| IN THE MATTER OF ARBITRATION BETWEEN | APPEAL |
|---|---|
| Bexar County Sheriff's Department<br>AND<br>Bexar County Sheriff's Deputies Association | Case # 2010 – DSABC<br>Class 02 Ad. Seg. Unit<br>Contract Grievance |

## HEARING EXAMINER

Mark R. Sherman

## DATES OF HEARING

July 13 & 14, 2011
(Record of Hearing Closed 10/5/11)

## PLACE OF HEARING

Conference Room
Bexar County Records & Training Center
232 Iowa
San Antonio, Texas 78210

## DATE OF AWARD

November 25, 2011

## APPEARANCES

For the County: Albert Pena, Esq.
Denton, Navarro et. al. PC
2517 N. Main Ave.
San Antonio, Texas 78212

For the Union: Karl Brehm, Esq.
C.L.E.A.T. Staff Attorney
1939 N.E. Loop 410, Suite 210
San Antonio, Texas 78217

# ISSUE

Whether the Bexar County Sheriff's Office violated the Collective Bargaining Agreement when it changed its policy on assignment of detention officers to the Administrative Segregation Detention Units? If so, what is the appropriate remedy?

# RELEVANT CONTRACT PROVISIONS

## Collective Bargaining Agreement Between The Deputy Sheriffs Association of Bexar County and the Sheriff of Bexar County

**ARTICLE 3: MANAGEMENT RIGHTS**

**Section 1,**

The Association recognizes the traditional and existing prerogatives of the County and the Sheriff to operate and maintain their respective functions as authorized by law including but not limited to the following rights, subject to the terms of this Agreement The Sheriff shall retain all rights and authority to which, by law, is his responsibility to enforce.

A. Direct and schedule the work of its employees, to include the scheduling of overtime work in a manner most advantageous to the County. The Sheriff shall have the right to reschedule employees for required Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) annual training, which shall not be subject to this Article. A forty (40) hour block of in-service training may be provided annually to each employee.

The Sheriff shall also have the right to reschedule an additional forty (40) hours per employee annually, for remedial training, for additional Sheriff's Office training, and/or TCLEOSE approved training, at the Sheriffs discretion, which shall not be subject to this Article.

B. Hire, promote, demote, transfer, assign and retain employees in positions with the County and the Sheriff's Office as provided under this Agreement and by applicable laws and Civil Service Commission rules.

C. Discharge demote, or suspend employees for just cause as defined herein, pursuant to the requirements of Subchapter B of Chapter 158, Texas Local Government Code.

D. Maintain the efficiency of governmental operations.

E. Lay off employees from duty because of lack of work, consistent with Civil Service Regulations, and State laws.

F. Determine the methods, processes, means, and personnel by which operations are to be carried out.

G. Transfer any operation now conducted by it to another unit of government, except as specifically provided in this Agreement.

**ARTICLE 4: MAINTENANCE OF STANDARDS**

**Section 1.**

Established practices, standards, and conditions of employment, oral or written, existing on the date of this Agreement, concerning mandatory subjects of bargaining shall not be changed during the term of the Agreement whether or not they are specified in the Agreement.

**Article 13 Contract Dispute Resolution**

**Section 4, Arbitration**

If a grievance is submitted to arbitration, within seven (7) calendar days, the Sheriff and/or County and the Association shall select an arbitrator by rotation from the parties' pre-determined panel of six (6) qualified neutral arbitrators. The panel list is attached as Exhibit "A" to this Agreement. Should any panel member subsequently refuse or be unable to continue to serve on the panel, the Parties may mutually agree to his replacement from a mutually accepted list of three arbitrators, in the event the parties cannot mutually agree to a replacement, the remaining members of the panel will continue to serve for the duration of the Agreement.

The conduct of the hearing shall be governed by the standard rules of the American Arbitration Association. The parties, by mutual agreement, may request that the hearing be held in accordance with the Expedited Labor Arbitration Rules which are found as Attachment 3 to this Agreement and are incorporated herein by reference.

Upon written request delivered at least five (5) calendar days prior to the date of the hearing, a party to the proceeding shall provide to the opposing party the names and addresses of witnesses expected to be called at the hearing. In the absence of good or excusable cause, the arbitrator may exclude the testimony of a witness upon the failure of a party to disclose such a witness. The parties, in writing, may request discovery from each other concerning the grievance. Should the opposing party not agree to provide the requested information within five (5) calendar days of the request; the request shall be deemed denied. The requesting party may then apply to the Arbitrator, who shall order such discovery as is appropriate to the nature of the case, consistent with, but not bound by, the rules of discovery in Texas civil cases. In considering the application, the Arbitrator, shall consider the burden and expense of producing the information, the need of the requesting party, the amount of time available prior to the hearing, and such other matters as he may deem material. In no event shall discovery be requested within five (5) calendar days prior to the hearing, unless agreed by the parties.

The arbitrator shall not have the power to add to, amend, modify, or subtract from the provisions of this Agreement in arriving at his decision on the issue or issues presented and shall confine his decision to the interpretation of

this Agreement. The arbitrator shall confine himself to the precise issue submitted for arbitration and shall have no authority to determine any other issues not so submitted to him the decision of the arbitrator shall be final and binding upon the Sheriff and/or County and the Association.

The County shall bear the expense of any witnesses called by the County and/or Sheriff. The Association shall bear the expense of any witnesses called by the Association. The losing party shall pay the fees and expenses of the arbitrator wholly o partially, to the extent that any grievance unreasonably advanced or unreasonably denied as may be found by the arbitrator, in the absence of such a finding the parties shall split the Arbitrator fees and expenses equally.

**Section 5. Election of Remedies.**

It is specifically and expressly understood that filing a grievance under this Article that has as its last step final and binding arbitration, constitutes an election of remedies and any appeal of an arbitrator's decision in this procedure shall be strictly and solely limited to the grounds that the arbitrator exceeded his or her authority and jurisdiction as provided under this Agreement, that the decision of the arbitrator was procured by fraud or collusion or that the arbitrators decision is based upon a clear and manifest error or law.

**ARTICLE 30: COLLECTIVE BARGAINING OBLIGATIONS**

**Section 1**

The parties may amend or add to the provisions of this Agreement during its term only by express, mutual, written agreement.

**Section 2**

Except as otherwise provided in this Agreement, the County may not implement material changes in compensation, hours, or conditions of employment during the term of this Agreement without the Association's express written agreement, whether or not this Agreement is expressed or silent as to such matters. Subject to the provisions of Article 4 of this Agreement (maintenance of standards) nothing in this Article changes or impairs the authority of the County or the Sheriff as to matters that are not mandatory subjects of bargaining or not expressly covered in this Agreement.

**Section 3**

In the event of the enactment of any statute, ordinance, or rule during the term of this Agreement by any non-party national or state legislative body, political subdivision, or rule-making body (for example, the Bexar County Sheriffs Civil Service Commission), which results in material change in compensation, hours, or conditions of employment for bargaining unit employees, upon request of the Association, the County, or the Sheriff, the parties shall meet for the purpose of negotiating amended or additional provisions of this Agreement concerning the effects of such statute, ordinance, or rule on the bargaining unit.

# FACTS

The Bexar County Sheriff's Office (the County) employs hundreds of Deputies as law enforcement officers and hundreds more as detention officers. Both groups are represented by the Deputy Sheriffs Association of Bexar County (the Union). The Grievance in this case relates to detention officers who work in the Main Jail. It was filed after a new Sheriff's administration implemented changes to the policy for manning some of its Administrative Segregation Units.

In a policy that remained unchanged since 1996, Section III, Subsection C, (1) of the Detention Division Policy and Procedures Manual stated "There shall be three (3) officers assigned to this living unit during the first and second shifts." That changed when the Manual was revised in early June 2010. Section IV, Subsection E, (1) of the revised Manual specified "There shall be two (2) officers assigned to the Administrative Segregation Units."

With the assistance of Attorneys from the Combined Law Enforcement Associations of Texas, the Union pursued a class action grievance under Article 13 section (3) of the Collective Bargaining Agreement to challenge Management's policy revision. Several months later, the undersigned Arbitrator was notified that his name had come up on the Parties rotating list and that he was selected for this case. Hearings were conducted on July 13 and 14, 2011. At the conclusion of the second day of Hearings, the Parties arranged to file post-hearing Briefs. The Record of the Hearing was eventually declared closed in early October 2011 after the Arbitrator received those Briefs and a dispute about the contents of the Union's Brief was addressed. He renders the following decision in the hope that it represents the final and binding resolution of this matter.

