

IN THE MATTER OF ARBITRATION BETWEEN

MINNESOTA TEAMSTERS PUBLIC & LAW ENFORCEMENT EMPLOYEES UNION LOCAL NO. 320)	OPINION AND AWARD
)	
AND)	BMS NO. 09-PA-1132
)	
THE CITY OF OWATONNA, MINNESOTA)	Grievance re: Discipline

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ARBITRATOR: Charlotte Neigh

HEARING: May 4, 2010

POSTHEARING BRIEFS RECEIVED: June 5, 2010

AWARD: June 27, 2010

REPRESENTATIVES

For the Union:

Paula R. Johnston, General Counsel
3001 University Avenue S.E.
Minneapolis, Minnesota 55414

For the Employer:

Brandon M. Fitzsimmons, Esq.
Flaherty & Hood, P.A.
525 Park Street - #470
St. Paul, Minnesota 55103

JURISDICTION AND PROCEDURE

Pursuant to the parties' Labor Agreement and the procedures of the Minnesota Bureau of Mediation Services, Charlotte Neigh was appointed to arbitrate this matter. A hearing was held in Owatonna, Minnesota, at which time both parties had a full opportunity to offer evidence. Posthearing briefs were filed by the agreed deadline of June 4th, at which time the record was closed.

ISSUES

1. Whether the grievance is substantively arbitrable.
2. If yes, whether the Employer had just cause to demote the Grievant from Sergeant to Police Officer.
3. If not, what is the appropriate remedy.

PERTINENT AUTHORITY RELATING TO ARBITRABILITY

LABOR AGREEMENT

ARTICLE 6. EMPLOYEE RIGHTS - GRIEVANCE PROCEDURE

6.1 Definition of A Grievance

A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this AGREEMENT.

6.4 Arbitrator's Authority

- A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this AGREEMENT. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the UNION, and shall have no authority to make a decision on any other issue not so submitted.

- B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. . . . The decision shall be binding on both the EMPLOYER and the UNION and shall be based solely on the arbitrator's interpretation or application of the express terms of this AGREEMENT and to the facts of the grievance presented.

6.6 CHOICE OF REMEDY

If, as a result of the witten Employer response in Step 3, the grievance involves the suspension, demotion or discharge of an employee who has completed the required evaluation period, the grievance may be appealed either to Step 4 of Article 6 or a procedure such as: Civil Service, Veteran's Preference or Fair Employment. If appealed to any procedure other than Step 4 of Article 6, the grievance is not subject to the arbitration procedure as provided in Step 4 of Article 6. The aggrieved employee shall indicate in writing which procedure is to be utilized - Step 4 of Article 6 or another appeal procedure - and shall sign a statement to the effect that the choice of any one procedure precludes the aggrieved employee from making an additional appeal through any other procedure.

ARTICLE 17. SAVINGS CLAUSE

This AGREEMENT is subject to the laws of the United States, the State of Minnesota, Steele County and the City of Owatonna. In the event any provision of this AGREEMENT shall be held to be contrary to the law by a court of competent jurisdiction from whose final decree or judgment no appeal has been taken within the time limit provided, such provision shall be voided. All other provisions of this AGREEMENT shall continue in full force and effect. The voided provision may be renegotiated at the written request of either party.

BACKGROUND AND UNDISPUTED FACTS RELATING TO ARBITRABILITY

On 11/3/08 the Grievant was informed that he was being reassigned from his patrol sergeant position to the position of administrative sergeant with fewer patrol and supervisory duties, effective 1/4/09. On 5/19/09 the Grievant's supervising Captain issued a Personnel Incident Report (PIR) citing the Grievant for deficiency in performing his duties, and recommending a 4-day disciplinary suspension and a work-performance plan.

On 6/3/09 the Chief notified the Grievant that, rather than being suspended, he was being demoted to the position of police officer. The Union promptly filed a grievance, claiming the demotion was without just cause.

Background and Undisputed Facts Re: Arbitrability (continued)

An arbitrator was selected and a hearing was scheduled for 1/21/10; this was postponed by agreement of the parties. On 1/22/10 the Employer received a Notice of Charge of Discrimination from the U.S. Equal Employment Opportunity Commission (EEOC), regarding a claim of age discrimination filed by the Grievant, relating to his demotion and other adverse employment actions. The Employer promptly notified the Union that the grievance was no longer subject to arbitration because of Article 6.6, the choice-of-remedy provision.

The parties cooperated in scheduling a new hearing date, at which time the Employer raised the issue of arbitrability, to which the Union responded. The arbitrator declined to rule on the arbitrability issue at that time and the parties proceeded to present evidence on the merits of the case. It is necessary to first address the arbitrability issue.

SUMMARY OF THE PARTIES' ARGUMENTS REGARDING ARBITRABILITY

THE EMPLOYER ARGUES THAT:

- Under the clear terms of Article 6.6, the grievance is no longer subject to arbitration because the Grievant chose a different forum. The fact that the Grievant failed to sign a statement regarding his choice of remedy is inconsequential because that is a mere formality.
- An arbitration decision must be based on the express terms of a collective bargaining agreement (CBA), and the language waives any right to arbitration under these circumstances. A sufficient review of the Grievant's claims can be provided by the EEOC.
- An arbitrator is without authority to determine the legality of the choice-of-remedy provision, but must enforce the terms that exist. Otherwise, it would be necessary to analyze and apply external law, including the Age Discrimination in Employment Act (ADEA), which is the province of the courts, not an arbitrator.
- The fact that the Union wants to change this provision in negotiations is an acknowledgment that it cannot be done by an arbitrator.
- Article 6.4 B, prohibiting decisions contrary to law, does not allow an arbitrator to deviate from the CBA as written.
- The choice-of-remedy provision is legal; it does not preclude the Grievant from pursuing an age discrimination claim. Federal circuit courts have held that such a CBA provision does not constitute an impermissible waiver of the right to a discrimination claim.
- An employer should not be required to spend time and resources defending the same claim twice.

Employer Arguments Re: Arbitrability (continued)

- The EEOC manual and the federal case cited by the Union should not be relied on: the case is from a different federal circuit and is from the early 1990s; other federal circuit cases have declined to follow it; the manual does not thoroughly consider the issues presented here, and it has been found not to be persuasive.
- The grievance is also barred by estoppel and laches because the Union has failed to challenge Article 6.6 in negotiations for 12 CBAs since 1989. The Employer is prejudiced by allowing the Union to use arbitration as a fishing expedition to prepare an EEOC case.

THE UNION ARGUES THAT:

- The CBA is expressly subject to laws. The choice-of-remedy provision is invalid because it conflicts with the law by preventing the Grievant from pursuing both a just cause claim in arbitration and an age discrimination claim under the ADEA; court cases have ruled that an employee may not be precluded from pursuing both.
- A Union may not waive an employee's right to arbitrate a grievance under the CBA, and it may not waive an employee's rights under the ADEA.
- A federal circuit case on point with this case held that such a choice-of-remedy provision is retaliation of the type prohibited by the ADEA.
- The same court rejected the Employer's rationale regarding the desirability of avoiding duplicative litigation and held that Congress' intention was to provide parallel and overlapping remedies against discrimination. The EEOC has taken the position that an employee may not legally be prohibited from pursuing both.
- The grievance arbitration and the EEOC charge involve different claims; the Union has not alleged age discrimination in pursuing the grievance.
- The Union is not using the grievance arbitration as a fishing expedition; it does not represent the Grievant in the EEOC matter.
- Finding the grievance to be arbitrable would not be amending the CBA; the choice-of-remedy provision is already invalid under the law; the CBA expressly prohibits an arbitrator from making decisions contrary to law.
- The savings clause acknowledges that the CBA is subject to external law; this bolsters an arbitrator's authority to consider external law.
- The parties are equally responsible for failing to amend the illegal provision; asserting its unenforceability does not give the Union any advantage, as it is not representing the Grievant in the EEOC action, and it does not cause detriment to the Employer.

