IN THE MATTER OF ARBITRATION BETWEEN

DEPUTY SHERIFFS ASSOCIATION OF BEXAR COUNTY, Union,	§	Juan Contreras, Grievant *Outside Hiring*
and	§	William L. McKee, Ph.D. Arbitrator
BEXAR COUNTY, TEXAS / BEXAR COUNTY SHERIFF'S OFFICE Employer.	§	.

AWARD

A hearing in this matter took place on June 18 and 19, 2015, in San Antonio, Texas. Upon receipt of post-hearing briefs and replies, the hearing closed.

Appearances:

For the Union/Appellant: Karl Brehm
CLEAT Staff Attorney
San Antonio, Texas

For the Employer: Nicholas "Nico" LaHood
Criminal District Attorney
Sue Ann Gregory
Assistant District Attorney
Bexar County, Texas

I. ISSUE

The parties did not stipulate to the wording of the issue but generally agreed that the issue to be decided is:

> Whether the County violated the Collective Bargaining Agreement ("CBA") between the Deputy Sheriff's Association of Bexar County ("DSABC" or "Association"), the Bexar County Sheriff's Office ("BCSO") and Bexar County, Texas ("County") by hiring more than two outside candidates for open positions in Law Enforcement in one year, rather than filling those positions with existing Detention Officers and, if so, what is the appropriate remedy.

II. FACTS

Juan Contreras is the President of the Association. On November 14, 2014, he filed the instant grievance that provided in relevant part:

> 1. STATE IN DETAIL THE INCIDENT CAUSING THIS GRIEVANCE AND THE FACTS ON WHICH IT IS BASED:
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> The Bexar County Sheriff's Office (BCSO) has taken active steps to employ outside law enforcement officers as employees into the law enforcement division, filling vacant positions in law enforcement that would have been filled by eligible employees currently employed in the detention division. The BCSO is hiring such outside officers en masse which was never the intent of the parties to the CBA
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> 2. SECTION OR ARTICLE OF THE CONTRACT THAT HAS BEEN VIOLATED:
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> CBA Article 18, Section 1 "Hiring". CBA Article 25, "Transfers into Law Enforcement". Section 1, "Guiding Principles". CBA Article 3, "Management Rights", Section 1(B)
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> 3. IF A PAST PRACTICE IS ALLEGED, STATE IN REASONABLE DETAIL A DESCIPTION OF THE PAST PRACTICE:
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> [blank]
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> 4. Remedy or adjustment sought:
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> Compliance with the CBA, with the BCSO hiring outside employees as it has in the past in limited numbers and in accordance with past historical trends. The CBA allows 2 unobjectionable positions it can fill, but the remainder are subject to the requirements of the CBA.

In September 2014 the Bexar County Commissioners Court granted the BCSO 26 new Law Enforcement positions, in part because the County needed more Law Enforcement Officers to provide court security (i.e., act as court bailiffs). In November 2014 the County publicly posted a Job Bulletin, inviting applications for the position of Deputy Sheriff Law Enforcement Patrol. In late 2014 the BCSO announced that a Law Enforcement

examination would be held in January 2015.[1] After the exam was given, BCSO identified 16 outside candidates to be qualified for hire into Law Enforcement and proceeded to process their hiring and train them as patrol and court security officers. As of the date of the hearing in this matter in June 2015, BCSO has transferred six Detention Officers into the Law Enforcement Patrol class. BCSO leaders testified that they anticipate transferring an additional 18 Detention Officers to Law Enforcement in 2015.

III. RELEVANT CONTRACT PROVISIONS

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.

* * * *

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. It is agreed and understood that the Sheriff's right to determine and assign duties includes the assignment of additional duties to Members which are similar to duties performed by other Members of the same classification which shall not constitute a change in working conditions. Members in the same classification do not have the right to the continuation of their particular job duties/job descriptions during the duration of this Agreement.

[1] A Law Enforcement exam is specifically for outside candidates, as opposed to the transfer exam administered to internal candidates who wish to transfer from Detention to Law Enforcement.

ARTICLE 18 – HIRING

Section 1. Hiring.

The minimum age for employment for any position in the Sheriff's Office excluding civilian positions is 21 years of age. However, if there is not a sufficient number of qualified applicants, the age may be lowered to 20 or 19 as necessary.

