

**IN THE MATTER OF ARBITRATION BETWEEN**

---

**LAW ENFORCEMENT LABOR SERVICES  
INC., ST. PAUL, MINNESOTA  
(Union)**

**and**

**COUNTY OF COOK, MINNESOTA  
(Employer)**

---

**DECISION AND AWARD  
(determination of seniority)**

**BMS CASE NO: 15-PA-0692**

**ARBITRATOR:**

James N. Abelsen

**HEARING:**

June 29, 2015

**POST HEARING BRIEFS RECEIVED:**

July 20, 2015

**APPEARANCES:**

**FOR THE UNION:**

Isaac Kaufman, General Counsel  
Law Enforcement Labor Services  
327 York Ave.  
St. Paul, MN. 55130

**FOR THE EMPLOYER:**

Dyan Jean Ebert, Attorney  
Quinlivan & Hughes, P.A.  
P.O. Box 1008  
St. Cloud, MN. 56302-1008

## **INTRODUCTION**

This matter came on for hearing on June 29, 2015 in the Cook County court house in Grand Marais, Minnesota. The parties submitted post hearing briefs on July 20, 2015 at which time the record was closed.

The parties agreed that there were no procedural defects, no issues of arbitrability, and that this matter was properly before the arbitrator.

### **ISSUE PRESENTED BY THE PARTIES**

Did the Employer correctly apply the Collective Bargaining Agreement and state law by granting seniority credit to Deputies Leif Lunde and Ben Hallberg for the time they served in non-bargaining unit supervisory positions in the Sheriff's Department? If not, what is the appropriate remedy?

### **RELEVANT FACTS AND BACKGROUND**

The Union and Employer are parties to a Collective Bargaining Agreement (CBA or Agreement) covering the period of time January 1, 2014 through December 31, 2015. In January, 2015 Deputies Leif Lunde and Ben Hallberg rejoined the Cook County Sheriff's Department after serving in non-bargaining unit supervisory positions within the department.

Deputy Lunde was first employed by the Cook County Sheriff's Department as a Deputy Sheriff in 1998. On February 1, 2005 he was appointed Chief Deputy Sheriff, a non-bargaining unit position, and served in that capacity until July 1, 2014 when he was appointed to the position of Interim Sheriff. In 2014 he ran unsuccessfully for the elected position of Sheriff, and following that election loss he returned to the department as a Deputy Sheriff. Upon his return, the County Board gave Deputy Lunde credit for seniority back to his original hire date of May 27, 1998.

Deputy Hallberg was first employed by the Department in 2004 as a part time non-bargaining unit Dispatcher. In January, 2008 he became a full time Dispatcher, which is a bargaining unit position, and in April, 2011, he became a full time Sheriff's Deputy.

He served in that capacity until July 1, 2014 when he was appointed to the non-bargaining unit position of Chief Deputy Sheriff to serve under Interim Sheriff Lunde.

Like Deputy Lunde, Deputy Hallberg returned to the Department as a Deputy Sheriff following the 2014 Sheriffs election. Upon his return he was given seniority credit by the County Board, not back to his original date of hire in 2004, but back to January 29, 2008, the date he became a full time dispatcher and member of the bargaining unit.

The Union and the individual Grievants, Deputies Collman, Spry, and Zallar, have challenged the Employers calculation of seniority for Deputies Lunde and Hallberg, contending that the County Board improperly gave them credit for the time they spent in non-bargaining unit supervisory positions. For Deputy Lunde the Union's requested method of recalculation would reduce his seniority ranking by some 9 years and for Deputy Hallberg the reduction would be approximately 6 months, which would improve the seniority ranking for the individual Grievants.

The CBA language in question reads in relevant part as follows:

**ARTICLE 8 –SENIORITY**

Section 1. Seniority shall mean an employee's length of service with the Employer since the employee's last date of hire. An employee's continuous service record shall be broken only by separation from service by reason of discharge prior to completion of the probationary period, discharge for cause, resignation, retirement or death.

