

MINNESOTA BUREAU OF MEDIATION SERVICES

ARBITRATION AWARD

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IN THE MATTER OF ARBITRATION)	
)	
Between)	
)	BMS# 13 PA 0659
CITY OF CROSBY)	13 PA 0660
)	
and)	
)	John Remington,
)	Arbitrator
INTERNATIONAL BROTHERHOOD of)	
TEAMSTERS, LOCAL #346)	
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THE PROCEEDINGS

The above captioned parties, having been unable to resolve a grievance over the demotion and later termination of Grievant S., selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Minnesota Bureau of Mediation Services, to hear decide the matter in a final and binding determination. Accordingly, hearings were held on September 27, 2013 and from October 7 through October 11, 2013 in Crosby, Minnesota at which times the parties were represented by counsel and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties requested the opportunity to file post hearing briefs which they did subsequently file on November 19, 2013.

The following appearances were entered:

For the Employer:

Melanie Abrams, Esq.

Abrams and Schmidt LLC
Arden Hills, MN

Kim Coughlin

Chief of Police

For the Union:

Patrick Kelly, Esq.

Kelly and Lemmons
St. Paul, MN

Martin Norder, Esq.

THE ISSUE

**DID THE EMPLOYER HAVE JUST CAUSE TO
DEMOTE AND SUBSEQUENTLY TERMINATE
THE EMPLOYMENT OF GRIEVANT AND, IF NOT,
WHAT SHALL THE REMEDY BE?**

BACKGROUND

The City of Crosby, hereinafter referred to as the “Employer” or “City”, is a municipality of the State of Minnesota and a public employer within the meaning of Minnesota Statutes § 179A. The city has a police department that employed eight full time police officers in 2012 and an additional number of part-time officers who were assigned to fill in as needed. Three of the above full time officers were supervisory: a Chief, a Captain and a Sergeant. The police department is organized in a traditional paramilitary structure with a chain-of-command specified in departmental policy and city ordinance. All “essential employees” of the department are represented, for purposes of collective bargaining, by the International Brotherhood of Teamsters and its Local Union

#346, hereinafter referred to as the “UNION.” The parties’ current collective agreement defines “essential employee” to include all full-time officers (those who work at least 14 hours per week or 35% of the normal work week) including the departmental Records Manager but excluding confidential and supervisory employees. However, Article 29 of the collective agreement clearly and unambiguously provides that the “Sergeant” position is included within the bargaining unit and covered by the labor agreement.

Sergeant S., the Grievant in this matter, was initially employed by the City as a police intern in 1995; became a part-time dispatcher in 1997; and a full time police officer in 1999. In 2007 he applied for, and was promoted to the position of Sergeant by Chief of Police Kim Coughlin. As Sergeant he was assigned to work as the night shift supervisor for patrol officers working a 5:00 p.m. to 3:00 a.m. shift. At the time of his promotion Grievant was serving as the designated Union Job Steward, the principal union officer representing City essential employees. He was elected to this position in 2002.

The Employer and the Union were engaged in collective bargaining for a new labor agreement during the summer of 2012. During these negotiations the Employer was represented by City Council Members Ed Vukelich and Elizabeth Hofmann. Inexplicably, neither Chief Coughlin nor other representative of departmental supervision was included on the management bargaining team. The Union was represented by Grievant and Union Business Agent Les Kundo. At least three other police officers (J. A., S. R., and Dean Savor) also participated in negotiations on behalf of the Union.¹ During a negotiation session on July 13, 2012 Grievant requested a pay raise for the Sergeant’s position. When asked for justification for this increase by Councilwoman

¹ The record is not entirely clear concerning which union member police officers attended this bargaining session. Officers Mike Van Horn and Tom Mount may have attended some of the bargaining session and apparently Officer Chelsey Collette and Clerk Mike Midthun were also at the July 13 session.

Hofmann, Grievant apparently indicated that he was doing most of the departmental investigations, a response which surprised both Hofmann and Vukelich since it was their perception that investigations were being handled almost exclusively by the Captain. When the Employer representatives began to raise questions about the Captain's duties, Business Agent Kundo indicated that it was inappropriate to discuss the job duties or performance of the Captain in negotiations. The negotiation session ended shortly thereafter.

