IN THE MATTER OF THE ARBITRATION BETWEEN

THE GENERAL DRIVERS, WAREHOUSEMEN, HELPERS & INSIDE EMPLOYEES, TEAMSTERS UNION, LOCAL 346,	)	MINNESOTA BUREAU OF MEDIATION SERVICES CASE NO. 10-PA-1258
Union,	)	
and	)	
THE COUNTY OF AITKIN,	)	DECISION AND AWARD OF ARBITRATOR
Employer.	)	

APPEARANCES

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On June 17, 2010, in Aitkin, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by having non-bargaining unit volunteers perform work that should have been done by bargaining unit members. Post-hearing briefs were received by the arbitrator on July 14, 2010.

FACTS

The Employer (sometimes, the "County") is the County of Aitkin, a north central Minnesota county. The Union is the collective bargaining representative of two bargaining units of employees who work in the Employer's Sheriff's Department. One bargaining unit consists of the Department's Jailers and Dispatchers, and the other consists entirely of law enforcement officers -- sixteen Deputy Sheriffs and one Sergeant. The Union brings the present grievance in behalf of employees in the law enforcement bargaining unit. Hereafter, when I refer to the "Union," I intend to refer to it in its capacity as the representative of the law enforcement bargaining unit, unless I note otherwise.

I summarize the evidence relating to the occurrences that led to the present grievance, as follows. At 9:21 p.m. on November 3, 2009, Jen Twombley, a 911 Dispatcher, received a call from John Treboske, who informed her that his brother, James, had gone hunting in the woods at about 10:00 a.m. that morning and had not been heard from since. (Hereafter, I refer to James Treboske as the "hunter" and to John Treboske merely as "Treboske.") Treboske related that the hunter was not physically fit, smoked a pack of cigarettes a day and was not familiar with the area in which he was hunting. The hunter had no cell phone, GPS or compass with him. At the time of the call, the air temperature was about thirty degrees, and there was fog, mist and a light mix of rain and snow in the area, precipitation that continued till about 3:00 a.m. on November 4.

After Twombley received the call from Treboske, she notified Greg Payment, one of the three Deputies who were on duty at the time of the call, and, between 9:22 p.m. and 9:43 p.m., Payment and the other two Deputies who were on duty, Travis Winter and Aaron Cook, arrived at the location in the woods where Treboske, looking for his brother, had made the 911 call.

At 10:05 p.m., Payment, who was the primary Deputy at the scene, radioed Dispatcher Twombley and asked her to call Sheriff Scott Turner, explaining that he did not have cell phone service that would enable him to make the call directly. The following excerpts, which I have edited for relevance, are taken from a transcript of calls from Payment to Twombley and from Twombley to Turner:

> 10:05 p.m. [Payment to Twombley]: We don't have cell service down here. Do you want to call [Turner or Undersheriff Drahota] to see if they wanna call out the posse or if they want, ah, the K-9 search crew to come out here. The reporting party doesn't know the area. Unknown where he would have been going to hunt. We did locate his vehicle, but don't know where he's at from there. So if you want to pass that information on to him and see what he would like us to do.
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> 10:06 p.m. [Twombley to Turner]: . . . We've got a missing hunter. Down off of Birch Street in Piney Township. The reporting [party], it's his brother, does not know the area very well. He's been in the woods since 9 o'clock this morning. He has done this before, but usually is always back at dark. And they have not seen or heard from him. He does not have a cell phone with him. Do you want us to call out like a K-9 search crew? The posse? [Payment] doesn't have cell reception so I'm just relaying for him. . . .
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> [Turner]: Okay, what I would recommend probably, being that we don't [know exactly where he is] and we have a general idea the quickest way is if we can get some aircraft up. An aircraft from the State up maybe.

[There follows a discussion between Twombley and Turner relating 1) that aircraft can't fly because of the weather, 2) that the area is large and in a state forest, 3) that Payment is looking for direction from Turner as to what he should do, 4) that the hunter is 45 years old, 5) that he might have no more than a candy bar with him, and 6) that it was raining, but Twombley cannot tell if it is still raining.]

[Turner]: Okay. Um, yeah, I would call out the posse and have them go out and see what they can do.

[Twombley]: All right. We will go from there then.

The discussions during these communications about calling out the "posse" refer to the Aitkin County Sheriff's Posse (hereafter, the "Posse"), an organization that I describe more fully below.