This language has been part of the CBA between the Sheriff's Department and the employees Union since at least the late 1990's, and has been in effect for all times relevant to this matter. Over the years the Department has hired full-time employees, part-time employees and temporary employees. There have been resignations, retirements, promotions, changes in classifications, and movement in and out of the bargaining unit.

The evidence shows that in the past, when it came to determining an individual's seniority, not all those changes in status or position were handled consistently. Some part-time hires were given seniority credit for their part-time job, while several others were not. And at least one continuously serving full-time member of the department was

not given credit for a position he held outside the bargaining unit, while others who were outside the bargaining unit for a time were given credit.

There was much discussion and evidence submitted explaining the circumstances and reasons for these inconsistencies. And while there is some logic and some basis for these inconsistencies, it seems most likely that as long as someone was not being treated unfairly, and as long as no one's seniority ranking would be adversely affected, and department morale would not suffer, the parties simply decided on a case by case basis what type of service would count for seniority, and what would or would not constitute a break in service.

This then, appears to be the first situation where the parties have been unable to agree on how to interpret or apply the seniority language in the Agreement in a way that would satisfy the disparate wishes of several different people within the department.

Faced with that situation, the County Board unilaterally granted seniority credit to Deputies Lunde and Hallberg based on their understanding of the Agreement, and also on what they believe these two deputies were entitled to under Minnesota statutory law.

The statute they relied upon provides in part as follows:

**Minnesota Statute Section 3.088 LEAVE OF ABSENCE**

Subd 1. (A)ny...employee of a political subdivision...who serves as a legislator or is elected to a full-time city or county office in Minnesota is entitled to a leave of absence ....with right of reinstatement as provided in this section.

Subd. 2. (I)n the case of an elected city or county official on the completion of the final day of the term to which the official was elected, the ....employee shall be reinstated in the public position held at the time of ... taking city or county office.

Upon reinstatement, the... employee shall have the same rights with respect to accrued and future seniority status... and other benefits as if actually employed during the time of the leave.

The Employer believes this language reflects a clear legislative intent to encourage public employees to seek elected and appointed office by giving them the assurance that if they choose to do so, important benefits, like seniority, will not be jeopardized. The Union on the other hand, argues that by its plain and unambiguous language, the benefits

provided under this statute apply only to elected officials, and not to appointed public officials.

## **UNION'S POSITION**

The Union makes essentially three arguments to support its position. First, they argue that the County Board's action is not supported by the language of the Collective Bargaining Agreement. In particular, they believe that Article 8 does not address this situation where two individuals leave the bargaining unit for a time and return at a later date to a bargaining unit position. This situation they argue, is an "unforeseen circumstance" which is unaddressed in the Agreement, and therefore a "gap filling" remedy is called for.

Secondly, they argue that there has been a "past practice" in the department which supports their position, that individuals who leave the bargaining unit and then return, should not be given credit for their non-bargaining unit service.

And finally, they argue that Minn. Stat Sec. 3.088, which is relied upon by the employer, is inapplicable to this situation where Deputies Lunde and Hallberg are returning from "appointed" positions, not "elected" positions.

### **Language of the Collective Bargaining Agreement – The need for gap filling**

The Union contends that when the parties negotiated the seniority language of the contract they did not contemplate a situation where a bargaining unit member would leave their position to accept a non-bargaining unit appointed position, and later return to the bargaining unit. This, they say is an "unforeseen circumstance," which produces a "gap" in the contract, which in turn calls for this gap to be filled.

In support of this position, they argue that many contract disputes, including this one, arise because the parties did not foresee and provide for a particular set of circumstances. So, as in this case, there was no meeting of the minds. And they cite considerable authority for the proposition that "gaps in a collective bargaining agreement are inevitable, and an important role of an arbitrator is to serve as the parties' gap-filler."

