

STATE OF MINNESOTA
BUREAU OF MEDIATION SERVICES

In Re the Arbitration between

Minnesota Teamsters Public & Law
Enforcement Employees'
Union, Local 320

Grievant,

and

BMS Case No.: 12-PA-0053

Chisago County, Minnesota
Respondent.

DECISION AND AWARD

BEFORE

Bernice L. Fields, Arbitrator

APPEARANCES:

For: Labor Union Local 320

Paula R. Johnson, General Counsel
Teamsters Local 320
3001 University Ave. S.E.
Minneapolis, MN 55414

For: Chisago County

Kristine Nelson Fuge, Assistant County Attorney
313 North Main Street, Room 373
Center City, MN 55012

Place of Hearing

Center City, Minnesota

Date of Hearing

January 19, 2012

Date of Award

April 11, 2012

Relevant Contract Provisions

Article 3 and Article 8

Contract Year

September, 2010 to December 31, 2010

Type of Grievance

Demotion, Retaliation for Protected Political Activity, and
Failure to Follow Past Practices

I. STATEMENT OF JURISDICTION

This matter came on for hearing pursuant to a Collective Bargaining Agreement (CBA) between the parties effective September, 2010 to December 31, 2010. A hearing occurred on January 19, 2012, in a conference room of the Chisago County Government Center, Center City, Minnesota. Ms. Paula R. Johnston, General Counsel, represented Teamsters Local 320, hereinafter, Union. Ms. Kristine Nelson Fuge, Assistant County Attorney, represented Chisago County, hereinafter, Employer.

The hearing proceeded in an orderly manner. There was full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the Arbitrator. The advocates fully and fairly represented their respective parties.

The parties stipulated that the matter had been properly submitted to arbitration and that there were no issues of substantive or procedural arbitrability to be resolved. The Arbitrator officially closed the hearing on the receipt of briefs from the parties on March 15, 2012.

II. ISSUES

1. WHETHER GRIEVANT WAS PROPERLY DEMOTED PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT?

2. WHETHER GRIEVANT'S DEMOTION WAS IN RETALIATION FOR PROTECTED POLITICAL/UNION ACTIVITIES?

3. WHETHER A PAST PRACTICE OBLIGATES THE EMPLOYER TO MAINTAIN GRIEVANT'S SALARY AT THE LIEUTENANT STEP DESPITE HIS DEMOTION TO SERGEANT?

III. STATEMENT OF THE FACTS

Grievant, Steve Pouti, was hired as a Deputy Sheriff in Chisago County in June, 1998. He was promoted to Corporal in 2003, Sergeant in 2004, and Lieutenant in 2005. As Lieutenant,

Grievant supervised sergeants, corporals, and deputies, commanded the SWAT team, supervised the Field Training Program, and the water/recreation patrol.

In late 2010, Grievant contacted Teamsters Local 320 regarding organizing the captains and lieutenants into their own bargaining unit. Grievant was the primary organizer during the campaign to establish the unit. Since every eligible captain and lieutenant signed an authorization card, the Bureau of Mediation Services certified Teamsters Local 320 as the exclusive representative of the unit. Grievant became the bargaining unit steward and helped to negotiate and sign the first contract which covered September, 2010 to December 31, 2010.

There was an election for Chisago County Sheriff in 2010. Grievant supported and worked in the campaign of the unsuccessful candidate.

In the backdrop of Grievant's organizing activities, the Employer, Chisago County, was experiencing a deepening financial crisis because of the national recession and declining local government support from the State. The Employer adopted austerity measures including but not limited to:

- a mandatory three month waiting period to fill all vacant non-essential positions;

- institutionalized a high-deductible Health Savings Account for all new employees; and

- pay freezes for non-union positions and elected officials along with a five (5) day unpaid furlough across all segments except the Sheriff's Office.

In addition, in December, 2010 the Employer approved its 2011 County Budget. The 2011 Budget reduced revenue to the Sheriff's Office by \$750,000 from 2010 funding. The implementation of methods to reduce the deficit was left to the discretion of the newly elected Sheriff.