New employees hired into entry-level positions in either Law Enforcement or Detention must at a minimum successfully fulfill a written examination appropriate for the position, agility test, and interview requirement. The minimum passing score on a written entry examination shall be at least 75. However, if there is not a sufficient number of qualified applicants, a minimum passing score of 70 may be used. The Law Enforcement entry-level written examination must be similar in nature to the Transfer test excluding internal policies and procedures, and will be developed under the purview of the Sheriff's Civil Service Commission. The number of total questions of the Law Enforcement entry-level written examination will be the same as the total number of questions of the Transfer test.

In addition, the Sheriff may in each calendar year fill two (2) Law Enforcement entry-level positions notwithstanding the requirements of this Section (other than age) or Section 2. This provision does not limit the Sheriff's hiring authority or the number of other outside hires by the Sheriff consistent with historical trends as per Article 3 and Article 25. The Association further agrees that the pending grievance 2010-DSABC-Class 1 regarding the Transfer test and outside hiring will be dismissed with prejudice and that it will not accept or file any similar grievances or complaints under the prior Agreement and/or Paragraph 10 of the MOU dated September 8, 2009.

ARTICLE 25 – TRANSFERS INTO LAW ENFORCEMENT

Section 1. Guiding Principles Governing Transfers Into Entry Level Law Enforcement.

A. The County, the Sheriff, and the DSABC agree in principle:

1. That a major purpose of the fair and reasonable compensation payable under this Agreement is to encourage a professional career oriented department in both the Detention and Law Enforcement Divisions; and

2. That hiring into the Law Enforcement Division should encourage career advancement by giving special consideration to applicants from the Detention Division.

* * * *

C. In accordance with these agreed principles, the Sheriff has for a number of years encouraged hiring into Law Enforcement entry-level

> vacancies from the Detention Division to the extent that, without any obligation to do so, the vast majority of individuals hired into those positions have come from the Detention Division. Although the Sheriff intends to retain his lawful hiring prerogatives, the Sheriff fully supports the DSABC objective of maintaining and encouraging special consideration for the hiring of Members from the Detention Division. Barring unforeseen circumstances and circumstances which are not within the Sheriff's ability to control, the Sheriff intends to maintain the historical trends that he has established in this regard. A Bargaining Unit Member who is transferred from a position in Detention to an entry-level position in Law Enforcement will be subject to the following applicable Sections.

IV. POSITIONS OF THE PARTIES

Association's Argument

According to the Association, the vast majority of sworn staff enter BCSO employment in the Detention Division. Detention is considered by many to be a less desirable assignment than Law Enforcement, and the possibility to transfer to the Law Enforcement Division is a significant incentive (or "carrot") for Members to accept offers of employment and to continue serving in Detention. A transfer from Detention to Law Enforcement is considered to be a promotion, although it is not subject to a promotion test. Former Sheriff Ortiz understood the Department's need to foster the expectation that movement from Detention to Law Enforcement was encouraged, and many current Detention Officers accepted Detention positions with the BCSO with the implicit understanding that they could one day move to law enforcement.

The BCSO violated the provision of the CBA that requires it to abide by the "historical trend" with respect to outside hires into Law Enforcement. In the years that the parties have negotiated over this subject there is no evidence of BCSO ever hiring nearly as many as 16 outside hires into Law Enforcement in one year. Indeed, the number of outside

hires into Law Enforcement had been trending down to lower single digits for the past several years. There have not been more than 10 outside hires since approximately 2006 or 2007, and many recent years had only two or three such hires.

Former Sheriff Ortiz, who led the department when the current CBA was executed, testified that his intent was that hiring two outside candidates into Law Enforcement annually, as provided in Article 18, Section 1, would be sufficient. Other Law Enforcement positions would be filled by transferring Detention Officers. He explained that he intended to hire into Law Enforcement only those outsiders who had specialized training or expertise.

