ARBITRATION AWARD AND OPINION

In the Matter of the Arbitration	Grievant: Jocelyn Hotle
between AFSCME COUNCIL 18	Arbitrator Case No.: BernCoArb 101-13
and	
BERNALILLO COUNTY	

BEFORE: PILAR VAILE, ARBITRATOR

APPEARANCES:

For the Union:	Rob Trombley, AFSCME Council 18 Paul Montoya, AFSCME Local 1661
For the County:	Michael Garcia
Place of the Hearing:	New Mexico State Bar 5121 Masthead Dr. NE Albuquerque, NM 87109
Date of Hearing:	November 20, 2013
Date of Post-hearing Briefs:	received December 20, 2013
Date of Award:	January 21, 2014
Relevant Contract/Other Provisions:	CBA Articles 3, 5, 15, 27, 31, 33; and SOP 246
Contract Year:	2012-2014
Type of Grievance:	Discipline/Termination

AWARD SUMMARY

The Union alleges that the County violated the Collective Bargaining Agreement (CBA) by terminating Grievant Jocelyn Hotle from the Bernalillo County Sheriff's Office (BCSO or Department) without just cause when she failed to qualify on her Department issued firearm, a Glock 22, in that (a) Hotle was not provided 10 days suspension without pay in order to better practice for her qualification, and (b) the County did not allow the Grievant to qualify another firearm, in particular her personally owned M&P 9mm Smith & Wesson ("9mm") that had a smaller grip and less recoil. The undersigned concludes the County violated Article 27 of the

CBA in failing to provide the Grievant with 10 days unpaid suspension, but that Grievant was not able at that time to qualify on her personally owned firearm, although it fit her grip better. Accordingly, the grievance is granted in part and denied in part, with a the remedy as provided below

Pilar Vaile, Arbitrator

ISSUES AND REQUESTED REMEDY

The parties stipulated to the following issue:

Was there just cause to terminate the Grievant and, if not, what is the remedy?

PERTINENT CONTRACT AND OTHER LANGAUGE

COLLECTIVE BARGAINING AGREEMENT
ARTICLE 3—Management Rights

3.1 The County, in accordance with applicable statues, ordinances, rules and regulations, except as expressly limited, altered or modified by provision of this Agreement or appendices hereto, or subsequent modification by written instrument signed by the Parties which shall specifically identify and refer to the particular ARTICLE and subsection of this Agreement addressed herein, retains the exclusive right and authority to:

3.1.1 .... (4) determine methods, means, and personnel by with the operations of the County's Departments are to be operated and conducted; .... and, (9) take all such actions necessary to maintain such services.

3.1.2 ... (4) suspend, demote, dismiss and otherwise discipline employees for just cause...; and (10) determine and implement all policies, procedures and standards not otherwise restricted, limited or prohibited by the specific provisions of this Agreement.

...

3.3 It is further understood and agreed that any provision in this Agreement meeting the criteria set out in 3.1 hereof shall supersede the affected management right.

(Emphasis added.)

ARTICLE 5—Non-Discrimination

5.1 The County shall not discriminate against any employee based ... sex ...

5.2 The County and the Union agree that employees shall be provided a workplace that is free of discrimination ... which is based on ... sex ...

5.3 Any allegation of discrimination of the nature set forth in this ARTICLE shall be pursued under the procedures set forth in applicable, Federal, State statutes and regulations and County policies, with the EEOC, Human Rights Division, Worker's Compensation Administration, Wage and Hour Division, etc., or in accordance with such other appropriate Statutory or Administrative procedures. Article 5 shall not be grievable.

(Emphasis added.)

ARTICLE 15—Discipline

15.1 The County shall discipline employees only for just cause and in a timely manner.

...

15.1.4 All disciplinary action in the nature of suspension, demotion or dismissal shall be preceded by a written Notice of Intent to Discipline which shall include the conduct, action or omission which form the basis for the contemplated disciplinary action. The notice of intended discipline shall also identify any policy regulation, or procedure or statue violated.

15.1.5 Prior to the final disciplinary action or suspension or dismissal, a pre-determination hearing shall be held.

15.1.6 Thereafter a Notice of Final Action shall be issued and served upon the subject employee, and shall be limited to those matters set forth in the Notice of Intent to Discipline.[1]

(Emphasis added.)

ARTICLE 27—Firearms Qualifications

27.1 All employees shall be required to qualify every calendar quarter with the service handgun carried by the employee while on duty.

27.2 Qualifications shall be conducted under guidelines submitted to the New Mexico Law Enforcement Academy.

...

27.5 Subject to the conditions set forth in paragraph 27.7 below, in the event an employee attempts to qualify but fails to fire a qualifying score with the handgun mentioned above, he or she shall immediately be relieved of law enforcement duties with pay and shall undergo remedial training under the direction of the range personnel.

27.5.1 Upon completion of the initial remedial training, the employee shall attempt to qualify ...

27.5.2 Should the employee fail to qualify after initial remedial training, he shall continue to be relieved of law enforcement duties with pay and shall complete an intensified program of remedial training under the direction of range personnel. Upon completion of the intensified remedial training, the employee shall attempt to qualify ...

27.5.3 Should the employee fail to qualify after intensified remedial training, he shall immediately be suspended without pay. Within ten (10) days of being suspended without pay the employee must attempt to qualify. Should the employee qualify, he shall immediately be reinstated and return to his normal duty assignment.

27.5.4 Should the employee fail to qualify after being suspended without pay, his employment shall immediately be terminated.

...

27.7 Any employee who is unable to attempt to qualify on his last possible opportunity, due to sickness or other Department approved circumstances, shall be allowed no more than forty-five (45) calendar days past the end of the three month period or from the date of his return to duty to meet the required qualification.

ARTICLE 31—Issued Equipment

31.1. The County shall provide all Court Security Specialists covered within the scope of this agreement with the following equipment.