# POSITION OF THE UNION

The Union's position in support of the Grievance was spelled out in the following excerpt from its post-hearing brief:

**Argument**

**I. Procedural Issues**

Customarily, the Union would address concerns over procedural matters or procedural objections to the grievance first in crafting its arguments in this brief. During the hearing of the instant case there was mention of a potential procedural demurrer to the grievance which the Movant has been left unaware of what such might be after the conclusion of the grievance hearing. Most procedural objections arise from the processes about which a grievance moves towards the arbitration hearing and concern whether contractual obligations were met. The President of the DSABC, Sgt. David Kilcrease testified as to the manner in which the current grievance moved from initial filing of the grievance, approval by the association grievance committee, presentation to the respondents, response by management, attempted resolution between the parties and ultimate presentation before the arbitrator. (See Joint Exhibit #2 and all subparts thereto) Sgt. Kilcrease testified as to the proper compliance of the collective bargaining agreement necessary for the Union to bring a grievance as has been done in previous grievances. No procedural opposition was voiced at the time of Sgt. Kilcrease's testimony, nor afterwards before the conclusion of the hearing addressing procedural issues which might question the Union's compliance with the grievance procedure of the collective bargaining agreement. Therefore the Union believes the Arbitrator to have proper jurisdiction over the matter and authority to provide a substantive ruling on the merits as presented. Indeed, there is nothing in the record to evidence anything otherwise.

Fairness as to Notice of the Acts being Grieved

The grievance document filed by the DSABC in the instant case cites four (4) separate provision of the collective bargaining agreement which the Union believed to have been violated with the actions of the Sheriff's Office in this matter at the time the grievance was filed. (See Joint Exhibit #2, subpart G) Those sections are as follows:

Article 3 "Management Rights," Section 1 (L) which reads, "The Association recognizes the County and Sheriff's existing right to establish and enforce policies and procedures and amendments thereto subject to the terms of this Agreement. The Sheriff has the right to amend, suspend, and/or alter his policies and procedures subject to the terms of this Agreement. " (Joint Exhibit 1, page 8)(underline added for emphasis);

Article 4 "Maintenance of Standards" which reads, "Established practices, standards and conditions of employment, oral or written, existing on the date of this Agreement, concerning mandatory subjects of bargaining shall not be changed during the term of the Agreement whether or not they are specified in the Agreement" (Joint Exhibit 1, page 10)(underline added for emphasis);

Article 28 "Miscellaneous Provisions," Section 4 "Conflict with Civil Service Statute"

The Association would concede that the provisions of this section of the collective bargaining agreement to not have application to the current grievance.

Article 30, "Collective Bargaining Obligations' Section 2 which reads, "Except as otherwise provided in this Agreement, the County may not implement material changes in compensation, hours, or conditions of employment during the term of this Agreement without the Association's express written agreement, whether or not this Agreement is expressed or silent as to such matters. Subject to the provisions of Article 4 of this Agreement (maintenance of standards) nothing in this Article changes or impairs the authority of the County or Sheriff as to matters that are not mandatory subjects of bargaining or not expressly covered in this Agreement. (Joint Exhibit 1, page 69)(underline added for emphasis).

The grievance document goes on to cite the policy which was altered that is at the heart of the dispute in this case, Bexar County Sheriff's Office Detention Policy and Procedure BC No. 1000.01-02 (Exhibit Union 2, old policy and Exhibit Union 3, current policy). As the grievance states:

"That policy has up until the herein grieved alteration, required three (3) deputies assigned to inmate living units designed for inmates to be segregated from the general inmate population during first and second shifts. The new altered policy by Detention Administration allows for two (2) deputies to supervise such inmate units in violation of the past practice of the detention tier of the Sheriff's Office." (Joint Exhibit 2, subpart G, page 2 of 3)

As the grievance continues in the next paragraph "The altered policy materially alters the working conditions of the remaining officers assigned to supervise segregated inmates by increasing the workload on those remaining deputies… This change in policy clearly jeopardized the safety of BCSO Detention officers assigned to segregated units and is a change of those officers' working conditions." The grievance then goes not into detail how the removal of one officer from one of the two halves of each segregation unit increases the workload and eschews the safety of those officers still in the unit. Given the level of specificity cited in the grievance above, the Movant can hardly imagine how the Respondent BCSO could have been given anymore notification as to the claims of the Union in this matter.

**II. Substantive Issues**

Interdependence of Segregation Unit Officers has resulted in a Change in Working Conditions

In a previous (but unrelated) grievance between the parties, the Union argued that supervisors commonly assigned to a work shift within the Detention tier of the BCSO, operated as a "crew" when at work. The number of supervisors at work on each shift was reduced and a grievance was filed over it. Thus the word "crew" and its understanding are not unfamiliar to the parties in this grievance. The Union herein urges the understanding of a "crew" to the arbitrator to illustrate how material the instituted changes in this matter are. Elkouri & Elkouri's "How Arbitration Works" states the test to determine whether a "crew" exists is as follows:

"…to demonstrate the existence of a crew in the absence of a contractual definition, it must be shown that (1) an established course of conduct has existed (2) with respect to the assignment of a specific number of employees (3) who have performed in an interdependent manner (4) a particular type of

work (5) under a given set of circumstances (6) for a significant period of time."1

The Movant admits that word "crew" was never actually used during the hearing of this grievance. Nor was the term "crew" as its understood and management/labor relations utilized by either party during the processing of the grievance towards arbitration. But the Union believes this term's concept, was clearly articulated during the hearing and the arguments for and against whether a "crew" exists was in fact aired out excessively during the instant hearing. It is the position of the Union that what essentially is being debated in this grievance is a reduction in the size of each "crew" which was assigned to work administrative segregation detention units during the 1st and 2nd shifts. That the reduction creates a drastic increase in accountability and workload for the remaining members of the crew which constitutes a material change in the working conditions in violation of the collective bargaining agreement. The Union asserts that the facts as presented before the arbitrator in the hearing pertaining to the job assignments, task performance and relationship to each other, of those officers assigned to administrative segregation (a/k/a "lockdown") units, qualifies each group of officers for each unit as a "crew." As stated further in Elkouri & Elkouri's "How Arbitration Works, "It is the relationship between this course of conduct and some given set of underlying circumstances which is important in determining whether there has been a recurring response which has evolved as the normal and accepted reaction with dealing with the problem."2

The Grievant believes the "normal and accepted reaction" of the BCSO to the need for supervision over lockdown units within its facility was to customarily place three (3) individuals in each unit; one officer in the officer's station (usually a corporal) and one officer in each side of the unit. In fact the old policy was a memorializing of such. The past practice was a natural outgrowth of the structural design of those lockdown units. The layout of the units was fixed with two halves and an officers' station and the Sheriff's Office elected to always to assign a single officer to each space. Removal of an officer from one space puts greater responsibility on the remaining others.

Officers in each half of the unit were inter-reliant upon the corporal in the officer's station to watch over them and perform the administrative duties of the entire unit. And the dayroom officers were inter-reliant upon each other to perform all the supervision duties required for the unit as a whole. Though officers in the dayroom were assigned to separate halves of the unit, they could in the absence of a fellow officer cover the entire unit. The BCSO charts (See Exhibit County #1 and supporting amendments thereto) demonstrate less than three (3) officers had to run those units. But such evidence only gives credence to the Grievant claims that these officers worked inter-reliantly to get the job done as a crew. Those same officers are just as interdependent now, just as they were in the past. They must work around obstacles, work related or not, whatever the cause, including the absences of individual members from the team, to keep the operation going. That teamwork was in existence before the current BCSO Detention Administration and it continues now. The reduction of the crew's size is a huge and unnecessary obstacle but they have continued to perform as ordered. In fact, there was implicit recognition of this fact during the hearing. The increase in the number of inmates in each dayroom hour period from the previous maximum of four (4) inmates up to eight (8) was a necessity borne of the alteration by the BCSO. (Exhibit County #5) That increase in the number of inmates was

[1] Elkouri & Elkouri "How Arbitration Works." Alan Miles Ruben, ed. 6th edition. Page 711.