The newly elected Sheriff was sworn in January, 2011. Over the next two months, the Sheriff's administrative team considered community needs, scheduling options, and general organization efficiencies in determining how to reduce expenses. The Sheriff testified that "avoiding layoffs was a primary goal." Based on the evidence gathered, the Sheriff determined that "flattening" the organizational structure would eliminate the deficit and improve overall operations. The County Board approved the Sheriff's restructure proposal on March 2, 2011.

The restructure plan eliminated six (6) corporals and two (2) lieutenant positions. Instead the restructure created five (5) sergeant positions. Grievant was demoted on the restructured plan to Sergeant. His demotion became effective May 16, 2011. Grievant's salary was reduced from \$35.00 per hour to \$32.63 per hour. The duties that Grievant performed as Lieutenant were dispersed to other employees.

On May 20, 2011, Grievant filed a grievance alleging that his demotion was not consistent with the CBA, was retaliation for protected political/union activity, and that the Employer was obligated because of past practice to maintain his salary at the lieutenant level despite his demotion to sergeant. The grievance was not resolved during the formal grievance process and moved to binding arbitration.

IV. RELEVANT CONTRACT PROVISIONS

ARTICLE 3 EMPLOYER AUTHORITY

3.1 The Employer retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; to establish work schedules; and to perform any inherent managerial function not specifically limited by this agreement.

3.2 Any term and condition of employment not specifically established or modified by this Agreement shall remain solely the discretion of the Employer to modify, establish, or eliminate.

ARTICLE 8. PROBATION & TRIAL PERIODS

8.3 An employee who is promoted to a position within this bargaining unit shall serve a twelve (12) month trial period. During the trial period, the Employer may return the employee to a position in his/her former classification and to his/her rate of pay immediately prior to the promotion. An employee who is returned to his/her former classification will be provided the reasons in writing.

ARTICLE 21. DISCIPLINE

21.1 The Employer will discipline employees for just cause only. Discipline will be in one or more of the following forms:
Verbal warning;
Written warning;
Suspension;
Demotion; or
Discharge.

Suspensions, demotions, and discharges shall be in writing.

RELEVANT COUNTY PERSONNEL POLICIES

Chisago County Personnel Policy, as amended April 30, 2003, Section C, Policy 2, Part G, provides, in relevant part, as follows:

The County Board may abolish a position whenever it deems it necessary and in the best interest of the County because of changes in departmental organization, or through stoppage or lack of work.

Chisago County Personnel Policy, as amended April 30, 2003, Section C, Policy 1, Part I, provides, in relevant part, as follows:

If an employee is demoted voluntarily or involuntarily, the Department Head and the Human Resources Director shall recommend to the County Board the appropriate step the employee in the new classification salary level. If a demoted employee exceeds the maximum of the level, the employee's wages may be retained.

V. SUMMARY OF THE POSITIONS OF THE PARTIES

Position of the Union

1. The County Demoted The Grievant In Violation Of The Collective Bargaining Agreement.

The bargaining unit was organized in 2010. Union Exs. 1 - 4. The parties negotiated the first collective bargaining agreement the same year, fully executing the agreement by signature

in December. Joint Ex. 1, p. 17. Since it was a first contract, the each party had the opportunity to negotiate the exact language that it desired.

The CBA provides two circumstances in which a member can be demoted. The first is found in Article 8, §8.3, which states that:

An employee who is promoted to a position within this bargaining unit shall serve a twelve (12) month trial period. During the trial period, the Employer may return the employee to a position in his/her former classification and to his/her rate of pay immediately prior to the promotion. An employee who is returned to his/her former classification will be provided the reasons in writing.

The Grievant was promoted to the rank of lieutenant in 2005. Union Ex. 13. He had clearly passed the twelve (12) month probationary period at the time that he was demoted. Thus the demotion in 2011 was not allowable under §8.3.