31.1.1 One Court Security Specialist badge.

31.1.2 One Sam Brown belt, one under belt, one handcuff case, one mace canister, one

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Notes:

[1] Article 15 goes on to describe the ordinary levels of corrective action to be applied under principles of progressive discipline. However, in this case this general provision is superseded by the specific levels of corrective action provided for in Article 27, Firearms Qualifications, *see below*.

Mace holder, one sidearm hostler, on ASP and holder, one portable radio (walkie) with holder and charger, three magazines for the sidearm with holder, one pair of handcuffs, one box of service ammunition quarterly and one tazer with holster.

...

31.3 Should the employee wish to substitute privately owned articles in lieu of issued articles, the employee must first have permission of the Sheriff or his designee and the privately owned articles must meet the specifications of the issued articles.

...

31.6 The Sheriff's Department issues high capacity semi-automatic handguns, such handguns shall be carried by all Court Security Specialists while on duty as their primary sidearm. Nothing in this article shall preclude the carrying of an auxiliary handgun as approved by the Department. The Department shall post a list of approved alternative handguns.

(Emphasis added.)

ARTICLE 33—Standard Operating Procedures

33.1 It is understood that the Court Security Specialists are operating as a unit of the Bernalillo County Sheriff's Office and shall adhere to the Office's Standard Operating Procedures.

(Emphasis added.)

BCSO RULES AND REGULATIONS, RULE 246 (SOP 246)—Authorized Firearms/Ammunition and Firearms Qualifications

246-1 Authorized Handguns for on Duty Use

There are four handguns authorized for duty use: the department issued handgun, a personally owned duty handgun (maximum of two operating systems authorized at one time), alternate handguns, and a back-up handgun ...

246-3 Department Issued Duty Handgun

A. The Glock Model 22 semi-automatic pistol will be issued to all new personnel and must be carried until their 2nd anniversary date of hire.

(Emphasis added.)

246-4 Alternate Handgun

A. Personnel operating in an undercover capacity must obtain written approval from their Division Commander prior to carrying an alternate handgun that may be more suitable for their undercover needs. An alternate handgun is any handgun used in on-duty undercover operation.

B. Personnel using alternate handgun must complete the same procedures outline in "Personally Owned Duty Handgun Approval Process."

(Emphasis added.)

246-5 Personally Owned Duty Handgun

A. Specifications for a personally owned duty handgun:
[semi-auto setting, chambered in one of enumerated calibers, and have certain barrel length and trigger pull, all applicable to the 9 mm Smith & Wesson that Grievant prefers]

B. Procedures regarding personally owned duty handguns
   1. Sworn personnel who have been employed for more than 2 years may request from the Sheriff permission to carry a personally owned semi-automatic weapon which meets the previously described specifications.
   2. Personnel requesting and receiving authorization to carry a personally owned weapon will utilize that weapon while on-duty, during all qualifications, and during all training until they have informed the Sheriff, in writing, that they will no longer be carrying the personally owned weapon.
   3. Personnel must be authorized to carry personally owned duty handguns that are different operating systems... Deputies must qualify with all personally owned handguns they are authorized to carry at each quarterly qualification.
   4. Personnel choosing to carry a personally owned duty handgun may turn in their department issued handgun to the Department Rangemaster. Those choosing not to turn in their Department issued handgun will be required to qualify with their personally owned handgun and their department issued handgun during each quarterly qualification shoot.

   (Emphasis added.)

246-6 Personally Owned Duty Handgun Approval Process

A. Contact Range and be scheduled for process ...
B. ...
C. Range will inspect and verify that the handgun meets the required specification ...
D. Shooter performs a test out and [is] qualified with the handgun..
E. Rangemaster signs approval request form.
F. Deputy submits approval request form and memo, through their chain of command, to the Sheriff for consideration.
G. Sheriff retains the option to approve or deny the request.
H. A copy of the approval or denial will be sent to the deputy's personnel file, the deputy, and the Rangemaster.
I. When the deputy receives an approved request form from the Sheriff, they may begin carrying the personally owned weapon.

246-7 Back-up Handgun

A. A member may carry a personally owned back-up handgun concealed on his person while in uniform or out of uniform, whether on or off duty, to use in any unforeseen emergency circumstances. The handgun must be of quality manufacture and chambered for piston ammunition.
B. Prior to carrying the back-up handgun the deputy must contact the Rangemaster and be scheduled for the back-up firearm transition course, and/or have had a back-up firearm transition course in the Basic Academy and/or attended an advanced training backup firearms course.
C. ...
D. The member must qualify twice (2x) each year on the Department back-up qualification course during the state day shoot and state night shoot quarters.

   ...

(Emphasis added.)

246-16 Range Procedures

...

L. Personnel with multiple duty handguns who are unable to qualify with one of those duty handguns after 4 attempts will forfeit the privilege to carry that handgun for one (1) calendar year; and will be subject to retaining on the handgun prior to being authorized to carry the weapon. All department personnel must qualify with at least one duty handgun (either the department issued handgun or personally owned duty handgun) per quarter or be subject to the provisions stipulated in section [M] below.

M. The following qualification procedures will apply to all sworn members of this agency, all commissioned Sheriff's Department members (School Resource Specialist, Court Security Personnel, etc.), and all commissioned non-departmental certified law enforcement members (APS Police personnel, etc.) qualifying with this department.

[Arb. Note: The following relevant procedures are essentially identical to that in CBA Article 27, except as noted here.]

3. The intensive remedial training will consist of training that will last not more than 8 hours, and focus on the deputy's identified deficiencies...
   a. If the deputy fails to qualify they are encouraged to seek additional instruction from departmental and non-departmental members as they see fit or as coordinated through their immediate supervisor....
4. Deputies or members who have failed to qualify to this point will be directed to report to the range within 10 working days (Monday – Friday, excluding holidays) where they will be given two (2) opportunities to qualify...
5. If the deputy fails to qualify after the final qualification attempts, a memorandum will be drafted .. recommending termination pursuant to the ... Contract.