A second bargaining session was held on August 8, 2013 during which discussion of the captain's position was continued. Vukelich and Hofmann represented the City while the Union was represented by the Grievant, Kundo, Officer A, Midthun, Officer R, and Savor. While it is clear that the incumbent Captain was discussed, it appears that the focus was on his duties, the questionable need for such a position in a small department, and only incidentally on his job performance. However, following the bargaining session, Hofmann and Vukelich initiated a sidebar discussion with Grievant and Kundo during which the Captain's duties and activities were discussed further and Vukelich and Hofmann requested Grievant to provide them with job descriptions for both the Captain and Sergeant positions. While the Employer alleges that Grievant was critical of the Captain's job performance during this meeting, statements taken by the Employer's external investigator, Justin Churchill, including those from Hofmann and Vukelich, fail to support this allegation.² Indeed the testimony of Hofmann and Vukelich at the hearing indicated no criticism or allegations initiated by Grievant of poor job performance on the

² When asked by the Employer's Investigator "Do you believe that Sgt. S. was publicly criticizing or ridiculing" the Captain? Hofmann responded: "I don't. I don't think so because he was just truthfully answering my questions." Hofmann Statement, p.13. Churchill's report also indicates that Vukelich, and not Grievant, raised the issue of the Captain's job duties. IA Report, p. 4- Employer Exhibit #12.

part of the Captain. The Council Members' testimony further revealed that they initiated the sidebar meeting and that Grievant simply responded to their questions. According to the testimony of Kundo, supported by his bargaining notes, Grievant actually opposed the proposed elimination of the Captain's position indicating that such an action would not be well received by the Chief.

It is nonetheless apparent from the record of the hearing that there was sentiment on the part of some City Council members to consider elimination of the captain position as a possible cost saving measure. Hoffman testified that another Council Member, Deb Shankle, was already in the process of surveying other small city police departments regarding the position of captain. Indeed the Council discussed eliminating the Captain's position at its August 27, 2012 meeting. This sentiment certainly would have been exacerbated by Council Members Hofmann and Vukelich concluding that the Sergeant and other police officers were actually conducting the investigations which Council had misunderstood were all to be conducted by the Captain.

At some point Vukelich took it upon himself to initiate a personal investigation of job duties in the police department and requested a number of officers, including Grievant, to meet with him at his home. He spoke with most, if not all of the police union members, either in person or by phone, and also directed Grievant to provide him with a copy of the Sergeant's job description.³ Vukelich admitted during his testimony at

³ Grievant clearly edited the Sergeant's job description by adding a page of additional duties prior to giving the description to Vukelich. Grievant testified that he needed to update the description to accurately reflect the duties being performed, did so, and passed it by the Captain for approval before bringing it to Vukelich. The Chief was out of town at the time and the Captain simply assumed that Grievant had been requested by the Chief to update his job description. The Captain apparently had no knowledge that the job description was intended for the Council. Accordingly, he testified that he gave it a cursory review and returned it to Grievant without comment. Whether or not he "approved" the additional duties is a matter of perception. However, his testimony at the hearing indicated that he agreed that the Sergeant did perform most of the additional duties listed.

the hearing that his memory is unreliable. It is accordingly difficult to determine from his apparently conflicting testimony, and his statements given during the internal investigation, exactly when his various discussions with Grievant and other officers occurred, when he became aware of other information, and what he may have said to Grievant or Grievant to him.

It appears that the Council's controversy over the duties of the Captain and what work he actually performed resulted in a rumor that the Council was considering adverse action against the Captain. Chief Coughlin testified that she first learned of this controversy from an "unknown citizen on the street" on August 27, 2012. She immediately contacted both Vukelich and Hofmann in an attempt to ascertain exactly what was being proposed and why, and was apparently able to prevent any immediate action being taken by the Council. She then determined that a formal investigation was necessary, placed Grievant on administrative leave, and referred the matter to Deputy Chief Justin Churchill of the neighboring Mille Lacs Tribal Police Department. Coughlin contacted Churchill on September 6, 2012 and requested a general internal investigation focused on the above incidents and a determination of whether a violation of the chain of command had occurred. Churchill was provided with written instructions from the Chief concerning the scope of the investigation and possible violations of policy and professional conduct which may have occurred.

Churchill subsequently produced a written fact finding summary together with carefully prepared witness statements which he personally taped and transcribed. This summary and the statements were reviewed by a three person Disciplinary Panel including the Chief, retired Minneapolis Police Commander Robert Skomra, and retired

Itasca County Sheriff Pat Medure. This panel ultimately sustained ten of eighteen charges of misconduct against Grievant. A Loudermill hearing was convened on January 10, 2013. Following this hearing the Panel issued a demotion notice to Grievant for violating nine of the ten sustained charges, and recommended termination for violation of the tenth sustained charge (Untruthfulness). Grievant's termination was confirmed by the City Council on January 28, 2013.