ANALYSIS AND DISCUSSION REGARDING ARBITRABILITY

Both parties argued the arbitrability issue in their posthearing briefs. The Employer maintains that the choice-of-remedy provision is legal but even if it isn't, an arbitrator is without authority to ignore or nullify it. The Union maintains that the provision is illegal and unenforceable, and that the Arbitrator is required to take this into account.

Arbitrator Authority to Consider External Law

In this arbitration case external law has been cited by the Union for the limited purpose of barring enforcement of the choice-of-remedy provision, so that the substance of the grievance may be arbitrated. The Union has not claimed age discrimination in the grievance and that is not an issue to be addressed in this arbitration, either under the CBA or under the ADEA. The only issue that has been submitted, in accordance with Article 6.4, is whether the Employer had just cause to demote the Grievant.

The Employer argues that an arbitration decision must be based exclusively on the express terms of a collective bargaining agreement (CBA) and an arbitrator may not analyze and apply external law. However, Article 6.4 B of the CBA expressly prohibits an arbitrator from making "decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law". It is concluded that this language requires an arbitrator to consider whether CBA terms conflict with external law. Therefore it is necessary to consider whether the law makes the choice-of-remedy provision unenforceable.

Legality of Choice-of-Remedy Provision

The Union relies on the EEOC Compliance Manual and the case it cites: *EEOC v. Board of Governors of State Colleges & Universities*, 957 F.2d 424 (7th Cir.), cert denied, 506 U.S. 906 (1992). In that case the CBA provided that the grievance procedure could be terminated if the aggrieved employee sought resolution in any other forum. The Seventh Circuit ruled that this constituted an adverse employment action in violation of the anti-retaliation clause of the ADEA, stating at page 431: "A collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity under the ADEA."

The Employer argues that the *Board of Governors* case should not be relied on because: it is not from the 8th Circuit; and other federal circuit cases have declined to follow it. The Employer cites *Richardson v. Commission on Human Rights & Opportunities*, 52 F.3d 114 (2d Cir. 2008). That case considered whether an election-of-remedies provision in a CBA was prohibited by Title VII of the Civil Rights Act of 1964, or, in the alternative, whether it constituted discrimination. The provision stated: ". . . disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the Commission on Human Rights and Opportunities arising from the same common nucleus of operative fact."

Analysis and Discussion Re: Arbitrability (continued)

The *Richardson* court concluded that this CBA provision did not violate the Act. However, it is noted that the choice-of-remedy provision in *Richardson* related specifically to claims of “unlawful discrimination”, and the court was satisfied that the alternate forum would adequately address the discrimination claim. This distinguishes *Richardson* from *Board of Governors* and from this arbitration case, where the effect of the choice-of-remedy provision would be to bar arbitration of grievances based on just cause, not just those claiming discrimination.

The Employer also cites *Franklin v. Local 2 of the Sheet Metal Workers International Association*, 565 F.3d 508 (8th Cir. 2009) for not following *Board of Governors*. However, it is noted that the *Franklin* court distinguished the facts of that case as the reason for not agreeing with Appellants’ reliance on a secondary holding in *Board of Governors*. There is no suggestion that the 8th Circuit disagrees with the fundamental holding in *Board of Governors*: that such a broad choice-of-remedy provision is prohibited. The Supreme Court declined to hear *Board of Governors* and the cited circuit court cases did not reject its fundamental holding. It is concluded that it is directly on point and is persuasive in this arbitration case.

The Employer also argues that the grievance should be barred by estoppel and laches because the Union has repeatedly failed over an extended period of time to amend the CBA to cure the alleged illegality of the choice-of-remedy provision. The Union persuasively argues that: both parties are equally responsible for having failed to address this problem over the years; and there has been no advantage to the Union or detriment to the Employer. The Union is not conducting a “fishing expedition” in preparation for the EEOC case, as it does not represent the Grievant in that case. The Employer’s desire to avoid the time and expense involved in duplicative litigation cannot outweigh the policy and intent of the anti-discrimination laws. The *Board of Governors* court noted at page 428 that Congress intended to provide parallel and overlapping remedies against discrimination and expressly intended to permit an employee to pursue both grievance arbitration and a cause of action under an anti-discrimination law.

It is concluded that the choice-of-remedy provision: is inconsistent with federal anti-discrimination law, particularly the ADEA; is unenforceable; and cannot be allowed to bar arbitration of the grievance in this case.

PERTINENT AUTHORITY RELATING TO DEMOTION

LABOR AGREEMENT

ARTICLE 5. EMPLOYER AUTHORITY

5.1 It is recognized that, except as expressly stated herein, the EMPLOYER shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the Police Department in all of its various aspects, including . . . to hire, promote, demote, suspend, discipline, discharge . . . to make and enforce reasonable rules and regulations . . .

5.4 The Union agrees its members shall comply with all Police Department rules and regulations, including those relating to conduct and work performance.

5.5 Rules and regulations and departmental policy, as referred to herein, shall be drafted and reduced to writing for clarification of the above terms. In addition, all Civil Service rules, regulations and procedures not inconsistent with the terms of this AGREEMENT shall not be affected hereby.

5.6 It is recognized by all parties to this AGREEMENT that any individuals who are associated with the field of criminal law have to be constantly growing in knowledge and expertise to keep abreast of the many changes promulgated through the legislative process, as well as interpretive changes from the courts. . . . (T)he EMPLOYER deems it necessary for any employee who wants to maintain his/her level of competence, necessary to fulfill his/her duties and enhance his/her promotability, that the employee attend various training sessions. . . . which would be scheduled at approximately one-month intervals . . . at no cost to the employee. It is understood that while attendance at these sessions is not mandatory, neither would it qualify the employee for any overtime pay or compensation time off.

ARTICLE 7. DISCIPLINE

7.1 The Employer will discipline employees for just cause only. Discipline will be one (1) or more of the following forms:

- A. Oral reprimand;
- B. Written reprimand;
- C. Suspension;
- D. Demotion, or
- E. Discharge.

OWATONNA POLICE DEPARTMENT MANUAL

FORWARD

General Orders-Special Orders-Rules

These directives are designed to cover situations in which no deviations or exceptions are permitted. The essence of rules and orders is inflexibility. . . .

