

**SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**

lax



FROM: Human Resources Department

SUBMITTAL DATE:
July 20, 2010

SUBJECT: County's Opposition to the Request for Appeal filed by the Riverside Sheriffs' Association related to the grievance concerning the Senior District Attorney Investigator IIIB classification.

RECOMMENDED MOTION:

- (1) That the Clerk of the Board set a public hearing within 45 days and notify both the Human Resources Department and the Riverside Sheriffs' Association of the date the matter will be heard by the Board.
- (2) That the Board of Supervisors receive and consider the recommendation of the Human Resources Department to uphold the decision by Arbitrator Fredric R. Horowitz, Esq., and deny the grievance.

BACKGROUND: On or about July 6, 2010, RSA filed with the Board of Supervisors an appeal of an advisory arbitration opinion issued by Mr. Fredric R. Horowitz on June 29, 2010. Pursuant to grievance procedure between the parties set out below and contained in the 2008-2011 MOU, the County is required to respond within 10 days to the filed appeal. The County filed its opposition with the Clerk of the Board on July 14, 2010.

Barbara A. Olivier

Barbara A. Olivier
Asst. County Executive Officer/Human Resources Dir.

FINANCIAL DATA	Current F.Y. Total Cost:	\$ N/A	In Current Year Budget:	N/A
	Current F.Y. Net County Cost:	\$ N/A	Budget Adjustment:	N/A
	Annual Net County Cost:	\$ N/A	For Fiscal Year:	2010/2011

SOURCE OF FUNDS:	Positions To Be Deleted Per A-30	<input type="checkbox"/>
	Requires 4/5 Vote	<input type="checkbox"/>

C.E.O. RECOMMENDATION:

APPROVE

BY: *Karen L. Johnson*

Karen L. Johnson

County Executive Office Signature

- Policy
- Policy
- Consent
- Consent

Dept's Recomm.:
Per Exec. Ofc.:

Prev. Agn. Ref.: | **District:** ALL | **Agenda Number:**

3.91

BACKGROUND continued:

The Memorandum of Understanding for the Law Enforcement Unit, specifically Article XI, Section 12, provides the following:

- J. Either the Human Resources Department or RSA may appeal the decision of the arbitrator to the Board of Supervisors within fifteen (15) calendar days of the date of the arbitrator's award. All appeals must include a copy of the award. A copy of the appeal, and all documents submitted to the Board of Supervisors in support thereof, shall be served on the respondent by the appellant at the time the appeal is filed. The respondent shall have ten (10) calendar days from date of the receipt of the appeal in which to file and serve its written opposition, if any. The Board of Supervisors shall hear and decide the appeal within forty-five (45) calendar days of the date of the appeal. The Clerk of the Board of Supervisors shall give reasonable notice to both parties of the date the matter will be heard by the Board. Both parties shall be given a minimum of fifteen minutes to present oral argument in favor of their respective positions; however, no additional testimony will be taken.

The Board of Supervisors may either accept or reject the arbitrator's decision, or accept part of the decision and reject the rest. If the Board of Supervisors rejects all or part of the arbitrator's decision, the Board shall state its reasons for rejection in a written decision. The decision of the Board of Supervisors shall be the final step in these administrative procedures. If RSA is dissatisfied with the Board's decision it may bring an action in Superior Court to enforce the MOU.

In the event that neither party appeals within fifteen (15) calendar days of the date of the arbitrator's award, the Arbitrator's Award shall be final and binding on the parties. In the event that Human Resources appeals but the Board of Supervisors does not rule on the appeal within forty-five (45) calendar days of the appeal, the arbitrator's ruling shall be final and binding. In the event that RSA appeals but the Board of Supervisors does not rule on the appeal within forty-five (45) calendar days, RSA will have exhausted its administrative remedies and may bring an action in Superior Court to enforce the MOU.

For the reasons set forth in Attachment A, the County urges the Board of Supervisors to accept the advisory opinion of the experienced arbitrator and to not substitute its opinion for that of the expert hired by the parties to resolve the issue. A copy of the advisory arbitration opinion issued by Mr. Horowitz is included as Exhibit A of Attachment A and a copy of the appeal filed by the Riverside Sheriffs' Association is included as Attachment B.

Attachment A



COUNTY OF
Riverside
HUMAN RESOURCES
Winner IPMA Award for Excellence

County Administrative Center
4080 Lemon Street, P.O. Box 1569 • Riverside, CA 92502 • (951) 955-3500
44-199 Monroe Street, Suite B • Indio, CA 92201 • (760) 863-8327

BARBARA A. OLIVIER, SPHR
ASST. COUNTY EXECUTIVE OFFICER
HUMAN RESOURCES DIRECTOR

SHAWN ATIN, SPHR
ASST. HUMAN RESOURCES DIRECTOR

July 14, 2010

Clerk of the Board
County of Riverside
4080 Lemon Street
Riverside, CA 92501

RE: County's Opposition to the Riverside Sheriffs' Association Request for Appeal to the Board of Supervisors
Senior District Attorney Investigators IIIB Grievance – Petition # R0809-019

Dear Madame,

On or about July 6, 2010, RSA filed an appeal with your office of an advisory arbitration opinion issued by Mr. Fredric Horowitz on June 29, 2010. Pursuant to the grievance procedure between the parties contained in the 2008-2011 Memorandum of Understanding (MOU), the County is required to respond within ten days to the filed appeal.

For the reasons set out below, the County urges the Board of Supervisors to accept the advisory opinion of the experienced arbitrator and to not substitute its opinion for that of the expert hired by the parties to resolve the issue.

Background

On April 6, 2009, Paul Collins, on behalf of the Riverside Sheriff's Association ("RSA"), and, in particular, all District Attorney Investigators designated as Senior Investigators IIIB, filed Grievance R0809-019 concerning a March 25, 2009 informational memorandum sent by Chief Investigator Vern Horst to Riverside County District Attorney Rod Pacheco. A true and correct copy of the memorandum is attached hereto as Exhibit "A" and incorporated herein by reference.

The March 25, 2009 memorandum outlined Chief Horst's analysis of the Senior Investigator II B and IIIB positions, though it focused primarily on functional supervisory responsibilities for those senior investigators in the IIIB classification. This memorandum did not, however, in and of itself, result in any grievable action itself, since it proposed none be taken. The grievance,

therefore, was an entirely anticipatory, though prescient, strike at what was expected to follow in short order.

RSA somehow obtained a draft version of the memorandum from Chief Horst to all Bureau of Investigation staff implementing the responsibilities outlined in the March 25, 2009 memorandum to District Attorney Pacheco. The actual staff memorandum distributed by Chief Horst on April 10, 2009 is attached hereto as Exhibit "B" and incorporated by reference herein. Its essential thrust mirrors that of the draft, but its language is more precise, to provide explicit direction to anyone holding the Senior Investigator IIIB classification. It is without dispute that following the distribution of that memorandum on April 10, 2009 Senior Investigator IIIB's became, throughout the Bureau of Investigation, functional supervisors in both name and practice.