The evidence shows that another Deputy, Daniel G. Guida, who has special training in search and rescue and has an All Terrain Vehicle ("ATV"), was "called out" at 10:28 p.m., apparently by Payment, and that Guida advised Payment "to hold off on the Posse for now since we don't have an idea how big of an area we are looking at or what the conditions are in the woods." Guida arrived at the woods location at 10:43 p.m. according to one record or at 11:33 p.m. according to another. He decided to call Central Minnesota Search and Rescue "Central Lakes") because that organization has dogs trained in search and rescue. In addition, a call was made before midnight to a Conservation Officer, though he did not travel to the woods location. It appears that the decision to call the Conservation Officer was made either by Payment or by Guida.

At 1:54 a.m., on November 4, the dogs arrived and at 2:02 a.m., they went into the woods, accompanied by Deputies Winter and Cook.

At 3:00 a.m. on November 4, 2009, Twombley and Turner had further discussions by telephone, in which Twombley told Turner that the Central Lakes dogs were out trying to find the hunter and that Payment "is wondering if you wanted us to call out St. Louis County for their trackers or Itasca County Search and Rescue. Twombley also told Turner that Guida was at the woods location and that he had told her to hold off on calling out the Posse "because he didn't know the terrain they were dealing with at the time." Twombley told Turner that Guida said if the hunter was not located by "probably about about 4:30 a.m. or so, to go ahead and contact the Posse and have them meet down there at 6:00 a.m. and maybe they'll have a better idea of what they are dealing with."

The search with dogs was not successful, and it ended at about 4:00 a.m. Between 6:30 a.m. and 7:00 a.m., eight members of the Posse arrived at the woods location with ATVs. At 7:30 a.m., the Deputies from the next regular shift, the dogs from Central Lakes and members of the Posse resumed the search. At 8:13 a.m., a member of the Posse found the hunter, who had become disoriented by the weather and had made a campfire for the night.

On November 12, 2009, the Union brought the present grievance, relevant parts of which are set out below:

> Rescue Squad Volunteers used on lost hunter search without all available employees having been offered work.

As amended, the grievance alleges violation of Articles 5 and 10 of the parties' labor agreement. It seeks "compensation per

contract language for all employees affected had proper notification of work availability been given."

Article 5 of the labor agreement relates to seniority. It contains seven unnumbered paragraphs, one of which establishes ranking of employees by seniority. It also states that the "policy of seniority shall prevail to regular and seasonal employees" and that seasonal and part-time employees "shall be carried on the bottom of the [seniority] list in proper sequence and the list shall so state that they are seasonal or part-time." In addition, Article 5 provides for layoff and recall by use of seniority ranking.

Article 10 also contains seven unnumbered paragraphs. Its sixth paragraph, which I set out below, is the part of the labor agreement that is primarily at issue in this case:

> Rescue Squad Volunteers shall not normally perform any duties performed by employees covered by this agreement. However, the Rescue Squad may assist upon request of the Sheriff, providing all employees, except those on sick leave, workers' compensation, vacation, or temporary lay-off, have completed their scheduled work day or are engaged in work.

The parties presented the following evidence concerning the history of this provision (hereafter, sometimes, the "disputed paragraph"). Since 1992, it has been included, without change, in each of the parties' successive labor agreements. Neither party presented evidence concerning the bargaining history that led to its first adoption, or indeed, to its subsequent readoptions with each new labor agreement.

Guida testified that he has been a Deputy since 1994 and has been a Union steward since 2002. Turner began employment in

the Department in 1995 as a Deputy and has been promoted to Sergeant and Undersheriff, the latter a management position. He became Sheriff in May of 2005. Both Guida and Turner testified that there has been no organization with the words, "Rescue Squad," in its title since their employment by the Department and that they know of none that existed previous to that employment.

In September of 2006, Turner arranged to have the "Aitkin County Sheriff's Posse," organized as a volunteer, non-profit organization. Below are excerpts from its most recent by-laws:

> Article II. Section 1. Acting as an integral part of the Aitkin County Sheriff's Posse, the members handle the policing, safety, security and general crowd and traffic control at events, assist the Sheriff's Office, be public spirited, provide good fellowship and cooperate with peace officers and with similar County organizations.
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> Section 2. To participate in parades, fairs, shows and other County activities and to assist in organized search and rescue operations.
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> Article III. Section 2. . . . Applicants shall be 18 years of age or older; shall be of good moral character; be in good physical condition; should have access to a suitable ATV and have transportation for the same.