GENERAL ORDER: 200

SUBJECT: RULES AND REGULATIONS

PURPOSE: This General Order is concerned with employee conduct. In some cases, the rules pertain to conduct off-duty but, for the most part, the rules are concerned with on-duty conduct. These rules have been divided into six (6) major areas of conduct:

- 1. Discipline
- 2. Professional Conduct
- 3. Job Performance
- 4. Property, Equipment and Reports
- 5. Alcohol and Drugs
- 6. Job-Related Conditions

OPD Manual - General Order 200 (continued)

1. DISCIPLINE

1.01 Violation of Rules

Employees shall not commit any acts or omit any acts which constitute a violation of any of the rules, regulations, directives, orders or policies of the Department, whether stated in this General Order or elsewhere. Ignorance of the rules, regulations, directives, orders or policies shall not be considered as a justification for any such violations. Employees shall be responsible for their own acts, and they shall not shift to others the burden of responsibility for executing or failing to execute a lawful order or duty.

3.04 Unacceptable Performance

Employees shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Employees shall perform their duties in a manner which will tend to establish and maintain the highest standards of efficiency in carrying out the functions and objectives of the department. Unacceptable performance may be demonstrated by an employee's lack of knowledge regarding laws for their application; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the employee's rank or position; the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention; absence without leave; or the unnecessary absence from an assigned responsibility during a tour of duty. In addition to other indications of unacceptable performance, the following will be considered prima facie evidence of such performance; repeated poor evaluations or a written record of repeated infractions of the rules, regulations, manuals or directives.

CITY OF OWATONNA PERSONNEL POLICY AND PROCEDURES MANUAL

1.3 SCOPE

The complete manual applies to all employees except those cases where a union contract has a differing provision, provided the city, in all events, reserves its inherent managerial authority. . .

CHAPTER 11 - DISCIPLINARY PROCEDURE

11.1 ACCEPTABLE AND UNACCEPTABLE BEHAVIOR

It is the policy of the City of Owatonna to administer preventive and progressive disciplinary action consistently, without discrimination of any kind. The city expects all employees to exhibit appropriate behavior and good judgment as well as competence at work. When employees fall short in these areas, disciplinary action will be considered.

The City Administrator, department directors, and direct supervisors have the right to impose discipline upon an employee. Examples of unacceptable behavior include, but are not limited to:

- (5) Demonstrating insubordination, including, but not limited to:
 - (a) Refusal to perform a reasonable, safe and proper work assignment.
 - (b) Refusal to work overtime when required.
 - (c) Refusal to render assistance.
 - (d) Insolent response to directives.
 - (e) Delay in carrying out an assignment.
 - (f) Undermining and disrespectful behavior.
- (10) Misusing or failing to use designated authority in the performance of duties.
- (16) Inability or incompetence to perform duties.
- (24) Failure to comply with conditions of employment, licensure, and/or certification requirements.
- (25) Inability or unwillingness to work effectively and respectfully with other coworkers and/or citizens.

BACKGROUND AND UNDISPUTED FACTS REGARDING DEMOTION

The Grievant was hired as a police officer on April 8, 1985 by the Owatonna Police Department (OPD) and was promoted to the rank of sergeant in 1995. From 1995 through 2004 the Grievant was disciplined twice: a written warning in 2002 for unsatisfactory performance and harassment; a written reprimand in 2004 for conduct unbecoming an officer for discrediting the chief of police and the promotional process.

A new OPD Chief was appointed in December 2004 and undertook an ambitious program to improve public safety services, which he characterized as a “paradigm shift”. This was reflected in: increased training opportunities to improve the professionalism of the department and its employees; updated equipment and use of technology; changes in operations and procedures; and increased monitoring, evaluation and stated expectations of performance. The Chief introduced a management style that emphasized engagement, communication and leadership. During 2005 and 2006 the Chief directly supervised the Grievant as a Patrol Sergeant, due to gaps in upper level staffing. In June 2009 the OPD had 41 employees, including: 1 chief, 2 captains, 3 corporal investigators, 8 sergeants, 22 police officers, and 5 non-licensed

General Order 215 - Employee Conduct - September 8, 2005

This order established a procedure in cases of allegations of misconduct or criticism of the department’s services; its stated purpose is to provide citizens with an avenue to voice legitimate grievances, while protecting employees from false charges. It also contemplates reports initiated by a supervisor. It expressly states that counseling and training do not constitute disciplinary action unless specifically stated as an oral or written reprimand. A report may be classified as 1) a question, 2) a performance matter, or 3) a complaint; the classification determines the processing and final disposition.

The order defines *performance matter* as a report about services or actions of an employee not classified as misconduct and likely to be resolved by training and counseling. Examples are “minor issues such as attitude, demeanor, courtesy, tardiness, and attendance”. The supervisor of the officer(s) involved investigates the matter and submits a report to the captain with recommendations for counseling or training. The captain has discretion regarding disposition of the matter: place the report in the employee’s departmental file with a set time for removal if no similar issues are raised; counsel or instruct the employee, or recommend no further action; refer the employee for formal training; or refer for investigation as a formal complaint.

GRIEVANT’S PERFORMANCE AND DISCIPLINARY RECORD: 2005 - 2009

The Grievant’s performance record includes: assignments; discussions; supervisor’s observations; counseling/training; performance evaluations; performance matters; and formal disciplinary actions. Selected portions relevant to the stated reasons for the Grievant’s demotion follow.

2005 Performance Record

On 9/12/05 the Grievant received a written reprimand for a second event of unacceptable performance, based on failure to incorporate mandated daily tasks into his routine.

2005 Performance Evaluation

After the first full year of the new administration, the Chief conducted a 2005 performance evaluation (PE) of the Grievant, rating him as generally meeting expectations, except for below expectations in the category of “initiative”, defined as “Often unable or unwilling to begin and complete tasks without direct supervision”. The Chief credited the Grievant with several “accomplishments/strengths”, and also listed several “areas for further development”, including: self development; administrative skills and capabilities; effective communication; report writing skills; reviewing the reports of the officers he supervised; documenting coaching and discipline of his officers; and “tactical procedures - command presence/officer safety/delegation of responsibilities”.

The Chief provided the Grievant with written, detailed notes regarding the categories of: 1) patrol knowledge, resource management and accountability; 2) administrative knowledge, skills and abilities; and 3) approach to department philosophies, focus and direction. The Chief was concerned about the Grievant’s lack of a plan for self development and his contentment with the “status quo”, and cautioned that, while recognizing the Grievant was “not open to working outside his comfort zone”, the Grievant would be held to “a higher level of accountability in areas . . . (of) normal daily operational functions”.

In the patrol category, the Chief characterized specific areas that the Grievant “must improve” as “borderline deficiencies”, including: knowledge of laws and investigative procedures; coordinating and delegating resources rather than performing tasks himself; and documenting his observations or actions regarding officers under his supervision and sharing this information with other supervisors. The Chief assured the Grievant that he would be provided with the necessary academic and training opportunities to “get him performing at an overall acceptable range”.

In the administrative category, the Chief stated that the Grievant “will be required to strengthen his knowledge, skills and abilities” “in order to adequately represent the department appropriately for his rank”, specifying written and oral communications, and computer competency. The Chief also noted: the need to perform enumerated necessary tasks prior to every shift, particularly understanding staffing levels; failure to review his officers’ reports; and Grievant’s avoidance of writing reports himself.

In the philosophy category, the Chief stated that: it was “imperative that each supervisor accept and institutionalize the overall goals and objectives of the department”; “communication of the department’s mission and the vision is critical to both the officer’s and the entire department’s success”; and the Grievant “will be depended upon to make certain he is on board with the department’s direction”.

