

**IN THE MATTER OF ARBITRATION
BETWEEN**

WRIGHT COUNTY,

Employer,

**OPINION AND AWARD
Arbitrator A. Ray McCoy**

and

**BMS Case No. 09-PA-0131
(Suspension)**

WRIGHT COUNTY DEPUTIES ASSOCIATION,

December 6, 2012

Union.

Appearances

On Behalf of Wright County

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INTRODUCTION

The Union initiated this grievance on July 23, 2008. The Parties notified the arbitrator of his selection on June 20, 2011. The Parties initially selected January 12, 2012 as the hearing date. On December 22, 2011, the Parties notified the arbitrator of an agreement to postpone and reschedule the hearing. The Parties selected September 12, 2012 as the new hearing date. The hearing was held on that date at the Wright County Law Enforcement Center, 3800 Braddock Avenue NE, Buffalo, Minnesota 55313.

The Parties had a full and fair opportunity to present their respective cases including the examination of witnesses and the introduction of documentary evidence. At the conclusion of the hearing, the Parties agreed to submit post-hearing briefs. The Parties agreed to have the arbitrator exchange briefs at the end of the day on October 29, 2012. The Parties subsequently agreed to extend the deadline to November 2, 2012. The arbitrator received the briefs as agreed on that date and closed the record.

JURISDICTION

The arbitrator has jurisdiction pursuant to Article VII of the *Labor Agreement Between Wright County and Law Enforcement Labor Services, Inc.* effective January 1, 2006 through December 31, 2008. (Hereinafter referred to as the "Agreement") Article VII, Section 7.5 states:

"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 decisions on any other issue not so submitted. 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 Arbitrator's decision shall be submitted in writing within thirty (30) days following close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. 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.” (Agreement at p. 4)

The Arbitrator’s jurisdiction is valid pursuant to the Agreement even though Law Enforcement Labor Services is no longer the exclusive representative of the Wright County deputies. The current exclusive representative is the Wright County Deputies Association. All events relevant to this dispute took place during the effective period of the Agreement.

ISSUE

The Parties submitted the following written issues for determination:

- Employer: 1. Whether the grievance is procedurally non-arbitrable?
 2. Whether the 24 hour (3 day) suspension of the Grievant was
 for just cause? If not, what is the appropriate remedy?
- Union: 1. Did Wright County have “just cause” for the discipline imposed?

RELEVANT CONTRACT PROVISIONS & POLICIES

ARTICLE VII – EMPLOYEE RIGHTS-GRIEVANCE PROCEDURE

7.4 PROCEDURE Grievances, as defined by Section 7.1, shall be resolved in conformance with the following procedure:

Step 1 An Employee claiming a violation concerning the interpretation or application of this Agreement shall, within twenty-one (21) calendar days after such alleged violation has occurred, present such grievance to the Employee’s supervisor as designated by the Employer. The Employer-designated representative will discuss and give an answer to such Step 1 grievance within ten (10) calendar days after receipt. A grievance not resolved in Step 1, and appealed to Step 2 shall be placed in writing setting forth the nature of the grievance, the facts on which it is based, the provision or provisions of the Agreement allegedly violated, the remedy requested and shall be appealed to Step 2 within ten (10) calendar days after the Employer-designated representative’s final answer in Step1. Any grievance not appealed in writing to Step 2 by the Union within ten (10) calendar days shall be considered waived.

Step 2. If appealed, the written grievance shall be presented by the Union and discussed with the Employer-designated Step 2 representative. The

Employer-designated representative shall give the Union the Employer's Step 2 answer in writing within ten (10) calendar days following the Employer-designated representative's final Step 2 answer. Any grievance not appealed in writing to Step 3 by the Union within ten (10) calendar days shall be considered waived.

Step 3 If appealed, the written grievance shall be presented by the Union and discussed with the Employer-designated Step 3 representative. The Employer-designated representative shall give the Union the Employer's answer in writing within ten (10) calendar days after receipt of such Step 3 grievance. A grievance not resolved in Step 3 may be appealed to Step 4 within ten (10) calendar days following the Employer-designated representative's final answer in Step 3. Any grievance not appealed in writing to Step 4 by the Union within ten (10) calendar days shall be considered waived.