[2] Elkouri & Elkouri "How Arbitration Works." Alan Miles Ruben, ed. 6th edition. Page 711 citing United States Steel Corp., 33 LA 394, 404 (Garrett, 1959)

instituted as Chief Daniel Gabehart testified to because there was too much having to catch-up from previous shifts which failed to provide the necessary hours to inmates outside the cells. Both Chief Dovalina and Gabehart stated how the laundry services of inmates was switched to free up the time of officers during the shift as well.

The Grievant would draw the attention of the arbitrator for the sake of comparison to the conclusions of former National Academy of Arbitrators President Saul Wallen in his treatise, "The Silent Contract vs. Express Provisions: The Arbitration of Local Working Conditions." In his discussion of crews and protection of such under working conditions provisions of contract he takes notice of these guidelines within the steel industry:

"Under the local working conditions clauses...it has been held that a crew size may constitute a local working condition entitled to protection insofar as it provides benefits to the crew members. Such a local working condition limits the company's power under the management clause to change the complement of personnel absent a showing of change in the basis for the local working condition and a reasonable causal relationship between the change in underlying conditions and the company's action in modifying the local working condition."

"A local working condition on crew size may have been established by a local agreement, by a grievance settlement, or by the existence of a crew of a particular size or composed of particular jobs, over a period of time. In general the crew size must be one prevailing after the operation has become stabilized."

"Local working condition on crew sizes, like those on other matters, may be changed if the basis for their existence has been changed or removed. Changes in equipment, machinery, or technology associated with a job my serve to eliminate the basis for a certain size crew. A change in the process or the elimination of unnecessary duties may serve to do likewise. A reduction in crew has been upheld where there was a decrease in workload. However, changes in equipment and methods of operation will not justify a reduction in crew size which was based on a workload which remains unaffected by these equipment and method changes."

"If a time study shows that a crew contains unnecessary employees whose work can be done by the remaining crew members, it will not justify a change in local working condition as to the crew size if there has been no change in the underlying conditions. Nor is lower cost of operation, standing alone, a proper basis for a reduction in crew size." 3

The Union would point out that there has been no change as to methods, or equipment or machinery or technology, which has affected the manner in which BCSO detention officers in lockdown units supervise inmates. The only alteration has been the mentality of those people working in management who decide what policy is at the BCSO. The detention officers at BCSO continue to work in the same jail facility, on the same type of work schedule in many cases watching over the very same inmates. A historical procession of supervisors believed three (3) officers were needed to supervise a lockdown unit given its layout and the collective bargaining agreement was ratified during that time. A new group of supervisors has come into office who desire to have the same amount of labor as was required of three (3) officers to know be performed by two (2) in the exact same lockdown units. Importantly, as the grievance hearing borne out, the number of lockdown units has increase over time as well

[3] Saul Wallen. "The Silent Contract vs. Express Provisions: The Arbitration of Local Working Conditions" pg 130-31. Available at http://naarb.org/proceedings/index.asp

during the duration of the contract. See Exhibit Union #4. Therefore more employees are subject to the altered working conditions complained of.

Regardless of the value of Mr. Wallen's study, as the research compiled by the BCSO reveals, the situation where only two (2) officers ran a lockdown unit was the exception; under the current Administration that exception was urged in the hearing as justification for such to be instituted as the rule. The BCSO attempts to pigeonhole the minority of occurrences in violation of its own policy into justification of an entirely new policy. The BCSO wants to argue its breaking of its own rules now is reason to alter the working environment today. The problem is that there was good reason for the old policy and the contract binds the BCSO to that policy as a condition of employee's employment. The Sheriff's Office would rather ignore those facts just as it ignored its own policies in the past when such were inconvenient. The Sheriff's policies though are not so easily disregarded when there is a contract which binds the Sheriff's Office to material matters to its employees' interest.

During the arbitration the Union pointed to the BCSO own policies on "supervision and control of inmates." See Exhibit Union 6A & 6B. Those policies themselves state that "Supervision of inmates is considered ineffective or having failed any time an inmate or group of inmates, believe they are the ones providing supervision or control by actually having control or authority, or taking actions implying this authority." That policy makes clear that an officer's very presence within a detention unit is evidence and suggestive of the control the officer has over the supervision of inmates housed within that unit. But if presence is evidence of control isn't the reverse also true, that no presence equals no control? Of course that is true. Can inmates really believe that they are under the control of a detention officer who is actually in another room? The Sheriff's representatives were quick to point out that the officer in the officers' station who has the ability to monitor with a screen what is happening can maintain control of that officer-less room. But as was made clear during the hearing, that officer is tied to the control room. The responsibilities to be performed for those inmates is actually the duty of the officer not assigned in the officers' station but the other officer who is forced to jump between rooms. One man or woman is tasked with the duties to supervise two rooms. What the new polices mandate is that there will also be at least one room of a lockdown unit void of a detention deputy.

Precedence of 1:64 Arbitration Hearing by Mr. Otis King

On November 2, 2006, The Texas Commission on Jail Standards (TCJS) approved a six (6) month variance of standards at the Bexar County Jail allowing the BCSO to increase inmate capacity of four (4) inmate units at the Jail Annex. It is important for the arbitrator to understand that the Bexar County Adult Detention Center is composed of two (2) separate facilities, which operate differently. The Main Jail houses the Administrative Segregation units at issue in this matter was not involved in that prior grievance and arbitration award but that does not mean such is not relevant to this case. Each affected unit at the Annex was allowed to increase its inmate population from forty-eight (48) inmates to sixty-four (64) inmates by the state. Admittedly, those detention units are different from administrative segregation units of the Mail Jail. The previous arbitration award dealt with inmate units where inmates are free to interact in the open areas of the unit or the dayroom, recreation or restrooms. A single officer is assigned to those general supervision units. The instant case deals with inmates in segregated inmate cells not so free to interact with one another. Also those units in the previous arbitration were manned by a single officer; the instant dispute revolves whether two or three officers should staff a detention unit. Of course, the inmates who are supervised while free to interact are classified as less dangerous than those

inmates in lockdown units. The nature of the inmates housed to lockdown units is not in dispute.

Mr. King stated in his award as follows:

"The above observation notwithstanding, this case is not about standards of operation in the Bexar County main jail or any other jail in Texas. The Bexar County CBA was executed by the parties to this grievance on August 17, 2006 and extends through September 30, 2009. Its provisions control the questions to be answered in this case. At the time the Contract was entered into, the Bexar County main jail was operating with an officer/inmate ratio as described above. Likewise, the Annex Two Dormitory Units were staffing with one officer to each Unit. The Union has not chosen to grieve the staffing patterns which were existent in the main jail at the time the CBA was agreed to and which have not changed and are not proposed to be changed. Rather, it has grieved the existing ratio of detention officer to inmates in Annex Two which the Sheriff proposes to change. Article 4 of the CBA prohibits the Sheriff from changing established practices, and/or conditions of employment which existed on the date the Collective Bargaining Agreement was finalized. The Sheriff has not contended the 1:48 ratio of officers to inmates was not the norm in existence in the Annex Dormitory Units when the current CBA was signed. Thus, the only remaining question to be addressed in this case is whether the 1:48 staffing of the Annex Two Dormitories was an established practice, a jail operating standard and/or a condition of employment subject to mandatory bargaining on August 7, 2006. As the Arbitrator is certain that the three mentioned terms are the subject of mandatory bargaining and it has not been contended otherwise, that question will not be addressed further.

Perhaps one of the most contentious issues addressed by the parties during arbitration was whether the changes proposed constitute a change in the condition of employment. From the testimony and presentation of witnesses called by both the Sheriff and the Union the answer is a resounding yes."4

That prior arbitration award dealt with issues similar to the current matter. In a general sense, both cases are grievances built upon the Bexar County Sheriff's Office demand of increased supervision of inmates out of bargaining unit members. In the first case, the number of inmates was proposed to be increased keeping the number of officers constant. In this case, as the Union's advocate urged, the opposite side of the proverbial coin was flipped with inmate numbers kept constant but rather the number of officers was reduced. There are two mathematical ways to alter a ratio and the BCSO has attempted both.

It was very prophetic of Mr. King in his award when he stated, "The Union has not chosen to grieve the staffing patterns which were existent in the main jail at the time the CBA was agreed to and which have not changed and are not proposed to be changed" because that is exactly what has happened in this case now. The Union has grieved the staffing changes at the Mail Jail which have been altered from that which were in existence when the contract was agreed to. The BCSO was found to have run afoul of the contract with its first attempt to alter the supervision ratio at the Jail Annex; that should also be the outcome from the second attempt as well at the Main Jail. Regardless of the formula, the math is constant between scenarios; the result is increased demand of labor for and amplified work stress on each affected deputy which the Union argues is

[4] In the Matter of Arbitration Between DSABC and BCSO, Grievance 2006-GC-Class #3 Before Mr. Otis H. King, Arbitrator .

a material change of working conditions for the employees and therefore a violation of the collective bargaining agreement.