On May 14, 2009, the grievance proceeded to a Step 1 meeting pursuant to the applicable provisions of the RSA/County MOU. RSA appeared by its counsel, Dennis Hayes, and by its representatives, Paul Collins and Pat McNamara. The County appeared by Lisa Pina, Human Resources Services Manager and District Attorney Office Personnel Assistant District Attorney Kelly Keenan and Assistant Chief Investigator Rich Twiss. The parties agreed that the grievance was limited to the "working out of classification" aspects of the grievance petition for Investigator IIIB's, since the alleged Peace Officer Bill of Rights violation was not grievable under the applicable MOU. On May 29, 2009, the Step 1 decision was issued in writing, denying the grievance.

As was its right, RSA then timely sought arbitration of the Step 1 decision pursuant to the provisions of the applicable MOU. The matter proceeded to one day arbitration on February 23, 2010, before impartial arbitrator Frederic R. Horowitz. The parties could not agree on the issue to be decided, so each submitted their version for the arbitrator's review. The County contended that the sole issue to be decided therein was whether current MOU Article XVII, Section 3 of the arbitration's Exhibit 14, a verbatim recitation of identical language found in three prior MOU's (the 2000 amendment adding the Riverside County District Attorney Investigator Career Plan, which created the Senior Investigator IIIB classification) permits the Chief Investigator or his designee to require Senior Investigator IIIB's to assume functional supervisory responsibilities over subordinates when so designated and, if not, what was the applicable remedy? The union contended that a past practice was created when the incumbent Senior Investigator IIIB's had only been tasked with supervision duties when the supervisor was out of the office, and that the past practiced has now prevented the County from requiring the incumbents to fulfill those duties.

Numerous witnesses were sworn and testified, and documents were admitted into evidence by stipulation save for one exception, a set of irrelevant hearsay documents from the Los Angeles Police Department purporting to define the term "functional supervision". At the conclusion of testimony, the parties agreed to make their closing argument through written brief, to be due within 30 days of completion of the hearing transcription. Closing briefs were submitted on April 14, 2010 and the matter stood submitted.

On June 29, 2010, arbitrator Horowitz issued his Opinion and Award, finding for the County and denying the grievance in its entirety. Pursuant to the MOU, and as is its right, RSA has now appealed the arbitrator's decision to the Riverside County Board of Supervisors.

County's Position

CREATION OF THE CAREER PLAN AND THE IIIB CLASSIFICATION

On the January 25, 2000 Board of Supervisors Submittal, it outlines the unequivocal purpose behind the creation of the new positions and their prospective cost (in excess of \$112,000 annually). On page 4 of the newly created Career Plan, the positions of Senior Investigator IIB and IIIB are explicitly delineated, each in paragraphs both erroneously numbered "5".

Even the most cursory reading of the two paragraphs demonstrates the different intent for each position: while the IIB position notes that a IIB is a highly skilled specialist "who may also be charged with some limited supervisory related tasks", the IIIB position notes that incumbents are highly skilled individuals who also "assume functional supervisory responsibilities over subordinate investigators when so designated by the Chief Investigator or his designee". The IIIB language had absolutely no limitation on the temporal extent or scope of supervisory responsibility, save for performing that function when so designated to do so. Commensurate with that level of responsibility was the accompanying initial 10 salary range pay differential above that of a IIB investigator. On page 6, the Plan noted that both IIB and IIIB investigators can expect "added responsibilities" as required by the Chief Investigator, which may include "functional supervision" as assigned.

Assistant Chief Investigator Tony Pradia testified at the arbitration hearing. He has been with the District Attorney's Office since 1991, serving the last five years as Assistant Chief and had also served 17 1/2 years with the Los Angeles Sheriff's Department prior to joining the County, the last five and one half years of which tenure were served as a Sergeant (RT 81/8-16). He effectively authored the entirety of the Career Plan that was ultimately approved by the County after consulting with peers who had initially sought to create such a plan years earlier. At the time he authored the proposed Career Plan, he was the RSA Chapter Director for the District Attorney Investigators, a role he analogized to a "union steward". The plan created one new position, the IIIB, and rewrote the responsibilities of the IIB, both with pay raises.

As Chapter Director, he was directly involved in all of the "side" negotiations with the County of Riverside that led to the creation of the IIIB position, unlike Darryl Drott, RSA's field representative. The cost of the career plan was explicitly discussed, as was the inclusion of supervisory/functional supervisory responsibilities for these new positions. It was specifically agreed by the parties that these new positions could not have the same essential job functions of the previously established Senior Investigator position, as the pay raises could only be justified by adding these newly added supervisory responsibilities and the County's additional (and proper) concern that you simply cannot pay some employees more than others to do the exact same work. Functional supervision was not only discussed but explicitly bargained for. The Career Plan language that explicitly did not limit the temporal scope or extent of functional

supervisory duties of Investigator IIIB's was not a drafting oversight, but was done intentionally. The Career Plan is still in effect today, and the identical Career Plan language regarding the duties of IIIB's has been adopted, verbatim, in all subsequent MOU's (though each subsequent MOU correctly eliminated the duplicate paragraph 5 numbering for the Senior Investigator IIIB position) for both the description of the position and its discussion of functional supervision in the Basic Provisions portion of Section 3.

Only Darryl Drott's slanted testimony on the intent of the new IIIB position purportedly contradicted what Pradia has testified to. Drott described the position as a "carrot" dangled before "race horses", not one involving supervision at all. Curiously and contradictorily, though, Drott went on to say, in his direct testimony, that the III position was intended as a functional supervisor but, in his own interpretation, only in a limited temporary role, despite the absence of any language supporting that interpretation. On cross examination, Drott readily admitted that while the temporary supervisory role was explicitly delineated in the IIB job designation in the Career Plan, there was no such limitation in the IIIB job designation, except as he now "infers" it.

Drott's testimony did not bear careful scrutiny, as noted by the arbitrator in his decision. Had the limitations suggested by Drott been intended, Pradia would have been assuredly instructed to rewrite the job descriptions entirely differently to reflect those temporally limited supervisory functions for Investigator IIIBs, rather than leaving it as ultimately approved by all concerned, with the broad, unfettered sole discretion for the supervisory usage of IIIB's left up to the Chief Investigator or his designee.

Drott was neither an author of nor a consultant to the drafting of the Career Plan. His testimony as to its intent flew in the face of the exact language used and the realities of the collective bargaining process and was properly rejected by the arbitrator. He wanted the impartial arbitrator to believe the County knowingly bargained away monies exceeding \$100,000 annually without extracting anything in return as part of a separate side negotiation. The suggestion remains, on its face, ludicrous.