The second circumstance under which a member may be demoted is through discipline under Article 21. Section 21.1 requires that the employer may only discipline employees for just cause. Joint Ex. 1, p. 15. The County conceded at the hearing that the Grievant had not committed any misconduct. It also conceded that the Grievant's performance of the duties of the lieutenant position was exceptional. *See* Union Exs. 7 - 12. He had no previous discipline in his file. There is no question that the County did not have just cause to demote the Grievant under Article 21.

Further evidence that the parties intended for demotions to be allowable in only these two circumstances is found in the Article 3, Employer Authority. Section 3.1 contains standard language regarding the inherent managerial rights of the County. Joint Ex. 1, p. 1. What it lacks is any reference to the County's ability to demote an employee for reasons other than failing the probationary period or misconduct. *Id.* As noted previously, this is a first contract and each party had the opportunity to negotiate the specific terms. The County negotiated specific language regarding its right to demote employees "due to lack of work or other legitimate reasons" with the Deputy bargaining unit, to which the demoted corporals belong. Joint Ex. 9, p. 7. It failed to

do so with the Grievant's bargaining unit.

It cannot be stated strongly enough that the Union vehemently believes that the County's decision to demote the corporals was not for any legitimate reason. However, that issue is not before this Arbitrator. The Union points to the language in the Deputy contract only to reinforce the fact that the contract at issue allows for two, and only two, circumstances under which a member may be demoted.

The language that the parties negotiated in the CBA allows for demotions in two circumstances: within the probationary period and for disciplinary reasons which amount to just cause. Neither circumstance existed in this case. Therefore, the demotion of the Grievant was improper and he should be reinstated to the lieutenant rank with the commensurate wages and benefits.

2. The Grievant Was Demoted Due To Union Animus.

A public employer maintains certain inherent managerial rights under state law. Minn. Stat. §179A.07, subd. 1. The County, however, voluntarily limited those rights when it negotiated certain terms and conditions into the contract. The contract determines when - and if - the County can demote a member of this bargaining unit.

The Grievant was instrumental in organizing this bargaining unit. It was the Grievant who first contacted the Union in early 2010 to start the process. The Union met with all of the captains and lieutenants, and the Grievant was a driving force behind their decision to sign authorization cards indicating a desire to be represented by the Union. In the end an election was not even necessary. Because every captain and every lieutenant signed an authorization card, the Bureau of Mediation Services certified Teamsters Local 320 as the exclusive representative without an election on April 15, 2010. Union Ex. 4.

The Grievant continued engaging in significant union activity by taking on the role of union steward. He assisted [the] Business Agent in negotiating the current contract, which was the first contract for the group. Those negotiations took several months, and the Grievant signed the final agreement in December of 2010. Joint Ex. 1, p. 17, 19.

An election for the Chisago County Sheriff was held that fall. Since the previous Sheriff was retiring, a Chisago County Deputy decided to run. His opponent was a Lieutenant Commander from the Minneapolis Police Department. The Grievant supported the Chisago County Deputy. He was heavily involved in the Deputy's campaign. The Deputy was unsuccessful.

The new Sheriff testified that he "reorganized" the department for several reasons, including that he believed that the department was "top heavy" in structure. He testified that he believed that the span of control was too large within the department, and that (for some reason) it was difficult for employees to tell who their supervisors were. He also noted that performance evaluations were being done by evaluators who might not have seen the actual work of the employee being evaluated.

The new Sheriff clearly wanted to put his own stamp on things and shaped the department in a rather unique way. His desires, however, do not negate the contract. They do not negate the fact that demotions are allowable under the contract in only two circumstances, neither of which is present here.

[In addition, the new Sheriff] claimed that another reason for the reorganization was to save money. He was unable to provide any actual figures in support of his claim. The only dollar figure that he was able to testify to was the \$750,000 budget difficulty that he apparently inherited from the former administration.

The reorganization included several major changes to the command structure. A new captain position was added to accommodate the outgoing Deputy Sheriff. Six corporal ranks were “eliminated.” Joint Ex. 7, p. 2. One lieutenant rank (the Grievant’s position) was “eliminated”. Id. A second lieutenant position was not eliminated, but the then-incumbent retired in May of 2011 and the position was not filled. Four new sergeant positions were created, along with one new jail sergeant. Id.

