the Agreement was not yet effective on the date of the phone call, which was placed by the investigator in December of 2008. It cannot be determined if a similar paragraph existed in the parties' previous labor agreement because it is not part of the record. Finally, a second recorded statement was obtained from Grievant after the phone call in question. Grievant again had his Union counsel present. The fact of the phone call and the results of the investigator's interview of JB were discussed in that second formal statement. The transcript of that session does not show that any objection whatsoever was raised about the propriety of the phone call or the admissibility of the evidence obtained from JB at that time.

After careful consideration of the relevant evidence in the record, the findings are re-stated as follows:

1. The LCA was valid and fully in force for the purpose of Grievant's termination.
2. The scope of the LCA included any and all forms of Conduct Unbecoming.
3. Grievant did commit Conduct Unbecoming within the scope of the LCA.

Given these findings, the undersigned finds that the merits of the instant grievance are not arbitrable.

Accordingly, the undersigned has no proper basis for disturbing the Employer's invocation of the LCA as it did. It follows, therefore, that the grievance must be denied.

AWARD

The merits of Grievant's termination are not arbitrable in accordance with the terms of the Last Chance Agreement signed by the Employer, Grievant, and Grievant's exclusive representative in May and June of 2006. The grievance, therefore, is denied.



Gerald E. Wallin, Esq.
Arbitrator

April 18, 2010