DECISION

The Union argues that the disputed paragraph is clear and unambiguous. As the Union interprets its language, the reference to "Rescue Squad Volunteers" in the opening sentence and to "the Rescue Squad" in the second sentence are references to any volunteer group. The Union reads the first sentence as a general prohibition -- that "normally" no volunteers from any rescue squad are to "perform duties performed by employees

covered by this agreement." For the Union, "normally" is defined solely by the exception stated in the second sentence -- an exception that permits "the Rescue Squad" to "assist upon request of the Sheriff, providing all employees, except those on sick leave, workers' compensation, vacation, or temporary lay-off, have completed their scheduled work day or are engaged in work."

The Union argues that there is no ambiguity in the language of the disputed paragraph. It covers any search and rescue volunteers, and it prohibits them from performing duties that Deputies perform, with one exception to that prohibition -- when all Deputies are engaged in work, have completed their work, are on sick leave, on workers' compensation, on vacation, or on temporary lay-off. (Hereafter, I usually use the words, "unavailable" and "available" to indicate whether Deputies come within these listed reasons for not being able to work.) The Union argues that, because some Deputies were available to work on the morning of November 4, 2009, when the Posse worked from 6:30 a.m. till 8:30 a.m., the Employer violated the disputed paragraph by calling out members of the Posse.

The Employer argues that the disputed paragraph is ambiguous. For the Employer, use of the upper case in the subjects of the first and second sentences -- "Rescue Squad Volunteers" and "the Rescue Squad" -- shows that the drafters intended those words to refer to a particular organization of rescue squad volunteers -- one that, as shown by the lack of evidence identifying it, no longer exists. The Employer argues any such particular organization is now defunct and, therefore, that the language

cannot include the Posse, which was created in 2006, fourteen years after the original writing of the disputed paragraph.

The Employer also makes the following argument. Even if the interpreter adopts the Union's interpretation that the upper case nouns, "Rescue Squad Volunteers" and "the Rescue Squad," do not refer to a particular organization, but, instead, refer to any rescue squad volunteers, the parties' practice shows that they have interpreted the modifier, "normally," to permit the use of rescue squad volunteers from many different organizations in an emergency. For the Employer, the prohibition against the use of rescue squad volunteers when Deputies are available does not apply when the circumstances are such that use of outside volunteers is reasonably necessary.

The evidence shows that volunteers from the following organizations have been used over many years:

- Central Minnesota Search and Rescue K-9 (volunteers with search dogs).
- Civil Air Patrol (volunteers with aircraft)
- Minnesota Search and Rescue Dog Association (volunteers with search dogs)
- St. Louis County Search and Rescue Squad (a volunteer organization)
- Itasca County Search and Rescue
- Various volunteers from fire departments within Aitkin County, including those from Palisade, Hill City, Jacobson, McGregor, McGrath, Garrison, Isle and Finlayson

The Union concedes that the Employer has used volunteers from these organizations in the past without calling out all available Deputies, and it concedes that the Employer should be able to do so in the future. The Union, however, distinguishes the use of volunteers provided by those independent organiza-

tions from the use of volunteers from the Posse. It does so because the Posse is an organization under direct control of the Sheriff.

On September 16, 2008, a search was conducted by the Department during the process of attempting to serve a search warrant. The Department used some junior ranked Deputies and some members of the Posse to conduct the search. On September 26, 2008, Sergeant Dale Gillson filed a grievance (the "Gillson Grievance"), relevant parts of which are set out below:

> Statement of Grievance by Employee: Work situation occurred (search warrant) where overtime was paid to junior officers when senior officer was not notified of overtime availability and would have been available and qualified to perform work. Rescue Squad Volunteers were also used at this time to perform duties performed by Sheriff's Deputies.
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> [Section of the Contract that applies]: Article 5 (Seniority) Article 10 (weekly hours and overtime rates).

On October 24, 2008, Turner sent the following memorandum to all employees, describing the parties' settlement of the Gillson Grievance:

> All employees should follow the seniority list for calling in an employee during scheduled time off to cover for another employee who is absent. The preference will go to the employee who is able to cover the entire shift versus only a portion thereof. Only one phone call will be made to the employee's residence. If you are unable to reach the employee in person during that call, it will be deemed that the employee has voluntarily waived his/her opportunity to work additional hours.
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> The Sheriff's Administration will give preference to the most senior person who volunteers to work hours for an employee who has requested time off in advance.
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> Please note that the Sheriff's Administration retains the exclusive right to determine which employee(s) should report to work (or remain at work) during an emergency or

> as deemed necessary for the efficient operation of the Sheriff's Office. The Sheriff's Administration has exclusive control over who decides when an emergency has commenced or is likely to commence as well as for determining what is necessary for the efficient operation of the Sheriff's Office. The Sheriff's Administration does not need to follow the seniority list when determining who should work under these circumstances.