Four former corporals were promoted to the new sergeant positions. Joint Ex. 8, p. 4-5. Wages for the sergeant position are higher than the wages for the corporal position. In 2011, the yearly corporal wage was \$63,586. Joint Ex. 9, p. 48. The yearly wage for the sergeant position for 2011 was \$67,580. Id. While it doesn’t appear to be part of the reorganization, the sergeant position that the grievant was demoted to was also new. The Grievant’s salary as a lieutenant was \$72,800 per year. Joint Ex. 1, Appendix A. His salary as a sergeant is \$67,850. Joint Ex. 9, p. 48.

No legitimate business need justifies the elimination of the lieutenant position and the Grievant’s subsequent demotion. Transferring work to a different job classification and then eliminating the former classification may not be a bona fide elimination. *Tembec Paper Group and United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 928*, 123 LA 634, 638 (Howell, 2007).

“...The Company does have the right to combine jobs or to remove specific duties from particular jobs, but this does not mean that the Company, in the absence of such changed conditions as technological change or eliminated of the need for particular job duties, can take a bargaining unit job, abolish it, and assign all the duties to another job that is created outside the bargaining unit.”
Id., quoting *Tennessee A. Water Co.*, 77-2 ARB 8477.

In this case, there were literally no changes in the conditions surrounding the duties. The duties are clearly still needed because they are being done by others. “If management had the

unfettered right to eliminate negotiated job classifications, the whole process of negotiating job classifications and inclusion in the contract would be negated.” 123 LA 634, 639. A desire to be more efficient (such as spreading out the supervisors) or to save money are not, of themselves, legitimate business reasons for eliminating a position. “[I]n efforts to become more efficient, management may not ignore or unilaterally change negotiated contract provisions.” Id. Since no legitimate business reason for the elimination exist, the grievant should be reinstated to the lieutenant position.

Position of the Employer

1. The Decision To Reorganize Operations And Eliminate Positions Is A Matter Of Inherent Managerial Policy.

The County of Chisago’s decision to reorganize the Sheriff’s Office and eliminate positions as part thereof is an inherent management policy decision related to “overall budget” and “organizational structure”. Minn. Stat. Sec. 179A.07, Subd.1. The principle of inherent managerial rights has been followed and applied by arbitrators in Minnesota. For example, in *County of Stearns v. LELS, Inc.*, BMS Case No. 11-PA-0434 (Arbitration Award dated 09/22/2011 by Rolland C. Toenges), the arbitrator was faced with how to treat the reclassification of employees due to operational changes targeted to reduce expenses for budgetary purposes. Upon review of the labor agreement, the arbitrator determined that the proposed reorganization was not limited by any term or condition, but rather was specifically authorized through language reserving to the employer certain managerial rights. Similarly, the arbitrator in *ISD No. 911 vs. Service Employees Intl. Union*, BMS Case No. 11-PA-0385 (Arbitration Award dated 06/17/2011 by James A. Lundberg) looked to the specific provision in a labor agreement that provided no obligation to meet and confer on matters of inherent managerial policy such as “organizational structure” and the “direction and number of personnel”. In both *Stearns* and *ISD 911*, the

arbitrators upheld that the public entity's exercise of these inherent managerial rights was consistent with Minn. Stat. Sec. 179A.07, Subd. 1.

2. Neither Reorganization nor Position Elimination is Covered by the Labor Agreement.

Upon review of the Teamster's Agreement, there is no provision which covers either position elimination or reorganization. There are provisions covering seniority, grievances, strikes, probation, work schedule, holidays, vacations, snow days, sick leave, leaves of absence, injury on duty, severance, insurance and health coverage, drug testing, uniforms, wages, reimbursements, discipline and POST licensure. However, there is no provision covering reorganization or position elimination. In fact, section 3.2 of the Teamster's Agreement specifically states, "Any term and condition of employment not specifically established or modified by this agreement shall remain **solely** within the discretion of the Employer to modify, establish, or eliminate." *Joint Exhibit 1* (emphasis added). When an agreement is silent as to reorganizations and position eliminations as it is in the present case, an employer has unfettered authority to determine how that reorganization is completed.