Step 4 A grievance unresolved in Step 3 and appealed to Step 4 by the Union shall be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act of 1971, as amended. The selection of an arbitrator shall be made in accordance with the "Rules Governing the Arbitration of Grievances" as established by the Bureau of Mediation Services.

ARTICLE X – DISCIPLINE

10.1 The Employer will discipline Employees for just cause only. Discipline will be in one or more of the following forms:

- a. oral reprimand
- b. written reprimand
- c. suspension
- d. demotion, or
- e. discharge.

10.2 Suspensions, demotions and discharges shall be in written form.

WRIGHT COUNTY SHERIFF'S OFFICE POLICY RULES OF CONDUCT G-110 SECTION 13

Members of the department shall be held strictly responsible for the proper performance of their duties. Members shall maintain sufficient competency to properly perform their duties and the responsibilities of their positions. Members shall perform their duties in a manner which will maintain the

highest standards of efficiency in carrying out the mission and operations of the department.

Unacceptable performance includes a lack of knowledge of the application of laws required to be enforced; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the member's grade, 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 unnecessary or unexcused absence from the assigned patrol area during a tour of duty.

SHERIFF DEPARTMENT POLICY ANNOUNCEMENT SMOKING BAN ENFORCEMENT

“As of October 1st, smoking is virtually banned in most businesses in Minnesota. Wright County Public Health has met with several business owners/employees over the past few months and provided training on how to enforce the smoking ban. In a nutshell, the business owners/management and the Public Health departments are the primary enforcement staff to make sure that the ban is being complied with. If someone is smoking in violation of the ban, the business owner/employees are responsible for making sure that the person in violation is told to stop smoking in their business, once again the Public Health department will follow-up on those complaints. If a patron/customer of a business calls reporting that another customer is smoking a cigarette in the booth next to them, dispatch will tell the caller to contact the management of the business and make them aware of the smoking violation. It will be the responsibility of the business management to enforce the smoking ban in their business. If you have further questions, call Joel Torkelson at the Public Health Department 682-7909 Lt. Dan” (Email Message Sent By Lieutenant Dan Anselment, October 2, 2007, Employer Exhibit 6)

POSITIONS OF THE PARTIES

Employer's Position

1. This grievance is procedurally non-arbitrable because the Union failed to meet with management to discuss the grievance at Step 3 and there was no mutual agreement to waive the Step 3 meeting.
2. The collective bargaining agreement contains a mandatory process for Step 3 grievances.
3. Step 3 grievance meetings are not conducted by telephone.

4. The Step 3 grievance meeting gives the Employer a chance to understand the basis for the Union's grievance, the Union's substantive claims and the remedy requested.
5. Waiver of the Step 3 grievance meeting is only done in writing.
6. A meaningful exchange of information as part of the grievance process is consistent with the purpose and intent of a grievance procedure.
7. The Union filed a Step 3 grievance, scheduled a Step 3 meeting, canceled the Step 3 meeting and called to reschedule the Step 3 meeting more than ten (10) days since the filing of the Step 3 grievance.
8. When the Union called to reschedule, the Employer informed the Union that it had not met the timelines for holding the meeting.
9. The grievance was not processed in accordance with the parties' past practice of conducting formal Step 3 grievance meetings in person and therefore the grievance should be dismissed as procedurally non-arbitrable.
10. Arbitrators strictly construe the requirements of the grievance procedure on the basis that the parties mutually establish procedures to promote and ensure the expeditious and proper handling of grievances.
11. An arbitrator's failure to enforce the procedures in the grievance article modifies the bargain struck by the parties.
12. Arbitrators recognize as a matter of contract law that if a grievance is processed contrary to the negotiated grievance procedure, the arbitrator does not have jurisdiction to decide the case on the merits.
13. The collective bargaining agreement in this case provides in express and unambiguous language that the arbitrator does not have the authority to "amend, modify, nullify, ignore, add to, or subtract from the terms and conditions" of the contract.
14. A finding that this grievance is procedurally arbitrable would ignore the clear provisions of the collective bargaining agreement and exceed the arbitrator's jurisdiction over disputes properly brought before the arbitrator.
15. The grievance is barred by the doctrine of laches. Laches is an equitable doctrine that is applied to bar grievances where there has been an unreasonable or protracted delay in the processing of a grievance.
16. The Grievant was disciplined in July of 2008. The doctrine of laches applies to the present matter because the Union and the Grievant rested on their rights and allowed a significant period of time to elapse before processing the grievance to arbitration.
17. The Employer had just cause to suspend the Grievant for three days.
18. The Grievant does not dispute that he failed to go into Rasset Bar to determine if people were smoking.
19. The Grievant had knowledge of his obligations as deputy sheriff.
20. Wright County Sheriff's Office Policy, Rules of Conduct G-110, Section 13 provides that members of the department shall be held strictly responsible for the proper performance of their duties. Members shall perform their duties in a manner which will maintain the highest standards of efficiency in carrying out the mission and operations of the department.