Change in Inmate Groups within Lockdown Units is Material

During the course of the hearing the importance of the optional increase in the number of inmates allowed out of their cells was hotly debated. See Exhibit Union #5. The Union argued that the number of inmates allowed in such groups was logically increased because with one less officer to run and supervise those groups in each unit, more inmates would have to be attended to by the remaining officer. The Sheriff's Office witness, Deputy Chief Daniel Gabehart testified that the inmate groups were allowed to increase because too often the 3rd shift would find itself performing those inmate day room hours when such should have been completed by the 1st or 2nd shifts prior. That testimony begs the question though, if the BCSO was running behind on allowing inmate dayroom hours even when there were three (3) officers in each Administrative Segregation Unit, how could the BCSO honestly expect the situation to improve with less officers performing those tasks? The motive for the increased in inmates allowed to have their dayroom hours together is obvious. It was a necessity with the reduction of manpower to run each unit. The BCSO realized they could not expect the same productivity from two officers as three with all other variables being the same. So the Sheriff's Office elected to increase the amount of inmates potentially in each inmate group. That was a direct increase in the risk to officers' safety as more inmates not secured inside of the cell equals more potential trouble for officers and greater potential for encounter with inmates outside their cells. The Union thinks is evident that any one person whose job it is to work with inmates would much rather work with four rather than eight at any one time.

The Union also pointed out during cross-examination of Chief Gabehart, that while the Chief (prior to appointment as Chief) served as a Captain, he did not command directly any of these administrative segregation units at issue. The Chief's former position of Captain had him assigned to the Jail Annex which does not house any of the lockdown units in dispute in this matter. While the Union acknowledges Chief Gabehart's vast experience, such does not include according to the evidence at hearing, supervision of those lockdown units. Nor has the Chief ever worked in those administrative segregation units by his own admission. See Transcript page 317. The BCSO through Chief Gabehart's testimony recounted how when there were three offices assigned to the lockdown units would sometimes have to draw officers away for other responsibilities. The Chief mentioned hospital or medical visits for inmates or visits with an inmate's family or attorney would sometimes necessitate the third officer leave the unit. See Transcript page 322-23. The BCSO urges such facts should be interpreted as because two officers sometimes ran a lockdown unit in the past therefore two officer can always been assigned to those units now. Aside from the fact there is a strong contractual argument against such position by the BCSO, the Union would point out the obvious logical flaw with such thinking. The need for inmates to be escorted to medical, or booking or be given visits with their family and/or attorney are not going to disappear simply because a third officer is no longer in administrative segregation units. Rather, if the BCSO used to take the third officer out of lockdown units when there were three officers, now the BCSO will be taking out the second officer in those units when there are only two officers so assigned. Chief Gabehart is exactly right when he was asked by Mr. Pena if the officers are doing the exact same thing in pretty much the same manner they were before the policy change. The problem is that those officers are doing it with less people and that violates the contract because the Sheriff's Office is supposed to adhere to the contract before doing such.

Mandatory Subjects of Bargaining

The Union has alleged that the BCSO has violated Article 30 of the collective bargaining agreement which reads as follows:

"Except as otherwise provided in this Agreement, the County may not implement material changes in compensation, hours, or conditions of employment during the term of this Agreement without the Association's express written agreement, whether or not this Agreement is expressed or silent as to such matters. Subject to the provisions of Article 4 of this Agreement (maintenance of standards) nothing in this Article changes or impairs the authority of the County or Sheriff as to matters that are not mandatory subjects of bargaining or not expressly covered in this Agreement. (Joint Exhibit 1, page 69) (underline added for emphasis).

The above cited provision obligates the BCSO and County to notify and bargain with the Union concerning matters which are mandatory subjects of bargaining. But this begs the question, "What is a mandatory subject of bargaining?" And does the crux of the grievance involve such a topic of mandatory bargaining?

It is important to note that the Texas Statute which permits the Union to legally obtain the right to collectively bargain, chapter 174 of Texas Local Government Code, has been held by Texas Courts to impose the same duties as the Federal National Labor Relations Act ("NLRA") imposes on private industry within the United States. "This Court has previously noted that the duty to bargain collectively and in good faith imposed by chapter 174 of the local government code is the same duty imposed by the NLRA upon private sector employers and labor units. See McAllen Police Officers Union, et al. v. The McAllen Professional Law Enforcement Ass'n., 82 S.W.3d 401, 409 (Tex. App. – Corpus Christi 2002, pet denied) citing Corpus Christi Fire Fighters Ass'n v. City of Corpus Christi, 10 S.W.3d 723, 726 (Tex. App. – Corpus Christi 1999, pet. denied). Only a few of the 254 counties the State of Texas have collective bargaining for their Sheriff's Deputies but Bexar County is such a place.

Because of the relation of chapter 174 to the NLRA the Union can persuasively argue that if a matter is interpreted as a mandatory subject of bargaining for the NLRA then it is also for chapter 174 of the Texas Local Government Code or the "FPERA" which stands for the Fire and Police Employee Relations Act, which the statue says act is to be called.5

Elkouri & Elkouri's treatise on labor arbitration notes that "the original NLRA placed on employers a legally enforceable or 'mandatory' duty to bargain with duly authorized employee representatives on subjects failing within the terms of 'rates of pay, wages, hours of employment, or other conditions of employment."6 The Elkouri's also noted that "It is well settled that unilateral decisions made by an employer during the course of a collective bargaining relationship concerning matters that or mandatory subjects of bargaining are regarded as per se refusals to bargain."7 If the Union can prove to the satisfaction of the Arbitrator that the dispute of this grievance turns upon a mandatory subject of bargaining then the BCSO will have violated Article 30 of the CBA with its unilateral action in this grievance.

The Elkouris treatise provides a list of topics held by the NLRA to be mandatory subjects of bargaining. That list is as follows:

---

[5] *See* Texas Local Government Code § 174.001, which says how the act may be referred to.

[6] Elkouri & Elkouri, How Arbitration Works, 6th Ed. Page 642.

[7] Elkouri & Elkouri, How Arbitration Works, 6th Ed. Page 643.

"…holiday and vacation pay, subcontracting, discharges, workloads and work standards, bonuses, pensions, profit sharing , insurance benefits, change of insurance plan administrator, merit increases, Union shop, check-off of Union dues, hiring hall, work schedules, plant rules, rest periods, placing existing practices in the contract, management rights, zipper clauses, most favored nations clauses…, incentive pay plans, in-plant cafeteria and vending machine food and beverage prices and services, company-owned houses, stock purchase plans, employee discounts, paid coffee breaks, accumulation of seniority…, no-strike clauses, production work by supervisors, installation of new machinery, transfer of employees to new location, Union negotiating committee pay. (emphasis added)"[8]

But that list itself is not exhaustive as aside from the NLRA, courts have ruled through litigation that other areas are also mandatory subjects of bargaining. Such instances found by courts address the following areas of concern cited by the Elkouris:

"employee safety, termination of Union privileges, employer payments to Union trust fund, recreation fund, disbursement of state funds allocated to increase wages and benefits, cost of arbitration transcripts, allocation of severance and vacation pay after plant closure, layoff decisions, Christmas bonuses, profit-sharing benefits, drug and alcohol testing, drug and alcohol testing policy, change in paid lunch policy, number of members in Union grievance committee, banned use of personal radios, leave-without-pay roster reduction, elimination of shift work, implementation of a light duty program, replacement of economic strikers by permanent subcontract, change of driver dispatch procedure, implementation of a smoking ban, removal of guns from security guards, production incentive bonuses, on-call procedures, amendments to pension plans to comport with Internal Revenue Code, number of hours worked in and out of the office, restricting telephone use to emergencies only, restrictive conditions on conversations among employees, requiring route salesmen to account for their product on nightly rather than weekly basis, change in starting time, new attendance policy, providing free parking to employees. (emphasis added)[9]

As the Union's grievance makes clear, the instant grievance was filed over a concern for employee safety and increased workload both of which are traditionally recognized mandatory subjects of bargaining. The grievance states, "The altered policy materially alters the working conditions of the remaining officers assigned to supervise segregated inmates by increasing the workload on those remaining deputies…This change of policy clearly jeopardizes the safety of BCSO Detention officers assigned to segregated units…" The grievance later continues, "The responsibilities of the remaining officer have doubled, while sacrificing the safety of that remaining officer by removing the fellow officer who used to accompany s/he in the unit." See Joint Exhibit 2, subpart G. The witnesses for the Union, Corporal Charles Hopes and Corporal David Cantu both testified that they felt that the safety of officers (including themselves) was sacrificed with the grieved alteration. See Transcript Testimony of Hopes and Cantu generally.