The County's argument that it was excused from adhering to historical trends due to "unforeseen circumstances beyond the Sheriff's ability to control" is an affirmative defense for which the County bears the burden of proof. Actually, the County's own data fail to support the contention that the jail population was unexpectedly high in 2014. The data set provided by the County was cherry-picked with a starting point of 2011. According to the testimony of the Association's witness, Morris Munoz, who worked as BCSO Jail Population Monitor during part of the time in question, the BCSO was responsible for as many inmates or more inmates during Sheriff Ortiz' tenure as under Sheriff Pamerleau's, although some of the inmates under Sheriff Ortiz were housed off-site. Mandatory overtime for Detention Officers became a practice under Sheriff Ortiz, due to the increased jail population during that time.

Indeed, the parties entered into the September 2009 MOU in order to permit Detention Officers to supervise more inmates than the CBA previously allowed. The *quid-pro-quo* for arriving at that agreement was the County's provision of a certain process that provides Detention Officers the opportunity to transfer into Law Enforcement.

Contrary to the County's argument that the number of vacant Law Enforcement positions was abnormally high in 2014, Deputy Chief Manuel Longoria testified that the Law Enforcement Division has historically had periods of high numbers of vacant positions. There were no unforeseen circumstances or circumstances beyond the Sheriff's ability to control.

Additionally, the County's argument is largely premised upon a high number of vacancies in Detention. The County created a morale problem among Detention officers by assigning those officers excessive mandatory overtime. Morale in Detention was further impaired when the County decided to hire outside candidates in to Law Enforcement.

The County did not establish its affirmative defense by a preponderance of evidence. BCSO witnesses could not assure the Arbitrator that this one-time incident of hiring large numbers of outside candidates would be an exception. Chief Nicholas indicated that if BCSO felt the need, it again would hire outsiders directly into Law Enforcement. This would continue to deprive Detention personnel of the opportunities they have been promised to move into Law Enforcement. Detention Officers will continue to lose morale and seek other employment, and the cycle of an understaffed Detention Division will perpetuate. When such a precedent is set, it cannot be undone.

The testimony of Albert Pena about the parties' bargaining history was a violation of the Texas Disciplinary Rules of Professional Conduct, which prohibit a lawyer from representing a party as both an advocate and a witness. Mr. Pena was a representative/advocate for the County and BCSO during negotiations for the current CBA. He then served as technical advisor and expert for the Respondents at the hearing. His true role was that of co-counsel and co-advocate in the hearing to assist Ms. Gregory in the

presentation of her case. He likely received compensation from Respondents for his services during the hearing. This draws into question whether his testimony "should be taken as proof or as an analysis of the proof," pursuant to Rule 3.08.

The Arbitrator possesses the jurisdiction and authority to award the remedy requested by the Association -- removal of the outside hires. Arbitrators have vast power to craft remedies once they find a violation of a collective bargaining agreement. The County's argument that those employees are subject to the just cause provisions of the CBA is not accurate. All 16 of the new hires have yet to complete their one-year probationary periods and, thus, have no rights under the CBA or Civil Service Commission Rules. They can be removed for any reason. Instead, the County elected to proceed with hiring these individuals after the Union filed the instant grievance. Perhaps the County did not inform the candidates that their employment was being challenged. The County hired these employees at its own peril. In any event, the Arbitrator has the ability to craft a remedy that does not require terminating the new employees – such as directing that those employees be offered positions in Detention. All the Union is asking is that the terms of the CBA be enforced.

For the above reasons, the Association contends that the grievance should be upheld.

Employer's Argument

The County argues that its actions honored the CBA, and the Association failed to establish the existence of a violation. There is no contractual basis for the Association's argument that the CBA restricts to two the annual number of Law Enforcement Officers that can be hired from outside the BCSO. Further, the Association failed to establish that two outside hires per year is the "historic trend" referenced in the CBA. While Association President Contreras attempted to limit the basis for the "historic trend" to Sheriff

Pamerleau's first two years in office, he ultimately acknowledged that the CBA places no such restrictions on the definition of "historic trends."

Former Sheriff Ortiz apparently targeted two outside hires per year, based on his interpretation of the 2009 MOU. The MOU actually contains no such limitation. Further, the evidence showed that Sheriff Ortiz actually hired six outside candidates into Law Enforcement in 2010 and three in 2012.