The Union points out that seniority is an extremely valuable benefit to its members. Deputies with more seniority can bid for more favorable shifts, they can more easily secure time off to be with their families, and they have preference for overtime. They build seniority by working nights, weekends, and holidays, and they pay union dues to protect this important benefit. Had this issue been contemplated by the parties during negotiations, there is no way, argues the union that they would ever have agreed to allow these two appointed officers to continue accruing seniority while outside the unit. This then is an “unforeseen circumstance,” which requires an arbitrated “gap-filling”.

### **Past Practice**

In response to the employers claim that there is an established practice of crediting union members with seniority while serving in a non-bargaining unit position, the Union notes that only three such cases have occurred. And that limited number of cases, they argue, is insufficient to establish a practice that would bind the parties.

The Union cites considerable authority for the proposition that in order to establish a binding past practice as an implied term of the contract, “the way of operating must be so frequent and regular and repetitious so as to establish a mutual understanding that the way of operating will continue in the future.” The three examples proffered by the county, argues the Union, not only do not meet that standard, but those examples are misleading, and the facts in those cases are not analogous to the facts in this case.

If there is a past practice to be followed, argues the Union, the better examples are those which they presented, in which employees were denied seniority credit for the time they served in non-union positions. Several examples discussed at the hearing were cited by the Union as more comparable cases, where the more compelling past practice argument favors their position.

### **Minnesota Statute Section 3.088**

In response to the Employers argument that the seniority rights of Deputies Lunde and Hallberg are protected by state law, the Union submits that the statute relied upon simply does not apply to this situation. They reference language in the statute which

they believe clearly and unambiguously extends this protection only to elected officials and not to appointed officials. They note that the Chief Deputy position, previously held by Deputies Lunde and Hallberg, is always an appointed position in every county in Minnesota, and there is no evidence which supports the Employers argument that the legislative intent and public policy is to protect the seniority rights of both elected and appointed public officials.

### **EMPLOYER'S POSITION**

The Employer makes essentially three arguments in support of its position that their granting of seniority to the two Deputies was appropriate. First, they believe the language in the Agreement supports their decision. Secondly, they believe their decision is consistent with the past practice of the department. And thirdly, that their decision is supported by sound public policy and Minnesota statutory law.

#### **Language of the collective bargaining agreement**

The Employer acknowledges that in determining seniority, which begins with an employee's "last date of hire," they have not always been consistent in how that date has been established. Nevertheless, they argue, the date of hire is not the issue. The issue is whether or not there has been a break in the deputies "continuous service record", which according to the contract, would cause a "break" in their seniority. In this case, under the terms of this contract, the Employer believes that Deputies Lunde and Hallberg did not have their continuous service record broken, as that is defined in the Agreement.

#### **Past practice**

The Employer offers three examples of situations where there has been an established practice of applying the Agreement in such a way that other members of the department, who have served in appointed non-bargaining unit positions, have not suffered a "break" in their "continuous service record". These examples they argue, are analogous to this case, they show a consistent past practice, and are a correct interpretation of the contract language.

They contend that the examples cited by the Union, which might suggest otherwise are all distinguishable, primarily because those cases involved individuals who began their continuous service as part-time employees, or were temporary employees who transitioned into full-time employment, and did not begin accruing seniority status until they became full-time. So the situations cited by the Union are not analogous to this matter, where the employment of Deputies Lunde and Hallberg has been full time.

**Minnesota Statute Section 3.088**

The Employer argues that this section of Minnesota statutes, which was cited earlier, is additional authority for their decision, if not their obligation, to grant seniority to Deputies Lunde and Hallberg for their service in an “appointed public office”.

They argue that this statute shows an intent on the part of the legislature to encourage public employees like Deputies Lunde and Hallberg, to seek out elected and appointed positions, by providing them protection from loss of seniority and other benefits should they choose to seek such positions. The Employer believes that the reference in the statute to someone being “elected,” as opposed to being “appointed”, if given a strict and narrow reading, would lead to the absurd result of giving greater protection to those elected than to those who are appointed. This they argue, would be poor public policy and would essentially defeat the legislative intent to encourage public service.