2005 PE (continued)

In his summary, the Chief stated that the Grievant “will need to increase his performance and no longer accept the status quo”. He referenced a project that the Grievant had not yet completed as an example of his tendency to spend time talking to get out of an assignment rather than just getting it done. He also noted that the Grievant had received two notices of unacceptable performance during 2005 but “has improved significantly” since they were addressed. The Chief set himself a goal of establishing an individual plan to assist the Grievant to meet the expectations of his position, and concluded that if little or no improvement was made by the time of the next PE, “he should know that he will be placed on a performance improvement plan”.

Individual goals/objectives listed: self-development assessment; determine training interests; communicate and work closely with peers; communicate effectively and accurately; complete process for management of vehicle forfeiture program; improve report-writing skills, and review and evaluate officers’ reports; increase administrative capacities; daily thoroughness and completeness of all job tasks and responsibilities.

The Grievant signed the PE, acknowledging that he had read it and discussed it with the Chief. The Grievant did not offer any written comments in the space provided.

2006 Performance Record

In 2006 the Grievant attended a two-week course on supervisor training. He was counseled for failing to complete the assigned task of coordinating a DWI forfeiture manual and was relieved of supervisory duties in order to finish it.

2006 Performance Evaluation

At this time all of the sergeants were provided with written overall duties and expectations of a shift supervisor, and the Chief stated that increased efforts would be necessary in 2007.

The Chief rated the Grievant as meeting expectations in every category, and exceeding expectations in “public contact”. Accomplishments/strengths included: a unique ability to deal with obstinate people; improved reporting related to animal control; development of a vehicle forfeiture guide and coordination of disposal; increased self-initiated activity in patrol functions; and improved understanding and follow-through on specific shift assignments.

Areas for further development included: reviewing officer reports; increased involvement in search and seizure situations to avoid statutory and constitutional violations; review and enhance vehicle forfeiture guide and procedures; further improvement in written documents, particularly sufficient detail; stricter supervision of and assistance for officers not meeting standards; and “communicate with your peers - all of them!”. The Chief noted the necessity of believing in the mission vision as a foundation. He also warned that in the future all supervisors would be held responsible for proficiency in knowledge and application of search and seizure laws and guidelines.

2006 PE (continued)

The Chief encouraged the Grievant to seek out training such as: conflict resolution management; oral and written communications; discipline; and strategic planning. The Chief noted that the Grievant had “improved significantly” as a shift supervisor, had generally been very good at assigning resources to enforce local ordinances, and was being assigned to develop a plan for the entire department. Areas needing additional effort included: proper application of search and seizure; operational and tactical approach to incidents; final document preparation; relationship building and collaboration, including communications of all sorts with members of the department and his immediate peer group.

The Chief noted that the Grievant was “expected to continue believing in the mission and vision of the department and taking his role seriously”. The Grievant signed the PE, acknowledging that he had read it and discussed it with the Chief; he did not write any comments in the space provided.

2007 Performance Record

In 2007 the Grievant was counseled for: failure to communicate changes in animal control procedures; how to start and finish projects; failure to properly complete vehicle title application, delaying auction for six months; working traffic at all schools rather than just one; two reminders to complete past-due evaluations of his subordinates; failing to supervise one subordinate; failing to timely deliver a form to the jail, the subject of a complaint from the jail; inability to properly track forfeited vehicles, the subject of a complaint from the county attorney’s office; failing to follow up on citizen action request after two reminders; failing to timely communicate information from an informant, causing unnecessarily rushed planning, and coming to assist after having been drinking alcoholic beverages; and failing to take charge as an incident commander at the scene of an incident and leaving the city uncovered for calls.

2007 Performance Evaluation

The Grievant’s supervising Captain did the 2007 PE, rating the Grievant as meeting expectations in every category except public contact, where he exceeded expectations. The Captain noted a significant improvement in the quantity of work, and consistent initiatives in organizing traffic details, characterizing traffic enforcement as a strong area for the Grievant. The Captain was critical of the Grievant’s “disagreement with current management philosophy, which creates confusion from time to time”, and of his tendency to look for shortcuts that may compromise the outcome of significant incidents.

The Captain made several comments about the Grievant’s needing “to apply himself”. Areas for further development included: training and education, keeping current with trends; communication with peers; better review of subordinates’ reports; embracing technological change; more professional initiatives and development; increased knowledge of 4th amendment issues; and mandatory attendance at a 4-day leadership academy.

2007 PE (continued)

The Captain noted: “The sergeant’s position is management, and requires increased levels of leadership in order to be successful”. Under goals for ethics/integrity the Captain noted that the Grievant should “continue to expand his buy-in to current administration policies . . . There is no room in this department for independent operators as they will surely fail. (Grievant) needs to endorse philosophies of this department with subordinates whether he agrees with them or not.”

The Captain rated the Grievant’s accountability as unsatisfactory, noting his need to hold his subordinates more accountable to consistently perform up to expectations by supervising their activities for the entire shift. The Grievant was put on notice that thereafter he would be “kept to a higher standard of accountability with his work group”. As part of a continued work plan, the Grievant was required to attend the leadership academy to learn “current supervisory and leadership skills that will help him in this area”.

Under communications, the Captain noted that the Grievant’s writing ability would need to improve, and pointed out that effective written communication within the department was important because schedules and time did not allow depending on oral communication only. He encouraged the Grievant to use e-mail, noting that over the year he had received only five e-mails from the Grievant and hundreds from the other sergeants. He concluded that the Grievant “must learn to take the time to communicate more frequently with others, especially among his peer group”.

Under adaptability/flexibility, the Captain noted that the Grievant did not always follow suggestions to improve his performance and was happy staying at his current level. The Captain wrote “To do so is not acceptable within this department any longer. He will need to strive for improvement in everything he does especially in his supervisory style.” The Captain distinguished managing from leading, as the difference between telling people what to do and motivating them to want to do it. The Captain said that the Grievant “needs to become a leader in order to stay current as a supervisor within this department. Anything less is unacceptable, and is a show of having a lack of initiative. . . . (The Grievant) needs to step up his level of supervision or he will surely fail in the coming years.”

The Captain rated the Grievant as unsatisfactory for achievement orientation, calling it “a major area of concern . . . as he continues to struggle with personal and professional goals”, and noting that the department needed leaders motivated to grow personally and professionally, and to help others attain their goals. The Captain noted that the younger generation of officers would not respond to old methods. The Captain criticized the Grievant for not planning ahead, but waiting to react to developments, another distinction between managing and leading. The Captain thought that increased computer ability would help the Grievant with organizational and planning skills, and strongly recommended that he attend training for this. The Grievant was assigned to coordinate traffic enforcement initiatives for the department.

2008 Performance Record

In January the Grievant was counseled for lack of productivity by the officers on his shift. In March he attended training in leadership skills. In April he declined an opportunity to attend a lifesavers conference to learn innovations in traffic enforcement. In May he was required to redo his evaluations of his subordinates because they were incomplete, too short, and vague. In July the Grievant was counseled about: failing to properly explain to a subordinate why and when approval is needed for time off; failing to complete operations plans for the day shift; and failing to timely approve time-off slips. In August the Grievant was counseled for: leaving a shift log blank and failing to document numerous incidents of property damage calls; and failing to timely submit a report on follow-up to concerns received from the National Night Out event. In September the Grievant was counseled for submitting performance matters on two of his officers that mimicked and mocked language the Captain had used in a performance matter report about the Grievant.