Imposing a limit of two outside hires per year into Law Enforcement would add a new term to the CBA, which the CBA does not allow. The Association's attempts to affix a static number or limit a historic trend to a specific sheriff's administration contradict the clear intent and meaning of Article 25, Section 1(C). Moreover, the Association's position that "historic trends" should be measured for each individual administration is belied by Article 33, Section 2, which provides that a successor Sheriff is bound by the terms of the CBA currently in place, to the extent permitted by law.

The language of Article 25, Section 1(C) makes clear that the "historic trend" is not a number of hires but refers, instead, to the practice of hiring "the vast majority" of Law Enforcement Officers from the Detention ranks. In practice, the BCSO continues to fill the vast majority of Law Enforcement openings with Detention Officers and will do so again in 2015 by transferring 24 Detention Officers to Law Enforcement (six of whom have already been transferred), as compared to 16 outside hires.

Although the language of Article 25, Section 1(C) is not ambiguous, the County also presented evidence of the parties' bargaining history in this regard. Mr. Pena, who was involved in negotiations for the current CBA, testified that that the Association proposed to limit the Sheriff's general outside hiring authority for Law Enforcement to two, but the

Employer rejected that proposal. He added that the Association also proposed language stating that the Sheriff's "first priority" would be to hire from Detention. This proposal was rejected because it contradicted the language of Article 18 about the Sheriff's authority to hire. Instead, the parties simply agreed to language that reflects the Sheriff's intention to maintain and encourage "special consideration" for hiring from the Detention ranks for Law Enforcement vacancies. Based upon this evidence it is clear that the parties did not intend that the Sheriff's authority to hire from the outside should be limited to only two outside hires per year.

Article 25, Section 1(C) also makes clear that the Sheriff's intent to hire the vast majority of Law Enforcement Officers from Detention is subject to unforeseen circumstances outside of his or her control. The Employer demonstrated the unforeseen, uncontrollable circumstances that influenced the hiring decisions at issue in this case. Specifically, when these outside candidates were hired, the BCSO was experiencing unforeseen large jail populations as well as an uncharacteristically high number of vacancies within both the Detention and Law Enforcement Divisions.

The BCSO risked losing the Law Enforcement vacancies authorized by the County if the positions were not immediately filled. It could not afford to deplete Detention staff any further, considering the large number of resignations and resulting high mandatory overtime that was being required in that Division at the time. The Association's contention that the shortages in Detention staff were caused by the BCSO was based on conjecture, hearsay, and unsubstantiated opinion. Mr. Contreras admitted that the County was not bound by the CBA to accept his suggestions for offsetting vacancies, reducing mandatory overtime, or addressing the burgeoning jail population.

Other Sections of Article 25 make clear that, notwithstanding the expressed "intent" to abide by historic trends vis-à-vis hiring for Law Enforcement, "[t]he Sheriff continues to retain his authority to fill entry level vacancies in Law Enforcement by selecting a candidate from outside of the Sheriff's Office. . ." Article 25, Section 2(F).

The Association has failed to establish a violation of Article 18. The clear language of Article 18, Section 1 provides that the Sheriff's authority to hire two Law Enforcement candidates per year without following the other requirements of that section "does not limit the Sheriff's hiring authority or the number of outside hires by the Sheriff consistent with historical trends per Article 3 and Article 25."

Further, the Association did not prove a violation of Article 3, Management Rights. A sheriff's hiring authority, as provided in that article, is subject in part to the provisions of Articles 18 and 25, neither of which were violated in this case.

The Association made several attempts to expand the scope of the grievance, which is not permitted under the CBA. Article 13, Section 3 of the CBA provides that "[t]he written grievance cannot be amended or supplemented after its submission to the Association Grievance Committee." At first the Union attempted to challenge the qualifications of individuals hired by BCSO, but the grievance did not complain about the qualifications of the new hires. Similarly, the Union has attempted to argue past practice, but it left blank the specific section of the grievance form that states, "IF A PAST PRACTICE IS ALLEGED, STATE IN REASONABLE DETAIL A DESCIPTION OF THE PAST PRACTICE." The grievance made no reference to past practice, and the Employer did not have an opportunity to prepare or present evidence disputing an allegation of past practice.

Finally, the specific remedy of removing the Law Enforcement cadets hired earlier this year was not stated in the grievance submitted to the Association's Grievance Committee.