**THE COUNTY DID USE IIIB'S AS FUNCTIONAL SUPERVISORS AND VIRTUALLY ALL
INCUMBENTS KNEW THOSE DUTIES WERE PERMITTED TO BE ASSIGNED TO
THEM**

Tony Pradia, Assistant Chief Investigator Richard Twiss and Senior Investigator IIIB David Hussey testified at arbitration that they performed functional supervision as a Senior Investigator III B, ordered others to do so, or observed others in the IIIB classification doing so prior to March of 2009. Pradia both performed those duties and ordered his IIIB to do so. Twiss observed others doing so and Hussey performed those duties himself as a IIIB. The County conceded, however, that not all IIIB's were tasked with these duties. The County contended, however, that the issue is not whether Investigator IIIB's were consistently tasked, but whether they could be so tasked when designated by the Chief Investigator, precisely because the MOU explicitly permitted such a designation.

RSA called six present or former IIIB's to testify. All six indicated they had not been asked to perform supervisory functions prior to March of 2009, indicating their essential job duties never really changed despite their significant pay increase and promotion to the IIIB classification. Of those six, however, five explicitly admitted that they knew they could be assigned those duties because they had read the MOU prior to applying for the IIIB position and the other, Thomas Reid, admitted that while he was sure the MOU specified the prospect of functional supervisory duties, he claimed to be unfamiliar with the MOU itself. Hussey also knew, by reading the MOU, that a successful IIIB candidate could be assigned functional supervisory duties.

The functional supervisory language in the Career Plan found in the governing MOU is unequivocal. Each of the past or present IIIB's knew that what Chief Horst ordered be done by IIIB's in April 2009 could have been ordered done at any time since January 25, 2000 by any Chief Investigator, since he had the delineated authority in the MOU to issue such assignments wholly within his unbridled discretion. Even the District Attorney Policy 500.33, contemplates the supervisorial use, without limitation of time or scope, of Investigator IIIB's to serve as supervisors or team leaders to assist in reducing the span-of control ratio within divisions and units or for special assignments, in addition to their having more limited temporary supervisorial duties (such as acting in lieu of a Supervising Investigator now Commander who is ill, on vacation or otherwise unavailable). In fact, Chief Horst specifically referred to the need to improve the span of control in these harsh economic times by reassigning IIIB's and having them perform functional supervision as a basis for his April 10 memorandum. More importantly, as Tony Pradia so aptly noted, at the time the 2000 labor negotiations concerning the creation of the IIIB class were ongoing, it was specifically discussed that functional supervision could mean the equivalent of running day to day operations of a particular unit as a justification for a significant pay increase. In response to the arbitrator's questions, Mr. Pradia responded that the Chief's discretion on how the IIIB job classification could be utilized was discussed in negotiations, and Mr. Pradia stated, "In addition to that, they would be called upon that they could be a supervisor".

LEGAL ANALYSIS

Chief Horst's impassioned explanation for the issuance of his April 10 memorandum, and his analysis of the authority for the use of Senior Investigator IIIB's as functional supervisors, is both reality based on today's harsh economic times and the mandate to most effectively utilize all existing personnel, and grounded in the foundational creational underpinnings of the Investigator IIIB position. To accept RSA's skewed 20/20 hindsight interpretation of unequivocal language would do a grave and unconscionable injustice to the hardworking Senior IIIB's who willingly accepted their assignment with the explicit knowledge that they could be tasked to perform functional supervision, the Senior Investigator IIB's who received up to 11% less for doing the exact same work that the IIIB's now claim is all they were ever responsible to perform, and the County of Riverside, who expressly bargained for the assumption of functional supervision, with commensurate pay increases, by the Investigator IIIB's as a condition precedent to the position coming into existence.

No one disputes that the RSA MOU, the governing document of the employment relationship, contains no limitation on the scope or length time for performance of functional supervisory duties as to IIIB's, while there are scope restrictions ("limited") as to the IIB's. The Basic Provisions of the Career Plan also call for the assumption of functional supervision by IIIB's without any limitation of time or scope "when so designated".

Cases rarely permit the use of Maxims of Jurisprudence in their analysis. This case, however, does. The maxims, found at Civil Code Section 3509 et seq., are designed to aid in the application of all relevant law.

The first applicable one is Civil Code Section 3511, which notes the "Where the reason is the same, the rule should be the same". Here, the reason for denying the grievance remains grounded in the concept that, to accept the grievance, the arbitrator must accept the contention that then, as now, it mattered not to the County to give up to an 11% pay raise to certain employees (at an annual cost that would exceed \$112,000) to do no more than what certain others already did for 11% less. The County bargained then, as it would now, that for entitlement to a pay raise, a commensurate addition of duties would necessarily be required. In this case, those duties were functional supervision. Since the bargained for reason for the IIIB position has never changed, the bargained for ruling must support the County's position herein.

The next applicable maxim is found in Civil Code Section 3512, providing "One must not change his purpose to the injury of another". Here, a fraction of the Investigator IIIB's want to do just that-subvert the premise upon which their monetary largesse was founded. The position expressly accepted the prospect of functional supervision, and all candidates knew of that risk when they applied for the promotion. Having accepted the risk, they should not now be allowed to categorically disavow it when it suits their purpose, to the detriment of their peers and the taxpayers of Riverside County. Civil Code Sections 3515 and 3521 can be analyzed similarly, because they note, respectively, that "He who consents to an act is not wronged by it" and "He who takes the benefit must bear the burden". Since all relevant evidence suggests that each IIIB candidate knew they could be tasked with functional supervision "when so designated", they are now irrevocably stuck with their decision to go forward with their promotion and pay increase in the face of that knowledge.

The last two applicable maxims relate to interpretation. Civil Code Section 3541 notes that "An interpretation which gives effect is preferred to one which makes void". Civil Code Section 3542 notes that "Interpretation must be reasonable." In interpreting the applicable 2000 MOU amendment which created the IIIB position, the successor MOU provisions, as well as the DA Policy Manual provision concerning IIIBs, the only interpretation that is both reasonable and avoids effectively eviscerating the intent behind the creation of the position is the County's: that the assumption of functional supervision duties by IIIB's when designated to do so by the Chief Investigator was expressly bargained for and must now be conclusively upheld.

In ruling for the County, arbitrator Horowitz noted:

A review of the career plan negotiated by the parties in 2000 confirms the MOU grants the District Attorney broad authority to assign functional supervisory duties to the Senior DA Investigator IIIB's. In Article XVII, Section 3., the position includes the following description:

This is a highly skilled individual law enforcement investigations and operations who also assumes functional supervisory responsibilities over subordinate investigators when so designated by the Chief Investigator or his designee.