Importantly, the Elkouris included the caveat that their list was neither exhaustive, nor final and there exists generally a duty to bargain upon request. 10 The Union was never notified beforehand of the change but rather only found out of it after institution. The Union therefore was never given the opportunity to request bargaining over the matter. Also the Union would point out the fact that there is no "zipper clause" within the CBA at issue which

[8] Elkouri & Elkouri, How Arbitration Works, 6th Ed. Page 643-44.
[9] Elkouri & Elkouri, How Arbitration Works, 6th Ed. Page 644-45.
[10] Elkouri & Elkouri, How Arbitration Works, 6th Ed. Page 646.

might potentially waive the continuous duty to bargain upon the BCSO in this matter. Chief Dovalina was asked during direct testimony if he believed that the authority granted to the BCSO within the "Management Rights" clause of the CBA was sufficient right to allow the alterations he made; and to no surprise he did believe such. See Transcript Page 362-63. But as the lawful authority cited within the Elkouris' treatise makes clear, that is not asking the right question. The proper question which should have been put to Chief Dovalina is "where is the waiver of the Union's right to negotiate over the mandatory subjections of bargaining concerning employee workloads and employee safety?" There is no such specific waiver in the CBA and therefore the "Management Rights" article alone is not suffice to relinquish the Union's power to bargain over those areas.

Chief Daniel Gabehart discussed his beliefs for the reasoning behind the change during cross-examination. During that discussion of the BCSO's logic for the change, the Chief admitted that discipline instituted upon officers has increased as a result of the new administration's philosophy. The relationship between the instant grievance and discipline exists because there is a requirement that each and every inmate within the BCADC be personally observed by an officer every so often. For most inmates in the Bexar County Jail that period observation time is every 50 minutes but for administrative segregation inmates that period of time is only 30 minutes. When officers fail to do their observation checks timely they are disciplined for such. The unstated underlining facts that led up to this exchange is that the Union's attorney representative often appeals those discipline matters before Chief Gabehart, so both men are well aware of the situations of how officers come to be disciplined for missed observation checks within the jail. That exchange during cross-examination took place as follows:

Q (Mr. Brehm): But when officers fail to comply with policy or the requirements to do those observational checks timely, they get disciplined and you handle that discipline quite often; is that correct?

A (Chief Gabehart): Yes, sir.

Q (Mr. Brehm): And am I correct or not that the amount o discipline issued to those officers has increased greatly over the last couple of years concerning those observational checks?

A (Chief Gabehart): Because it's been enforced –

Q (Mr. Brehm): Okay.

A (Chief Gabehart): --in the last couple of years.

Q (Mr. Brehm): So am I correct to say that the new Administration has made that one of its pet peeves?

A (Chief Gabehart): No. We've made it our goal to comply with State standards so that we can keep our certification intact.

Q (Mr. Brehm): Okay.

A (Chief Gabehart): And the only way to do that is too sadly enough require the officers to do what they're required to do.

Q (Mr. Brehm): Okay. But I am correct that discipline has increased?

A (Chief Gabehart): Yes, discipline has increased.

-See Transcript Page 343-44.

The above exchange is important because it clarifies that the new Administration has elected to discipline officers more severely than their predecessors. Or, in the words of Chief Gabehart to "enforce" discipline that implicitly from the Chief's response the Chief believes was not enforced before he was in his current office. It is evident from the exchange with Chief Gabehart, that the decision of management which has been grieved has also affected discipline which has been increasingly doled out to the bargaining unit members. The decision to increase disciplinary response was made during the duration of the current CBA. Officers were expected to comply with one disciplinary standard under the prior regime. With the accession of a new regime at the BCSO another stricter performance criterion overnight was put into place. The Union would urge to the Arbitrator that there can be no more fundamental mandatory topic of bargaining than employee discipline. The CBA at issue does contain a "Just Cause" provision. The Union would argue that the simple CBA inclusion of a "Just Cause" requirement could mandate a change in disciplinary severity is a mandatory bargaining subject as well that was not negotiated with the Union in violation of the contract. The implicit justification from Chief Gabehart for the increased discipline is because the current management did not believe their forerunners in their office to have been properly performing their duties. The Union could urge to the Arbitrator that the election to ratchet up discipline in-of-itself is a mandatory subject of bargaining. In the current grievance that fact is important because management has not only made the punishment for job failure more severe but also required less employees to perform the same jobs by removing the third officer from the lockdown units. It is one thing to increase consequences for work failure. It is a completely separate and unfair expectation to do so while providing fewer employees to perform the same functions are before.

Chief Dovalina (whom was responsible for the instituted alteration which initialed the grievance, See Transcript Page 352) stated that he was an ex-Union representative and he stated that if he felt "at any point this was a contract violation, I would not have made that change." See Transcript Page 362. Still he admittedly made the alteration without first consulting with the Union. See Transcript Page 372. Nor does the fact that the CBA's management rights provision provides the BCSO can "schedule and direct the workforce" allow this type of change without Union approval. To establish a waiver of the statutory right to negotiate over mandatory subjects of collective bargaining, there must be a clear and unmistakable relinquishment of the right. A management rights clause merely reserves to the employer the authority to create and enforce reasonable rules and that does not rise to the level of a clear and unmistakable waiver. Even a Union's acquiescence in a previous unilateral change does not operate as an enduring waiver of the right to bargain over changes. And even when there is a "zipper clause" present the NLRB (with considerable court support) has narrowly interpreted such clauses to give very little affect. It must appear to an arbitrator that the issue was fully discussed or explored and that the Union consciously yielded its interest in the matter. [11]

Assessment of the Sheriff's Office Exhibits

The Sheriff's Office entered into the record a document which was responsive to the Union's assertion that the removal of the third officer from the lockdown units was a valid officer safety concern. See Exhibit County #3. The Union posited that with fewer officers in the lockdown unit, an increase in officer safety concerns was likely. The Union had two officers who currently are not of supervisor rank testify as to their experiences working lockdown units at

[11] Elkouri & Elkouri, How Arbitration Works, 6th Ed. Page 648-50.

the BCADC. Both those officers testified as to instances where they were assaulted by at least one inmate in the jail which was not listed on the BCSO listing of inmate assaults exhibit. In fact, Cpl. Charles Hopes testified that he experienced what he called a "mini-riot" where he was fortunate to not be seriously injured by inmates who forced their way through the officers' station to get to another group of inmates. That incident most certainly should have been considered for counting on the County's exhibit but it was not. Cpl. Hopes was even disciplined for his actions in that matter by his supervisor, Captain Steven Long. If that incident was not listed along with the incident attested to by the Union's other witness, Cpl. David Cantu, how reliable can the County's exhibit truly be? How many other incidents failed to be counted? What value is the County's Exhibit?

The Sheriff's Office also entered into the record a large collection of documents which purported to reflect all the times that less than 3 offices worked an administrative segregation unit. See Exhibit County #1 and later introduced binder of supportive documents. But as that exhibit was proven to reflect, sometimes instances where only 1 officer was working a lockdown unit were counted. How is it possible for only 1 officer to work an administrative segregation unit? The jail sometimes has units that are half lockdown and the other half another type of inmate classification. Counting those half units was of no probative value to the current grievance and on eschews the evidence towards the County's argument. Again the Union would argue that evidence has little probative value and has no bearing on the contractual arguments urged by the DSABC.

**IV. Conclusion**

The Grievant has met its burdens with regard to the present case. The Grievant has established the existence of a material working condition which should have been addressed through the relevant provisions of the collective bargaining agreement before being altered by the Sheriff's Office. The hearing in this matter demonstrated that the Bexar County Sheriff's Office has violated the collective bargaining agreement in this grievance. The Association's requested remedy should be granted.

**V. Prayer**

WHEREFORE, PREMISES CONSIDERED, Grievant, prays that the Arbitrator grant the Grievant's request that the Grievance be sustained and its requested relief granted.

