

**IN THE MATTER OF ARBITRATION**

**OPINION & AWARD**

**-between-**

**Grievance Arbitration**

**THE MINNESOTA CONSERVATION  
OFFICERS ASSOCIATION**

**Re: Employee Discipline**

**-and-**

**THE STATE of MINNESOTA  
DEPT. of NATURAL RESOURCES**

**Before: Jay C. Fogelberg  
Neutral Arbitrator**

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**Representation-**

For the Employer: Laura J. Davis, Principal Labor Rep.

For the Association: Christopher K. Wachtler

**Statement of Jurisdiction-**

The Collective Bargaining Agreement duly executed by the parties, provides for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial two steps of the grievance procedure. A formal complaint was submitted by the Association on behalf of the Grievant in December of 2012, and thereafter appealed to binding arbitration when the parties were unable to resolve this matter to their mutual satisfaction. The under-signed was then mutually selected as

the Neutral Arbitrator by the parties and a hearing convened on July 16, 2013 in St. Paul, and continued on July 25<sup>th</sup>. Following receipt of position statements, testimony and supportive documentation, each side indicated they would submit written summary arguments. The briefs were received on August 19, 2013, at which time the hearing was deemed officially closed. At the commencement of the proceedings, the parties stipulated that this matter was properly before the Arbitrator for resolution based upon its merits, and that the following represents a fair description of the issue.

**The Issue-**

Did the Employer have just cause to demote the Grievant Donald Murray? If not, what is the appropriate remedy?

**Preliminary Statement of the Facts-**

The record developed during the course of the proceedings indicates that Grievant, Don Murray, had been employed by the Minnesota Department of Natural Resources (hereafter "DNR," "Employer," or "Department") since 1997. When he first joined the Department he was classified as a Conservation Officer, but thereafter became a pilot, holding one of four such regional positions within the Employer's Division of Enforcement's Aviation Section. He reported to the Section's Chief Pilot Al

Buchert. He is a member of the bargaining unit represented by the Minnesota Conservation Officers' Association ("Association," "Union," or "M.C.O.A.") who, together with the Employer, has negotiated and executed a collective bargaining agreement covering terms and conditions of employment (Joint Ex. 1).

The DNR's Fish and Wildlife Division conducts long-term studies of various fish and mammals in order to better manage the state's land and other natural resources. These studies gather data and analyze animal's behavior, survival rates, den locations, mating, diet and other behavior. The Department captures a variety of animals indigenous to the area such as moose, Wolf, sturgeon, bear and martens, by first tranquilizing them and then placing a transmitting radio collar on the animal to track their movement in connection with their various research projects. Officer Murray's principal duties as a pilot relating to these studies were to perform aerial surveillance and telemetry missions in his assigned area in the northeast part of the state. Weather permitting, the Grievant flew a minimum of two telemetry assignments each week.

Dr. John Erb, a Research Scientist for the department heads up one of the Department's projects focusing on the American Marten. The study has concentrated on an approximate ninety square mile area of northeastern

Minnesota, for the past seven years. Part of that project involved aerial telemetry of the subject performed by the Grievant. Nearly sixty some martens have been captured and "collared" in order to assess the animal's movement in the area.

On January 6, 2012, a researcher from the Department removed a collar from a deceased marten and redeployed it on another live one located approximately 5½ miles to the northeast of the area where the first one had routinely been identified. However, after flying telemetry missions on January 10<sup>th</sup> and again on the 19<sup>th</sup>, Murray reported locating the collar's signal in the area of the original marten before he had died. However, on three other occasions, beginning on January 12<sup>th</sup> and running through March 8, 2012, two other DNR employees reported locating the collar's signal within a mile of the site where the second marten had been captured, collared and released. Only the Grievant had identified the radio signal in the areas formerly inhabited by the originally marked marten.

The discrepancy between Officer Murray's findings and those of the other two Department employees caused Dr. Erb to doubt the accuracy of the Grievant's report. Consequently, he contacted Murray's supervisor, Captain Allen Buchert concerning the matter. Buchert, in turn forwarded the memorandum from Erb to his superior, Major Roger Tietz on March 14,

2012, who thereafter determined that an investigation into the irregularity was warranted. The matter was then turned over to a Senior Investigator for the DNR, Marna Johnson, who interviewed the Grievant and other telemetry pilots, as well as his supervisor Alan Buchert and Wildlife biologist Barry Sampson. Eventually, she concluded that there was no other logical explanation for the conflicting signals reported other than falsification of the data by Officer Murray.