On 9/9/08 the Grievant received an oral reprimand for failure to perform assigned tasks, based on a day shift that had only one officer on the street, contrary to the required minimum of two.

On 9/19/08 the Captain wrote up a Personnel Incident Report (PIR), which he categorized as a performance matter, relating to failure to perform assigned duties. It referenced the list of regular shift duties and individual assignments given to sergeants at the beginning of the year. The Grievant had been assigned the overall formation, implementation, and evaluation of traffic initiatives, and was to design a monthly plan, with specific assignments for designated days. The Captain stated that the Grievant had failed to do this on time and what he did was not complete, despite repeated reminders by the Captain. On July 18th the Grievant said he would have the plan posted before August 1st but failed to do so on time or for the complete month. The Captain gave him additional directions on August 13th and the Grievant failed to do it in September. He also failed to carry out a specific related instruction on September 2nd. The Captain concluded with a detailed, specific Action Plan for Improvement to guide the Grievant in accomplishing his assignment of coordinating traffic enforcement initiatives.

On 10/3/08 the Captain wrote a memo to the Grievant regarding a report that the Grievant had submitted, pointing out errors and omissions in the report. The Captain also noted that the Grievant had incorrectly run a license plate number through the state system, resulting in erroneous information. The Captain also criticized the Grievant's failure to return a phone call to the person at the school who had reported a traffic safety violation, despite the Grievant's having assured the Captain that he would do so. The Captain concluded by pointing out that he should not have to do this kind of follow-up with work from a sergeant.

On 11/18/08 the Grievant received a written performance matter relating to his mishandling of a search and seizure incident on 10/25/08, which the county attorney's office had found to involve: a questionable entry of a hotel room; failure to identify the person suspected by the hotel staff of dealing drugs; an illegal pat-search; and unjustified seizure of money, in addition to other errors.

2008 Performance Evaluation

The Captain rated the Grievant as below expectations overall, particularly: quantity and quality of work; knowledge; initiative; and judgment. His criticisms included: necessity of numerous reminders to get the Grievant to communicate the department-wide traffic initiatives; poor quality of reports prepared and reviewed; removal from coordination of the forfeiture program due to complaints from the county attorney's office; inability to complete assigned tasks within timelines; not buying into management philosophies and priorities; not supporting management expectations for a supervisory level position; difficulty staying on assigned tasks, requiring extra supervision; difficulty making supervisory level decisions without help from others; and no demonstrated interest in developing more positive relationships with his peer group.

Evaluation of other factors noted: not seeming to accept the vision and mission; following his own agenda rather than giving priority to assigned tasks; being the only sergeant never to request training and doing only mandatory training; no interest in professional development to stay current with modern policing and to be able to train subordinates; conducting an illegal search and seizure and submitting reports that did not articulate probable cause; not meeting expectations of a police officer, let alone a supervisor; lack of commitment to expectations of a supervisor; and failure to direct, supervise and train subordinates.

Under leadership/employee development, the Captain stated that the Grievant: was the only sergeant who had not worked on professional development for subordinates and not met with them to discuss goals and aspirations; had mocked the type of expected leadership to his subordinates on a consistent basis; and was the only sergeant not to make a sincere and conscious effort to make improvements. The Captain commented: "This will have to change if (the Grievant) wishes to continue working as a sergeant in this department". The Grievant signed an acknowledgment that he read and discussed this PE with the Captain but made no comments.

This PE was done on 12/19/08 and has several references to the Grievant's new assignment to an administrative position for 2009, commencing in January. In the PE, the Captain stated that he expected that this new assignment, with a detailed work plan would: decrease the amount of direct supervision by the Grievant; allow time to become better acquainted with duties required of a supervisor; as coordinator for department-wide traffic initiatives, give the experience of monitoring and reporting each officer's performance; allow the Grievant to learn how to develop graphs and charts to measure effectiveness of his initiatives; require the Grievant to become proficient in search and seizure issues in order to properly direct officers conducting traffic stops; result in improved writing skills needed for reports and newspaper articles; and enable a sincere and noticeable change in leadership abilities. The Grievant was to meet monthly with the patrol commander to evaluate progress, and these evaluations were to reviewed at the end of 2009. The Captain hoped that the Grievant would be able to return to his duties as a watch commander at the end of 2009.

In the PE the Captain directed the Grievant to: meet with the patrol commander on a monthly basis to evaluate performance and progress of duties; become familiar with Microsoft Office applications to be able to chart progress and file reports; and develop training opportunities for roll-call, such as policy updates, search and seizure, case law.

Administrative Sergeant Assignment

The administrative sergeant position was outlined in a 10/28/08 memo from the Captain to the Chief. The memo did not identify which sergeant should be given the assignment. It was proposed as: “part of a continuing effort to enhance both personal and professional development within the sergeant’s group”; and to have a huge impact on the safety and wellbeing of the citizens.

The Captain described the main focus as “further development of traffic and local ordinance related issues with emphasis on . . . changing perceptions within the community (about) traffic enforcement” because “the public feels we are spending too much time and being too aggressive . . . working traffic within the city”. The assigned sergeant was to work days, and on weekdays be assigned to administrative duties and roll-call, with watch commander duties only during rotating weekends or when assigned to fill voids. The Captain reasoned that the position would develop technical and leadership skills essential to a supervisor. The skills to be enhanced included: computer; formulation of policy and procedure; search and seizure concepts; decision making; problem solving; and knowledge necessary to properly advise others.

The Captain enumerated 18 responsibilities that would be included in the assignment. The primary responsibility was to identify, develop and coordinate all traffic initiatives for the department on a daily, weekly and monthly basis, with monthly reports. Problems were to be identified and strategies developed to address them; departmental resources to be utilized were listed. Other specific responsibilities included: liaison for school safety patrols and bus stop arm violations; improve public perception of traffic enforcement and establish positive relations with media outlets; coordinate initiatives for parking control, animal control, and administrative fines; conduct afternoon roll-call, coordinating policy and procedure review; supply all directed patrol initiatives for HOT Sheets; implement a tracking system for action requests with monthly reports; coordinate team leader reports on a weekly basis; weekly discussions with patrol commander regarding strategies and plans needed to address problem areas; attend weekly investigative meetings; work with Safe and Sober coordinator to incorporate grant campaigns within traffic enforcement initiatives, and provide a summary of all campaign initiatives completed during regular shifts.

The Chief’s 11/3/08 memo to the Grievant advised that, effective 1/4/09 he would be placed in an administrative position within the patrol division for a minimum of one year, continuing to report to the division commander. It referenced the specific responsibilities in the Captain’s memorandum, and added that: the assignment would be evaluated throughout the year and then a determination of an extension or an assignment back to field supervisor duties would be assessed; and the Grievant would not be supervising others unless they were working specifically with him on his assigned duties. The Chief’s final point was: “This assignment will be looked upon as an opportunity to develop the administrative knowledge, skills and abilities that are necessary for the rank of Sergeant and necessary as a leader within this organization. Therefore, it is expected that throughout the course of this assignment that you conduct all department business and any discussions of such in accordance with the mission and objectives of the department. Further, be a solid member of the management team by delivering a strong, consistent message about our direction and purpose.”

The Grievant was directed to make an appointment with the Captain to discuss more specifically his new duties.