In the absence of language, Grievant Pouti has focused on the position elimination as "discipline." The evidence is undisputed that Grievant Pouti has been an excellent employee for Chisago County as illustrated by being promoted three times in ten years. Even a cursory review of his performance reviews highlights Grievant Pouti's stellar work record. However, there is no evidence that the reorganization and elimination of six positions was disciplinary.

3. There Was No Past Practice Applicable to Maintaining a Pay Grade for Grievant Pouti.

Grievant Pouti has alleged that the past practice of Chisago County required him to be paid at his lieutenant pay despite the position being eliminated. Grievant Pouti supports this allegation with a Memorandum of Understanding from March 17, 2006. *Union Exhibit 5*. Upon

review of the Memorandum, it is clear that this facts underlying Grievant Pouti's position elimination are not analogous. Specifically, [the Deputy who was demoted to Sergeant] agreed to take a "voluntary" demotion at his request, his position was not eliminated. Second, the additional revenues to fund [the demoted Deputy] at his Sergeant rank were funded by the State of Minnesota and the Chisago County Solid Waste Fee, funds not available to fund Grievant Pouti at a lieutenant rank.

Additionally, Grievant Pouti argues that Chisago County was required to pay him a lieutenant rate of pay because of Chisago County Personnel Policy, as amended April 30, 2003, Section C, Policy 1, Part I. However, upon review of that Policy, the County Board's authority to allow pay to continue following a change in position through demotion is discretionary, not mandatory.

Past practice will only be binding when it is: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. *See Elkouri & Elkouri, HOW ARBITRATION WORKS, Sixth Edition (2003), Chap. 12.2, p. 608.* The party alleging the past practice has the burden of proving its existence and strong proof is ordinarily required.

4. The Position Elimination Was Not Retaliatory In Any Respect, But Rather Was Acted Upon In Good Faith For A Reasonable Business Purpose.

Activities by Grievant Pouti did not Influence the reorganization decision. The grievance application does not set forth any facts related to purported retaliation of Grievant Pouti his for support of a particular candidate for sheriff. *Joint Exhibit 2.* Grievant Pouti testified that he didn't know of any adverse action taken by [the newly elected] Sheriff against him that was a result of his public support for unsuccessful Chisago County Sheriff candidate. While [the Union] Business Agent testified in the arbitration that he believed Grievant Pouti's position was

specifically targeted for elimination due to his union activities and his support for [the unsuccessful candidate], he could not provide a basis for this belief nor point to specific facts. [The] Business Agent further testified that while it was “suspicious” in his mind, there was no “overt sentiment” from his discussions with Chisago County.

At the arbitration, Grievant Pouti alternatively alleged that he was unfairly treated and his position targeted for elimination as a result of his union organizing activities. This allegation was not stated in the original grievance and no evidence was produced that would support a finding that the County took specific action against Grievant Pouti for organizing the Teamster’s Unit for the Captains and Lieutenants. As with most public entities in the Minnesota, Chisago County has a work force that is primarily represented by organized labor. Efforts at retaliating employees for exercising their statutory right to organize is not only contrary to law but is most certainly detrimental to public entities supported by tax payers, like Chisago County.

VI. ANALYSIS AND FINDINGS

1. WHETHER GRIEVANT WAS PROPERLY DEMOTED PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT?

The Grievant Was Properly Demoted Pursuant To Article 3 Of The Collective Bargaining Agreement.

This case revisits the perennial debate of management’s “inherent rights vs contract rights.” In these cases the agreement itself is the point of concentration, and the function of the arbitrator is to interpret and apply its provisions. An agreement is not ambiguous if the arbitrator can determine its meaning without any other guide than knowledge of the simple facts on which, from the nature of the language in general, its meaning depends. An agreement is ambiguous if “plausible contentions may be made for conflicting interpretations.”¹

¹ Elkouri & Elkouri, *How Arbitrations Works* 3rd ed. (Washington, D.C. BNA, 1981).