# POSITION OF THE COUNTY

The County's position in relation to the Grievance was spelled out in the following excerpt from its post-hearing brief:

**INTRODUCTION**

This case involves the authority of the Sheriff to amend his Detention Division Manual Policy and Procedure BC 1000.01 for Administrative Segregation units in the County Jail reducing the number of Deputies assigned to each unit on the first and second shifts (details) from 3 Deputies to 2 Deputies, the same

number of Deputies assigned to the third shift of a 24 hour day operation. This grievance does not involve Intensive Supervision units governed by a separate Sheriff's policy which units are normally staffed with 2 Deputies nor does it involve Administrative Segregation units in the Jail Annex located across the street from the Main Jail. The Administrative Segregation units are units designed to house up to 88 inmates, up to 2 in each of 44 cells. The 2 level units (almost square) are physically divided in half corner (a control room) to opposite corner (outdoor recreational area) by a dividing wall, partially glassed, with 22 cells on each side (U-1). The Control Room is located at the corner of the unit such that both sides of the unit can be observed through the glass windows of the control room, usually manned by a Corporal or Deputy. The other Deputy is assigned to the unit, and if not in either side of the unit engaged in rotating inmates for their hygiene hour in the dayroom area or other duties, is in the control room with the Corporal observing any inmates out of their cells. The inmates are incarcerated in their cells for 23 hours a day, other than for required daily hygiene dayroom hour; recreation time (3 hours per week) in a separate TV monitored outdoor recreation area, or for authorized purposes including medical services, visitations, and official visits. All other services including distribution of meals, commissary items, human services are provided to the inmates in their cells. All inmates are handcuffed and put in leg irons when moving to and from the living unit, as needed due to their classification or due to disruptive behavior (Detention Policy and Procedure Manual BC No. 1000.01 U-3)

**II. SUMMARY OF ISSUES**

The Association alleges that the change of BC 1000.01 is a violation of the Maintenance of Standards Article 4 and Collective Bargaining Obligations Section 2 of Article 30 of the Collective Bargaining Agreement ("CBA" or "Agreement") because it materially alters the working conditions of the remaining Officers assigned to supervise inmates in the Administrative Segregation units by increasing the workload and jeopardizing the safety of those remaining Deputies. The County alleges that Article 4 and Section 2 of Article 30 specifically applies only to matters that are mandatory subjects of bargaining, which does not include staffing or workload, and that there is no proof, other than speculation and mere conjecture, that the change jeopardizes the safety of the 2 Deputies assigned to these units. Lastly, the change implemented by this policy does not materially alter the existing working conditions of the Deputies assigned to these units and that this change of operations is not the proper scope of a past practice which did not exist here.

**III. NO VIOLATION OF ARTICLE 4 MAINTENANCE OF STANDARDS**

Grievant has failed to prove any violation of the Maintenance of Standards Article 4 of the CBA because no binding established practice regarding a mandatory subject of bargaining as alleged in the Grievance existed on the date of the CBA, nor for that matter, during the term of the Agreement. The CBA provides the following:

ARTICLE 4 MAINTENANCE OF STANDARDS

Section 1.

Established practices, standards, and conditions of employment, oral or written, existing on the date of this Agreement, concerning mandatory subjects of bargaining shall not be changed during the term of the Agreement whether or not they are specified in the Agreement. (J-1, p. 10)

In Article 3 Management Rights, the Association recognizes the traditional and existing prerogatives of the County and the Sheriff to operate and maintain their respective functions as authorized by law including the following rights:

B. Hire, promote, demote, transfer, assign and retain employees in positions with the county and the Sheriff's Office as provided under this Agreement and by applicable laws and Civil Service Commission rules.

D. Maintain the efficiency of governmental operations.

F. Determine the methods, processes, means and personnel by which operations are to be carried out.

L. The Association recognizes the County and the Sheriff's existing right to establish and enforce policies and procedures and amendments thereto subject of the terms of this Agreement. The Sheriff has the right to amend, suspend, and /or alter his policies and procedures subject to the terms of this agreement. (J-1, p. 7)

In addition under Article 14 Section 2C, the Sheriff has the discretion to deploy his resources (J-1, p. 34).

The Association alleges that changing the number of Deputies in an Administrative Segregation unit, as previously set out in the Policy, is a violation of Article 4 of the CBA. Without waiving its procedural objections to the Grievance, there is no violation of the Article 4 Maintenance of Standards provision. The evidence demonstrates that there is no established practice as to the manning of the Administrative Segregation units due to lack of mutuality and consistency or, fixed practice.

A past practice, to be binding on both parties, must be: 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Elkouri and Elkouri, How Arbitration Works, (6th edition) p. 608. The elements of an established past practice, aside from the other elements required under the parties Article 4, does not exist here as the mutuality and established elements of a past practice are not present and were not proven. In fact, the evidence at the hearing demonstrated that the number of Deputies assigned to these units fluctuated both before and even after the execution of this first CBA between the parties.

First, under Article 4, the practice must be established and existing on the date of the Agreement. This Grievance does not involve the third shift which has always been assigned 2 Deputies pursuant to the Sheriff's Policy and Procedure. Prior to the Agreement, the evidence demonstrated that there were less than 3 Deputies assigned to these Administrative Segregation units on both the first and second shifts (CO-1). This was confirmed by the Grievant's witness, Sgt. Charles Hopes who worked the BC Administrative Segregation unit during the first shift (1st Detail) (T. p. 252; Exh. p. 612). In 2006, there were approximately 416 first and second shifts with less than 3 Deputies present (CO-1). Even before the Agreement was signed on August 17, 2006, there were numerous instances where there were only 2 Deputies assigned to the Administrative Segregation units (CO-1A, pgs. 00421-00449). Cpl. Hopes was the unit supervisor for a total of 50 shifts from May 2006 through February, 2010 when there was only himself and another Deputy assigned to the unit which occurred not only on Thursdays (CO-1A pgs.00430-00450; 00520-00522;00532-00546;00581-00595). Cpl. David Cantu also worked Administrative Segregation unit CC on the 1st shift with only 1 other Deputy before the policy change (T. 302). On the second shift, Association witness Captain Steve Long (then Lt.) was the 2nd shift commander for 15 shifts before the Agreement was signed in

August 17, 2006, and another 105 shifts after the Agreement became effective with Administrative Segregation units manned by only 2 Deputies (CO-1A, pgs. 00423-00469; 00471-00513;00515-00520; 00533-00534; 00577-00641). The County Exhibit CO-1A also reflected that even the third shift had Administrative Segregation units operating with only 1 Deputy, not 2, present; and that there were a total of 855 shifts with less than 3 Deputies present during the first and second shifts (CO-1). Deputy Chief Gabehart also confirmed that it was common for these units to be run with less than 3 Deputies during the entire shift or even at times during the shift (T. p. 319). Cpl. Hopes confirmed this and that he was sometimes alone in the control room of the unit himself (T. p. 270). Thus, there was no consistency of the alleged practice either before or after the date of the CBA for an established practice.

Second, the alleged practice lacks mutuality as this was unilaterally determined by management and not based on any acceptance or tacit agreement between the Association and the Sheriff. A choice by management in the exercise of its managerial discretion as to a current method of operation is not an obligation or commitment for the future. Esso Standard Oil Co, 16 LA 73, 74 (Shulman, 1951); Ralston Purina Co., 85 LA 1, 5 (Cohen 1985). Here, the prior Sheriff solely implemented a written policy and procedures BC 1000.01-2 for supervision of Administrative Segregation units which was last previously amended on 9/19/1996 (U-2). The current Sheriff, Amadeo Ortiz, only took office in January 2009, as did the Jail Administrator Roger Dovalina (T. p. 316). The existing policy and procedure was promulgated by the prior Sheriff before the Deputies obtained collective bargaining in 2004 and the execution of the first Collective Bargaining Agreement between The Deputy Sheriff's Association of Bexar County, the Sheriff and Bexar County in August of 2006 (JT-1). There was no evidence that the Association had any involvement in the promulgation of the Administrative Segregation unit policy and procedure, nor in its subsequent amendment in 1996. The CBA contains no provisions establishing any staffing or procedures as to the Administrative Segregation units which authority remains with the Sheriff and within this management rights cited above to operate the jail. (Texas Local Government Code Section 351.041; J-1, p. 7). The element of mutuality is not proven.