On November 28, 2012, the Director of the Enforcement Division for the Department, Jim Konrad, sent a memorandum to the Grievant informing him that he was being demoted from NR Specialist 4 – Pilot, to NR Specialist 2 – Conservation Officer (DNR Ex. 2). In the memo, the Director cited a violation of Division Directive A-4-99 (“Conduct Unbecoming a Conservation Officer”) and the published Workplace Behaviors of the Department, *supra*, as reasons for the action taken. A formal grievance was filed the following month by the Union on behalf of Murray, challenging the demotion as being unjust. Eventually the matter was appealed to binding arbitration for resolution.

## **Relevant Contractual & Policy Provisions-**

From the Master Agreement:

### Article 16 Discipline & Discharge

Section 1. Discipline. Disciplinary action by the Appointing Authority shall be imposed for just cause only. Except in cases of discharge, the intent of discipline is to be corrective in nature. Disciplinary actions may include any of the following, but not necessarily in this order.

1. Oral Reprimand
2. Written Reprimand
3. Suspension....
4. Demotion
5. Discharge

From the Employer's Published Policies:

DNR Workplace Behaviors

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Explanations and Guidelines

"We are open and honest" – We do not hold back information which others need to perform their work. When we need to critique, we do so honestly and in a positive and constructive manner, designed to help rather than impair. We do not withhold relevant information. We do not deceive the media or any member of the public. We are scrupulously accurate in reporting discussions and agreements and do not modify or distort a situation for any reasons whatsoever.

\* \* \*

"Acknowledge mistakes" – We honestly accept responsibility for mistakes. We do not seek to hide the error or our responsibility

for the error, especially when revealing the error helps to correct it. In accepting responsibility, we seek opportunities to correct the error, wherever possible.

## Conduct Unbecoming a Conservation Officer

### 1. Purpose

The purpose of this directive is to define conduct which is unbecoming a Conservation Officer and therefore prohibited. State law requires all Minnesota law enforcement agencies to enact policies delineating unacceptable conduct by law enforcement officers. This Direct is based on the model policy developed by the Peace Officer Standards and Training Board (POST) and is intended to fulfill that requirement.

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### 6. Principle Four

Conservation Officers shall not, whether on or off duty, exhibit any conduct which discredits themselves, the division, or the Department or otherwise impairs their ability or that of other officers, the Division, or the Department to provide law enforcement services to the community.

## **Positions of the Parties-**

The **EMPLOYER** takes the position in this matter that the demotion of Officer Murray was justified and reasonable under the circumstances. In support of their claim, the DNR asserts that although Officer Murray has been an otherwise good pilot for the Department, he nevertheless submitted data to his superiors in January of last year, acquired while performing two

separate aerial telemetry assignments, which he knew to be false. The Employer charges that after the collar from the first marten was redeployed to the second one located some 5½ miles away, the Grievant reported its location at the original site after the first animal had died. When he first submitted the incorrect information to the Department, other wildlife personnel were dispatched to search for the recently collared marten. They located its signal near the place where it had been trapped, collared, and released. This was not anywhere near where Officer Murray reported its location on two separate occasions. According to management, the distance the second marten would have had to travel in the relatively short time between the two reports submitted by the Grievant and what others found via both air and ground telemetry, was not consistent with anything they had observed previously in their studies of the animal. Under the circumstances, no other plausible explanation was put forward other than to conclude that the reported information was deliberately misrepresented by the Grievant. His actions violate Agency policy and published standards of behavior which Officer Murray had been trained on and had been made well aware of its importance. Moreover, it adversely impacts the credibility of the Department's study as well as the Grievant's own credibility as a pilot. Accordingly, no other alternative was available other than to remove



Murray from the flight program and return him to the NR Specialist 2 position. Accordingly, his grievance must be denied in its entirety.