(Emphasis added.)

WITNESSES AND EXHIBITS

Joint Exhibits

J-1 Deputy Nicholas Balistreri Auxiliary/Backup Weapon Memo and Weapon Authorization Form (2009)

J-2 Deputy David Booth Auxiliary/Backup Weapon Memos and Weapon Authorization Forms (2009 and 2012)

J-3 D 1/C John Barricklow Request to Carry Personal Memo and Weapon Authorization Form (2009)

J-4 CSS John McKenna Request for Weapon Authorization Memo, Weapon Authorization Form, and Firearms Qualification and Training log (2010)

J-5 Deputy Fred Beers Auxiliary/Backup Weapon Memo and Weapon Authorization Form (2009)

J-6 Deputy Brandon Blackmon Auxiliary/Backup Weapon Memo and Weapon Authorization Form (2009)[2]

J-7 Sergeant Kevin Bleffert Primary Use Weapon Memo and Weapon Authorization Form (2005)

J-8 Detective Robert Bolin Carrying of Glock-23 as Primary Duty Weapon Memo and Weapon Authorization Form (2003)

For the County

A. Collective Bargaining Agreement, AFSCME Local 1661, Court Security Specialists, 2012-2014
B. Job Description, Court Security Specialist
C. Shooting Qualification Certificates, CSS Jocelyn Hotle
D. Shooting Records of Training, Jocelyn Hotle
E. Certificates, Deputy Axl Plum
F. Notice of Intent to Dismiss, July 12, 2013
G. Notice of Final Action, July 29, 2013
H. BCSO Rules and Regulations excerpt, Rule 246 ("SOP 246")

Testimony of Dan Houston, Bernalillo County Sheriff

Testimony of Axl Plum, BCSO Deputy and former Range Master working with Hotle

Testimony of Craig Sevier, BCSO Lieutenant and Director of Training

Testimony of Jocelyn Hotle, Grievant

For the Union

1. Notice of Intent to Dismiss, July 12, 2013
2. Demand for Arbitration, and underlying Grievance
3. Contract Negotiations Tentative Agreements, initialed

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[2] The Blackmon Memo titles states only "Auxiliary Weapon," but the text of the memo refers—as do all four (4) of the "Auxiliary/Backup" memos—to a "back-up weapon." The remaining memos refer to alternate primary weapon use rather than backup and/or auxiliary use.

4. Training Opportunity memo dated October 25, 2013
5. Miscellaneous Termination Documents (supplied upon Union request)
6. Targets
7. APD Documents
8. Range Sign in Sheets
9. Personnel Documents
10. Eric Allen Certifications
11. Title 10, Chapter 19, Part 8 and Part 9
12. SOP 246
13. Hansen v. FBI
14. Deputy Statements
15. 1661 Contract
16. Bernalillo County Rules and Regulations
17. NMDPS/LEA Instructor Handbook
18. Law Enforcement Training Act
19. Signature page of 2009-2010 Local 2499 and MDC Contract
20. CD of July 25, 2013 Pre-Det hearing
21. CD of August 16, 2013 Step 2 Grievance meeting

Testimony of Brian Coss, Chief of Staff for the N.M. Corrections Dept. Training Academy

Testimony of Gerard Barela, retired from BCSO, current CSS, and Negotiating Team member

Testimony of Eric Allen, Bernalillo County Metropolitan Detention Center Firearm Instructor

Testimony of P.J. Montoya, BCSO CCS and Union Representative

Testimony of Jocelyn Hotle, Grievant

PARTIES' POSITIONS

The County argues that it had just cause to terminate Court Security Specialist Jocelyn Hotle, because she "failed to qualify on her BCSO-issued Glock 22 after being given at least 10 work days to practice, plus weekends, and six attempts to do so." It further argues that, being short of two years employment as a CSS, she was not entitled under either the CBA or BCSO SOP to use her personally owned weapon but, even if she had been, she had never followed the proper procedure to request to do so, even as she was struggling to qualify during this period of

time. The County stipulates that it did not put Hotle on a 10-day unpaid suspension as required under the contract and SOP, but argues that this provision is intended to benefit the employer not the employee, and that the employer chose to not do so to avoid adding further stress and anxiety to Ms. Hotle, and thereby undermine her ability to succeed in firearms qualifications.

The Union argues that the County did not have just cause to terminate the Grievant because it required her to report to work for six (6) hours a day, before being allowed to practice at the range, and because it did not permit her to qualify on her preferred weapon, a 9mm. As to the first issued, the Union argues that had the employer granted Hotle 10 days off, unpaid, as required in the contract, she could have practiced more and at better times, and she could have obtained training outside of the Department. Instead, she was required to go to the range at the end of the day, when she was not fresh. Additionally, when she went the instructor was usually not available to provide her any personal instruction, because he was doing night training or other work.

As to the second issue, the Union argues that the two-year employment requirement stated in the SOP was specifically omitted under the CSS contract because all of the CSS personnel had more than two years of law enforcement employment. In any event, other employees had not been required to wait two years and Hotle was only 15 days short of two years of employment as a CSS. Additionally, Hotle had almost two (2) years as a certified law enforcement officer with the APD, where she was trained on and used a 9mm. The Union also argues the one-gun policy is a bad policy, with potentially discriminatory impact. The Glock 22 is a larger gun with a heavier recoil, so harder to qualify on for females, who tend to be smaller and have less upper body strength than men. For all these reasons, it asserts, Hotle should have been allowed to qualify on the 9mm. Finally, the Union argues that SOP 246 contradicts Article 27, Article 27 governs CSSs, and CSS Hotle should have been allowed to use a different, more appropriately sized gun pursuant to Article 27.[3]

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[3] This argument has been somewhat convoluted. The Union most directly suggested this only at arbitration. (Barela testimony.) It was not asserted clearly at the June 25, 2013 Pre-Det Hearing or in the August 16, 2013 Step 2 meeting; there the argument was made as more of a normative or moral exhortation of what ideally should have been done. (Un. Exs. 20 and 21.) However, at the Step 2 meeting the Union did argue the SOP procedures were not applicable to CSSs because the Sheriff had denied the CSSs law enforcement commissions. Thereafter, in its Post-Arbitration Brief, the Union's argument shifted to assert that Article 27 was the "only policy governing the grievant" because the Sheriff had denied the CSSs the law enforcement commission. See Union Post-Hearing Brief at 5. However, the

STIPULATION

The County stipulated that the CBA "procedure ... calls for a 10-day suspension" without pay when a CSS fails to qualify after intensive remedial training, and "the Sheriff knows that and he just chose to waive it." (Trans. 205:22-206:12.)