2009 Performance Record

On 1/6/09 the Captain issued a performance matter for the Grievant's surreptitious recording of the discussion of his annual performance evaluation on 12/19/08, which violated an express regulation contained in Special Order 02-1.

In February, at a meeting with the Captain and the Chief, the Grievant said that he was not on the same page regarding policing philosophies and the mission of the department, and that he and the Chief would never agree on how to do things.

In January the Grievant was counseled: for submitting a monthly report that was incomplete and submitted with a week left in the month; and on how to prepare brochures and a power-point presentation adequate for in-service training. In February the Grievant was counseled about expectations for monthly reporting and attended two days of training in Microsoft Excel; the Captain noted that the Grievant still had no idea how to make graphs and charts and again instructed the Community Service Officers (CSOs) not to help the Grievant do his reports because he needed to learn how to do it. In March the Captain: had to explain to the Grievant why he needed to deny an officer's request for comp overtime, which the Grievant should have known; and showed the Grievant how to use e-briefing to set up traffic details to eliminate the need for paper reports. On April 7th the Captain instructed a CSO not to assist the Grievant in preparing handouts for his presentation on April 10th. On April 10th the presentation did not include an actual plan, which it should have. On April 13th the Grievant requested overtime pay for coming in to prepare the handouts; the Captain told the Grievant to take it to the Chief, as he had ample time to do this during his scheduled work time. In April and May the Grievant failed to properly follow up on a request from the county attorney's office. In May the Grievant failed to complete all of the reports required for a vehicle crash involving a squad car.

Quarterly Performance Review - 5/18/09

On 5/18/09 the Captain sent a memo to the Chief regarding a review of the Grievant's performance after four months in the administrative sergeant position. The Captain made detailed findings on each of the 18 initiatives that had been assigned to the Grievant, concluding that he had failed to accomplish any of them. The Captain also noted specifics of the Grievant's failure to perform satisfactorily as a watch commander on the weekends when he was so assigned. The Captain noted that the Grievant had not accomplished the goals set at the time of his 2008 performance review, and in February 2009 had told the Chief that he did not agree with the mission and the direction of the department. The Captain concluded that the Grievant had failed to get on board with department expectations even after repeated opportunities to improve his performance. The Captain recommended that the Grievant be assigned an additional work plan requiring a daily log of his activities and performance, as well as tasked with specific goals and a means to measure accomplishments.

On 5/19/09 the Captain reiterated his evaluation in a Personnel Incident Report, recommending disciplinary action in the form of a 4-day suspension, and a more specific and detailed work plan.

Demotion - 6/3/09

By letter dated 6/3/09, the Chief notified the Grievant that he had made the final decision to demote the Grievant to a police officer position, effective 6/3/09 at 4:30 p.m. The Grievant was instructed to report to begin his new position at 6:30 a.m. on 6/5/09 and report to the Captain for a copy of a detailed Performance Improvement Plan.

The Union promptly grieved the demotion. A Step 3 grievance meeting was held with the City Administrator on June 10th, and by letter dated 6/29/09 she denied the grievance, stating that, given the Grievant's record, the demotion and improvement plan were the only action that would prevent her from recommending to the civil service commission that he be discharged.

The grievance proceeded to arbitration.

PARTIES' ARGUMENTS REGARDING JUST CAUSE

THE EMPLOYER ARGUES THAT:

- The Employer established clear expectations for the Grievant; he was given clear supervisory and administrative goals and objectives. The Grievant was given clear notice of the department's expectations and the disciplinary consequences for misconduct and/or unacceptable performance.
- Prior to 2009 the Grievant's performance and conduct demonstrated he lacked the knowledge, ability and willingness to perform the duties and responsibilities of a sergeant. The Grievant's annual PEs from 2005 through 2007 repeatedly showed the same performance problems.
- The Grievant's unacceptable performance had negative effects: setting a poor example for his subordinates; requiring other employees to perform his work; delays in processing criminal incidents; complaints from the county attorney's office; and preventing residents from getting prompt responses to public safety concerns.
- In 2009, as an attempt to remedy the Grievant's performance and to professionally develop him, the Chief assigned him to primarily administrative duties, focusing on traffic initiatives, which were a priority for the OPD in 2008 and 2009. The Grievant's Captain gave him a memorandum outlining the duties and discussed them with him, and invited any questions that might arise. To enable the Grievant to focus on the administrative assignment, he was relieved of most regular supervisory and patrol duties. The Grievant was given opportunities for training in computer programs, leadership and traffic initiatives, not all of which he accepted.
- In 2009, while assigned to the administrative sergeant position, the Grievant failed to avail himself of training opportunities and to ask his supervising Captain for guidance or assistance. He also performed below expectations on the occasions when he was scheduled to function as a patrol supervisor.

Employer Arguments (continued)

- After more than four months in the administrative position, the Grievant's performance was reviewed by his Captain, who found little to no progress in all 18 of the initiatives, and that the Grievant had failed to satisfactorily perform his reduced supervisory and patrol duties. The Captain recommended disciplinary action for unacceptable performance.
- The Grievant's poor evaluation in May 2009 and his prior record of continuing performance problems violated the OPD rule regarding unacceptable performance and justified disciplinary action.
- The Employer made efforts to correct the Grievant's performance and to help him develop professionally, including training opportunities, counseling, written directives, performance evaluations and disciplinary action. Demotion was the appropriate discipline in light of his unacceptable performance and disciplinary record.
- The Employer followed a fair and reasonable process before deciding to demote the Grievant.
- It is not necessary to issue a suspension before resorting to demotion given his total abdication of his duties and the futile efforts made to remedy his performance and engage him in professional development. The City Administrator would have recommended discharge if the Grievant had not been demoted.
- It was not necessary to retain the Grievant in the administrative position for an entire year before demoting him. He was notified that his performance in this position would be evaluated throughout the year. No other sergeant placed in an administrative position has made as little progress as the Grievant did in four months.
- Demotion was warranted and reinstatement to a sergeant position would be detrimental to the department: other employees do not have confidence in the Grievant; and his repeated lack of knowledge and initiative, and inability to correctly supervise and do administrative work, would burden others at a time when financial constraints require that all employees do their job efficiently.
- The grievance should be denied.

THE UNION ARGUES THAT:

- The Grievant was not given adequate instruction regarding his duties in the newly created administrative position, and was denied assistance when he attempted to perform them. The Grievant testified that he was not given any explanation; the Chief was unable to provide a coherent explanation; and the Captain did not testify.