**ANALYSIS AND DISCUSSION**

For many years, the employer and at least two different unions, have operated under a collective bargaining agreement with a seniority section which has remained unchanged through at least six contract negotiations. And over those years there have been a number of hires, resignations, retirements, probably some terminations, a number of temporary and permanent promotions, and a variety of personnel actions which have had, or could have had an impact on peoples seniority.

In looking at the way in which many of these actions were handled, it is clear that there has not always been consistent application of the seniority language. That may be

explained, at least in part, by the fact that the language may be somewhat unclear. But it may also be that when people moved from part-time to full-time, or moved to a different classification, or were promoted to a non-bargaining unit position, their seniority date was administratively set or modified in a way, that under the circumstances just seemed “fair” to everyone. Or perhaps more importantly, would not cause someone else to lose their seniority ranking. And as long as no one was being disadvantaged by someone else’s change in seniority ranking, the issue may never have been discussed.

This situation however, is different. Deputies Lunde and Hallberg were promoted out of the bargaining unit into administrative or supervisory positions, which has happened before. They returned to the bargaining unit, which has also happened before, but the seniority credit they have been given by the Employer for their service outside the bargaining unit will now cause a loss of seniority ranking for the three individual grievants, deputies Spry, Collman, and Zallar.

So this set of circumstances presented the Employer with a situation they had not had to deal with before. And their decision to grant seniority credit to the returning deputies, which adversely affects three other deputies, now presents a number of issues.

The first issue, and the threshold question, is whether or not the language of the contract actually addresses this situation? Secondly, if it does not, has the language been applied over the years in such a way as to establish a legally binding past practice? Thirdly, if a binding past practice has not been established, does this situation present an unforeseen set of circumstances, unanticipated by the parties, which requires an interpretation of the language, or the filling of a gap in the language, to reflect the true intention of the parties? And finally, if this cannot be resolved by the language itself, or by past practice, or by filling a gap in the language, is the solution found in Minnesota statutory law?

### **Past practice of the parties**

Addressing first the issue of past practice, both parties offer examples of seniority calculations that support their position. They cite instances where employees have

worked outside the bargaining unit and have not been given seniority credit, and instances where they have been given credit. Some employees have been given credit for part-time service, while others have not. And while there are certain distinctions to be made in the various examples they cite, and while one side may have one or two more examples of a consistency than the other, the fact is that there has not been consistent application of the contract language over the years, and no clear consistent past practice has been established one way or the other.

As many authorities have said, “sporadic occurrences of an activity do not rise to the level of a past practice”, and for an activity or occurrence to rise to that level, there must be “strong proof” of the practice, and the practice must be “unequivocal, clearly enunciated, and acted upon over a reasonable period of time.” It is also said that there must be “clarity, consistency, and acceptability” between the parties for a practice to become an implied term of the contract. (*Seventh Edition of Elkouri & Elkouri: How Arbitration works Ch. 12. 2*).

In this case, neither party has shown that there has been a practice or pattern of behavior which would rise to the level of establishing a way of doing business that would be binding on the parties today.

### **Unforeseen circumstances requiring a gap filling remedy**

While the Agreement does deal with the issue of seniority, the parties have differing views as to whether or not the seniority section covers all that it should. The Employer believes the language was applied correctly when they granted Deputies Lunde and Hallberg seniority credit for their time in supervisory positions, while the Union believes the language simply does not address the situation where people are promoted out of the bargaining unit and then return.

Had this been discussed during negotiations argues the Union, they would never have agreed to contract language which would allow someone who left the bargaining unit to continue accruing seniority credit during their absence. This, they believe, is a

“gap” in the contract language that is appropriately filled or remedied through this grievance process.