Grievant responded by filing two grievances. The first was filed on January 14, 2013 challenging the demotion. The second was filed on January 28, 2013 contesting the termination. The first grievance alleges that Grievant was discharged in violation of Articles 3 and 9 of the collective bargaining agreement as well as Minnesota Statutes §626.89; §179.06; §179.60; the United States Constitution and the Minnesota State Constitution. This grievance states, in relevant part:

..... Grievant states the discipline was without just cause and in violation of Art. 9, Sections 1 &2.....
The employer issued a statement of allegations without supporting documentation..... the employer violated the Police Officer Bill of Rights MS 626.89 and PELRA statutes..... The employer's discipline also is in violation of its own policies and regulations, including but not limited to, progressive discipline. The discipline issued by the employer may be retaliation for exercising Grievant's Constitutional rights and other rights under law which is also protected under Article 18, Section 1 of the contract. The discipline is also excessive and disparate. The Grievant was a steward of the Union and the employer interfered with his activities and duties as a steward in violation of Art. 2, Section 2 and PELRA.

In remedy the grievance requests that the demotion be removed and the officer made whole including removing any reference to the demotion from Grievant's personnel file.

The second grievance is virtually identical to the first grievance except that it addresses Grievant's termination rather than the demotion and additionally alleges that the discipline of termination constitutes double jeopardy. In remedy it requests that Grievant be reinstated, made whole, and that any reference to the termination be excluded from his personnel file. It is apparent that, although no formal answer to either grievance was provided, that the parties agreed to combine both grievances and proceed directly to arbitration. These grievances are therefore properly before the Arbitrator for final and binding determination.

PERTINENT CONTRACT PROVISIONS

ARTICLE 2

JOB STEWARD:

Section 2: The Employer recognizes the right of the Union to designate a Job Steward or Job Committee to handle such Union business as may from time to time be delegated to the Job Steward or Job Committee by the Union in handling grievances. Union shall inform the employer in writing of the names of such stewards.

ARTICLE 3

MANAGEMENT RIGHTS:

Section 1: The management of the City of Crosby, Minnesota, and the direction of the working force, including the right to hire, to suspend or discharge for cause, to lay off employees because of lack of work, to make reasonable work assignments, the right to make technology changes, and all other rights relating thereto; except only as may otherwise be provided herein, are vested in the Employer and shall not be abridged.

Section 2: Union recognizes the right and obligation of the Employer to efficiently manage and conduct the operation

of the Police Department within its legal limitations and the Employer's primary obligation to protect the lives and property of persons within the city.

ARTICLE 9

DISCIPLINE AND DISCHARGE

Section 1: No employee who has completed his/her probationary period shall be disciplined or discharged except for just cause. With respect to discharge, the employee shall receive at least one written warning notice of the complaint prior to discharge. No warning notice need be given if the cause of such discharge is theft, drunkenness, drug use or gross insubordination. Employer agrees to allow the Union access to the Policy and Procedures Manual upon reasonable notice.

Section 2: Prior to demoting or suspending an employee as disciplinary action for an alleged violation of published rules and/or regulations, the Employer shall prepare or assemble a statement of alleged violations and deliver the same to the employee and serve a statement of charges as outlined in this Article. If the intent is a demotion, the position to be demoted to shall be identified: if the intent is a suspension, the intended time of suspension shall be identified.

Section 3: If the Employer has reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public. Employees disciplined by written reprimand shall receive a copy of the reprimand.

ARTICLE 18

CONSTITUTIONAL PROTECTION:

Section 1: Employees shall have the rights granted to all citizens by the United States and Minnesota State constitutions.

ARTICLE 29

SERGEANT:

Section 1: There shall exist within the bargaining unit the job title of "Sergeant." Said position shall be filled by employer and shall be paid an additional \$1.00 per hour. The duties of the Sergeant shall be determined by the Employer.

CONTENTIONS OF THE PARTIES

The Employer takes the position that it has met its burden of proof in demonstrating just cause for both the demotion and subsequent termination of Grievant. The Employer argues that, based on an internal investigation conducted by an outside investigator, it sustained nine (9) charges of misconduct against Grievant and determined that these sustained charges were sufficient to demote Grievant from his position as a police Sergeant. It further argues that based on twenty-one (21) additional documented charges of untruthfulness it also had just cause to discharge Grievant. In this connection it argues that it is a fundamental expectation of police officers that they will be truthful in word and action and that failure to meet this requisite high standard of truthfulness has serious negative consequences on an officer's ability to perform his/her duties and can render them unable to testify in a criminal case in support of prosecution. This is particularly true of supervisory personnel who may be held to a higher standard of conduct. The Employer therefore asks that the discipline be sustained.