Union Arguments (continued)

- In his 2008 PE the Grievant was promised that the “administration would assist in whatever way we can to help him succeed” but the administration was actively obstructing his attempts to perform his new duties, such as instructing the CSOs not to help him do his reports.
- The administration discouraged the Grievant from asking questions and seeking help, as shown by: the Captain’s note that he had to hold his hand in helping to prepare a power point presentation; and the Captain’s note about the Grievant’s lack of enthusiasm for a presentation. This does not create an environment conducive to seeking out assistance. The quarterly evaluation contained criticism that the Captain’s helping the Grievant was a factor in the Grievant’s failure to accomplish the initiative.
- The Captain’s proposals to prepare a “specific and detailed plan” with direction and milestones for the Grievant after May 2009 is tantamount to admitting that the administrative position was poorly conceived and badly communicated to the Grievant.
- The Grievant’s testimony disagreed with the Chief’s testimony that the Grievant was already performing the administrative duties as a patrol sergeant; the Grievant testified that most, if not all, of the duties were new to him. This is corroborated by the job description for the patrol sergeant, which shows that much of the work is typical police work such as: investigating; testifying; working a uniformed shift doing security patrols, traffic control, responding to radio calls, and arresting criminals. These duties are drastically different from research, coordination, and developing strategic plans. Typical law enforcement reports are different from the kind of comprehensive reports required of the administrative position.
- The administrative position was nearly academic and was designed to exploit every area in which the Grievant had not excelled as a patrol sergeant. In the 2005 PE the Chief noted that the Grievant was not open to working outside his comfort zone and therefore would have higher expectations for limited responsibilities; this calls in to question the motivation for assigning the Grievant to the administrative position. The Chief testified that he wanted to “find deficiencies” in the Grievant, which shows that he was being set up to fail.
- The Grievant was not given adequate time to accomplish the goals of the administrative position. It was stated to be for a one-year term and he was told that he would have one year to make a change in his leadership abilities. Instead, he had less than five months before he was demoted. No specific deadlines were given to the Grievant for any of the 18 initiatives. It was completely impossible for any one to complete all 18 initiatives in less than five months.
- The Grievant could not have failed in his supervisory duties to the extent that warranted demotion on the rare occasions when he was directly supervising officers. The Grievant worked approximately eleven days as a supervisor during this period. No actual evidence was provided to prove his alleged failures.

Union Arguments (continued)

- The Grievant's past performance record did not justify demotion. He received an overall rating of meets expectations or its equivalent on every PE until 2008. He successfully performed the duties and responsibilities of a sergeant for nearly 14 years.
- Many of the comments in the Grievant's 2008 PE were almost identical to those on the 2007 PE but received a lower rating. The Chief was unable to explain this.
- There are a disturbing number of references to having the Grievant "buy in" to current administration policies in the 2008 PE. This suggests that his demotion had less to do with his performance than his willingness to show the type of reverence apparently expected by the Chief from his subordinates.
- The performance record lists only minor instances of discussion, reminders, or simple notations, with only one entry of minor discipline in the form of an oral reprimand. The Employer characterizes the record as listing "informal actions taken against" the Grievant but that is not accurate for most of the entries. Many entries on the performance record are not related to performance, but note training courses. The mere fact that the Grievant attended leadership training cannot be considered as an action against him. Nor can his declining the opportunity to attend a safety conference be held against him.
- Several notations on the performance record are clearly intended to reflect poorly on the Grievant alone when in fact they applied to either the department as a whole or to all of the supervisors. The Chief acknowledged in the 2006 PE that the entire department was weak in application of search and seizure laws. All of the sergeants, not only the Grievant, were sent to the supervisory training course. The incident command training done together with the fire department was for the entire department. The leadership academy was attended by all sergeants.
- The performance record shows that the Grievant was assigned to the administrative position on the same date as the Captain's memo proposing the position to the Chief. The Grievant was set up to fail by being put into a position with duties that were impossible for him to perform.
- The performance record shows that over a four-year period the Grievant received only one disciplinary action - an oral reprimand in September 2008. The leap from an oral reprimand to demotion is enormous. If the Grievant's performance was as poor as the Employer now claims, it would have disciplined him often and with progressive severity. Instead, he continued to perform his duties as sergeant and receive acceptable PEs, with the exception of 2008.
- The Employer did not use progressive discipline. The Captain recommended a four-day suspension but the Chief decided on demotion instead, although the Employer did not have just cause to issue any discipline. The Captain's additional recommendations for a Work Performance Plan would have increased the Grievant's chances of being successful in the administrative position.

Union Arguments (continued)

- The Grievant is being subjected to double jeopardy by being disciplined again for performance record entries through September 2008. At that time he received an oral reprimand, which he grieved. The City Administrator denied that grievance, based in part on a portion of the performance record used to justify the demotion. Once discipline is imposed and accepted, it cannot be increased or another punishment imposed. This is a due process violation.
- The Employer did not have just cause to demote the Grievant. The grievance should be sustained and the Grievant reinstated to the patrol sergeant position with full back pay and benefits, and otherwise made whole.

ANALYSIS AND DISCUSSION REGARDING DEMOTION

The Employer has expressly retained the right to demote employees in Article 5.1 of the CBA, and Article 7 lists demotion as one of the forms of disciplinary action. General Order 200, §3.04 defines unacceptable performance, and General Order 215 makes it subject to disciplinary action, including demotion. The question is whether the Grievant's performance constituted just cause for demotion.

The Grievant's PEs prior to 2005: did not occur every year; followed a different format; were not detailed; and did not emphasize development or management style. Although they understandably may have led the Grievant to believe that his way of operating and level of performance were acceptable, he and the department were put on notice with the arrival of a new Chief that there was a new level of expectations and that the employees would be required to conform to it.

The Employer has an undisputed right to manage the department, which in 2004 entailed appointing a new Chief with a clearly defined management style and the intention to make significant changes. A determined and well-thought-out approach to management is apparent in: the philosophy, policies, procedures and regulations promulgated by the Chief; the Grievant's extensive and thorough PEs starting in 2005; and the record of the Grievant's performance.

General Order 200, §3.04 requires employees to "maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions . . . in a manner which will tend to establish and maintain the highest standards of efficiency in carrying out the functions and objectives of the department. Unacceptable performance may be demonstrated by . . . lack of knowledge regarding laws for their application; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the . . . rank or position."

The Employer has shown that the Grievant's performance can properly be described as unacceptable according to this definition. In September 2005 the Grievant received a written reprimand for unacceptable performance. As early as the 2005 PE, the Grievant was cautioned by the Chief that he "must improve" specific areas, which were "borderline deficiencies". They included one of the same areas where the Grievant had trouble in late 2008: knowledge of laws and investigative procedures, which relates directly to the search and seizure incident that was the subject of a performance matter in November 2008. This occurred even though both the 2006 and 2007 PEs also noted the need for a better understanding of search and seizure issues.

Analysis and Discussion (continued)

The Chief also warned the Grievant that he would “be required to strengthen his knowledge, skills and abilities . . . in order to adequately represent the department appropriately for his rank”, and specified two areas that were still problematic in 2009: written and oral communications; and computer competency. It is clear that in the first year of the new administration the Grievant had reasonable notice that he would have to raise his level of performance, and was given guidance and support for how to do that.

The Grievant was also advised by the Chief in the 2005 PE that: it was “imperative that each supervisor accept and institutionalize the overall goals and objectives”, and “communication of the . . . mission and vision is critical to both the officer’s and the entire department’s success”. The Chief reiterated this expectation in the 2006 PE. In the 2007 PE the Captain noted the Grievant’s “disagreement with current management philosophy, which creates confusion from time to time”, and stated that the Grievant “needs to endorse philosophies of this department with subordinates whether he agrees with them or not”. In the 2008 PE the Captain noted that the Grievant’s subordinates reported that he consistently mocked the expected leadership style. As late as February 2009 the Grievant stated to the Chief in the presence of the Captain that he disagreed with the direction of the department and that he and the Chief would never agree on how to do things. This attitude suggests that the Grievant’s performance deficiencies over the years may have been caused to some extent by unwillingness rather than inability, as his supervisors sometimes suspected.