21. Unacceptable performance includes an unwillingness or inability to perform assigned tasks, the failure to conform to work standards established for the member's grade, or position and the failure to take appropriate action on the occasion of a crime, disorder or other condition deserving of police attention.
22. The Grievant's job duties include investigating complaints concerning violation of City ordinances, state and federal laws.
23. The Employer disciplined the Grievant just three months prior to the incident leading to the grievance in this case for failing to properly investigate and therefore violating Policy G-110.
24. The Grievant failed to exit his squad car and conduct a proper investigation when he responded to a bank alarm and his report did not contain sufficient information regarding the alarm call.
25. The Grievant was reminded of the standards of conducted expected of deputies at that time.
26. The Grievant was reminded of the need to get out of his squad car, to respond diligently and to prepare complete reports.
27. The Grievant testified that he did not miss seeing broken glass when responding to the bank alarm. Then the Grievant changed his story stating that he does not clearly remember the events of the bank alarm.
28. The Grievant's credibility is negatively impacted by the fact that he has made inconsistent statements.
29. The Union and the Grievant did not grieve the one day suspension.
30. In 2006, the Employer directed the Patrol Sergeant to meet with the Grievant to counsel him on the thoroughness of his reports.
31. The investigation of the Grievant's actions was thorough, fair and established that he engaged in the conduct detailed in the suspension notice.
32. The three day suspension was appropriate. The Grievant provided minimal effort when responding to the May 17, 2008 call for service.
33. The Grievant's actions of merely looking through the exterior windows of the bar and then smoking a cigarette in the bar parking lot with the bar owner do not constitute the level of performance and high level of service that is expected of a 1st Grade Deputy.
34. The inconsistencies between the Grievant's Garrity Statement and his Testimony under oath at the arbitration hearing negatively impact his credibility.
35. The Grievant was repeatedly asked why he didn't go into the bar on May 17, 2008. He provided four different explanations.
36. At the arbitration hearing, the Grievant claimed that he did not go into the bar on May 17, 2008 because of the email from the Lieutenant regarding the Minnesota Smoking Ban. This information was not provided by the Grievant during his Garrity statement.
37. The Grievant also testified that he had another call pending while at the bar and did not want to spend a lot of time on a smoking violation call. The Grievant did not provide this information during his Garrity statement either.
38. The Grievant did have enough time to smoke a cigarette with the owner of the bar, however.
39. The Grievant's claimed reliance on an October 2, 2007 email is not credible.

40. There are no facts that mitigate the disciplinary principle.
41. Local law enforcement has the authority to issue petty misdemeanor citations to individuals or businesses who knowingly fail to comply with the smoking ban.
42. The Grievant testified that as he understood the email, Wright County deputies were instructed to stay out of smoking complaints.
43. There is nothing in the email that states officers should not respond to calls for service related to smoking.
44. There is nothing in the email that states the officer does not have to go into the bar to determine if anyone is smoking.
45. The Grievant should have entered the bar to determine if people were in fact smoking and write a report so that the Public Health Department could follow-up.
46. Once dispatched to a call a deputy is expected to respond diligently.