The Union takes the position that comments attributed to Grievant that were used as support for his alleged violations were made during union negotiations and that union stewards like Grievant are immune from discipline related to their conduct in the course of union business. In this connection the Union argues that the facts relied upon to

sustain the violations are not clear. The Union further takes the position that the investigation conducted on behalf of the Employer was not fair and objective; that the Employer inconsistently applied discipline; that Grievant's discipline-free work record was ignored; and that the Employer made no attempt to progressively discipline Grievant. It therefore argues that Grievant's discipline was excessive and that the grievance must be sustained.

DISCUSSION, OPINION AND AWARD

This is a particularly difficult matter to assess, in large part because many of the crucial facts are disputed. An equally difficult matter here is that there is a fundamental conflict between the roles of a police supervisor strictly adhering to a chain of command structure and a union steward engaging in protected concerted activity and representing his fellow employees under the equality principle. While a clear chain of command with defined lines of authority and responsibility is essential to the effective functioning of any police department, it is likewise fundamental in unionized labor-management relations that union representatives be deemed the equals of their employer counterparts. Simply put, the relationship between union steward and employer is not a master-servant relationship but rather a relationship of equal opposing parties. While the Employer contends that Grievant should be held to a higher standard because of his supervisory position, it is equally true that stewards may not be held to a higher standard in disciplinary matters. Here Grievant has been disciplined primarily based on alleged statements and comments made during union negotiations, an activity protected by Minnesota statute.

It cannot be denied that the responsibility for creating a situation in which issues that arose in negotiations led directly to the discipline of Grievant is almost wholly attributable to the Employer's actions. The management bargaining team lacked negotiations experience and was further handicapped by not having a supervisory representative from the police department at least in an advisory capacity. It was also the Employer that decided to appoint the union steward as Sergeant creating the conflict of interest noted above.⁴ The Employer also agreed at some point to include the sergeant's position in the collective bargaining unit as provided for in Article 29, supra. There can be little doubt therefore that Grievant's community of interest was legally and professionally with the officers he supervised. Under these circumstances it is neither realistic nor reasonable to expect Grievant to act in the interest of the Employer in collective bargaining. Rather his responsibility was to attempt to obtain wage, benefit and working condition improvements (including his own) for the bargaining unit. If a reduction in personnel was proposed, it would be his responsibility to protect the bargaining unit positions, if need be at the expense of supervisory positions. In this connection it must be noted that Grievant also enjoyed the right of confidential communication with other bargaining unit members and the expectation that he would not be disciplined for engaging in any protected concerted activity.

Brief comment is also warranted concerning the difficulty in negotiating and administering a collective bargaining agreement in a small, close knit police department. Bargaining and contract administration are frequently adversarial. This is particularly problematic for a city like Crosby where police supervisors and officers must work closely together, tend to socialize and interact almost exclusively with each other away

⁴ Grievant was elected union steward in 2002 but wasn't appointed Sergeant until 2007.

from the job, and rely on personal loyalty to reinforce lines of formal authority. Here Grievant was obviously placed in an untenable position by his conflicting roles as Sergeant and Union Steward; his friendship with his fellow officers, his respect for elected officials, and his personal loyalty to the Chief.

The Investigation

The Union was highly critical of the investigation conducted by the Employer, suggesting that it was neither thorough nor objective but rather was based on an overreaction on the part of the Chief who had already reached her conclusions and simply authorized an investigation to support those conclusions. The record tends to support such a claim. It is given further credence by the Chief's instructions to Churchill which indicate that Grievant and others had discussed the Captain, his job performance and duties which had "caused concern for Vukelich and Hofmann,"⁵ and the fact that the instructions given to Investigator Churchill were never produced by the Employer despite repeated requests from the Union.⁶ Churchill's selection as the investigator was also unfortunate under the circumstances. Although he testified credibly and attempted a thorough and professional fact finding, his perspective was clearly influenced by the fact, as he candidly admitted, that he had no knowledge or experience in collective bargaining. Accordingly, he had no appreciation for the fact that most of the comments attributed to Grievant that were used as support for the disciplinary violations were made either during union negotiations or in conversations related to negotiations, or that Grievant was engaging in activity protected by state statute when he made them. Indeed, many of the

⁵ IA Investigation Report, p.2. –Employer Exhibit #12.

⁶ Churchill's Investigative Report indicates that Chief Coughlin provided him with a "three-ring binder which included a summary of the allegations" and identified Grievant as the subject. Churchill testified that he returned the binder to the Chief when his work was completed. The binder was never offered in evidence or provided to the Union.

questions posed by Churchill to Grievant and other subjects interviewed reveal that Churchill was oblivious to the bargaining process or to Grievant's role and function as a union steward.