A 'basic provision' contained in that section states the classification:

. . . can expect added responsibilities as may be required by the Chief Investigator. Added responsibilities may include functional supervision, training of other employees, oversight and coordination of special projects, completed staff work, and other work as assigned by the District Attorney and/or Chief Investigator.

From this language, a finding the assignment of functional supervisory responsibilities as described in these provisions is specifically authorized by the plain language of the MOU is manifest.... But the language of the MOU contains no limitation on the frequency those supervisory duties described in the career plan may be assigned. Absent such restriction, it cannot be found the MOU precludes management from making such assignments to Senior DA Investigator IIIB's on a full-time basis"

Horowitz went on to note that "Nevertheless, there is no showing in this proceeding the parties agreed during negotiations to limit management's right to assign the functional supervision outlined in the career plan to a temporary or occasional basis. Nor were any restrictions placed in the career plan prohibiting the agency from exercising this prerogative on a full-time basis. Because the assignment of these duties is expressly sanctioned by the plain language of the MOU, a finding of violation as alleged by RSA is not established. The grievance is accordingly denied."

But the arbitrator did not limit his award based on simple contractual interpretation. He also considered today's stark economic realities: "The evidence reflects budget constraints were the primary concern behind the decision to reallocate functional supervision down the chain-of-command within the strictures of the existing class specifications. The use of 'leads' within a bargaining unit to conduct training, oversight, and special assignments are commonly found in a wide variety of classes and crafts in public and private sector employment. When delegated by an employer, those responsibilities are normally given to the most experienced and/or skilled journey-level members of a bargaining unit. In this case, the career plan drafted by the parties reflects this common industrial practice. Not surprisingly, the more fundamental responsibilities of supervision, such as discipline, performance appraisals, and strategic planning, are not included in the functional supervisory responsibilities identified in the career plan. Rather, those duties are embodied in the class specification for the Supervising DA Investigators and have not been consigned by Chief Horst to the Senior DA Investigator IIIB's herein."

In RSA's appeal, it wrongfully purports to add, as an issue, whether the Horst memorandum changed a "past practice" regarding the use of Investigator IIIB's as functional supervisors. The MOU in question does not define a past practice, nor does that term ever surface in the document itself. Moreover, in the MOU's Article XI, Section 2, "Grievance" is defined as a dispute that, within the province of the County to rectify, involves interpretation or application of the MOU or existing Ordinances, regulations, rules or policies-but NOT past practices.

Accordingly, the County contends that the existence or non-existence of a past practice was beyond the scope of the arbitration, since such an issue is NOT grievable, and thus beyond the consideration of the Board of Supervisors.

Even if the Board of Supervisors ultimately concludes the issue of a past practice was a grievable issue, the evidence on that subject clearly favored the County. First, there was evidence that IIIB's were used, albeit inconsistently, as functional supervisors over the years. Second, it would be unreasonable to conclude that a past practice can be founded on the wholly discretionary authority vested in any incumbent Chief Investigator to assign, or not assign, such functional supervisory duties. That authority was intentionally unfettered and could be exercised at any time, or, just as surely, never exercised. There was no practice, past or otherwise, per se, until Chief Horst took control and exercised his discretion in April of 2009. A grievance should not be allowed to preclude the fundamental exercise of discretion by a Department Head unless there is some evidence of an arbitrary, capricious or unlawful purpose. There can be no such evidence in this case, because Chief Horst's assignment rationale in today's economic climate is impeccable.

Third, but equally important, there is no evidence that current assignments made by Chief Horst to IIIB's exceed the scope of duties permitted to be assigned to them under the Career Plan as embodied in the MOU, or the intent of the bargained for creation of the IIIB position as shown by Assistant Chief Pradia. The IIIB position is one of functional supervision, where veteran investigators oversee virtually peer veteran investigators and subordinate staff, and not a management position, as RSA now wants to argue. The role of a Commander/Supervising Investigator is far different than the IIIB role, since IIIB's do not impose discipline nor evaluate personnel, while Commanders do. RSA's attempt to muddy the waters by equating the positions was easily deflected by Chief Horst's testimony.

Last, though certainly not least, and carefully hidden in a footnote at the bottom of Page 3, is RSA's reference to an off the record discussion between counsel and the arbitrator after testimony in the matter had been completed and settlement prospects were being discussed at the arbitrator's insistence. While any such discussions were privileged and not subject to disclosure under the Evidence Code, RSA gravely misstates what was actually said. All that was said was that there would, in counsel's opinion, be no need for the Investigator IIIB position to remain if RSA's grievance was sustained, since there could be utterly no justification for that position to exist absent the performance of the obviously bargained for tasks of functional supervision, the tasks for which the position was created in the first instance.

CONCLUSION

Equity and common decency seeks to have done that which should be done. All that is equitable and decent here, based on the totality of the evidence, is that RSA's appeal must be denied. Despite RSA's calculated attempt to turn logic on its head, Chief Horst lawfully exercised his discretionary authority and required those investigators who are paid premium compensation to perform the duties that caused their premium pay to be issued in the first instance. That result does justice to the arms length negotiations that created the position in 2000, by giving the

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County the benefit of their bargain, the DA's office the quintessential use of their senior investigative staff in tough economic times, and the employees who willingly accepted the pay raise and promotion the duties they knowingly agreed to assume if requested to do so. Arbitrator Horowitz, an experienced neutral, quickly saw the assignment of these duties is expressly sanctioned by the MOU. So should this Honorable Board. The appeal, must, therefore, be denied.

Attached hereto as Exhibit A for the Board's reference is the Arbitrator's Opinion and Award.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Barbara A. Olivier, SPHR
Assistant County Executive Officer/Human Resources Director

Encl.

cc: Riverside County District Attorneys Office
Riverside Sheriffs' Association c/o Adam Chaikin, Esq.

In the Matter of Arbitration)
)
 between:)
)
 COUNTY OF RIVERSIDE, CALIFORNIA)
)
 and)
)
 RIVERSIDE SHERIFFS' ASSOCIATION, INC.)
)
 (Senior District Attorney Investigator III-B))
)
 _____)

**ARBITRATOR'S
OPINION
AND
AWARD**

Case No. R0809-019

Impartial Arbitrator: Fredric R. Horowitz, Esq.

Appearances:

Union: Adam E. Chaikin, Esq.
Law Offices of Dennis J. Hayes

Department: Bruce E. Disenhouse, Esq.
Kinkle, Rodiger and Spriggs

Hearings Held: February 23, 2010
Riverside, California

Submitted to Arbitrator: April 14, 2010

This arbitration arises under the 2008-2011 Memorandum of Understanding between County of Riverside, California ("Employer") and Riverside Sheriffs' Association, Inc. ("Union") covering the Law Enforcement Bargaining Unit ("MOU") [UX 14]. The parties concur the grievance at issue was processed pursuant to the provisions of Article XI of the MOU and is properly in arbitration.