Union's Position

1. No amount of discipline is warranted in this case because the Grievant did not violate any Sheriff's office policy.
2. The Grievant followed a clear policy directive that smoking complaints were to be handled by business owners and the public health department.
3. The Grievant did an appropriate investigation and moved on to his next assignment.
4. The Employer has the burden of proving that the Grievant's conduct violated County policy.
5. Absent a showing the Grievant violated County policy his prior discipline should not be used to determine the outcome of this case.
6. The Employer also has the burden of proving that the grievance is not procedurally arbitrable.
7. The Employer refused to discuss the grievance on August 13, 2008 effectively denying the Step 3 grievance on that date.
8. The Step 3 grievance request was likely not received by the Employer until August 4, 2008 which means that the denial was within the required ten (10) day period. The Union's Step 4 request made on August 14, 2008 was also timely.
9. Absent evidence on exactly when the Step 3 request was received, the Employer failed to meet its burden on the procedural arbitrability issue.
10. The Union requested the Step 3 meeting in writing on July 31, 2008. The request was mailed the following day, August 1, 2008 which was a Friday. The Employer therefore would not have received it until Monday, August 4, 2008 at the earliest.
11. The Employer refused to schedule the Step 3 meeting on August 13, 2008 which was only nine (9) days after the Step 3 request was received.
12. The Union requested arbitration on August 14, 2008 well within the deadline to appeal to that step.
13. Unless the Employer can prove that the Step 4 request was not received on August 4, 2008, the arbitration request was timely filed and there is no procedural arbitrability issue.
14. The Employer did not have just cause to suspend the grievant.

15. Because the grievant complied with the Captain's directive he did not violate sheriff's office policy.
16. The October 2, 2007 email is clear on its face that deputies are not responsible for investigating smoking complaints.
17. The Grievant spoke with the bar owner, informed her of the smoking complaint, the bar owner denied anyone was smoking and at that point, the Grievant had complied with the employer policy as expressed in the October 2, 2007 email.
18. Because the Employer failed to set clear policy expectations, the Grievant's discipline cannot be sustained under the just cause standard.
19. Deputies are only supposed to get involved in smoking complaints if a smoker refuses to leave an establishment.
20. The Grievant exceeded the expectations of deputies as described by the Employer in the October 2, 2007 email by going out to the bar and informing the owner of the smoking complaint. The owner was then responsible for dealing with the complaint.
21. If the Grievant was expected to prepare a report then the officer who went to the bar after the second report of smoking was called in should have also written a report.
22. The officer actually told the citizen who complained of the smoking that it wasn't the Sheriff's office's responsibility to handle smoking complaints.

FINDINGS OF FACT

On May 17, 2008, the Grievant, a Wright County 1st Grade Deputy received a call to go to Rasset Bar to investigate a smoking complaint called in by someone who chose to remain anonymous. The Grievant, while in route to Rasset Bar received another call of a complaint that marijuana was being smoked in the parking lot outside of the very same bar. The Grievant arrived on the scene found that there was no one smoking anything in the parking lot. The Grievant decided to look through the windows of the bar to see if he could observe anyone smoking. The Grievant did not see anyone smoking while looking through the windows of the bar. Shortly after beginning his investigation by looking through the windows, a male patron came out of the bar and asked the Grievant what he was doing. The male patron went back inside the bar and the owner came out to speak with the Grievant. The Grievant informed the owner of the smoking complaint. The Grievant left the premises without actually going inside the bar.

Shortly after leaving the bar, the dispatcher received a call from a different person/patron complaining of continued smoking in the bar. The second caller said

she saw the Grievant leave without ever entering the bar. A Sergeant spoke to the second caller by phone before proceeding to the bar. The Sergeant informed the complaining patron that it was not the Sheriff's office responsibility to enforce the smoking ban and encouraged her to go to another bar. When the Sergeant entered the bar he immediately spotted a patron smoking. He also understood that patrons had been smoking in the bar that night with full knowledge of the bar owner. The Sergeant did not write a report to the health department regarding the owner's intentional violation of the smoking ban but warned her that additional complaints might lead to a report being made to the health department.

The Sergeant did file a report of misconduct against the Grievant on May 28, 2008 for failing to properly handle the smoking complaint and more specifically for not actually going into the bar to determine whether patrons were smoking. The Sergeant's complaint led to an internal affairs investigation of the Grievant's actions related to that smoking complaint. The internal affairs investigation was designed to determine whether the Grievant violated Wright County Sheriff's Office Policy, Rules of Conduct G-110, Section 13. The investigator concluded that the Grievant made minimal effort on the call, that the nature of the call is insignificant because citizens expect deputies to give a high level of service and investigate their complaints. The investigator also concluded that it was the Grievant's minimal effort that led to the complaint by the citizen.