Conversely the **ASSOCIATION** takes the position that the demotion of Officer Murray was not justified under the circumstances. In support, the M.C.O.A. contends that the Grievant has been an excellent employee with an impeccable work record since joining the Department. He has flown numerous aerial telemetry assignments during his tenure with the DNR and has never before been questioned regarding the accuracy of the data submitted. The Union maintains that there are a number of plausible reasons why the reading taken by Lt. Murray on the two days in question generated the report he submitted to management. The frequency on the collar was set to 7606 which has been known to throw off interference that sounds very similar to the beeping from a marten's collar. Although the Grievant knew that the first marten had perished and its collar transferred to another one, no one informed him that the new location of the second marten was five miles away. Thus, according to the Association, Murray believed he was still receiving a signal from what he thought was the same collar on a different marten but in the same area as the original one. While the Grievant and the Union made several requests to the Department to have someone from management ride along on a flight with him to hear what he has heard and

thereafter included in his report, they consistently refused to do so. Rather, the M.C.O.A. charges that the Employer has acted hastily in their investigation while making a rush to judgment. They maintain that Lt. Murray did not falsify any information as alleged and that consequently no discipline whatsoever is warranted. Further, the Union asserts that the Grievant has suffered a partial loss of his hearing which has been well documented. He began making his supervisors aware of this condition in mid-November of 2011, and addressed it with the Employer's investigator, Marna Johnson in July during his *Garrity* hearing. Yet it was never truly considered by the Administration as a possible explanation for the discrepancy. Accordingly, for these reasons, they urge that the demotion be rescinded; that the Grievant be returned to his former assignment as a pilot in the Department, and; that he be made whole.

**Analysis of the Evidence-**

As I have previously observed in numerous other decisions involving the discipline of an employee, the near universal rule of arbitral jurisprudence holds that the employer must carry the initial burden of proof whenever the issue is one of discipline. While the quantum of evidence necessary to satisfy this assigned obligation may range from the less stringent

preponderance test, to the considerably higher criminal standard of proof beyond a reasonable doubt, the tendency of arbitrators is to use a heightened measurement, but one that falls between the two extremes, when charges of a serious nature resulting in the employee's discipline are involved. In the instant dispute, the Grievant has been accused of egregious misconduct: falsifying his waypoint data in connection with flying marten aerial telemetry. Accordingly, the "clear and convincing" evidentiary yardstick is what is being applied here. Such a measurement, it should be noted, is not as stringent as the criminal standard of beyond a reasonable doubt, but at the same time requires a higher degree of proof than the preponderance test in order to sustain the accusation.

The threshold question to be answered then, can be accurately framed as follows: whether the Administration has demonstrated ample justification for their decision to demote the Grievant to Conservation Officer via clear and convincing evidence.

Following a careful review of the evidence presented along with the arguments advanced by both sides in support of their respective positions, I conclude that the answer is no.

A number of salient facts have been adequately established on the record bearing directly upon the outcome of this matter:

- On January 6, 2012, DNR Biologist Barry Sampson discovered that the first marten who had been wearing the radio collar with the assigned frequency of 167.606 (hereafter “606”) had died. The collar was removed and redeployed to the second (live) martin located approximately 5½ miles from the area where the first one was routinely identified.
- Thereafter, Officer Murray identified the 606 collar on two separate occasions – January 10<sup>th</sup> and 19<sup>th</sup> – as being located very near the area where the first marten had previously been identified.
- On January 12<sup>th</sup> Sampson located marten two merely one-half mile from where he had initially collared it (Department’s Ex. 17).
- During the next six to seven weeks, 606 could not be located – neither by the Grievant who performed three telemetry flights in that time, nor Captain Buchert who also flew the surveys.
- On March 6<sup>th</sup> the supervisor located the second collared marten which was again pinpointed approximately one-half mile from where it had been released.
- The second marten has never been located in the vicinity reported by the Grievant on January 10 and 19.
- Tracking martens by plane is difficult and “stressful” work for a pilot (Employer’s Ex. 29).
- During his tenure, Officer Murray, up until 2012, had routinely received high marks on his performance reviews and his personnel record is void of any disciplinary actions prior to his demotion (Association’s Ex. G).