MATTERS AT ISSUE

The instant grievance presents the following issues to be decided in this proceeding:

1. Whether the Department violated Article XVII, Section 3, of the MOU when assigning full-time supervisory duties to a Senior District Attorney Investigator IIIB?
2. If so, what is the appropriate remedy?

BACKGROUND

The Riverside District Attorney ("DA") maintains a large staff of DA Investigators who are senior peace officers with extensive education, training, and experience. On January 25, 2000, the Board of Supervisors approved the District Attorney Investigator Career Development Plan as negotiated by the County and RSA for inclusion in the 1998-2001 MOU [UX 11]. That plan remains unchanged in Article XVII, Section 3, of the current MOU [UX 14].

The instant dispute concerns the assignment of full-time supervisory duties to Senior DA Investigator IIIB's, the highest classification of rank and file DA Investigator. After the career plan was established, Senior DA Investigator IIIB's were not asked to perform supervisory functions on a regular basis beyond special assignments or filling in for an absent supervisor. Vern Horst became the Chief of Investigators in September 2008. Chief Horst testified when he came to the Department, various Senior DA Investigator IIIB's were performing jobs from a Sergeant to Captain while others were functioning exclusively as investigators.

Motivated mainly by budget constraints, Chief Horst sought to increase the utilization of Senior DA Investigator IIIB's and level their assignments from unit to unit by adding additional supervisory responsibility. On March 25, 2009, Chief Host issued a memo to the District Attorney advising as follows:

Senior District Attorney Investigators II-B and III-B can expect added responsibilities as may be required by the Chief Investigator. Added responsibilities may include functional supervision, training of other employees, oversight and coordination of special projects, completed staff work, and other work assigned by the District Attorney and/or Chief of Investigators [UX 1].

On April 10, 2009, Chief Horst distributed a memo to all staff effectively advising the DA Investigator IIIB's to expect added supervisory responsibilities [CX 1]. According to Chief Horst, one Senior DA Investigator IIIB was assigned to each unit and required to perform the range of supervisory functions described in the career plan on a full-time basis. Chief Horst testified Senior DA Investigator IIIB's were not, however, tasked with disciplining subordinates, performance appraisals, or strategic planning. Those functions remained with management.

On April 6, 2009, RSA filed the instant grievance alleging the memo issued by Chief Horst on March 25, 2009, violated the career plan in the MOU and long-standing past practice by adding "direct supervision responsibilities to affected members" [UX 1]. For remedy, the Union sought an order for the County to cease and desist from mandating direct supervision requirements for Senior DA Investigator IIIB's [UX 1]. The County denied the grievance on the grounds functional supervision is expressly sanctioned by Article XVIII, Section 3. of the MOU [UX 2]. After the parties were unable to resolve the dispute through the remaining steps of the contractual grievance procedure, the matter was duly appealed to arbitration.

At arbitration, the parties were afforded a full opportunity to call and cross-examine witnesses under oath, introduce documents, and present argument. A transcript of the proceedings was prepared. Upon receipt of post-hearing briefs, the case was submitted for decision. No useful purpose is served by summarizing the entire record of evidence and argument, all of which has been carefully reviewed and considered. Only those matters deemed necessary in deciding the grievance at issue are discussed herein.

EXCERPTS FROM THE MOU [UX 14]

ARTICLE XVII – WORKWEEK, OVERTIME AND PREMIUM PAY

Section 3. DISTRICT ATTORNEY INVESTIGATOR CAREER PLAN

INTRODUCTION:

District Attorney Investigators are veterans of years of prior law enforcement service. The average experience level of the current investigative staff of the District Attorney's Office is at approximately 18 years. . . . District Attorney Investigators, as a group, are senior peace officers possessing extensive education, training, and experience. While their role is somewhat different than their counterparts in other law enforcement agencies, they are equally devoted and dedicated peace officers. . . .

INTENT OF PROPOSAL:

The District Attorney has stated that his intent is not only to develop a professional career prosecutorial staff, but a career investigative staff as well. As a result, the Career Program has been developed to provide continuing career incentives to DA Investigators, who, because of the organizational structure of the District Attorney Bureau of Investigations, have very limited promotional opportunities.

This program creates a special designation incentive based on exemplary performance, special skills, education, and training. This program will assist the District Attorney in continuing to develop a competent, professional, and career minded investigative staff by offering continuing career incentives to promote the retention of experienced, well-trained, and highly skilled investigators.

PROGRAM OBJECTIVES:

1. To offer career growth to SENIOR DISTRICT ATTORNEY INVESTIGATORS that does not force skilled peace officers into management roles that they have chosen not to pursue because there are limited promotional opportunities. . . .

POSITIONS:

5. SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB

SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB is a highly skilled specialist in law enforcement investigations and operations, who may also be charged with some limited supervisory related tasks or who possesses advanced forensic skill in such areas as handwriting, fingerprinting, and forged document examinations or other specialized skills

6. SENIOR DISTRICT ATTORNEY INVESTIGATOR IIIB

SENIOR DISTRICT ATTORNEY INVESTIGATOR IIIB is a special designation in the investigative career ladder. This is a highly skilled individual in law enforcement investigations and operations who also assumes functional supervisory responsibilities over subordinate investigators when so designated by the Chief Investigator or his designee. Subject to annual recommendation of the Executive Office and approval by the Board of Supervisors, the number of positions may equal up to 37% of the total Sr. District Attorney Investigator IIB class. . . .

BASIC PROVISIONS:

SENIOR DISTRICT ATTORNEY INVESTIGATORS IIB and IIIB can expect added responsibilities as may be required by the Chief Investigator. Added responsibilities may include functional supervision, training of other employees, oversight and coordination of special projects, completed staff work, and other work as assigned by the District Attorney and/or Chief Investigator. . . .

**EXCERPT FROM THE CLASS SPECIFICATION OF
SUPERVISING DA INVESTIGATOR B [UX 7]**

CLASS CONCEPT:

Under direction, to supervise the activities of some and non-sworn personnel assigned to specialized criminal or civil units in the Bureau of Investigation, and/or specialized multi-jurisdictional task force teams; to assign, monitor, and evaluate criminal and civil investigations involving the gathering of evidence for the apprehension and prosecution of persons suspected of violating the law; to perform complex, sensitive criminal, civil, and personnel investigations; and to do other work as required.