The Employer issued a notice of discipline to the Grievant dated July 2, 2008. The Employer decided that the Grievant "did not conduct a proper investigation of smoking cigarettes in violation of state law "#08-18320." The Employer's discipline of the Grievant was based on its belief that the Grievant should actually have entered the bar to determine whether patrons were smoking. The Union filed a step 1 grievance in this matter on July 23, 2008. The Employer denied the grievance without providing any additional information. By letter dated July 23, 2008, the Union moved the grievance to Step 2 and explained that the discipline was without just cause. The parties met and discussed the grievance on July 24, 2008. The

Employer denied the Step 2 grievance by letter on July 25, 2008. By letter dated July 31, 2008, the Union moved the grievance to Step 3.

The Union requested a Step 3 meeting to which the Employer agreed. The meeting was scheduled for August 7, 2008. On the morning of August 7, the Union representative contacted the Employer to reschedule the meeting and explained her inability to make the August 7th meeting. The Union representative suggested August 13 and August 15 as potential dates for rescheduling the meeting. On August 13, the Union called to reschedule the meeting and the Employer refused to meet saying more than 10 days had passed since the Union filed the Step 3 grievance on July 31st. The Employer directed the Union to contact the Employer's attorney. The Union advanced the grievance to Step 4 on August 14, 2008.

OPINION AND AWARD

The Employer argues that the grievance is not arbitrable because the Union failed to meet with the Employer at Step 3 of the process to discuss the grievance. The plain language of the Agreement states that:

“If appealed, the written grievance shall be presented by the Union and discussed with the Employer-designated Step 3 representative. The Employer-designated representative shall give the Union the Employer's answer in writing within ten (10) calendar days after receipt of such Step 3 grievance. A grievance not resolved in Step 3 may be appealed to Step 4 within ten (10) calendar days following the Employer-designated representative's final answer in Step 3. Any grievance not appealed in writing to Step 4 by the Union within ten (10) calendar days shall be considered waived.” (Agreement at p. 4)

Both sides agree that a face to face Step 3 meeting did not take place. However, there is no agreement as to whether the failure to hold a face to face meeting is fatal to the Union's right to move the grievance to Step 4. The arbitrator concludes that the weight of the evidence presented at the hearing supports the Union's position. The evidence shows that the Union “presented” the grievance by letter dated July

31, 2008. The Employer presented testimony that the parties scheduled a Step 3 meeting for August 7, 2008. The Union contacted the Employer on August 7, 2008 and explained the need to reschedule the meeting.

No further direct communication between the parties took place until August 13, 2008. During that telephone conversation the Employer refused to reschedule the Step 3 meeting and informed the Union that it failed to meet the timelines of the Agreement.

In line with the evidence presented at the hearing, the arbitrator finds that while a face to face meeting did not take place within ten (10) days of the Employer's receipt of the Step 3 request, the Agreement does not require a meeting to take place within that timeframe. The arbitrator also finds that but for the Employer's refusal to reschedule, a face to face meeting could have taken place within ten days.

The Agreement does not say that a face to face meeting must be held within ten days of the Employer's receipt of the Step 3 grievance. Rather, the Agreement states that the Employer must give the Union an answer to the Step 3 grievance within ten days of receiving the Step 3 request. Moreover, the plain language requires the Employer's response to be in writing and not verbal.

The Union provided sufficient evidence that it submitted and the Employer received the Step 3 request no earlier than August 4, 2008. The Union representative testified that the letter was mailed on August 1, 2008 and since the weekend followed the Employer could not have received it earlier than Monday, August 4, 2008. The evidence is clear that it was not the Union that failed to provide for a face to face meeting but the Employer.