Finally, under Article 4, the practice must concern a mandatory subject of bargaining (J-1, p.10). Staffing is normally not a mandatory subject of bargaining. City of Boston v. PPA, 532 N.E.2d 640 (Mass. 1989). Under the Texas collective bargaining statute, Chapter 174 of the Texas Local Government Code, the mandatory subjects of bargaining are compensation, hours, and other conditions of employment. TLGC §174.023. A subject constitutes a "working condition" only if it has a greater effect on working conditions than on management prerogatives. Corpus Christi Firefighters Association v. City of Corpus Christi, 10 S.W.3d 723, 728 (Tex. App.—Corpus Christi 1999, pet. denied). In that case, the court found that a grooming policy and vehicle accident rules had little effect of the firefighter's ability to perform his duties and thus is not a working condition nor did it violate the firefighter's collective bargaining agreement "Prevailing Rights" contractual clause similar to Article 4. Arbitrators are often hesitant to permit unwritten past practice, or methods of doing things to restrict the exercise of traditional and recognized functions of management. Esso Standard Oil Co, 16 LA 73, 74 (Shulman, 1951). The determination of the number of employees assigned to perform a task is a method of operation not within the scope of a past practice. There is no provision in the CBA requiring a specific number of Deputies in these units and as this is not a mandatory subject of bargaining, the provisions of Article 4 do not apply.

As the elements of consistency and mutuality to establish a binding past practice as of the date of the Agreement are lacking, and this does not involve a mandatory subject of bargaining as required by Article 4, no violation of

Article 4 has been proven, and this allegation of the Grievance should be denied.

**IV. NO VIOLATION OF ARTICLE 30**

The Association also asserted that the change of the staffing of the units violated Section 2 of Article 30 of the Collective Bargaining Agreement. That provision provides as follows:

Section 2.

Except as otherwise provided in this Agreement, the County may not implement material changes in compensation, hours, or conditions of employment during the term of this Agreement without the Association's express written agreement, whether or not this Agreement is expressed or silent as to such matters. Subject to the provisions of Article 4 of this Agreement (maintenance of standards) nothing in this Article changes or impairs the authority of the County or the Sheriff as to matters that are not mandatory subjects of bargaining or not expressly covered in this Agreement.

The Association contends in its Grievance that a change in the Sheriff's Administrative Segregation Unit policy requires the express written agreement of the Association (J-2). There is no express provision establishing any requirement of number of personnel assigned to an Administrative Segregation Unit in the CBA (J-1). Section 2 of Article 30 specifically provides that nothing in Article 30 changes or impairs the authority of the County or the Sheriff as to permissive subjects of bargaining (not mandatory subjects) or matters not expressly covered in this Agreement (subject to the provisions of Article 4). Even if the change did involve a mandatory subject of bargaining (which is not the case here as explained in Section III above), the change has to be material which it is not in this case.

In addition to the retained management right of the Sheriff in the Management Rights Article of the CBA, Section 2 of Article 30 specifically recognizes that Article 30 does not impair the Sheriff's authority as described. The Sheriff has the retained authority to establish and enforce policies and procedures and amendments thereto subject to the terms of the Agreement in Section 1(L) of Article 3 (J-1, p. 8).

In general, management is permitted to exercise much more discretion in assigning individual duties and tasks to workers than it is permitted in assignment of workers to regular jobs (where observance to seniority and fitness and ability are required considerations). Elkouri and Elkouri, How Arbitration Works (6th ed., p. 698). Where jobs are classified by titles but the parties have not negotiated a detailed description of job content, management will be permitted wide authority to assign any work that is of the same general type as, or is reasonable related to, or is incidental to the regular duties of the job. See United States Steel Corp., 49 LA 86,89 (Dybeck, 1967) ("maintenance of local conditions provision does not limit the level of work load). The employer may decrease or increase the duties as long as the total work load remains in reasonable bounds. St. Joseph Lead Co., 20 LA 890, 891 (Updegraf, 1953). Here, the assignment of work to Deputies in these units did not involve new tasks never performed by the Deputies working these units. It continued to consist of providing for the inmate's daily hygiene hour, weekly 3 hours of recreation, distribution of inmate meals, and other previously performed tasks.

The simultaneous performance of duties is permitted where not prohibited by the Agreement and needed due to operational circumstances. Ralston Purina Co. 85 LA 1 (Cohen 1985). In this instance, the tasks that are performed by the

Deputies assigned to an Administrative Segregation Unit have not changed. The Deputies still make their observation of the cells and enter a record in the log, still lets inmates out for their hygiene hour and their exercise time; and continue to assist other Deputies in other units as needed when they have completed their tasks (T p. 270). There is no express provision in the CBA establishing a specific number of Deputies assigned to work an Administrative Segregation Unit (J-1). Furthermore, there is no provision in the CBA that prohibits the Sheriff from amending his own Policies but actually acknowledges that right in Article 3 (L) above. This is not a complaint that the duties of the Deputies assigned to these units has changed. Cpl. Hopes admitted that the duties performed by these Deputies did not change. He testified that he is running hygiene hours on both sides of the unit simultaneously just as he did before the policy change (T. p. 264). As testified by 38 year veteran Deputy Chief Gabehart, the Officers in the Administrative Segregation units were often pulled out of the unit to assist in other tasks where Deputies were diverted from their posts to transfer inmates to the hospital, perform escorts of inmates to booking, medical services or visitations (T. p. 321-322). Cpl. Hopes testified that the amount of time to perform the observation checks on both sides of the unit only involved 5-7 minutes (T. p. 258). Even before the change in policy, Cpl. David Cantu stated that he would perform administrative confirmation of the Deputies entries in the logs of their observation checks which was the same amount of work being preformed currently under the amended Policy (T. p. 306). The work performed by the Corporal under this amended policy was the same work that was performed with only 1 other Deputy in the Administrative Segregation unit before the policy change (T. p. 309-310). Cpl. Cantu admitted that he was still required to observe Deputies and inmates while in the dayroom both before and after the policy change (T. p. 309-310). Captain Long also testified that the Deputy in the control room observed inmates in the dayroom now just as he had done before the policy change (T. p. 174). He also had to remind Deputies that they were due to perform their observation checks just as he had to do this minor task before the policy change except that it now involved reminding only 1 Deputy instead of 2 Deputies (T. p. 313). He admitted that the amount of work he did is the same (T. p .306). Hygiene or dayroom accessibility is required at least 1 hour every 24 hours by the Texas Jail Commission. In order to achieve compliance, the number of inmates per groups was authorized to be up to 8 inmates (T. p. 318). Accordingly, the inmates groups are being performed on all 3 shifts, even the third shift that has always been manned with only 2 Deputies (T. p. 320). And to further alleviate the disruptions to the inmates getting their hygiene dayroom hour, the laundry exchange previously performed during the first shift was moved to the third shift. (T. p. 330).

The Association contention that the reduction in staffing caused a material change of working conditions by increasing the safety risk of the Deputies. Certainly, in this class of jobs of jail guards, there are certain normal and inherent risks in performing their duties. The exposure to inmates while out in the dayroom for their hygiene hour in one side of these divided units is no greater than before. The inmates out of their cells on each side have not been put together into a single side of the divided unit. The exposure to the Deputy is still the same whether in the left or right side of the divided unit. In addition, measures are utilized to minimize the risk to the Deputies. For example, Cpl. Hopes testified that all inmates are put in restraints during their hygiene hour and their recreation hour (T. p. 252). Furthermore, the majority of the groups of inmates for hygiene and recreation hour are limited to 4 inmates except for two 6 inmate groups, reduced from 8 inmates per group to reduce disruptive behavior (T.p. 252-53, 257). However, no evidence was offered that demonstrated that any safety risk actually increased. The incidents of disruptive inmates testified to by the Association witnesses occurred before the policy change. Cpl. Hopes testified that the incident involving inmates attacking other inmates on the opposite side of the unit (with 3 deputies present) occurred before the reduction in the unit manpower in