Braided together, these unrefuted facts demonstrate that Officer Murray was an experienced pilot with an admirable work record who submitted waypoint data indicating that the second collared marten in

question had moved approximately five miles back to the area where the first marten had been pinpointed on two occasions. The first time between January 6<sup>th</sup> and the 10<sup>th</sup>, and again between January 12<sup>th</sup> and the 19<sup>th</sup>. I would agree with the Employer, as summarized by Dr. Erb in his March 14<sup>th</sup> memorandum to Buchert, that such movement of the second marten during the time in question was "...highly unlikely that it could be a biological reality" (DNR Ex. 18). At the same time however, it is relevant to note that marten two was not identified at all during the three telemetry flights conducted by the Grievant in February.<sup>1</sup>

On balance, the weight of the evidence demonstrates to my satisfaction that the Grievant failed to accurately report the second marten's position on two occasions in January of last year. While this creates questions concerning his best efforts while performing aerial telemetry on January 10<sup>th</sup> and again on the 19<sup>th</sup>, it does not rise to the level of deliberate falsification of data, as the DNR contends. Falsifying a record, by most any legal definition, is considered a crime committed by someone with the express intent to deceive or to conceal wrong doing. See: 18 USCA §§ 1506, 2071, 2073. The critical ingredient in establishing such a charge is "intent."

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<sup>1</sup> The Employer asserts that Officer Murray's failure to report a location of the second collared marten in February was an attempt to cover up his conduct, as it was "likely," in their words, that by then he realized that his inaccurate data reported in January might have been discovered. This allegation however, has not been credited here as it is little more than speculation on the part of the Department and lacks adequate support.

Project Supervisor Erb testified that he considered four possible scenarios to explain the Grievant's waypoint data, and then determined that the "most likely" one was deliberate falsification. In this instance, however, probability is not enough to establish fraud on the part of an employee who otherwise has owned an exemplary work record.

The Employer posits that circumstantial evidence is enough to support their position, and that only one reasonable inference can be drawn from the facts. Beyond the discrepancy between Officer Murray's January reports and those of other Department employees sent out to verify the location of the second marten, they point out that the Grievant did not enjoy marten telemetry work, finding it to be difficult and tedious (Employer's Ex. 19). They further claim that during the course of the investigation and at the time he was notified of his demotion, the Murray never apologized or took responsibility for his actions. In management's view, the amalgamation of these facts establish "by a preponderance of the evidence" that Officer Murray acted deliberately and with the intent to deceive when he filed his report. Therefore, his prior unblemished record notwithstanding, they maintain he could no longer be trusted to perform the duties of a DNR pilot.

As previously noted, the evidentiary standard of clear and convincing has been applied here, given the very serious nature of the charges leveled against this employee. A preponderance of the evidence does not satisfy the Department's burden. Moreover, it is doubtful whether they have reached the preponderant threshold based upon the facts as presented. A number of arguments raised by the Association have been considered and found to create real doubt as to the Grievant's alleged motives.

The record reveals that in November of 2011, Murray began making his supervisors aware that he was encountering hearing difficulties at times while performing aerial telemetry (Union's Ex. D). He mentioned this in his statement to the Employer's investigator as well in July of 2012 (testimony of Marna Johnson) and arranged for a safety expert (Eric Goslovich) to fly with him. It was subsequently recommended that the Grievant be entered into a formal hearing conservation program requiring annual audiograms (Union's Ex. F). Significantly the same recommendation suggested that Dr. Erb accompany Officer Murray on a telemetry flight in order to gain an insight into his experience (*id.*). That however, never happened. Nor was it ever adequately explained during the course of the hearing why no one from the Administration followed through on what would most certainly be a logical investigatory step prior to reaching the determination that fraud was

committed. This evidence, at minimum, raises a genuine question as to the Grievant's interpretation of the marten's signal.