On August 13, when the Union contacted the Employer to reschedule the Step 3 meeting, the Employer could have simply scheduled the meeting for the following day and still would have been within the ten (10) day time frame to submit its

response to the Step 3 grievance. Nothing in the Agreement prevents the Employer from submitting its written response to the Step 3 meeting within the mandatory 10 day period and then having a face to face meeting to discuss the grievance further. Given the requirements of the parties' grievance procedure a face to face meeting took place at both Step 1 and Step 2. (See Agreement, Article 7.4 p. 4; See also, Er. Ex. 5) It is unclear what additional light could be shed on the respective positions at Step 3 but it was certainly possible to hold a face to face meeting had only the Employer agreed to do so. It is difficult to understand the Employer's reluctance to hold a face to face meeting even after the Union advanced the grievance to Step 4. It is not uncommon for parties to resolve a grievance on the day of a scheduled arbitration hearing. There is nothing in the Agreement that suggests the Union should be prevented from meeting simply because ten days elapsed. The ten days does not apply to the meeting but to the Employer's obligation to respond in writing. While it would certainly make sense to meet in a timely manner, here the Union appears to have done that but run into a conflict requiring it to cancel the August 7th meeting. The Employer's refusal to meet appears disingenuous at best.

By refusing to meet and by failing to submit a written response to the Step 3 grievance, the Employer effectively undermined the plain language and intent of the parties' Agreement. The Union representative proposed meeting on August 13 or August 15 of 2008. The Employer did not respond to those proposed meeting dates. The arbitrator is perplexed by the Employer's testimony regarding the importance of the face to face meetings at Step 3 of the process given its refusal to agree to such a meeting even though one could have been held prior to the time the Employer was required to issue its written response.

The arbitrator must conclude that the Employer failed to demonstrate that the grievance should not be heard because of a procedural defect in the Union's processing of the grievance. In fact, the arbitrator must conclude that the Employer failed to follow the plain language of the Agreement requiring a written Step 3 response within ten days of receipt of the Union's Step 3 grievance.

The arbitrator recognizes that the Employer also raised a laches defense. However, there was no evidence introduced that allows the arbitrator to evaluate exactly why years passed before this matter was advanced to a hearing. The evidence shows that the Union representing the Wright County bargaining unit changed after the events under consideration here. The Agreement in effect in 2008 was negotiated by Law Enforcement Labor Services (LELS). LELS was removed as bargaining representative prior to the arbitrator being notified of selection and the Wright County Deputies Association installed in its place.

The Employer did not present any evidence that the Wright County Deputies Association delayed the processing of this matter to arbitration. There was no offer of proof during the hearing that indicated the Wright County Deputies Association delayed moving the grievance forward. While the events at issue in this case took place in 2008, the arbitrator was not notified of selection until 2011. No evidence was submitted suggesting the Union delayed the process. Both sides agreed to push the original hearing date out from January 2012 to September 2012. Neither side expressed any concern regarding a delay in the processing of the grievance until the Employer did so in its post-hearing brief. Therefore, the arbitrator must likewise reject the Employer's laches argument.

Turning to the merits of the grievance, it is clear the Grievant did not go into the bar to determine whether anyone was smoking. What is not immediately clear is whether his failure to do so violates the Wright County Sheriff's Office Policy, Rules of Conduct G-110, Section 13. Section 13 requires deputies to perform their duties properly, to maintain sufficient competency to properly perform their duties and responsibilities and to perform those duties in a manner which will maintain the highest standards of efficiency in carry out the mission and operations of the department. Section 13 goes on to provide examples of what constitutes unacceptable performance.

The investigation of the Grievant's performance on the evening he drove to Rasset Bar to respond to a complaint of patrons smoking concluded that he gave "minimal effort on this particular call." The Investigator concluded that "Looking into the windows does not qualify a complete and thorough investigation" (sic) The investigator concluded that the nature of the call is insignificant because citizens expect deputies to give a high level of service and investigate their complaints." See Employer Exhibit 3, Section 1, p. 3. The investigator also concluded that because the Sergeant who was called to the bar after the Grievant left actually went into the bar and discovered a patron smoking, that his actions demonstrate the standard response expected of the Grievant.

The Sergeant entered the bar, discovered a patron smoking, observed that the smoking was taking place with full knowledge of the bar owner, learned that not only was the bar owner implicit in violating the anti-smoking ban but that she lied to the Grievant and concluded his investigation by simply giving the owner a stern warning. The Sergeant did not make a report to the department of health.

Furthermore, according to the citizen who made the second complaint, the Sergeant told her "it's not really their (Sheriff's Department's) area, they don't ...really take care of that part of it, it's more like on the health department side." (Er. Ex. 3, Section 2, p. 3) The citizen went on to say that the Sergeant "actually suggested we go to a different bar..." (Id.)