The Grievance is also barred under Article 25, Section 2(G), which provides that "[n]o candidate may appeal or grieve any transfer selection decision . . . except for alleged violations of Subsection 2.E above." To the extent the grievance is about non-selection of transfers of candidates from Detention to Law Enforcement, it is barred.

The Association's requested remedy would require removal of the 16 Law Enforcement employees hired earlier this year, which would be a prohibited amendment to the grievance. It would also be punitive, which is contrary to the CBA, and beyond the scope of this Arbitrator's authority. Further, Mr. Contreras admitted that this remedy was not requested in the grievance due to an error on his part. He went on to testify that it should have been requested. As explained above, this amendment is barred under Article 13.

Removing 16 Law Enforcement employees is outside the scope of the Arbitrator's authority, as there is no provision in the CBA that would authorize such an action. To the contrary, summary discharge of these individuals is precluded by the CBA and Civil Service Rules. Deputy Chief Nicholas testified that the 16 officers are protected by civil service and could not be removed involuntarily in the absence of discipline.

The grievance should be denied because no violations of the CBA occurred and because the remedy requested by the Association is not permitted by the CBA.

V. FINDINGS

Because this is a contract case, the Association has the burden to prove a violation by a preponderance of evidence. Here, the Association is challenging the BCSO's hiring of 16 external candidates into the Law Enforcement Division in 2015. I am aware that Law

Enforcement is widely (although not universally) considered to be a more prestigious career path than Detention. In light of the recent issues with lack of hiring and the resulting mandatory overtime in the jail, Detention Officers have an even greater desire to transfer out of that Division and into Law Enforcement where staffing shortages are not as severe.

This case is not about whether the BCSO has done all that it can to alleviate staffing and morale issues in Detention. Instead, the issue in this case is whether the CBA limits to two (or, alternatively, to something less than 16) the number of outside candidates that can be hired into Law Enforcement in any one year. When faced with a contract grievance, an arbitrator's primary obligation is to ascertain and give meaning to the intent of the parties' as expressed in the plain language of the agreement. Only if the language of the Collective Bargaining Agreement is ambiguous or inconclusive should external evidence of the parties' intent[2] be considered.

In this case, the Association has alleged violation of three specific provisions of the CBA: Articles 3, 18 and 25. Much of the testimony at the hearing related to how outside hiring into Law Enforcement has been handled in the past. The Employer contends that this is a "past practice" argument, which should be disallowed because the Association did not

[2] The Union has challenged Mr. Pena's testimony on the grounds that he was improperly acting as both witness and advocate. It is not surprising that Mr. Pena is the person the Employer would call to testify regarding what happened during negotiations for the current CBA. He was the Employer's representative in those negotiations and has personal knowledge of the parties' discussions. Mr. Pena did not present himself as an advocate in this proceeding and did not make any of the Employer's arguments. There is no concern about blurring the lines between what he would say if her were an advocate and what he actually said as a witness. Further, I am of the opinion that, if the Association wished to challenge Mr. Pena's possibly dual roles at the hearing, it should have sought to disqualify him from acting in a "quasi" representative role as technical advisor before the hearing began. Therefore, I decline to strike his testimony on the Association's contention that his participation in this hearing violated the Texas Disciplinary Rules of Professional Conduct. However, as will be discussed below, there is no need to consider the matters about which he testified, because the language of the CBA is clear and unambiguous. Mr. Pena's testimony was not determinative.

allege a violation of past practice in its original grievance. I agree that, pursuant to Article 13 of the CBA, the Association may not use past practice, standing alone, as grounds to prove a violation. However, the reference to "historical trends" in Article 25, Section 1 incorporates consideration of what the parties have done in the past. Such evidence is admissible and relevant. However, it will be considered only to the extent it tends to prove or disprove that a violation of Article 25, Section 1 occurred.

With respect to Article 3, that provision of the CBA is a retention of Management Rights clause that is subject to the other provisions of the CBA. In order to prove that the Employer has exceeded its retained management rights, the Association must prove a violation of a separate provision of the CBA – in this case, either Article 18 or Article 25. Thus, there can be no stand-alone violation of Article 3.