This class functions as full, first-line supervisors and mid-level managers providing functional direction over specialized criminal or civil investigative units in the Bureau of Investigation. This class may also provide managerial oversight to highly specialized multi-jurisdictional task force teams at the director and/or assistant director levels. This class incorporates direct participation in the policy-making process for distinct operating subunits of the department and in the development of operating agreements, goals and objectives, and personnel related matters related to task forces. This class emphasizes various functional aspects beyond direct supervision including policy determination and formulation. . . .

OPINION BY THE ARBITRATOR

The Union contends the County violated the MOU and/or past practice by unilaterally changing the job duties of the Senior DA Investigator IIIB classification from a temporary or occasional supervisor to a front line or full-time supervisor. The County, however, asserts the assignment of functional supervision to Senior DA Investigator IIIB's is integral to the career plan for the classification and expressly sanctioned by the MOU. A review of all the evidence and argument in this proceeding supports the position of the County. It follows the grievance will be denied.

In any dispute over the interpretation and application of a provision in a collective bargaining agreement, the task of the arbitrator is to ascertain and apply the mutual intent of the parties. It is well settled the most reliable indicator of mutual intent is the words used by the parties in their labor contract. Where the terms of the disputed clause are clear, the arbitrator must give full effect to the meaning of those terms. If the language of a MOU is found to be ambiguous or susceptible to conflicting interpretations, the arbitrator will look to other common indicators, such as bargaining history and past practice, to ascertain the mutual

intent of the parties. Should all of these factors fail to reveal mutual intent, the arbitrator must then determine the most reasonable interpretation in light of all the circumstances presented.

A review of the career plan negotiated by the parties in 2000 confirms the MOU grants the District Attorney broad authority to assign functional supervisory duties to the Senior DA Investigator IIB's. In Article XVII, Section 3., the position includes the following description:

This is a highly skilled individual law enforcement investigations and operations who also assumes functional supervisory responsibilities over subordinate investigators when so designated by the Chief Investigator or his designee.

A "basic provision" contained in that section states the classification:

. . . can expect added responsibilities as may be required by the Chief Investigator. Added responsibilities may include functional supervision, training of other employees, oversight and coordination of special projects, completed staff work, and other work as assigned by the District Attorney and/or Chief Investigator.

From this language, a finding the assignment of functional supervisory responsibilities as described in these provisions is specifically authorized by the plain language of the MOU is manifest.

The Union does not here challenge the occasional or temporary assignment of such duties to Senior DA Investigator IIB's. Rather, RSA objects to the requirement they perform these responsibilities on a full-time basis. Before March 2009, Senior DA Investigator IIB's were rarely if ever utilized on a full-time basis in a supervisory capacity. Instead, according to the Union, that role belongs to the Supervising DA Investigators who had been performing these duties since the inception of the career plan in 2000. But the language of the MOU contains no limitation on the frequency those supervisory duties described in the career plan may be assigned. Absent such restriction, it cannot be found the MOU precludes management from making such assignments to Senior DA Investigator IIB's on a full-time basis.

The evidence reflects budget constraints were the primary concern behind the decision to reallocate functional supervision down the chain-of-command within the strictures of the existing class specifications. The use of "leads" within a bargaining unit to conduct training, oversight, and special assignments are commonly found in a wide variety of classes and crafts in public and private sector employment. When delegated by an employer, those responsibilities are normally given to the most experienced and/or skilled journey-level members of a

bargaining unit. In this case, the career plan drafted by the parties reflects this common industrial practice. Not surprisingly, the more fundamental responsibilities of supervision, such as discipline, performance appraisals, and strategic planning, are not included in the functional supervisory responsibilities identified in the career plan. Rather, those duties are embodied in the class specification for the Supervising DA Investigators and have not been consigned by Chief Horst to the Senior DA Investigator IIIB's herein.

RSA argues the parties never intended Senior DA Investigator IIIB's to become full-time supervisors when the career plan was adopted in 2001. It is recognized this subject was not discussed across the table when the career plan was negotiated and the career plan was not administered in this fashion until the changes at issue were implemented. It is also understood many Senior DA Investigator IIIB's do not welcome such a dramatic shift away from their daily responsibilities as investigators. Nevertheless, there is no showing in this proceeding the parties agreed during negotiations to limit management's right to assign the functional supervision outlined in the career plan to a temporary or occasional basis. Nor were any restrictions placed in the career plan prohibiting the agency from exercising this prerogative on a full-time basis. Because the assignment of these duties is expressly sanctioned by the plain language of the MOU, a finding of violation as alleged by RSA is not established. The grievance is accordingly denied.

AWARD

1. The Department did not violate Article XVII, Section 3, of the MOU when assigning full-time supervisory duties to a Senior District Attorney Investigator IIIB.
2. The grievance is denied.

DATED: June 29, 2010
Santa Monica, California



FREDRIC R. HOROWITZ, Arbitrator

Attachment B

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8 Attorneys for Riverside Sheriffs' Association

9
10 **BEFORE BOARD OF SUPERVISORS**

11 **IN THE MATTER OF ARBITRATION**
12 **BETWEEN,**
13 **RIVERSIDE SHERIFFS' ASSOCIATION,**
14 **Union,**
15 **and**
16 **COUNTY OF RIVERSIDE,**
17 **Employer.**

18 **APPEAL BY RIVERSIDE SHERIFFS'**
19 **ASSOCIATION OF ARBITRATOR'S**
20 **DECISION RE: SENIOR DA**
21 **INVESTIGATOR III-B- WORKING OUT**
22 **OF CLASS, GRIEVANCE NO. R0809-019**

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RECEIVED/RIVERSIDE COUNTY
ASSESSMENT APPEALS DIVISION
CLERK/BOARD OF SUPERVISORS
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P/S AC

1 **I. INTRODUCTION**

2 In an April 6, 2009, grievance¹, RSA alleged that the County of Riverside, hereinafter called
3 the County, violated Article XVII, Section 3 (District Attorney Investigator Career Plan) of the 2008-
4 2011 Law Enforcement Unit Memorandum of Understanding hereinafter called the Current MOU,
5 between the County and RSA. Since the dispute could not be resolved in the grievance procedure,
6 the matter was referred to arbitration pursuant to Article XI of the Current MOU. The Arbitrator
7 ruled in favor of the County. A true and correct copy of the Arbitrator's decision is attached hereto as
8 Exhibit A. RSA now appeals the Arbitrator's decision.²

9 By way of background, the instant appeal arises from the following. Between January 25, 2000,
10 when the District Attorney Investigator Career Plan ("Career Plan") became contractually binding, and
11 March 2009, the Senior District Attorney Investigator IIIBs³ were not tasked with full time (aka front
12 line) supervision of subordinates. Instead, the IIIs' primary function was investigation. The IIIs did
13 not handle the day to day operations of their units. They acted in a supervisory role only when the
14 supervisor was out of the office on vacation, sick, or training. Accordingly, a past practice was
15 established between the parties that the IIIs would be tasked with "functional supervisory duties" on a
16 temporary or occasional basis, rather than on a full time basis. Once the past practice was established,
17 it became an implied term of the MOU and was binding upon the parties.