The facts demonstrate that there was no practical difference between the Grievant's investigation and the Sergeant's in terms of the result. The citizen's expectations were not addressed by the Grievant or the Sergeant. The Sergeant had a great deal of proof that the owner was in violation of the state law and did nothing to advance the enforcement of that law. According to the Employer, "Local law enforcement has the authority to issue petty misdemeanor citations to individuals or businesses who knowingly fail to comply with the MCIAA. (Minnesota Clean Indoor Air Act)" (Employer Post-Hearing Brief at p. 19)

Having investigated and discovered the owner's willful violation of the law, the Sergeant failed to issue even a petty misdemeanor citation but nearly two weeks following the incident decided he should file a complaint against the Grievant for failure to fully investigate the call on the night of May 17, 2008. The Employer after investigating the matter and discovering the Sergeant's cavalier attitude as expressed to the complaining citizen when he suggested she go to a different bar took no action to discipline him for failure to give a high level of service. Not only did the Sergeant leave the scene without taking any action against the owner's willful conduct in violation of the law, he chose to directly quash any expectations on the part of the complaining citizen that the Sheriff's department had any role to play in dealing with the smoking violation.

It is, therefore, impossible to square the Employer's response to the Grievant's conduct in this situation with its lack of concern or response regarding the Sergeant's conduct. Had the Grievant gone into the bar and discovered all of the things the Sergeant discovered as well as spoke to the complaining citizen the way the Sergeant did, should the arbitrator conclude that the Employer would have been satisfied with that result? If the Sergeant's investigation is the standard that the Employer expected the Grievant to live up to then the Employer's Rules of Conduct Policy is very confusing.

It is clear that the outcomes of the two so-called investigations were the same. The citizen was not satisfied and the owner who blatantly engaged in conduct that violated the law and misled the Sheriff's department was left to return to her bar and smoke again while encouraging her patrons to do the same.

Under these facts, it makes no sense that the Grievant should have been singled out for discipline. It is unclear what part of the policy the Grievant violated. He actually did conduct an efficient investigation in light of the hands off approach to smoking violations as expressed by the Employer. He used his discretion to decide whether

going into the bar was warranted and decided that looking in the window was best. He spoke with the owner outside of the bar but took her at her word that there was no smoking going on and left the scene. The Grievant was aware of the October 2, 2007 announcement that smoking complaints would be handled by the department of health. In an effort to counter this argument, the Employer pointed out that there was no way the department of health could follow up if it did not receive a report from the deputy. However, the Employer failed to discipline the Sergeant for failing to make a report to the health department even though he had proof positive of the owner's willful violation.

The Sergeant went to the scene. The Sergeant decided to conduct his investigation by actually entering the bar. He discovered a patron smoking and that the bar owner had lied to him yet he took no action. As importantly, the Sergeant told the complaining citizen that enforcing the smoking ban was not the Sheriff's department's responsibility. That statement supports the Grievant's position that the actions he took were consistent with Sheriff Department policy. The Sergeant expressed clear policy and his lack of action after completing his investigation makes that point crystal clear.

“...if someone is smoking in violation of the ban, the business owner/employees are responsible for making sure that the person in violation is told to stop smoking. If they refuse to stop smoking when the staff requests them to do so, they will be asked to leave the establishment...if they refuse to leave, only then will law enforcement be called to investigate the incident as a trespassing complaint. If the business owner/staff fail to request people to stop smoking in their business, once again the Public Health Department will follow-up on those complaints.” (Er. Ex. 6)

According to this Employer email announcing protocol with regard to calls about smoking violations:

“If a patron/customer of a business calls reporting that another customer is smoking a cigarette in the booth next to them, dispatch will politely tell the caller to contact the management of the business and make them aware of the smoking violation. It will be the responsibility of the business management to enforce the smoking ban in their business.” (Id.)

It is therefore abundantly clear that regardless of the Wright County Sheriff's Office Policy, Rules of Conduct G-110 Section 13 or the position description for deputies, the Grievant was sent out on a call that he should not have been given. If the Employer wishes to maintain its position that even if the call should not have been given to the Grievant once it was given the Grievant should have actually gone into the bar, it must be held responsible for confusing the level of performance expected of the Grievant by issuing the above email policy directive. Moreover, the Employer must explain why it took no action against the Sergeant for failing to both give due consideration to the concern of the complaining citizen rather than advising her to go to different bar and more importantly failing to contact the department of health regarding the blatant conduct of the Rasset Bar owner.