BACKGROUND AND FINDINGS OF FACT

This matter was heard at the New Mexico State Bar, located at 5121 Masthead NE, Albuquerque, NM 7109 on November 2, 2013, pursuant to the parties' and Arbitrator's prior agreement. Both parties were given the opportunity to present and respond to relevant oral and documentary evidence, and all witnesses testified under oath as administered by the Arbitrator. No issue was raised as to arbitrability. The Union moved for a directed verdict after the County concluded its case-in-chief, arguing the County did not put on any evidence that Hotle had been terminated. The undersigned denied the motion in light of the Notice of Termination, and the Union went on to put on its case-in-chief. Thereafter, Post-Hearing Briefs and supplemental Joint Exhibits J-1 through J-8 were submitted on December 20, 2013, at which time the record closed.

Most of the salient facts are not in dispute. Jocelyn Hotle was hired as a CSS effective September 12, 2011. (Un. Ex. 9.) She had previously attended and completed Police Officer training with the Albuquerque Police Department in December 2008. (Un. Ex. 8.) At the time she applied for the CSS position on June 13, 2011, Hotle had a N.M. Law Enforcement Certification and was working for the City as a Court Service Specialist, where she had been employed for one (1) year and four (4) months, February 1, 2010. (Un. Exs. 8 and 9.)[4] Presumably, Hotle continued to work there until she began working as a CSS, which would have given her one (1) year and seven (7) months with APD.[5] Hotle was thereafter dismissed as a

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SOP expressly refers to and incorporates CCSs, although admittedly as commissioned Sheriff's Department members, which Hotle was not at the time in question. (County Ex. H., SOP 246-16 M; see also Barela testimony).

[4] Page 6 of 9 of Un. Ex. 9 is missing so it is unclear if Hotle had additional time with the City in a similar employment capacity.

CSS effective July 29, 2013 for failure to qualify on her Department issued .40 caliber Glock 22 semi-automatic pistol ("Glock 22"). Thus, she was 45 days short of two years of employment when she was terminated, not 15 days as suggested by the Union. Hotle was a well regarded, "solid" CSS, who was valued in this position because of her people skills and ability to de-escalate emotional or confrontational situations. (P.J. Montoya testimony.)

Undisputedly, qualification on firearms is very important. It is a State mandated requirement that law enforcement officers say proficient, and it is a specific job requirement for BCSO Deputies and members such as CSSs. Firearms qualification enables officers and members to defend themselves and others, and avoid causing collateral damage to bystanders or their property. Conversely, lack of firearms qualification can open the County to serious civil liability, if something were to go wrong. It would be negligent retention to keep on an employee who could not qualify on his or her firearm. (Houston testimony.) The County requires officers or members to achieve 80% on the qualification test to pass, and requires quarterly successful qualification. (Plum testimony, and Co. Ex. H, SOP 246-16.) In contrast, the NM Law Enforcement act twice annual successful qualification. (Sevier testimony.)[6]

The procedures for qualification specified in Article 27 of the CBA are essentially identical to those specified in SOP 246-16, except (relevant to the instant case) Article 27 mandates that an employee failing to qualify after intensive remedial training shall be placed on unpaid suspension for 10 days. During this time, the employee may seek training and practice opportunities when, where, as often, and for as long as he or she feels is appropriate. (P.J. Montoya testimony; see also Un. Exs. 20 and 21.) In contrast, the SOP only provides that after intensive remedial training, failing employees "are encouraged to seek additional instruction from departmental and non-departmental members as they see fit or as coordinated through their immediate supervisor." See 246-16 M.3.a.

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[5] Hotle and others repeatedly testified and represented that Hotle worked for APD and the undersigned infers that was this position, although not expressly stated in Un. Ex. 9.

[6] Union Advocate Rob Trombley suggested in questioning that the state may have a 70% qualification rate, but the he did not cite any statutory or regulatory authority for that number and the undersigned cannot find sworn witness testimony affirming that, in her review of the record.

The Glock 22 only comes in one size, with the exceptions discussed shortly. When the Department first switched to the Glock 22 in or about the 90s, it had a policy of allowing individuals with smaller hands to use a 9 mm pistol, a Glock Model 19. (Barela testimony.)

The Department currently authorizes four types of duty weapons:

1. The Glock Model 22 semi-automatic pistol, which is the Department issued handgun and must be carried by all personnel for the first two years of employment with the Department. No exceptions are made for employees transferring from other Departments or agencies. (County Ex. H, SOP 246-1 and 246-3.)
2. A personally owned duty handgun, which must meet certain technical specifications, and whose use must be requested and approved in writing. The personally owned duty handgun may be used in lieu of or in addition to the Department handgun. Once approved, officers/members must qualify on the personally owned duty gun quarterly; they must also continue to qualify quarterly on the Department issued handgun if it is not turned back in to the Department. (Id., 246-1, 246-5, and 246-6.)
3. Alternate handgun, which is any handgun used in on-duty undercover operations; its use is requested and approved in the same manner as personally owned duty hand guns. (Id., 246-1 and 246-4.)
4. Back-up handgun, which is an additional personally owned guns carried in a concealed location, to use in any unforeseen circumstance. A backup gun must be of quality manufacture and chambered for piston ammunition. Prior to carrying the backup gun, the officer or member must take or have had back up training, and thereafter he or she must qualify on the backup gun twice a year. (Id., 246-1 and 246-7.)