As the Union notes in its post hearing brief, it does appear that the investigatory questions posed to Grievant, Vukelich, Hofmann and several of the police officers interviewed were not impartial and objective. Indeed, many of these questions were leading or failed to provide an explanatory background so that witnesses could respond appropriately and accurately. The result was a flawed investigation, an investigation that was then utilized by the Disciplinary Panel to recommend Grievant's demotion and subsequent termination.

The matter of Jacob Heffron

A critical issue in this case is the testimony provided by part-time Crosby Police Officer Jacob Heffron together with a surreptitious audio recording which Heffron made of a conversation between Grievant and himself sometime in September of 2010.⁷ At the time Heffron was a full time police officer and Grievant was his Union Steward and Sergeant. This recording is the basis for several of the charges sustained by the Disciplinary Panel against Grievant. Heffron and the audio recording were not mentioned in the original instructions from Chief Coughlin to Churchill. However, the Chief became aware of the existence of the tape when Heffron came forward after Grievant was placed on administrative leave. There are some evidentiary problems with the recording. The first is that Heffron admittedly erased some of the early portion of the

⁷ According to Crosby Police Department policy, "Surreptitious recording of conversations between employees of the Crosby Police Department is prohibited." This policy was authorized by Chief of Police Kim Coughlin on 9/3/12. This policy was apparently not in effect when Heffron recorded his conversation with Grievant.

recording so that the recording is only a partial record of the conversation. The second is that neither the recording nor Heffron's testimony indicates the circumstances under which the conversation occurred other than that it took place in or near the garage. It does not appear from the content that it involved Grievant speaking to Heffron as his Sergeant. However, since Grievant was also Heffron's union representative it might be deemed confidential communication and protected union activity. Finally, it is readily apparent from the record that the charges against Grievant produced from the recording were not in the possession of the Chief at the time she targeted Grievant for disciplinary action nor were they relevant to Grievant's statements to the Employer's Personnel Committee. As such it may be deemed "after acquired evidence." Such evidence is often rejected in arbitration since it was not in the possession of the Employer at the time it decided to take disciplinary action. There can be little doubt that once Grievant was placed on administrative leave the Chief had already decided to take disciplinary action against him based on his alleged comments to Vukelich and Hofmann.

Heffron's explanation of why he recorded the conversation and kept it for two years was less than credible. He testified that he recorded the conversation because he was fearful of retaliation from Grievant but provided no specifics or explanation for this claim. He was unresponsive when asked why he kept the recording. However, the record of the hearing reveals that Heffron and Grievant were apparently friendly in 2010 although Heffron did testify that, at the time, he didn't have any faith in the entire administration of the police department. Presumably this included Grievant. Heffron admitted on cross examination that Grievant had never retaliated against him or anyone else that he knew of. The record also reveals that Heffron was involved, indeed may

have been the leader, of officers considering a “no confidence” vote against the Chief in 2010, and that Grievant opposed this effort. The Arbitrator deems it unproductive to speculate further on what Heffron’s motives may have been in coming forward two years after the fact with a recording which he obviously perceived to be adverse to Grievant. However, in consideration of the foregoing discussion he is compelled to find that the audio recording is of questionable evidentiary value and is not relevant to the charges which led to the Internal Investigation of Grievant by Churchill. It therefore cannot be given significant weight in the Arbitrator’s determinations.

The Charges Against Grievant

Based upon Churchill’s Internal Investigation report, the Disciplinary Panel sustained eleven charges of misconduct against Grievant. These charges were summarized in a letter (Employer Exhibit 13) to Grievant from Chief Coughlin dated December 19, 2012 entitled: Notice of Loudermill Hearing to Officer; Notice of Discipline Panel Meeting to Officer. The Discipline Panel actually met on December 13, 2012 but its report is not dated until December 20, 2012. Since the Chief was a member of the Discipline Panel, she was clearly in possession of its findings when she wrote the above letter to Grievant. Her letter cites two violations of Department Policies and Procedures; six violations of General Orders Governing Conduct; and three violations of Professional Conduct of Police Officers.⁸

The specifics of the sustained violations appear in the “Findings and Evidence” report of the Discipline Panel (Employer Exhibit #16). Charge 1 (Article 5, Canons of

⁸ The Chief’s December 19, 2012 letter lists a sustained charge related to Grievant’s “Attitude toward Profession.” However, the Disciplinary Panel report states that “After further review, the panel has changed this determination from Sustained to Not Sustained.” This further review could only have occurred on December 13, 2012, the only time the Disciplinary Panel met. Nonetheless, the December 19 letter continues to list the eleventh sustained charge.