Article 18, Section 1 provides in relevant part that

> . . . the Sheriff may in each calendar year fill two (2) Law Enforcement entry-level positions notwithstanding the requirements of this Section (other than age) or Section 2. This provision does not limit the Sheriff's hiring authority or the number of other outside hires by the Sheriff consistent with historical trends as per Article 3 and Article 25.

This section specifically states that the Sheriff's authority to hire from outside is <u>not limited</u>, except as per the "historical trends" referenced in Article 25. In other words, the Sheriff has two "freebie" hires per year who do not have to sit for or pass the written entry examination, agility test, and interview. The Sheriff can bring in whomever he or she chooses (so long as standard eligibility requirements are not violated). Article 18, by its express terms, does not limit the Sheriff's ability to hire any number of outside candidates into Law Enforcement.

The gravamen of the Association's grievance is obviously the reference to "historical trends" in Article 25, Section 1(C). That provision states that the Sheriff "intends

to retain his lawful hiring prerogatives," but "fully supports the DSABC objective of maintaining and encouraging special consideration for the hiring of Members from the Detention Division," and "[b]arring unforeseen circumstances and circumstances which are not within the Sheriff's ability to control, [] intends to maintain the historical trends that he has established in this regard." Just before that language wherein the Sheriff expresses intent to maintain historical trends, the very same paragraph identifies what has happened in the past as follows:

> . . . the Sheriff has for a number of years, encouraged hiring into Law Enforcement entry-level vacancies from the Detention Division to the extent that, without any obligation to do so, the vast majority of individuals hired into those positions have come from the Detention Division.

There is no definition of "historical trends" in the CBA. However, the first sentence of Article 25, Section 1(C) explicitly references what has been happening "for a number of years" – encouraging hiring into Law Enforcement from Detention such that the result is that the "vast majority" of Law Enforcement hires have come from Detention.

Based upon the context of Article 25, Section 1(C), I am compelled to agree with the Employer that "historical trends" is not a reference to a specific number of outside hires. Instead, it seems clear and unambiguous that "historical trends" refers to the end result of having "the vast majority" of Law Enforcement vacancies filled by transfers from Detention. To find that Article 25, Section 1(C) restricts the BCSO to hiring a specific number of outside candidates into Law Enforcement would be to add a new term that is not contained in the CBA. This interpretation is supported by the various provisions in the CBA that expressly state that the Sherriff has not agreed to limit or restrict her authority to hire

from outside of the BCSO, such as Article 18, Section 1; Article 25, Section 2(F), and even Paragraph 10(E) of the September 2009 MOU.

The Employer agrees that the provision restricting outside hires such that the "vast majority" of Law Enforcement vacancies will be filled from Detention is binding. "Vast majority" is a somewhat ambiguous term. Moreover, the CBA does not provide that the "vast majority" must be measured each year. As such, I find that the evidence presented was insufficient to show that, over time, the "vast majority" of Law Enforcement hires have not come from Detention. Although 16 external hires within one year was a significant departure, numerically, from past years, it appears that the overall number of Law Enforcement hires will be dramatically higher in 2015 than in the last several years. The evidence indicated that this is what is projected to happen. If all hiring goes as projected, a total of 24 Detention Officers will transfer into Law Enforcement this year, as compared to 16 outside hires. It is a 3:2 ratio, and is likely insufficient to offset the overall historical "vast majority" trend when the hiring statistics are viewed on a historical rather than one-year-at-a-time basis. At the very least, it is premature for the Association to claim that the "vast majority" trend has been abrogated.

The Association presented a significant amount of evidence about the previous Sheriff's interpretation of the "historical trends" provision and about the reasons underlying the employees' desire to encourage hiring into Law Enforcement from Detention. However, that evidence is simply not necessary to ascertain the meaning of the contract. That meaning can be derived from the four corners of the document itself. It is important to note that Sheriff Ortiz, like the current Sheriff, was an elected official whose term likely would be short and was only one of the parties on the Employer side of the CBA. The County may

have its own perspective about what the CBA provisions should mean. All three parties collectively memorialized their intentions in clear language. The Arbitrator is bound to enforce the contract according to its terms.

VI. AWARD

For the reasons set forth above, the grievance is denied.

September 22, 2015

William L. McKee, Ph.D.
Arbitrator