Both males and females with smaller hands have had difficulty using the Glock 22, while both males and females have been able to qualify on the Glock 22 without any trouble. (Plum, Coss and Allen testimony.) Employees seeking permission to use a personally owned, auxiliary/back-up,[7] or alternate weapon have done so for guns of greater, equal and less caliber than the Department issued Glock 22. (Jt. Exs. 1-8.)[8]

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[7] The relation of "auxiliary" to "back-up" was discussed at length by Negotiating Team Member Barela. He understood auxiliary to mean alternate rather than back up, and the undersigned will address that at greater length below. For now, however, she uses the two terms "auxiliary" and "backup" as synonyms based on plain, dictionary meaning and their common interchangeable usage by BCSO officers and members requesting to use a back-up weapon. (Jt. Exs. 1-2, 5-6; see also Webster's and Note 2; compare Jt. Exs. 3-4, 7-8.) In light of auxiliary's plain meaning and the Jt. Exhibits, Barela's understanding of auxiliary was not reasonable and he has offered insufficient evidence to establish that the County negotiators understood auxiliary as he did. Since Barela drafted these provisions (Barela testimony), they are construed against the Union under ordinary canons of construction, in te absence of independent corroboration of his understanding of the County negotiator's intent and understanding, such as bargaining notes.

[8] Sheriff Houston testified under oath that officers "typically" seek authorization to use a heavier caliber alternate weapon. This is not borne out at all by documentary evidence so disregarded.

While with the APD, Hotle had used a 9mm which she qualified on successfully. All APD officers were assigned either a Glock 22 or a 9mm based on the size of their hand. (Hotle testimony.) Although she "was not the best shot," Hotle qualified on the 9mm without the problems she had trying to qualify on the Glock 22, which did not fit. (Un. Ex. 20.) Hotle has qualified on the Glock 22 six or seven times since becoming a CSS, but has always had difficulties qualifying on it. (Hotle testimony; see also Un. Exs. 20 and 21.) The 9mm meets the SOP 246 specifications of an approved personally owned weapon that may be used in addition to or in lieu of the Department issued Glock 22. (Plum and Allen testimony.) Hotle had previously asked Range Masters and her Sergeants if and when she could switch to her 9mm, both when she was first hired on as a CSS and during this most recent, failed qualification attempt. (Hotle testimony; see also Un. Exs. 20 and 21.)[9]

T least three (3) CSSs have previously been allowed to use their personally owned weapon in lieu of the Department issued weapon, prior to having been with the BCSO for two years. (P.J. Montoya testimony; see also Un. Exs. 21 and 22.) This occurred prior to the existing SOP. (Un. Ex. 21). None have been allowed to do so in the three years in which Sheriff Houston has held the office, or since the CBA was entered into. (Houston testimony.) Additionally, once the new SOP was promulgated the three CSSs—P.J. Montoya, John McKenna and Laurie Gruebi (spelled phonetically from CD)—were required to submit a new letter requesting to use their personally owned weapon, and to attend a four (4) hour transition class. (Montoya testimony, and Un. Ex. 21.)[10]

Weapons training is also undisputedly important. The fundamentals of marksmanship training are stance; grip; sight picture; sight alignment; trigger control or press; breathing

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[9] Range Master Plum testified he did not remember Hotle asking this; Director of Training Sevier testified he was "not aware" of it; and Captain Katz indicated at the Step 2 hearing that Hotle's request had "never made it up to him." (Testimony and Un. Ex. 21.) Plum's testimony was frequently glib and on this point insufficiently unequivocal to rebut Hotle's testimony. Sevier's testimony and Katz' assertions do nothing to rebut Hotle's testimony that she utilized the chain of command, particularly in light of Hotle's consistent testimony and representations at the Pre-Det, the Step 2 and at arbitration. (Un. Ex. 20 and 21.)

[10] The requirement to attend a transition course suggests the personally owned guns at issue could be back-up guns rather than primary-use personally owned guns. In the case of John McKenna at least, though, it may have been a primary-use personally owned gun if the request was the same as Jt. Ex. 4. (Co. Ex. H, SOP 246-7 and Jt. Ex. 4.)

control; and follow through for additional shots. (Plum testimony.) Fit is a particularly, if not the most, important part of successful qualification. (Coss and Allen testimony.)

First, the backstrap of the handgun should fit high into the meaty part between your thumb and index finger. This helps to weather the recoil and also prevents the grip from shifting as you bring the weapon out of the holster. Second, fit addresses the actual and relative placement of the trigger finger. The trigger finger should fit on the trigger at the first crease or fully on the pad of the finger. Otherwise, the gun will be pulled to the left no matter how carefully or quietly the breathing or trigger squeezing. Additionally, once the weapon is removed from the holster and the grip is finalized, the index finger of the supporting hand should be approximately the same length along the barrel as the trigger finger when it is not in the trigger. Third and lastly, the meat of the two thumb/forefinger pairs must touch together, so you get 360 degrees of skin contact of the hands around the weapon, to help as much as possible in managing/controlling the recoil. (Allen testimony.) Much of the problems seen in inconsistent shot patterns can be traced to poor fit; if so, they likely will not be quickly corrected—if at all—absent correcting the fit. (Id.; see also Coss testimony.)[11]

Hotle has never been fitted by a County Range Master. (Hotle testimony.) In training, the County Range Master focuses on grip, but more as it relates to "defeating the retention device" in the holster. (Plum testimony.) Additionally, the County does not generally train new employees coming over from another agency on use of the weapon they are now being issued. (Id.)