The evidence shows that since the creation of the Posse it has been used several times without calling out all available Deputies and without provoking a grievance by the Union -- once, in the search for a lost Alzheimer's patient, once in search of a lost hunter (who was found before the Posse actually began the search) and once as a training exercise during a real search for a missing person who was presumed to be dead.

I interpret the disputed paragraph as follows. I find the language to be ambiguous. Several plausible interpretations are possible -- among them at least those the parties have suggested in their arguments.

First, I interpret the words, "Rescue Squad Volunteers" in the first sentence and the words, "the Rescue Squad," in the second sentence as intended not to be proper nouns, signifying a particular organization -- notwithstanding the drafters' use of upper case letters. There is no indication that such a particular organization ever existed, yet the parties have continued to readopt the language without change over many contract periods during which there has been continuous use of volunteers from many different rescue squads, without calling out all available Deputies. This evidence implies that the use of the upper case was inadvertent and not intended to refer to a particular organization, and, instead, that the drafters intended the words to refer to any organization of rescue volunteers.

Second, the parties' practice also shows that the word, "normally" does not have the limited meaning the Union ascribes to it, i.e., that the only exception to the prohibition stated in the first sentence is the one stated in the second sentence -- which permits the use of volunteers when all available Deputies have been called out. The way the parties have used volunteers in the past shows an interpretation that gives the word, "normally," a broader meaning -- that volunteers may be used without calling out all available Deputies at least when an "emergency" has occurred.

Whether an emergency exists is a question of fact that requires consideration of the circumstances. In the present case, the evidence shows that the Department was equipped with two ATVs at the time of the search for the hunter. The evidence does not show clearly whether those ATVs were being used by the four Deputies at the scene (the three who were on duty and Guida), but I assume that they were.

In many searches, the size of the area to be searched is unknown at first and may expand when first efforts are unsuccessful. In the present case, it appears that, after the initial stages of the search late on November 3 and during the early hours of November 4, it was a reasonable decision to determine that, because of adverse weather and Treboske's account that the hunter was in poor physical condition and lacked food, an emergency existed that required the use of the eight additional ATVs that were made available when eight members of the Posse arrived at 6:30 a.m. on November 4.

The parties disagree about how their settlement of the Gillson Grievance, which I have set out above in full, applies in the present case. The Employer argues that its last paragraph is determinative -- which gives the Sheriff's Administration "exclusive control over who decides when an emergency has commenced or is likely to commence as well as for determining what is necessary for the efficient operation of the Sheriff's Office." The Employer argues that this provision of the settlement applies not only to decisions about the use of junior ranked Deputies, but to the use of rescue squad volunteers. The Employer argues that such an interpretation should be made because the Gillson Grievance alleged violation not only of the seniority provisions in Article 5, but of the disputed paragraph in Article 10.

The Union argues that, because the primary focus of the Gillson Grievance was upon the Employer's use of junior ranked Deputies and not upon the use of volunteers, its settlement should be interpreted as applying to issues relating to seniority in violation of Article 5 and not to issues relating to the disputed paragraph in Article 10.

I have the following comments about the parties' arguments over interpretation of the Gillson Grievance settlement. First, my interpretation above of the disputed paragraph (in Article 10), is based primarily on evidence of the parties' practice and is determinative of this grievance. Because that interpretation is not dependent upon an interpretation of the Gillson Grievance settlement, my comments here

about the settlement should be taken as dicta, not binding in future cases. Second, based upon the evidence that the parties presented about the Gillson Grievance, it appears that the primary focus in that case was on the allegation that Article 5 was violated by the use of junior ranked Deputies. Third, as would be true in a challenge of any past settlement, the language of the Gillson Grievance settlement that gives the Sheriff's Administration "exclusive control over who decides when an emergency has commenced" may be subject to challenge if it appears that a decision about the existence of an emergency has not been made in good faith.

As noted above, the Union concedes that, in the past, rescue squad volunteers from other organizations have been used without calling out all available Deputies, and it does not oppose that use when appropriate in the future. The Union argues, however, that use of volunteers from the Posse should not come within that concession -- because the Sheriff has direct control over the Posse. I find no basis for that distinction in the disputed paragraph or in the parties' practice. The Sheriff has authority to call out volunteers from any organization, insofar as he is permitted to do so by the disputed paragraph of Article 10. There is no relevant difference between that authority and his authority to call out members of the Posse.

I conclude that the Employer did not violate the labor agreement by calling out members of the Posse to search for the hunter on the morning of November 4, 2009.

AWARD

The grievance is denied.

September 20, 2010

Thomas P. Gallagher, Arbitrator