Although the PEs for 2005, 2006, and 2007 rated the Grievant overall as meeting expectations, they also contained: extensive, detailed analysis and recommendations; and warnings that he would have to increase his level of performance in order to be successful as a sergeant in the department. It was not reasonable for the Grievant to think no improvement was necessary because of that overall rating.

The Grievant’s problem with properly completing assigned tasks was addressed in 2006 when he was relieved of supervisory duties in order to finish a DWI forfeiture manual. Notes in the Grievant’s performance record became more frequent in the spring of 2007, after the Captain started supervising the Grievant. Although the heading on the form is “Informal Action”, the Union correctly points out that some of the items are not corrective actions, but notes about assignments, discussions or training. However, many are counselings, which, although not disciplinary actions, did serve to instruct and guide the Grievant about better performance of his duties. A number of counselings in 2007 related to lack of timeliness, failing to communicate, and incomplete forms, reports and projects; this occurred while the Grievant was assigned to a patrol position.

In the 2007 PE the Captain commented several times about the need for the Grievant to “apply himself” and stated that: it was not acceptable for him to be content with his level of performance; and “he will need to strive for improvement in everything he does especially his supervisory style.” As part of a work plan the Grievant was required to attend the leadership academy to learn “current supervisory leadership skills that will help him in this area”. The Captain cautioned that if the Grievant did not step up his level of supervision “he will surely fail in the coming years”.

Analysis and Discussion (continued)

Despite this caution, throughout 2008 the Grievant was counseled for failing to timely and properly do various supervisory duties. He received an oral reprimand for failing to adequately staff a shift, and two written performance matters for: failing to perform regular and assigned duties; and mishandling a search and seizure incident. He also received a memo from the Captain pointing out errors and omissions in a report he had submitted, and addressing the Grievant's failure to return a phone call as he had said he would. The Captain correctly pointed out that he should not have to do this kind of follow-up with a sergeant. The 2007 PE and the 2008 counselings constitute ample warning to the Grievant that his rank was in jeopardy.

In the 2008 PE the Captain rated the Grievant overall as below expectations in basic requirements of the position and unsatisfactory in necessary skills and characteristics. Among various specific deficiencies noted, the Grievant had been removed from coordination of the vehicle forfeiture program due to complaints from the county attorney's office. The Captain stated that the Grievant did not meet the expectations for a police officer, let alone a supervisor. Given the Grievant's lamentable performance throughout 2008 and the specifics noted by the Captain, a rating of below expectations was warranted. This was the PE discussion that the Grievant attempted to record surreptitiously, for which he received a performance matter notice in January 2009 for violating an express prohibition of such recording.

For 2009 the Grievant was reassigned to an administrative sergeant position with only limited patrol and supervisory duties. The Chief told the Grievant in writing that this would be "looked upon as an opportunity to develop the administrative knowledge, skills and abilities that are necessary for the rank of Sergeant and necessary as a leader within this organization". This was clear notice to the Grievant that: 1) his administrative performance level was not adequate; and 2) his rank of sergeant was in jeopardy.

The primary responsibility of the administrative position was to identify, develop and coordinate all traffic initiatives for the department on a daily, weekly and monthly basis, with monthly reports. It is noted that in the 2007 PE the Captain had praised the Grievant for his consistent initiatives in organizing traffic details and for his strong ability in traffic enforcement; the Grievant was then assigned to coordinate traffic enforcement for the department in 2008. The Chief was correct in testifying that the 2009 assignment was not entirely new to the Grievant, contrary to what the Grievant claimed in his testimony. It is noted that the Grievant also had experience with other aspects of this assignment, including school safety violations, and local ordinance enforcement. A couple of the duties were simply to attend meetings, which the Grievant failed to do on a regular basis.

The Captain closely monitored the Grievant's performance in 2009, both in the administrative position and during his weekends on patrol supervision. From January through May the Captain had to counsel the Grievant about issues relating to patrol, supervisory and administrative tasks. The Captain offered guidance and suggestions to assist the Grievant with his administrative tasks but he insisted that the Grievant learn some new skills, such as computer graphics, rather than relying on CSOs to perform them. The Grievant was sent to training for this, which apparently did not achieve the desired competence.

Analysis and Discussion (continued)

The Grievant had been notified that he would be evaluated throughout the year and should have understood that he needed to show steady progress on the assigned initiatives. If he did not understand the timelines, the responsible thing would have been to inquire of the Captain. After four months the performance review by the Captain found that the Grievant had failed to accomplish any of the assigned initiatives, and that he had failed to perform satisfactorily as a watch commander during his scheduled weekends. Although the Union challenges the lack in this record of documentation to support alleged lapses in patrol duties, there is no reason to believe that the Employer could not have produced such evidence if the Union had raised this challenge earlier.

The Captain noted the Grievant's admission in February that he did not agree with the mission and direction of the department and concluded that he had failed to get on board with the department's expectations even after repeated opportunities to improve his performance. The Captain recommended an even more detailed work plan with daily reporting and accounting by the Grievant. A day later, in his written Personnel Incident Report, the Captain added the recommendation of a four-day disciplinary suspension.

As early as the 2005 PE the Chief had recommended measures the Grievant should take to "get him performing at an overall acceptable range". Not surprisingly, given the extensive unsuccessful efforts to accomplish this, the Chief now considered demoting the Grievant. He discussed it with the City Administrator, who strongly endorsed that approach, stating that otherwise she would seek termination of the Grievant's employment. It was reasonable for the Employer to conclude that other disciplinary action would be ineffective in achieving the improved performance that the Grievant had not produced despite all the efforts that had been exerted, and warnings he had received.

The Union claims that the Grievant was set up to fail in the new assignment and then denied adequate direction and support. It is true that the administrative assignment required skills in which the Grievant was deficient but that was the point. Since 2005 the Grievant had been told repeatedly that these knowledge, skills and abilities were considered necessary for the rank of sergeant in all assignments. The Grievant had repeatedly been counseled on the need to improve them and had consistently failed to make any attempt to do so, despite clear warnings that his rank was in jeopardy. Requiring this level of knowledge, skill and ability was a legitimate exercise of managerial authority. The performance log shows that the Captain attempted to guide and assist the Grievant in the required tasks; if he needed more direction, he was responsible to ask for it. The Grievant's testimony confirms the Captain's notes about the Grievant's failure to ask questions or seek guidance, further evidence of his poor attitude and lack of initiative.

While the Captain and the Chief may not have been surprised that the Grievant failed to perform acceptably in 2009, there is no evidence that this was their desired outcome. To the contrary, they demonstrated their desire to help him succeed in improving his performance by their efforts in directing and counseling him and by proposing specific kinds of education and training that would be useful. However, the Grievant was the only sergeant never to request training for himself or his subordinates, declined some training, and had to be ordered to some training that other sergeants requested. It is concluded that the Captain and the Chief made reasonable, good-faith efforts to assist the Grievant in achieving an acceptable level of performance.

CONCLUSIONS REGARDING DEMOTION

1. The record clearly supports the Employer's determination that the Grievant, whether through unwillingness or inability, failed to perform up to reasonably expected standards.
2. The Employer had just cause to demote the Grievant from Sergeant to Police Officer.

AWARD

1. The grievance is substantively arbitrable.
2. The grievance is denied.

June 27, 2010

Charlotte Neigh, Arbitrator