The Gen 4 Glock 22 now in use utilizes alternate handgrips to modify fit. The grip without any grip attachment is considered "small" and the attachments increase to size to medium and large. (Id.) Hotle was issued a Gen 4 Glock but she does not know, and no Ranger personnel or supervisor ever informed her, whether or not her gun had a grip extension. (Hotle testimony.) As best Hotle can recollect, the size of the model gun presented at the hearing—a Gen 3 (Plum testimony)—felt the same as her issued Gen 4. (Id.) The model gun demonstrated at arbittation did not properly fit Hotle's hand. (Allen testimony.)

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[11] The Arbitrator is not persuaded by and disregards Deputy Plum's confident testimony that he could come up with some trick or technique to fix any grip/size issue, absent "freakishly small hands" that he and fellow Range workers "joked" about. In contrast, Allen notes there can be some fixes, but still concludes "the gun has to fit the hand or the hand has to fit the gun." (Trans. 247: 1-2.)

Hotle's shot patterns evidence inconsistencies, which in turn indicate "heeling" or moving your hand up on the grip to better reach the trigger. This can occur when there is a poor grip fit. Similarly, Hotle's head shots (a required part of qualification and recognizable pattern on the target), ran low which indicates trigger control issues. This can also be a grip issue. (Un. Ex. 6 and Coss testimony; compare Plum testimony regarding improper "milking" of the grip.)

Here, according to the authenticated documentary evidence and sworn witness testimony, the Department followed all Article 27 and SOP provisions except that Hotle was not put on unpaid suspension after failing to qualify after intensive remedial training.[12] Instead her supervisor, Sergeant Javier Madrid, told her to report to work, after which Madrid went on vacation. (Hotle testimony.) The Sheriff reasoned that it would be less stressful for Hotle to be kept on duty, and be allowed to go to the range to practice after work. (Houston testimony; see also Un. Ex. 20.)[13]

Hotle's being told to report to work, rather than being put on unpaid suspension as negotiated in Article 27, had several consequences. Being on paid duty, Hotle was directed to appear for work at her regular time. Then she was released two hours early to go home, change clothes, and then go to the range. (Hotle testimony; see also Un. Exs. 20 and 21.)

Hotle was never denied a request to go to the range, and she went to the range 8 out of the 10 days that she had to engage in training before her final qualification attempt. However, she was not award she could request to go to the range in the middle of her shift, since she had been instructed to go at the end of her shift. (Hotle testimony.) Additionally, her training time

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[12] At the June 25, 2013 Pre-Det hearing, the Union Advocate represented that the Article 27 and SOP procedures were violated in a number of ways that could have seriously undermined the County's case for just cause. However, Hotle's testimony and the various Exhibits do not otherwise support those representations so they are disregarded here. (Allegations including complete failure to provide either initial or intensive remedial training; providing only target practice rather than actual instruction; requiring Hotle to take qualifying rounds multiple times and out of sequence and/or when fatigued. (Un. Ex. 20.))

[13] Sheriff Houston testified under oath that at some point during Hotle's attempt to qualify, he was approached by the President of a different union, the Bernalillo County Deputy Sheriffs Association, who suggested the Sheriff keep Hotle on paid status and have her go to the range after work. (Id.) This was not reflected in either the Pre-Det or Step 2 hearings, and Houston's testimony was not always reliable. (See Note 8; see also Un. Exs. 20 and 21.) In any event, this union is not the exclusive representative of CSS, and consultation with this union in regards to Ms. Hotle's situation would have violated the CBA. (County Ex. A, Article 2.)

was limited to 1-2 hours a day, and once the range was unavailable due to weather and another time she had a conflict. (Plum, Sevier and Hotle testimony.) Frequently when she was there Hotle felt the Range Master was distracted by other duties. (Hotle testimony; see also Un. Ex. 20.) This is in sharp contrast to Instructor training standards and manuals, which advocate that the person being trained should be closely observed during the course of training, with a low teacher-student ratio. (Coss testimony.)[14]

DISCUSSION AND CONCLUSIONS

I. Relevant Legal Standards

To prevail in a disciplinary case, the employer must prove by a preponderance of the evidence that the employee committed the offenses described in the notice of discipline, and that termination is supported by the just cause standard. Determination of just cause, in turn, presents two basic questions: "whether discipline was warranted, and if so, whether the penalty assessed was appropriate." U.S. Dept. of INS and AFGE Local 1917, 42 FLRA 650, 658 (1991). The first component of that analysis ordinarily requires the agency to prove all the elements of the substantive office with which the employee is charged. See King v. Nazelrod, 43 F.3d 663, 666 (Fed. Cir. 1994).

Assuming the elements of the offense is proven, a number of factors have been established that ordinarily govern whether the level of discipline chosen was appropriate.[15] For instance, there are the "7 tests of just cause" as laid out by Arbitrator Carroll Daugherty in Enterprise Wire Co. and Enterprise Independent Union, 46 LA 359 (1966), and recognized as a "fair and equitable" in AFGE Local 3310 and US Dept. of US Army Corps of Engineers ("Waterways"), 65 FLRA 437, 438(2011):

1. The employee was forewarned of the consequences of his or her actions
2. The employer's rules are reasonably related to business efficiency and performance which the employer could reasonably expect from the employee.

[14] The ratio for dynamic shooting is one-to-one; for night time shooting one-to-three; for day time shooting one-to-five. (Id.)

[15] Some of which also address the threshold question of proof of misconduct.

3. An effort was made before discharge to determine whether the employee was guilty as charged.
4. The investigation was conducted fairly and objectively.
5. The employer obtained substantial evidence of the employee's guilt.
6. The rules were applied fairly and without discrimination.
7. The degree of discipline is reasonably related to the seriousness of the employee's offense and the employee's past record.