18 By way of a memorandum dated March 25, 2009, Chief Investigator Vern Horst informed DA
19 Rod Pacheco that the IIIs' role would change such that they would become full time supervisors. In
20 an effort to excuse this significant change in job duties, Horst sent a second memorandum dated
21 April 10, 2009, to all staff setting forth that times were tough economically and that such actions
22 were cost saving measures.

23
24
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¹ The administrative record is available upon request.

26 ² For a more in depth discussion concerning the County's violation of the MOU and the basis for the
27 instant appeal, please see RSA's post hearing brief attached hereto as Exhibit B and incorporated
28 herein. For purposes of brevity, only certain issues are argued herein. However, RSA is not
waiving any of the arguments raised before the Arbitrator, all of which are hereby reserved.

³ For the purpose of brevity, the words "District Attorney" will be abbreviated by "DA". Also, the
words "Senior District Attorney Investigator I, IIB, and IIIB" will be abbreviated by I, II, and III,
respectively.

1 The change in job duties violated the past practice and therefore the MOU. The Arbitrator
2 found that "Before March 2009, the IIIs were rarely if ever utilized on a full-time basis in a
3 supervisory capacity." As such, the Arbitrator's findings support that there was a past practice
4 between the parties and that the County violated it. However, the Arbitrator mistakenly ruled that
5 the County was not restricted by the MOU from changing the job duties of the IIIs from temporary
6 supervisors to full time supervisors. Simply put, the decision of the Arbitrator is not supported by
7 his findings.⁴

8
9 **II. THE COUNTY VIOLATED ARTICLE XVII, SECTION 3 OF THE**
10 **CURRENT MOU AND/OR PAST PRACTICE BY UNILATERALLY**
11 **CHANGING THE JOB DUTIES OF THE SENIOR DISTRICT ATTORNEY**
12 **INVESTIGATOR III-B CLASSIFICATION FROM A**
13 **TEMPORARY/OCCASIONAL SUPERVISOR TO A FRONT LINE/FULL TIME**
14 **SUPERVISOR**

15 The Arbitrator found that "Before March 2009, the IIIs were rarely if ever utilized on a full-time
16 basis in a supervisory capacity." For approximately 9 years the IIIs were not tasked with full time
17 supervision of subordinates. Instead, the IIIs' primary function was investigation. The IIIs did not
18 handle the day to day operations of their units. They acted in a supervisory role only when the
19 supervisor was out of the office on vacation, sick, or training. Accordingly, a past practice was
20 established between the parties that the IIIs would be tasked with "functional supervisory duties" on a
21 temporary or occasional basis, rather than on a full time basis.

22 By way of a memorandum dated March 25, 2009, Chief Investigator Vern Horst violated the
23 past practice by changing the role of the IIIs from temporary supervisors to full time supervisors,
24 purportedly as a cost saving measure.

25 **1. The past practice of the parties provides that the IIIs may be tasked with temporary**
26 **supervision rather than full time supervision**

27 The evidence in the record and the findings of the Arbitrator established a past practice between
28 the parties that the IIIs would be tasked with "functional supervisory duties" on a temporary or

⁴ At the conclusion of the arbitration, counsel for the County (Bruce Disenhouse) represented to the Arbitrator that if the Arbitrator found in favor of RSA that the County would get rid of the IIIs. The threat made by Mr. Disenhouse may have improperly swayed the Arbitrator.

1 occasional basis, rather than on a full time basis. RSA's 6 witness collectively testified that from the
2 inception of the Career Plan in January 2000 until March, 2009, the IIIs did not act as full time or front
3 line supervisors; did not run the day to day operations of the units; and only acted as supervisors when
4 the Commander (aka Supervising DA Investigator) was on vacation, sick, in training, or out of the
5 office for other reasons. County witness Tony Pradia confirmed that prior to March, 2009, the IIIs did
6 not run the day to day operations of their units. Based upon the same, the Arbitrator found that
7 "Before March 2009, the IIIs were rarely if ever utilized on a full-time basis in a supervisory capacity."

8 In addition, the RSA witnesses testified collectively that on or about March, 2009, the duties of
9 the IIIs were changed from investigators that acted as supervisors on a limited/temporary basis to full
10 time/front line supervisors. The IIIs were tasked with running the day to day operations of their units
11 and supervising multiple individuals. Currently, the IIIs rarely, if ever, act as investigators. The
12 County's witnesses confirmed the same. County witness Pradia confirmed that subsequent to the
13 Memo from Chief Horst, the IIIs now run the day to day operations of their units. In addition, County
14 witness Hussey testified that in approximately February/March, 2009, his job duties changed, and he
15 received the additional duty of supervising individuals in his units.

16 As such, the evidence in the record and the Arbitrator's findings support a conclusion that there
17 was a past practice and that the County's conduct was a significant departure from the past practice
18 and a violation of the Current MOU and/or the past practice.

19 **2. The Bureau of Investigation policy manual for Riverside DA Investigators supports a**
20 **conclusion that the IIIs may be tasked with temporary supervision rather than full**
21 **time supervision**

22 The Bureau of Investigation policy manual for Riverside DA Investigators ("policy manual")
23 sets forth at (c):

24 **In the absence of a supervisor or designee, Senior**
25 **Investigators II-B and III-B shall have the temporary**
26 **authority of a supervising investigator as may be necessary to**
27 **meet the needs of the bureau of investigation or attorney staff.**
28 **While acting in such temporary capacity they shall be vested**
with the full authority and responsibility of a supervising
investigator.

///

1 In addition, the duties and responsibilities of the IIIs (as per the list attached to the policy
2 manual) sets forth that the IIIs will “Serve as the acting supervisor of a unit or a work group **in the**
3 **absence of a supervising investigator.**” As such, the County-created policy manual and the list of
4 duties and responsibilities attached thereto specify that a III will act as a supervisor only “in the
5 absence of a supervisor or designee” and only on a “temporary” basis.

6 **3. The pre-contract negotiations support a conclusion that the IIIs may be tasked with**
7 **temporary supervision rather than full time supervision**

8 RSA Labor Representative Darryl Drott, who attended the negotiation of the Career Plan,
9 testified that RSA had expressed its concern to the County at the table that RSA did not want the III
10 designation to act as a “broad day to day supervisor”. Rather, it was understood by the parties that the
11 term “functional supervisor” would give Chief Curfman “an opportunity to place them [IIIs] in a lead
12 role for specific assignments or programs to lead the team in a **limited temporary** purpose in a
13 supervisory role.”