It is true that in certain cases, where a contract does not fully address a particular subject it may be appropriate for an arbitrator to fill a “gap” in the contract. (*Village of Romeoville, 121 LA 1797, Wolf, 2006*) It is not appropriate however, to ignore contract language when the subject is fully addressed. (*Quebecor World, 120 LA 365, 367, 2004; Clark County WRD, 119 LA 955, 959, 2004*).

In this case there is an entire section of the Agreement addressing seniority, so that subject is clearly covered. And just because “being promoted out of the bargaining unit” is not specifically mentioned or listed as a reason for causing a break in seniority, that is not an indication that the subject was never contemplated, or that omission of this factor is an “unforeseen circumstance” that creates a gap in the language. The subject of seniority is addressed, the occurrences which cause breaks in seniority are spelled out in detail, and therefore there is no “gap” to be filled.

### **Contract language**

Since no past practice has been established which would bind the parties, and since no unforeseen circumstance has occurred which creates a gap in the contract, the question then becomes whether or not this matter can be resolved by the plain language of the Agreement. If the language is clear, then past practice does not matter, nor is gap filling required.

The seniority section of the Agreement reads as follows:

#### **ARTICLE 8 –SENIORITY**

Section 1. Seniority shall mean an employee’s length of service with the Employer since the employee’s last date of hire. An employee’s continuous service record shall be broken only by separation from service by reason of discharge prior to completion of the probationary period, discharge for cause, resignation, retirement or death.

There are a number of important phrases or key words in this section. First, it provides that calculation of seniority begins with the employee’s “last date of hire.” That

term, while a bit unusual, suggests that there could also be a “first” or “second” date of hire. So multiple hiring dates are anticipated. And the evidence shows that over the years, people have been employed a first time, then left the department, and later been reemployed by the department. And it is that final reemployment date that has been used as their “last date of hire”. In this case there appears to be agreement as to the last date of hire for both deputies Lunde and Hallberg, so that is not an issue.

The contract then provides that seniority, which begins accruing upon an employee’s last date of hire, will continue accruing until the employee’s “continuous service record (is) broken”. It then provides that an employee’s continuous service record is broken “only by separation from service.” And finally, it says that in order for the separation from service to cause a break in seniority, the separation must be caused by one of five things: A “discharge prior to completion of the probation period”, a “discharge for cause”, a “resignation,” “retirement,” or “death.” (As an aside, Section 2 of Article 8 also provides that being on lay-off status in excess of two years also causes a break in seniority, however that is not relevant to this case).

As to whether or not Deputies Lunde and Hallberg incurred a “separation from service”, the evidence shows that they were promoted to new positions, but those positions were still in the sheriff’s department. Granted, they were not members of the bargaining unit during that time, but they were in continuous service with the Cook County Sheriff’s Department. Therefore, there has not been a separation from service.

Furthermore, even if their promotions, or leaving the bargaining unit were to be characterized as a “separation from service”, that separation was not a result of any of the five listed causes which would result in a break in seniority. Therefore, the conclusion must be, that even though Deputies Lunde and Hallberg left the bargaining unit, they did not suffer a separation from service, or any kind of change in their employment, which would cause a break in their seniority.

While it may seem unfair that an employee can leave the bargaining unit and no longer pay union dues, and work in a position that doesn’t require overtime, or shift work, or holiday work, if the parties intended that leaving the bargaining unit would be a

basis for ending seniority accrual, that would need to be part of the Agreement and added to the list of occurrences which cause a break in service.