Similarly, there are the 12 "Douglas factors" identified in Douglas v. Veterans Administration, 5 MSPR 280 (1981), that an agency must consider in determining an appropriate penalty for employee misconduct:

1. The nature and seriousness of the offense and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.
3. The employees past disciplinary record.
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties.
6. The consistency of the penalty with those imposed upon other employees for the same or similar offenses.
7. The consistency of the penalty with any applicable agency table of penalties.
8. The notoriety of the offense or its impact upon the reputation of the agency.
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.
10. The potential for the employee's rehabilitation.
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

All of these factors and tests can be boiled down to the following: there was a reasonable rule in place governing the issue; the employee was aware of the rule; the rule was evenly applied; the alleged violation was fairly investigated; and all mitigating and extenuating circumstances were considered in settling on appropriate discipline.

Management's imposition of discipline is ordinarily entitled to deference. See Arbitrator Thomas Levak, USPS Case No. W1N-5C-D 14005 ("[t]he basic rule is that determination of the proper penalty of misconduct, particularly serious misconduct, is properly a function of management; an arbitrator should hesitate to set aside or reduce a penalty in the absence of a showing …. that the penalty was arbitrary, made in bad faith, or clearly wrong") Accordingly, a penalty determination is usually only reviewed to ensure that all relevant factors were considered, and final discipline is not inappropriate. See Taylor v. Dept. of Justice, 60 MSPR 686, 690-92 (1994).

However, an agency's failure to consider even a single significant mitigating circumstance is sufficient to overturn an agency-imposed penalty. See VanFossen v. U.S. Dept. of Housing and Urban Development, 748 F.2d 1579, 1581 (Fed. Cir. 1984). Additionally, an arbitrator may rescind or mitigate an agency's penalty if she finds salient factors were ignored or improperly used. See, e.g., D.C. Dept. of Public Works v. Colbert, 874 A.2d 353 (D.C. 2005).

II. Application

Here, there is no dispute that Hotle was required to qualify on an authorized duty weapon and that she failed to qualify on the Department issued Glock 22. Although failure to successfully qualify on an authorized duty handgun is not an "offense" per se, it is a clear breach of reasonable employment requirements. Compare Tener and Gosline, Employment and Labor Arbitration at 17-2 to 17-16 (1957) (noting that most arbitrators recognize that terminations for certain conduct, such as excessive absenteeism, "result from failure to fulfill the employment contract" rather than misconduct per se).

Turning to whether termination was appropriate, the question could be answered quite simply based on SOP 246-16, if that were all that needed to be considered. However, the case is not so simple. First the County admits it breached the Article 27, which also clearly governs the

dispute, by failing to put Hotle on 10-day suspension without pay. Second, the Union makes a number of contractual and policy arguments as to why Hotle should have been allowed to use her 9mm in the first instance. Both of these lines of argument, though, pose their issues related to harm, shared—or not—understandings of negotiators, and the reconciliation of potentially—or not—conflicting provisions.

Before turning to the main lines of argument and analysis, the Arbitrator addresses a number of factually and/or legally irrelevant or unpersuasive arguments made by both parties. It is irrelevant that Hotle's request to transfer to the 9mm was not transmitted up the chain of command, as Hotle had no control of its transmittal. It is irrelevant and unpersuasive that Hotle did not request vacation or time off, and was not affirmatively denied any such request. When an employee is instructed to report to work, and told she would be "allowed" to leave two hours early, there is no basis for him or her to belief a contrary request would be granted, or even well-received.

It is also extremely unpersuasive that Captain Katz at Step 2 "was pretty sure" Hotle "was given the option of coming to work with pay or going on ten days without pay," despite his simultaneous admission that he "did not know, without the grievant being there to speak."[16] Finally, the Arbitrator rejects the County's claim that Sheriff Houston had the right to "waive" the 10-day unpaid suspension provision of the Article 27 of the CBA. This is a clear, unambiguous provision, and nothing therein suggests its benefits were intended by both parties to adhere to only one party such that the one party could unilaterally "waive" its requirement. In particular, based on the language differences between SOP 246 and Article 27, and P.J. Montoya's testimony, it is apparent the different language in Article 27 was meant to ensure that a CSS could practice as he or see saw fit, rather than as ineffectively coordinated by the immediate supervisor. Cf. Article 27 and SOP 246-16 M.3.A.

As for the Union's claims, the Arbitrator rejects on several grounds the argument that one or more identified CSS employees were allowed to switch to an alternate duty handgun prior to the end of two years employment with the County. First, the practice was limited in scope and preceded the current Sheriff and SOP. Second, it is not even clear that the testimony is accurate

[16] This conclusion, like the Sheriff's and Katz's vehement and testy insistence that Hotle did not request time off and was paid for her time, also suggests a marked lack of open-mindedness in the Pre-Det and grievance processes.

in so far as it appears some or all of those employees may have used their personally owned weapons as back-ups rather than as their primary duty weapon. See Note 9.

The Arbitrator also rejects the claim that the County's "one-gun" policy is a bad policy and potentially discriminatory to females. (Barela and Coss testimony.) The policy is what it is, and the Arbitrator's role is not to pass judgment on it unless "unreasonable." Here only opinion testimony and references to prior Hearing Examiner and Department determinations in an unrelated case support the argument that the policy is unreasonable. See Hansen v. Webster, Civ. A. No. 84-3026 (Slip op., USDC DC, Jun. 30, 1986), 41 Fair Empl Prac. Cas. (BNA) 214, 40 Empl. Prc. Dec. (CCH) P36,368.[17] Weighed against this, is the fact that a one-gun policy facilitates training and County operations. The undersigned cannot conclude definitively on the basis of this record that the policy is unreasonable. Rather, it appears to represent a reasonable management determination as to appropriate means and methods to safely and efficiently meet its operational objectives.

Turning to the main issues, the Arbitrator first addresses the stipulated failure of the County to provide Hotle with a 10-day unpaid suspension. The Union and Hotle argue that she would have spent more time on the range, and maybe sought outside help, if she was not required to report for duty during that time. The County witnesses assert that one should not train for more than one to two hours at a time, or risk fatigue and diminishing returns. (Plum and Sevier testimony.) The Arbitrator is not convinced by the County's witnesses. In similar milieus such as the military, it is more common to spend a day or more on the range than simply an hour or two. In any event, one-two hour seems particularly paltry.