The arbitrator agrees with the Union position that the plain and unambiguous language of the email communication issued by the Employer on October 2, 2007 regarding the manner in which the Sheriff's department intended to respond to complaints of smoking violations overrides the more general and in this particular case uninformative language found in Section 13 of the Rules of Conduct. As a result, the arbitrator finds that to discipline the Grievant under these facts amounts to discipline without just cause. As the Union argued the Employer further confused the matter by stating that dispatchers were not to pass such complaints on to the deputies but should politely advise the complaining citizen of the proper way to file such complaints. In this case, the Employer failed to carry out the dictates of its stated policy by first passing on the call to the Grievant and then by not providing proper guidance regarding the Employer's expectations once the call did go through.

The just cause standard requires the Employer to enforce its rules equally. In this case, it is obvious that the Employer treated the Grievant and the Sergeant differently with regard to the standard of conduct required. According to the Sheriff, deputies have discretion with regard to the specific steps they take in performance of their duties. The Sheriff testified that their discretion has not been taken away. In this case, both the Grievant and the Sergeant exercised discretion with regard to the

amount of time, attention and the level of seriousness they chose to give to the complaint of smoking in the bar.

The Grievant decided to approach the task by looking in the window and speaking with the owner outside of the bar. That choice is consistent with the notion that the business owner is the chief source of enforcement. According to the policy directive, it is only when a patron refuses to leave or the owner is unable or unwilling to respond to a complaint that law enforcement should intervene. The Sergeant decided that it was within his discretion to simply warn the owner against continued violations and that there was no need to issue a report to the department of health. The Sergeant decided in his discretion that no report needed to be sent on to the department of health even though the owner was unwilling to obey the state ban on smoking.

At the hearing of this matter, the Employer stressed the need for deputies to get out of their cars and speak to local merchants or make an appearance in the business. The purpose of this approach is to develop a relationship with business owners and to build public awareness of the policing efforts. However, doing a business walk through for the purposes of establishing a police presence and making contact with citizens is quite a different matter than exercising discretion with regard to how to carry out an investigation regarding a specific complaint.

The Employer expressed a concern about customer service or making sure the citizens felt they were being heard and their concerns addressed. Again, comparing the actions of both the Grievant and the Sergeant in this case, there is little doubt that the public relations and customer service goals were unmet by both officers handling of the smoking complaints received that evening.

Testimony at the hearing did not contradict what the Grievant told the investigator after being issued a Garrity and Data Privacy warning in 2008. The Grievant told the

investigator that the bar owner came out while he was still in the parking lot and asked him if there was a problem. The Grievant told the investigator:

“I told her we received an anonymous complaint that there was smoking in the bar. She stated absolutely not. She doesn’t put up with that. And then I informed her that she was the one that was responsible for people smoking in her bar and that if she has any problems that she’s to tell them to leave or put it out. If they do not comply with her wishes, that she is to call us.” (Er. Ex. 3, Section 5, p. 2)

The Grievant testified that he took the owner at her word that no one was smoking inside after looking through the windows. The Grievant testified that he had no reason to question her account and that he took the call as far as he thought his authority allowed. In other words, given the direction that the deputies would only intervene if the patron failed to leave or extinguish the cigarette after being asked to do so. His testimony is consistent with the directions provided to him and other deputies by the Employer in the email dated October 2, 2007.

AWARD

Based on the record evidence including the testimony and post-hearing briefs, the arbitrator concludes that the Union properly advanced the grievance in accord with the Parties’ Agreement. The arbitrator also holds that the Employer failed to satisfy the requirement of Article X (Discipline) of the Parties’ Agreement requiring all discipline to be supported by just cause. The grievance is **SUSTAINED**. The Employer is required to remove all references to this disciplinary action from the Grievant’s personnel file and to compensate the Grievant for any wages lost during the 3-day (24-hour) suspension. The arbitrator retains jurisdiction to clarify any ambiguities with regard to the interpretation or implementation of this award.

Respectfully Submitted,
A Ray McCoy
Arbitrator

December 6, 2012