I have also been influenced by the testimony of the Association's expert witness in radio telemetry Dr. David Mech who has over fifty years experience with the subject. He allowed that aerial telemetry is "more art than a science," and consequently somewhat subjective. In the course of this testimony he identified "bleed overs" where other radio frequencies and animal collars carry various frequencies that could be in the area which can diminish the accuracy of the process by interfering with the particular signal being traced. Significantly, he opined that had he been given the waypoint data from the Grievant's January 2012 telemetry flights he would have delved more deeply into the cause of the problem prior to concluding that it was deliberate falsification.<sup>2</sup>

Other mitigating factors that have been considered, though not assigned as much weight as the foregoing evidence, include those testified to on cross-examination by Dr. Erb. For instance, he acknowledged that the Grievant could have been hearing "phantom" signals which exist in telemetry missions; that he could have tested the Grievant by placing

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<sup>2</sup> Dr. Mech co-authored a study of the American Marten, entitled "*Status, Distribution, and Movements of Martens in Northeastern Minnesota*" that was referenced in the Department's written investigation of Officer Murray's conduct, which included information about a marten (No. 2808) that moved three to four miles in a matter of days and that had swam across a large lake (DNR Ex. 22; p. 5-6).



another collar in the area to establish whether or not he was in fact falsifying data which is sometimes used in marten study protocol; that he was aware of Murray's hearing problem and Goslovich's recommendation that someone fly a mission with him to assess the malady along with any equipment issues, but never did, and; that he could not be absolutely certain based on the investigation's results that the Grievant deliberately falsified the data in question.

I have also been influenced in my decision by former Supervisor Buchert's acknowledgement that, despite his assertions under direct examination that marten telemetry is usually free of false readings, he once located a police scanner in someone's basement that he first believed was a signal being emitted by a (deceased) collared marten. In fact, he was so certain of the animal's location, that he obtained a search warrant in order to gain entrance to the house. Moreover, Captain Buchert's claim under direct examination at the hearing that movement of martens are predictable, must necessarily be contrasted with the unrefuted fact that 606 was not identified in the wild for a period of nearly six weeks between February and March.

Considered as a whole, I find the Employer's actions in connection with the investigation into this matter to be somewhat prejudicial. Why there

were no face-to-face discussions between Erb, Murray and Buchert to address the Employer's concerns, remains unanswered in the record. Similarly, that no one from the DNR ever flew a telemetry flight with Officer Murray to determine whether or not his version of the events were credible, despite his repeated requests and the recommendation of the audiologist, is most puzzling.

Finally, I have taken into consideration the Association's argument regarding desperate treatment. Their exhibit "L" references the experience of another DNR pilot who missed identifying the location of a collared Fisher – an animal similar in size to that of a marten – by approximately six miles, and yet received no discipline as a consequence. Other instances were also cited in their exhibits "D" and "E." The Employer counters that most of the examples referenced in the M.C.O.A. data are distinguishable based on motive. Not one of the instances cited, they argue, involved the deliberate falsification of data. As noted above however, intent has not been adequately established in the immediate dispute.

**Award-**

Based upon the foregoing analysis, I find the Associations grievance should be denied in part and sustained in part. That Officer Murray was careless in the performance of his telemetry duties during the two flights in January, has been adequately demonstrated in my judgment. His misidentification of the 607 marten on those occasions was contrary to the published "DNR Workplace Behaviors" as it fell below the standards of professionalism for someone in his position. At the same time however, the evidence in the record does not begin to establish via the clear and convincing standard applied, deliberate falsification of data as alleged by the Employer. Accordingly, Officer Murray's demotion shall be reduced to a Written Warning under the progressive ("corrective") disciplinary process found in Article 15 of the parties' labor agreement, and he is to be forthwith reinstated to the rank of Lieutenant and returned to his pilot position in Grand Rapids and otherwise made whole for loss of wages incurred (the difference in pay between his former rank as a pilot and the salary he received while occupying the Conservation Officer assignment) dating back to his demotion. His reinstatement however, shall be conditioned upon any retesting required to function as a pilot for the Department. Moreover, in light of the evidence presented, management may specifically require a

hearing test to determine his fitness for duty as a condition precedent to occupying the pilot's assignment, if they deem it necessary. Finally, the DNR's financial obligation shall include any out-of-pocket expenses the Grievant may have incurred in connection with his relocation to Two Harbors that can be adequately verified.

I will retain jurisdiction in this matter for the sole purpose of resolving any issue(s) that may arise in connection with the implementation of the remedy ordered here.

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Respectfully submitted this 18<sup>th</sup> day of September, 2013.

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Jay C. Fogelberg, Neutral Arbitrator