It is not the role of an arbitrator or court to ignore the plain language of a contract and add provisions that the parties have failed to include or chosen to leave out of the contract. (*Mason County, 127 LA 141, (Siegel, 2010); The Law of Contracts sec. 3.10, (4<sup>th</sup> ed. 1998); Seventh Edition of Elkouri and Elkouri: How Arbitration Works Ch. 9.2*)

Not only is it inappropriate as a general rule, for an arbitrator to add language to a contract, but in this particular case, with this Agreement in place, and with this set of facts, it would be a violation of the Agreement for this arbitrator to add “leaving the bargaining unit,” or “changing classifications,” or “promotion” to the list of reasons why someone’s seniority is broken. As provided in Article 6, sec 4 of the CBA:

**Subsection A. Arbitrator’s Authority:** The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this Agreement.

### **Application of Minnesota Statute Sec. 3.088**

As a final issue, the Employer argues that their decision to credit these deputies with seniority is supported, if not required by the provisions of Minnesota Statutes. Sec. 3.088, which has been cited previously.

The Employer believes this statute evinces a legislative intent to encourage public employees to seek out elected and appointed positions, by providing assurances that they would not risk losing their seniority and other benefits should they leave their position for a full-time city or county office.

The Union on the other hand, argues that the statutory language is clear. The statute applies to members of the legislature, all of whom are elected, and to those who serve in a city or county office by way of election, not by way of appointment. Had the legislature intended this statute to protect appointed positions it would have said so, but it did not.

This statute has been in place for over three decades and the language is clear and unequivocal. And, as with the CBA, it would be inappropriate to add any language, or

read into this statute any language that could have been placed there by the drafters, but was not. One could argue, as the employer has, that sound public policy should be to encourage public service, which is not an unreasonable argument. But there are significant differences between elected public service and appointed public service.

One obvious and major difference is that elected office, by its very nature is temporary. Electors do not have to give a reason why they vote someone into office or out of office, and anyone elected to office can be removed for no reason at all, or even for reasons that might otherwise be unlawful or discriminatory. On the other hand, that is not the case for most, if not all appointed public officials. Most appointed public officials are chosen for their experience and expertise, not for their electability or popularity, and removal of an appointed public official usually requires cause or a provable, lawful reason.

So while it would be fair to say that encouraging public service is sound public policy, it would also be fair to say that not all public offices, and not all public officials should be treated the same. Clearly, the legislature has decided to make a distinction between those who are elected and those who are appointed to city or county offices. They have chosen to protect employment benefits for public employees who seek elected city or county office, with all the uncertainties and lack of job security that go with it, but have decided that such protection is not necessary for those who are promoted or appointed to a full-time city or county office.

### **FINDINGS**

- Article 8 of the Agreement between the parties provides that the seniority of an employee of the Cook County Sheriff's Department (a) begins at the time the employee is hired into the department, and (b) continues to accrue as long as that employee is providing continuous service within the department, and (c) does not stop accruing until that continuous service is broken. It provides further that such service is broken by (i) discharge prior to completion of that persons probation

period, (ii) discharge for cause, (iii) resignation, (iv) retirement, (v) death, or (vi) being on lay off status for more than two years.

- The service record of Deputy Leif Lunde began December 16, 2004, and the service record of Deputy Ben Hallberg, for purposes of deciding this matter, began January 29, 2008. Both Deputies Lunde and Hallberg have provided continuous service with the department since the dates their service began, and no break in their service has occurred.
- No binding past practice in determining seniority has been established which would cause either Deputy Lunde or Deputy Hallberg to be denied seniority credit for the time they served in non-bargaining unit supervisory positions in the sheriff's department.
- The fact that the Agreement lists a number of specific reasons for causing a break in continuous service, and does not list "leaving the bargaining unit" or "promotion", or " a change in classification" as reasons, is not an indication that an unforeseen circumstance has occurred which would create a gap in the contract that must be filled.
- The clear and unambiguous language of Minnesota Statute Section 3.088 provides seniority protection for members of the legislature and for elected, but not for appointed city and county officials, and such statute is therefore, not a basis for awarding seniority to Deputies Lunde and Hallberg.

### DECISION

Based on the record as a whole and for the reasons cited herein, the grievance is DENIED.

Dated: August 13, 2015



James N. Abelsen, Arbitrator