June 2010 (T. p. 269). The incident that Cpl. Garcia described also occurred before the policy change as well (T. p. 300). The exhibit of assaults in these units from January 1, 2009 to April 19, 2011 demonstrated that the number of assaults were fewer after the policy change in June 2010 for the same 11 month equivalent period (CO-3). The presence of an additional Deputy did not prevent inmates from engaging in disruptive behavior even if there was another Deputy on the opposite side of the unit. Corridor officers, the floor Sergeant, and SERT Officers are assigned to each floor and can respond to a disturbance within seconds as well as Deputies in other doubled up Administrative Segregation units (T. p. 267, 274). Although Cpl. Hopes stated that safety is compromised because there are 8 inmates to an Officer on each side (his inmate groups are usually 4 per group) during hygiene hours, he testified that he meant there was less destruction of property (T. p. 280). Thus, the Deputies themselves control the level of risk in their unit by adjusting the number of inmates per groups depending on the circumstances in their unit. He admitted that this was the same situation as existed before when there were only 2 Deputies present for the shift (T. p. 268 - 274). And in the event of a disturbance, rovers assigned to the floor respond to assist unit Deputies as well as the Floor Sergeant and the SERT team (T. p. 266-67,274). In addition, after the policy changed, the Sheriff had a Deputy assigned to these units taser equipped and trained for increased safety (T. p. 254-55;275) and disruptive inmates in these units were leg-ironed to further protect the Deputies from their disruptive behavior (T. p. 324). In many instances, Deputies, along with the Corporal, are inside the control station which is secured and locked. (T. p.183; 326). To increase the Deputies safety, Jail Administrator Deputy Chief Dovalina not only instituted these measures but also implemented OC spray in the jail and budgeted specific funds for equipment and supplies for the emergency response SERT team (T. p. 365-367). And although the Jail Commission only requires these units to be manned by 1 Deputy, the Jail Administrator decided to keep 2 Deputies in these units (T. p. 375). As Deputies are only on one side of the unit at a time and exposed to only a small number of inmates at a time who are usually restrained, there is no increased risk to the safety of the Deputies now assigned to the units. Chief Gabehart, a 38 year veteran in the detention units stated that there was no increased safety risk to the Deputies than there was before the policy changed (T. p. 331). There being no evidence demonstrating an increased safety risk to the deputies that did not previously exist, there is no basis to find a material change of the working conditions of the Deputies assigned to these units.

The change was not arbitrary but was done due to a change in available Detention personnel which change necessitated the reassignment of Deputies. As testified to by Deputy Chief Dovalina, the change in the policy and reassignment was due to the loss of 14 Detention Deputies due to a voluntary retirement program. The VRIP program was initially limited to and targeted 28 Deputies assigned to Law Enforcement, not Detention. However, at the request of the Association, 14 Detention Deputies were included in the program (T. p. 355). The loss of these Deputies necessitated the reassignment of other Deputies, including the third Administrative Segregation unit Deputy to other vacant positions in the Jail due to the retirements (T. p. 375). This new staffing of the Administrative Segregation units on the first and second shifts still meets mandatory Jail Commission standards which only require 1 Deputy (T. p. 374-5). It also increased efficiency and productivity by utilizing these Deputies in other areas of the jail operation similar to other units in the Jail assigned only a single Deputy (T. p. 358; CO-4).

The changes having been implemented with a valid purpose and within the rights of the Sheriff as retained in the Management Rights Article in the Collective Bargaining Agreement, there is no violation of Section 2 of Article 30.

**CONCLUSION**

Respondents request that this Grievance be denied. No violation of any Article in the Collective Bargaining Agreement occurred as the Grievant failed to prove the practice alleged in his Grievance was a proper subject for a binding past practice and met the elements of such or that the change in policy was a material change of a condition of employment. Absent proof by the Grievant of a violation of a provision of the Collective Bargaining Agreement as alleged in the Grievance and applicable in this case, the Grievance must be denied.

## DISCUSSION AND OPINION

The Management Rights clause forms the line of demarcation in what the scholar Carter Goodrich once referred to as "The Frontier of Control" in the modern workplace. It is where Management stakes out its claim covering the boundaries of its various prerogatives. It is also where the union often tests those boundaries by challenging the exclusivity of Management's control. This is especially true in the realm of staffing. In our schools, the boundary conflicts often involve class size: a question of ratios. In our fire departments, the unions and department heads often jostle over manning: the minimum complement to staff an apparatus. In our jails and prisons it can be a combination of both ratios and manning. Unlike a previous case heard by Arbitrator Otis King that apparently involved ratios, this case involves a basic issue of unit manning.

The Arbitrator was curious about the Award of his colleague. He even made a point of asking at the Hearing whether the Parties wanted it entered into the Record. The Parties both declined the opportunity. Consequently, as far as these proceedings are concerned, that decision is a nullity. It would serve no one's interest for this Arbitrator to speculate about how that case did or did not comport with the facts and considerations relevant here.

In the end, neither the Union's references to the King decision, nor its belated introduction of the concept of a "crew" had any impact on the determination of this case. That is because this was a straightforward matter of contract interpretation.

The place to start is the language of Article 30, Section 2 that begins in a way that must have looked very promising to those who drafted the Grievance. It reads: "Except as otherwise provided in this Agreement, the County may not implement material changes in compensation, hours, or conditions of employment during the term of this Agreement without the Association's expressed written agreement, whether or not this agreement is expressed or silent as to such matters." This language must have looked especially strong in light of the supporting provisions contained in Article 4 that stated: "Established practices standards and conditions of employment, oral or written, existing on the date of this Agreement, concerning mandatory subjects of bargaining shall not be changed during the term of the Agreement whether or not they are specified in the Agreement.

However, the fly in the ointment of this remedial Grievance was the requirement that the matters which could not be materially changed had to concern "mandatory bargaining subjects". Indeed, even the language of Article 30, Section 2 contained this same qualification: "Subject to the provisions of Article 4 of this Agreement (maintenance of standards) nothing in this Article changes or impairs the authority of the County or the Sheriff as to matters that are not mandatory subjects of bargaining or not expressly covered in this Agreement." As the Parties came to understand at the Hearing, this placed critical importance on the language of the Management Rights Article. So, what sort of "frontier of control" did Management carve out?

Unfortunately for the Union, the Management Rights provisions in the Agreement covering staffing are unequivocal. In Section B, Management's prerogatives are listed to include the right to "Hire, promote, demote, *transfer, assign* and retain employees in positions within the County." Moreover in Section F it gets even more specific when it says: "Determine the methods, processes, means and *personnel by which operations are to be carried out.*"

The Arbitrator is sympathetic with members of the Union who testified about how having two instead of three officers to man the Administrative Segregation Unit represented a material change to their conditions of employment. Apart from the fact they are often dealing with the worst of the worst, they are being forced to perform many of the basic functions of their job twice as often as they were under the old manning arrangements. The Arbitrator is sure that it will provide little solace to these individuals for him to explain that this material change is permitted because of the category of bargaining topic this change happens to fall into. Unfortunately, however, this is the stark contractual reality of the situation.

The Sheriff's office is entitled to direct the work of officers and assign them in a way that maintains the efficiency of operations. It is entitled to determine the methods and personnel by which it will carry out operations. The Union seemed to recognize this on countless occasions in the past when there were only two officers in charge of the Administrative Segregation Units *under the old policy*. In this regard, it did not help the Union's case that it never challenged Management's right to assign two officers at a point in time when is own policy required three.

In the absence of convincing language to the contrary, few unions are able to challenge these sorts of strategic staffing decisions. Teachers unions cannot exercise control over the student / pupil ratio, firefighters cannot exercise control over the minimum manning on fire apparatus and correctional officers cannot exercise control over strategic staffing decisions that are made within legal standards. In the present case it was obvious to everyone that having two officers on the Administrative Segregation Unit more than complied with the State minimum requirement. Moreover, it was also obvious that the Collective Bargaining Agreement contained no provisions that specified minimum manning levels in any units. Therefore, in this instance, Management had its bases covered.

It may well be that members of the bargaining unit are left wondering whether the provisions of Article 4 and Article 30 provide *any* protection to them in the face of unilateral changes by Management. The answer is that they certainly do. If Management were to make unilateral changes concerning a mandatory subject for bargaining, these provisions would be of great assistance to the officers who are covered by the Agreement. If, for example, Management suddenly abolished shift differentials or uniform allowances for SERT members these would be actions that would be the subject of successful grievances under Articles 4 or 30. In the present case, the new policy that was introduced by Management in June 2010 materially changed the conditions of employment for officers working in the Administrative Segregation Unit in the Main Jail. Nevertheless, the change was covered by the provisions of the Management Rights Article that unequivocally protected the Sheriff's right to make this sort of strategic staffing decision. Therefore the grievance must be denied.

## AWARD

For the reasons explained above, the Grievance is DENIED.

November 25, 2011

Mark R Sherman, Arbitrator — Date