On this issue the Service fails to meet its burden of proof. Just cause cannot exist when adverse employment action is taken in violation of clear, unambiguous contract provisions. For this reason alone, the Union and Ms. Hotle are entitled to some remedy.

Next, the Arbitrator addresses the far more nuanced issue of whether Hotle should have been allowed to use her 9mm in the first instance. As noted above, this often sounded more like a normative or moral argument during the Pre-Det hearing and Step 2 grievance meeting, and the

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[17] The Union witnesses and Advocate assert the Hansen case held the Glock 22 or similar weapon had a prohibited discriminatory impact. In fact, the case only recited the prior determination of a Hearing Examiner and Agency, without further analysis or explanation. The Court itself explicitly declined to address the "training" claim as moot.

Arbitrator rejects any normative or moral obligations that do not exist in the language of the Contract, written policy, or law. However, by the time of arbitration, the Union had marshaled its theory and evidence somewhat better. See Note 3.

As best as this Arbitrator can piece together Barela's testimony, along with statements made by Union advocates at the Pre-Det hearing and the Step 2 meeting, it appears the union's argument is two-fold. First, SOP 246-16 conflicts with and is superseded by Article 27 of the CBA, in requiring written request and approval to use a personally owned duty weapon in lieu of the Department issued Glock 22. Moreover, although Article 33 generally states that "[i]t is understood that CSSs "will adhere to the [BCSO's] Standard Operating Procedures," that cannot apply in the event of a conflict in provisions. In so arguing, the Union rejects Article 31.3's relevance. While it speaks to authorization for the substitution of privately owned articles in lieu of issued articles, the Union argues that is limited to personal effects such as uniforms or equipment, since weapons are treated in Article 31.6. (See Transcript.)

There are, again, several problems with these arguments. Addressing low hanging fruit first, the Arbitrator notes that uniforms and equipment are also addressed in a separate Articles—Articles 31.4 and 31.5—so this argument does not necessarily help the Union much. More significantly, though, any conflict is not readily apparent on the face of the provisions. Article 31 speaks of "auxiliary" weapons, not personally owned handguns used in lieu of the Department issued Glock 22.

While CSS Barela appeared quite sincere in testifying the County negotiators understood his definition of "auxiliary" to mean "alternative" and not "back-up," his testimony did not address the pre-established and contrary definitions or usages of these terms. The plain dictionary meaning of "auxiliary" is "offering help." Related terms includes back up, additional and complementary, and its antonym include chief, main and principal. See Merriam Webster's Online Dictionary. This is much more like the SOP definition of a "back-up weapon" (an additional weapon of quality manufacture, concealed for use in unforeseen circumstances), than the SOP definition of either "alternate" weapons or "personally owned duty handgun[s]" –respectively any handgun used in undercover officers, and weapons meeting certain technical specifications, whose use in addition to or in lieu of the Department issued Glock 22 is authorize in a certain manner. (Co. Ex. H, SOP 246-1, 246-4 - 246-7.)

Moreover, the plain language meaning of these terms comports with common usage within the Department, including among CSSs. According to record evidence, BCSO officers and members used

the terms "auxiliary" and "back up" interchangeably, calling their requested backup weapon as either "auxiliary/backup weapon" or "auxiliary weapon." (Jt. Exs. 1-2, 5-6.) In contrast, when BCSO offices or members have sought use of a personally owned weapon as a "primary" duty weapon, they have not referred to it as an auxiliary weapon, as testified by Barela. (Jt. Exs. 3-4, 7-8.)

The undersigned finds CSS Barela credible as to his own understanding and intent. However, there is insufficient basis to conclude the County negotiators therefore had the same understanding. Instead, there are good grounds to justify a contrary understanding.

The Union's second argument as to whether Hotle should have been allowed to use her 9mm in the first instance, appears to go as follows: Articles 27 and 31.6 were drafted in light of Sheriff Houston having failed or refused to renew the commission of CSSs. As such, these articles replace the therefore no longer applicable SOP 246. The undersigned sees some merit in this argument but also notes that CSSs are expressly incorporated into 246 while commissioned officers, and their commission was thereafter renewed. Again, this argument supports Barela's understanding of the Contract but does not necessarily compel the conclusion that the County negotiators understood it in the same way.

Accordingly, based on the foregoing, the undersigned concludes that the County has proven by a preponderance of the evidence that Jocelyn Hotle did not, at the time period discussed herein, have a right to use a 9mm in lieu of the Department issued Glock 22. In particular, she had not yet been employed with the County for two years. Additionally, assuming a variance was warranted, she did not follow the proper written procedure to request and obtain approval to use the 9mm. Nor has the Union rebutted the County's case for just cause. See Note 11, supra.

III. Remedy

Nonetheless, the Union and Hotle are entitled to a remedy based on the stipulated violation of Article 27. Accordingly, the Service is hereby ordered to reinstate the Grievant with backpay, back benefits, and back seniority and employment time credit for the period from July 29, 2013 to the date she is formally reinstated. Hotle shall then seek to requalify pursuant to the terms of Article 27 and the SOP.

Prior to commencing the Firearms Qualifications process, the Grievant—now effectively having effectively over two years of employment with as a Court Security Specialist—shall be permitted the opportunity to request authorization to use her personally owned 9mm firearm.

Although the Sheriff retains the option to approve or deny the request pursuant to SOP 246-16 G, he or she shall only deny such a request if consistent with prior decision to approve or deny such requests, and furthermore shall explicitly state in writing the reasons for any denial.

Finally, Hotle will be allowed up to forty-five (45) calendar days from the date of actual reinstatement to meet the required qualification. Compare CBA Article 27.7.

AWARD

For the reasons stated above, the grievance is granted in part and denied in part with a remedy as provided above. For purposes of Article 18.15.8 the County is designated as the losing party in this matter, The undersigned shall retain jurisdiction for enforcement purposes.