Every collective bargaining agreement contains an employer's rights clause with powers too numerous to name individually, but which can be asserted by management in disputes like an ace in card games. When a contract states "management has the exclusive right to manage the business," it obviously refers to the countless questions which arise and are not covered by wages, hours, and working conditions, such as determination of products, equipment, materials, and prices to name a few. In these employer's rights clauses, not only does management have the right to operate the business, but many such clauses provide that management has the exclusive right to direct the workforce, and usually to layoff, recall, discharge, and hire.

The right to direct, where it involves wages, hours, or working conditions is a procedural right. It does not imply some right over and above labor's rights. It is recognition of the fact that someone must be boss; somebody has to run the plant. Workers cannot wander around at loose ends, each deciding what to do next. Management decides what the employee is to do.

However, the right to direct or initiate action does not imply a second-class role for the union. The union has the right to pursue its role of representing the interest of the employee with the same stature accorded management. To assure order, there is a clear procedural line drawn; the company directs and the union grieves when it objects. To make this desirable division of functions workable, it is essential that arbitrators not give greater weight to the directing force than to the objecting force. Thus, when the employer says Jones is to be laid off, the union cannot direct Jones to show up. When the union grieves Jones' layoff the arbitrator must not be influenced by the weight of the accomplished fact.

It is helpful to envision a collective bargaining agreement as a brick and mortar wall. The bricks are the rights negotiated from the employer's inherent management rights. These are usually very specific. The mortar surrounding, supporting, and connecting the bricks represent

the employer's inherent, common law right to operate the business in any manner, limited only by Federal and State legislation and the rights negotiated to the union. These inherent rights are usually broadly stated in a single management rights clause.

Consequently, it is impossible to enumerate all of the employer's residual or reserved rights definitively in any labor agreement, but that does not mean that a right not named does not exist. In this case, Article 3 specifically enumerates the right of the Employer to "establish and modify the organizational structure." This is a plenary power; therefore, the manner of the reorganization is solely within the Employer's discretion. Consultation with the Union would have been courteous, but is not required by the CBA.

The exercise of this right resulted in demotions for several classes of employees, Grievant among them. The Grievant challenges the Employer's right to demote him through reorganization because only two types of demotions are specified in the brick of Article 8 and neither type is applicable to him. Article 8, the Grievant argues, covers the only two incidents when an employee can be demoted; one for performance issues and the other for disciplinary reasons.

Article 3, however, covers demotions that occur because of reorganization. Article 3 demotions that arise from the mortar of the CBA are no less valid than the two stated specifically in the brick of Article 8. There is nothing ambiguous about the assertion of the right to reorganize the business structure. With such a sweeping reservation of rights, it is difficult to imagine anything that an employer could not do. Displacement of the employee structure is a modest exercise of the reserved right. Nor can the scope of Article 3 be a surprise to Grievant since he negotiated this language himself.

Failure to recognize the Employer's right to reorganize the work structure when it deems necessary would deny the Employer the ability to remain afloat and competitive in the turbulent financial whitewater that both public and private employers have navigated since 2008. Employees affected by the reorganization have been negatively impacted, regrettably, but if the Employer goes broke or if massive layoffs result because the Employer is unable to adapt quickly to changed circumstances, then many more suffer.

An employee's concerns are narrow: his/her salary, duties, healthcare, and retirement. The Employer's scope of concern is infinitely wider. The Employer must consider, how many employees, and not one more than necessary, are needed to provide the highest level of service to its constituency, how many paper clips and reams of paper are needed in a year, how many people are required to service the administration of benefits, wages, withholdings, and endless other concerns of which the employee is unaware. In addition, although arbitrators avoid saying so, we are cognizant that the Employer's concerns are coupled with a financial interest that cannot be ignored in balancing equities.