Police Ethics) asserts that Grievant provided council members/ public officials with information intended to result in negative employment consequences for the Captain without authority or disclosure to superior officers. Based on the record, this charge is wholly without merit. As hereinabove noted, Grievant did not initiate any critical comments about the Captain and only responded to questions from the public officials. However, even if Grievant had initiated criticism of the job performance of the Captain during collective bargaining, his comments would have been protected. Moreover, it would have been unethical for Grievant to discuss the content of bargaining sessions with his superior officers or to in any way reveal the Union's position as to whether or not the Captain's position should have been eliminated. The Panel's finding in this regard clearly indicates its lack of appreciation or understanding of the collective bargaining process.

The second sustained charge against Grievant states that he violated Police Department Policy, the Law Enforcement Code, Canon of Ethics and Post Board Regulations. It cites "cooperation with public officials in the discharge of their authorized duties, attitude towards profession, insubordination, public statements and appearances, dissemination of information, reporting internal violations, truthfulness, and professional conduct of police officers. See accumulated facts as set forth in the investigation." The charge is vague, lacks specificity, and appears to be little more than "piling on." Again, it is apparent that most, if not all of the conduct cited was directly related to Grievant's role in collective bargaining and accordingly protected from discipline.

The third sustained charge against Grievant is insubordination, a serious offense in any workplace. There are three separate offenses listed : a) Grievant made comments showing disrespect and insubordination toward Chief Coughlin and Captain Koop as evidenced by an audio recording (See above); b) Grievant impeded Chief Coughlin's efforts to gather factual information about another officer's performance by coaching officers on how to answer her questions; and c) Grievant changed and added to the Sergeant's job description in the Policy and Procedure manual without authorization from the Chief of Police. Grievant did not provide a copy of the altered job description to the Chief of Police." Grievant's alleged disrespectful and insubordinate comments are only evidenced by the Heffron's audio recording, which as noted above, is of dubious evidentiary value. While Grievant did not deny that his conversation with Heffron took place, it is apparent from the record that their discussion was in the nature of a bullshit session, a protected discussion between a union member and his steward, or both. To label it insubordinate and disrespectful is also a mischaracterization. The charge that Grievant somehow impeded the Chief's effort to gather factual information and coached officers is simply unsupported in the record. While Grievant may have discussed issues of controversy with other officers in anticipation of their being interviewed by the Chief, he was acting properly as a union steward to do so. However, the item relating to the changed job description is troubling. While it is true that Grievant simply added duties, most of which he actually performed, to his job description, his conduct in doing so was questionable. It is certainly a mitigating factor that the City's Personnel/ Bargaining Committee requested the job description and Grievant may only have been trying to comply with a current description of his duties by making additions. However, to

characterize the Captain's cursory review of the revised description as "approval" was, at best, misleading. Whether or not it was insubordinate is clearly a matter of perception and the Arbitrator cannot find, based on the totality of circumstances, that Grievant was intentionally insubordinate with respect to his submission of the revised job description to Vukelich. It is true that Grievant did not obtain the Chief's approval to revise the job description or ultimately provide her with a copy of the revisions. However, in summary, the Arbitrator must find that the charge of insubordination cannot, and should not have been, sustained based on the incidents cited.

The fourth sustained charge against Grievant involved statements allegedly made to council members that "attacked" the Captain. This matter has already been addressed above and the Arbitrator must find that no such "attack" occurred. Again, Grievant was engaging in collective bargaining in a candid "side bar" session. While the Arbitrator deems it unproductive to comment upon each and every comment attributed to Grievant, it must be noted that Grievant denied making many of the comments and this was only disputed by the testimony of Vukelich. On balance, Grievant was the more credible witness of the two. Specifically, there is no credible evidence to support the allegation that the Captain drinks coffee all day⁹, that the Captain doesn't do anything, that the Captain "handed off" an investigation, that the Captain took three months to do a line-up on a bad check case (likely attributable to Hofmann), that we (the Union) don't know what the Captain's hours are (possibly true but immaterial), that the Captain "pawned off" vehicle inspections, and so forth. The allegation that the Captain somehow mishandled a domestic complaint is clearly a red herring. The Arbitrator is here

⁹ This is certainly not a damning comment, even if true. On the contrary, the record reflects that reference to drinking coffee was attributable to Union Business Agent Kundo.

compelled to note that the Captain, who testified at the hearing, was fully credible. It is also apparent that the bargaining unit officers had little opportunity to observe the Captain's job performance and less understanding of his job duties. While they obviously perceived that he had an easy job and didn't do significant patrol work, they had no appreciation that his duties were largely administrative and that he effectively performed these duties.¹⁰ It is readily apparent that the controversy concerning the Captain was raised by the Employer representatives who perceived that his position may have been unnecessary and cannot in any way be viewed as criticism of his job performance or competence. There is certainly no evidence in the record to support the allegations that Grievant claimed the Captain does not do his job nor that he attempted to undermine the Captain or interfere with the maintenance of discipline within the department. The Arbitrator must therefore find that the alleged complaints about the Captain were neither valid nor extraordinary under the circumstances and that they cannot be attributed to Grievant individually or deemed anything more than comments made during negotiations.

The fifth sustained charge against Grievant again involves comments made during collective bargaining and is protected. It was also clearly made in response to questions from the council members. As discussed above, it cannot be sustained under the circumstances.

The sixth sustained charge against Grievant involves the alleged failure to report the circumstances of the above noted domestic complaint involving Grievant and the Captain. On the contrary, it is evident in the record that the Chief was aware of the

¹⁰ Testimony of Midthun and Ganseveld. See also statements of Midthun and Ganseveld as reported in the IA Report (Employer Exhibit #12).

complaint. This matter was not reported directly to the Council but only raised in collective bargaining discussions.

The seventh sustained charge against Grievant asserts that he was untruthful in several instances, most of which involved statements that he may or may not have made in collective bargaining. As herein discussed above, comments made in bargaining may not be utilized as the basis for disciplinary action. One of these statements involved discussion of a bomb/suspicious object call and alleges that Grievant omitted and changed pertinent facts. However, at the hearing Chief Coughlin testified that a Crow Wing Deputy determined that the Captain did not violate any policy in responding to the call after the fact. Grievant was not present during this conversation. However, Chief Coughlin had previously exchanged a text message with the Grievant indicating that she believed there had been a policy violation. (Union Exhibit #17). While Vukelich testified that this matter was raised during one of the negotiation sessions, the record reveals that the incident occurred on August 17, 2012, after the negotiating sessions discussed above. The unreliability of Vukelich's memory has already been noted above. The Arbitrator is therefore compelled to agree with Counsel for the Union that this controversy was no more than a difference of opinion and cannot be considered an intentional misinterpretation by Grievant. Grievant was also charged with fabricating information concerning the above domestic assault charge but there is no evidence of such fabrication in the record. Differences of opinion or perception cannot be deemed fabrication under the circumstances. This charge also suggests that there was discussion during negotiations of a "relationship" between the Chief and the Captain, and it is undisputed that Grievant may have indicated that the Chief and Captain were "buddy-

buddy.” Given the undisputed longstanding and close personal and professional relationship between the Chief and the Captain, the suggestion that they were “buddy-buddy” is apparently accurate, if unfortunately characterized. However, there is not a scintilla of evidence to even suggest that this relationship was inappropriate or unusual given their respective positions in the department or that Grievant’s comment was untruthful or an intentional misrepresentation.

A number of the incidents cited in the untruthfulness charge against Grievant arose because of apparent discrepancies in the IA statements provided by Vukelich and Grievant. Given the above discussion concerning Vukelich’s memory and credibility as a witness, these discrepancies must be resolved in favor of the Grievant. Indeed, Disciplinary Panel member Skomra testified that he didn’t even recall some of the claims made by Vukelich. Finally, three of the charges of untruthfulness levied against Grievant arose from Heffron’s above discussed audio tape recording and Grievant’s denial of these charges. In fairness, it must be noted that Grievant was unaware that the Investigator’s questions referred to comments that he had made two years ago. Grievant testified that he was under the impression that the Investigator’s questions were instead related to the 2012 bargaining sessions. Accordingly, his responses cannot be considered intentional misrepresentations. In summary, the Arbitrator must find that there is little, if any evidence of Grievant’s untruthfulness in responding to the questions of Investigator Churchill.

The eighth sustained charge against Grievant alleges that he reported concerns about the Captain’s performance to City Council members. This alleged reporting occurred during collective bargaining negotiations. This matter has been fully discussed

above and must accordingly be dismissed. This is also the case for the ninth sustained charge against Grievant where it is alleged that he attempted to criticize, undermine and discredit the Captain. This charge is clearly without merit.