In this case, the Employer's Article 3 right to restructure the workforce in any manner that it believes will benefit the business trumps the Article 8 demotion scheme. The Grievant is incorrect; Article 8 is not the sole scheme for demoting employees in the CBA. Even a cursory glance at Article 3 reveals at least four other instances where the Employer could demote and/or eliminate employees, all outside "just cause" review. In addition, the relevant personnel policies clarify and reinforce the Employer's right to abolish a position when it deems necessary. As long as an employer acts in good faith and not for any of the prohibited reasons: age, race, gender, affectional preference, national origin, or disability, it acts within its right to manage the business.

The harm to the Grievant is real and goes beyond financial loss. The loss of his status and responsibilities are also recognized, as are the pay freezes, involuntary furloughs, higher medical deductibles, and increased workloads endured by other employees. The negative effects from the Employer's necessity to reorganize have not impacted Grievant alone, or uniquely.

Grievant's demotion was consistent with the rights retained by the Employer in the CBA. No conflicting argument is plausible based on the plain meaning of the language of the contract and supported by specific personnel policies. The Employer did not breach the Agreement by demoting Grievant pursuant to Article 3.

2. WHETHER GRIEVANT'S DEMOTION WAS IN RETALIATION FOR PROTECTED POLITICAL/UNION ACTIVITIES

The Grievant's Demotion Was Not Motivated By His Participation In Protected Political Or Union Organizing Activities.

The Grievant did not meet his burden of proof on this issue. There was no testimony or documentary evidence that Grievant was demoted because he organized the Captains and Lieutenants Bargaining Unit. Nor can the Grievant prevail on the issue that his demotion stemmed from his support of the unsuccessful Chisago County Sheriff candidate. The new Sheriff testified positively regarding Grievant's performance of his duties. Suspensions are not evidence.

3. WHETHER A PAST PRACTICE EXISTS WHICH OBLIGATES THE EMPLOYER TO MAINTAIN GRIEVANT'S SALARY AT THE LIEUTANT SALARY STEP DESPITE HIS DEMOTION TO SERGEANT?

No Past Practice Exists Which Requires The Employer To Maintain Grievant At The Lieutenant Salary Step Despite His Demotion To Sergeant.

Unquestionably, the custom and practice of the parties constitutes one of the most significant evidentiary considerations in labor-management arbitration. Proof of custom and past

practice may be introduced for any of the following major purposes: (1) to provide the basis of the rules governing matters not included in the written contract; (2) to indicate the proper interpretation of contract language; or (3) to support allegations that the “clear language” of the written contract has been amended by mutual agreement to express the intention of the parties to make their written language consistent with what they regularly do in practice in the administration their labor agreement.² Past practice is only binding when it is: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.³

Nothing supports the Grievant’s contention that there is a past practice of retaining demoted employees at their pre-demotion salary after demotion. The one instance on which the Grievant relies occurred when the Deputy Sheriff agreed to voluntary demotion to Sergeant rank and the Employer in its discretion pursuant to Chisago County Personnel Policy, Section C, Policy 1, Part 1 maintained the demoted officer’s pay at the Deputy level from funds outside the budget. The relevant policy provides in applicable part:

If an employee is demoted voluntarily or involuntarily, the Department Head and the Human Resources Director shall recommend to the County Board the appropriate step the employee in the new classification salary level. If a demoted employee exceeds the maximum of the level, the employee’s wages may be retained.

The one time occurrence does not establish a past practice. The policy is also discretionary, not mandatory. The Employer has no obligation to continue Grievant at the Lieutenant salary step despite his demotion to Sergeant.

² *Metal Specialty Co.*, 39 LA 1265, 1269 (Volz, 1962); *Coca-Cola Bottling Co.*, 9 LA 197,198 (Jacobs, 1947)

³ Elkouri & Elkouri, *HOW ARBITRATION WORKS*, Sixth Edition (2003), Chap. 13.2, p. 608.

VII. AWARD

After study of the testimony and other evidence produced at the hearing, and the arguments of the parties in post hearing written briefs in support of their respective positions, and on the basis of the above discussion, I make the following award:

1. The grievance is denied.

Respectfully,

Dated: _____

Bernice L. Fields, Arbitrator