The ninth charge also states that Grievant “failed to exhibit positive effective leadership to the officers under his supervision and did not appreciate the importance and responsibility of his office” and that he “was also negligent, especially as a supervisor, in routinely reviewing the Crosby Police Department Policy and Procedure manual.” While these charges may appear to be relatively insignificant in comparison with the gravamen of Chief Coughlin’s dissatisfaction with his performance as a supervisor, they are at the center of the underlying problem revealed by this entire matter. Simply put, it is difficult for a police officer to effectively and faithfully simultaneously perform the duties of a supervisor and a union steward. Grievant admitted as much in his own testimony. These conflicting duties are particularly problematic in a small department where the steward is the only Sergeant. Here the Chief was understandably provoked by Grievant’s failure to appreciate the importance and responsibility of his office as a Police Sergeant and respect the obligations inherent in his position in the chain of command. That she also perceived him to have been negligent in his responsibilities to the Captain and the Chief is clear in the record of the hearing. Grievant’s failures in this regard are mitigated by the fact that he was not responsible for the exclusion of the Chief or her representative from the bargaining process. Neither can he be faulted for accepting election to the position of Union Steward prior to his appointment as Sergeant. The fact remains that the charges that Grievant failed to exhibit effective leadership and the responsibilities of his office and was negligent as a supervisor with regard to reviewing Departmental Policies and

Procedures have merit. These sustained charges, in addition to his questionable conduct in connection with the revision of his own job description and submitting it to the Employer's representatives in bargaining without a candid discussion with the Chief or Captain are sufficient to sustain the decision to demote him from his position as Police Sergeant.

Brief final comment is warranted with regard to Grievant's undisputed prior record of superior performance as a police officer for the City. It is doubtful, based on the record, that either the Disciplinary Panel or the City Council gave full consideration to this record in sustaining his discharge. Indeed, at least one member of the Disciplinary Panel testified that he didn't even recall reviewing Grievant's record of employment with the City. Given the extreme penalty of termination, the Arbitrator finds that the Grievant's exemplary prior record of performance cannot be, and should not have been, overlooked. In summary, the Arbitrator must find that the penalty of termination was excessive and not for just cause.

The Arbitrator has made an exhaustive review and analysis of the entire record in this matter and has given careful consideration to the thorough post hearing briefs submitted by the respective parties. Having done so, he is satisfied that the crucial issues which arose in these proceedings have been addressed above. Further, he has determined that certain other matters raised at the hearing and in the supporting briefs must be deemed immaterial, irrelevant, or side issues at the very most and therefore has not afforded them and significant mention, if at all. For example: Skomra's past association with the Chief; the Brendan Schram case; the Chief's September 13, 2012 order clarifying the chain of command; the Drug Task Force Internal Investigation considered

by Skomra to be an indication of untruthfulness on Grievant's part; the delay in investigating the domestic incident; whether or not Vukelich was "pissed off" at Grievant, threatened him with a charge of insubordination, or felt that the Chief had lied to him; whether or not Grievant claimed that he performed 75% of the investigations; whether or not Grievant ever claimed that the Chief's job was in jeopardy; whether or not Grievant ever claimed to having influenced Van Horn; whether or not Grievant was ever told by Vukelich or Hofmann not to report certain information to the Chief; whether or not the Chief transcribed the notes of the July 27, 2012 meeting; the matter of Heffron's alleged involvement with the pop fund; whether or not Churchill conducted a follow-up interview with Hofmann; whether or not Vukelich was a former member of Local #346 or had prior bargaining experience; and so forth.

Having considered the above review and analysis, together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievances and within the meaning of the parties' collective agreement, the evidence presented at the hearing is sufficient to find that the Employer had just cause to demote Grievant from his position as a Police Sergeant. He further finds that the evidence was insufficient to support the decision of the City to terminate Grievant as a police officer and that the Employer did not have just cause to discharge him from employment. Accordingly an award will issue, as follows:

AWARD

THE EMPLOYER HAD JUST CAUSE TO DEMOTE GRIEVANT FROM HIS POSITION AS POLICE SERGEANT. THE GRIEVANCE CONTESTING HIS DEMOTION IS DENIED AND DISMISSED.

THE EMPLOYER DID NOT HAVE JUST CAUSE TO TERMINATE GRIEVANT. THE GRIEVANCE CONTESTING HIS DISCHARGE MUST BE, AND IS HEREBY, SUSTAINED.

REMEDY

GRIEVANT SHALL BE REINSTATED TO THE POSITION OF FULL TIME POLICE OFFICER WITH THE CITY OF CROSBY FORTHWITH WITH NO LOSS OF SENIORITY OR BENEFITS. GRIEVANT SHALL RECEIVE BACK PAY AND ANY BENEFITS DUE TO JANUARY 28, 2013 AS A POLICE OFFICER, LESS ANY UNEMPLOYMENT COMPENSATION OR WAGES FROM EMPLOYMENT AS A POLICE OFFICER EARNED IN OTHER JURISDICTIONS BETWEEN JANUARY 28, 2013 AND THE DATE OF HIS REINSTATEMENT. ALL REFERENCE TO GRIEVANT'S TERMINATION SHALL BE EXPUNGED FROM HIS RECORD.

John Remington, Arbitrator

January 15, 2014

Gilbert, Arizona