14
15 **III. CONCLUSION.**

16 For all of the foregoing reasons, RSA respectively requests that the Board of Supervisors reject
17 the Arbitrator’s decision and instead:

18 1. Sustain the grievance;

19 2. Declare that the County violated Article XVII, Section 3, and Article V, Section 10, of the
20 2008 through 2011 Law Enforcement Unit MOU and a past practice by unilaterally changing the job
21 duties of the Senior District Attorney Investigator III-B classification from a temporary/occasional
22 supervisor to a front line/full time supervisor; and

23 3. Declare that the County is required to comply with Article XVII, Section 3, and Article V,
24 Section 10, of the 2008 through 2011 Law Enforcement Unit MOU and a past practice by treating the
25 Senior DA Investigator III-Bs as temporary/occasional supervisors rather than front line/full time
26 supervisors.

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Dated: July 2, 2010

HAYES & CUNNINGHAM, LLP

Adam E. Chaikin

By:

ADAM E. CHAIKIN
Attorneys for Riverside Sheriffs'
Association

In the Matter of Arbitration)
)
 between:)
)
 COUNTY OF RIVERSIDE, CALIFORNIA)
)
 and)
)
 RIVERSIDE SHERIFFS' ASSOCIATION, INC.)
)
)
 (Senior District Attorney Investigator III-B))
)
 _____)

**ARBITRATOR'S
OPINION
AND
AWARD**

Case No. R0809-019

Impartial Arbitrator: Fredric R. Horowitz, Esq.

Appearances:

Union: Adam E. Chaikin, Esq.
Law Offices of Dennis J. Hayes

Department: Bruce E. Disenhouse, Esq.
Kinkle, Rodiger and Spriggs

Hearings Held: February 23, 2010
Riverside, California

Submitted to Arbitrator: April 14, 2010

This arbitration arises under the 2008-2011 Memorandum of Understanding between County of Riverside, California ("Employer") and Riverside Sheriffs' Association, Inc. ("Union") covering the Law Enforcement Bargaining Unit ("MOU") [UX 14]. The parties concur the grievance at issue was processed pursuant to the provisions of Article XI of the MOU and is properly in arbitration.

MATTERS AT ISSUE

The instant grievance presents the following issues to be decided in this proceeding:

1. Whether the Department violated Article XVII, Section 3, of the MOU when assigning full-time supervisory duties to a Senior District Attorney Investigator IIIB?
2. If so, what is the appropriate remedy?

BACKGROUND

The Riverside District Attorney ("DA") maintains a large staff of DA Investigators who are senior peace officers with extensive education, training, and experience. On January 25, 2000, the Board of Supervisors approved the District Attorney Investigator Career Development Plan as negotiated by the County and RSA for inclusion in the 1998-2001 MOU [UX 11]. That plan remains unchanged in Article XVII, Section 3, of the current MOU [UX 14].

The instant dispute concerns the assignment of full-time supervisory duties to Senior DA Investigator IIIB's, the highest classification of rank and file DA Investigator. After the career plan was established, Senior DA Investigator IIIB's were not asked to perform supervisory functions on a regular basis beyond special assignments or filling in for an absent supervisor. Vern Horst became the Chief of Investigators in September 2008. Chief Horst testified when he came to the Department, various Senior DA Investigator IIIB's were performing jobs from a Sergeant to Captain while others were functioning exclusively as investigators.

Motivated mainly by budget constraints, Chief Horst sought to increase the utilization of Senior DA Investigator IIIB's and level their assignments from unit to unit by adding additional supervisory responsibility. On March 25, 2009, Chief Host issued a memo to the District Attorney advising as follows:

Senior District Attorney Investigators II-B and III-B can expect added responsibilities as may be required by the Chief Investigator. Added responsibilities may include functional supervision, training of other employees, oversight and coordination of special projects, completed staff work, and other work assigned by the District Attorney and/or Chief of Investigators [UX 1].

On April 10, 2009, Chief Horst distributed a memo to all staff effectively advising the DA Investigator IIIB's to expect added supervisory responsibilities [CX 1]. According to Chief Horst, one Senior DA Investigator IIIB was assigned to each unit and required to perform the range of supervisory functions described in the career plan on a full-time basis. Chief Horst testified Senior DA Investigator IIIB's were not, however, tasked with disciplining subordinates, performance appraisals, or strategic planning. Those functions remained with management.

On April 6, 2009, RSA filed the instant grievance alleging the memo issued by Chief Horst on March 25, 2009, violated the career plan in the MOU and long-standing past practice by adding "direct supervision responsibilities to affected members" [UX 1]. For remedy, the Union sought an order for the County to cease and desist from mandating direct supervision requirements for Senior DA Investigator IIIB's [UX 1]. The County denied the grievance on the grounds functional supervision is expressly sanctioned by Article XVIII, Section 3. of the MOU [UX 2]. After the parties were unable to resolve the dispute through the remaining steps of the contractual grievance procedure, the matter was duly appealed to arbitration.

At arbitration, the parties were afforded a full opportunity to call and cross-examine witnesses under oath, introduce documents, and present argument. A transcript of the proceedings was prepared. Upon receipt of post-hearing briefs, the case was submitted for decision. No useful purpose is served by summarizing the entire record of evidence and argument, all of which has been carefully reviewed and considered. Only those matters deemed necessary in deciding the grievance at issue are discussed herein.

EXCERPTS FROM THE MOU [UX 14]

ARTICLE XVII – WORKWEEK, OVERTIME AND PREMIUM PAY

Section 3. DISTRICT ATTORNEY INVESTIGATOR CAREER PLAN

INTRODUCTION:

District Attorney Investigators are veterans of years of prior law enforcement service. The average experience level of the current investigative staff of the District Attorney's Office is at approximately 18 years. . . . District Attorney Investigators, as a group, are senior peace officers possessing extensive education, training, and experience. While their role is somewhat different than their counterparts in other law enforcement agencies, they are equally devoted and dedicated peace officers. . . .

INTENT OF PROPOSAL:

The District Attorney has stated that his intent is not only to develop a professional career prosecutorial staff, but a career investigative staff as well. As a result, the Career Program has been developed to provide continuing career incentives to DA Investigators, who, because of the organizational structure of the District Attorney Bureau of Investigations, have very limited promotional opportunities.

This program creates a special designation incentive based on exemplary performance, special skills, education, and training. This program will assist the District Attorney in continuing to develop a competent, professional, and career minded investigative staff by offering continuing career incentives to promote the retention of experienced, well-trained, and highly skilled investigators.

PROGRAM OBJECTIVES:

1. To offer career growth to SENIOR DISTRICT ATTORNEY INVESTIGATORS that does not force skilled peace officers into management roles that they have chosen not to pursue because there are limited promotional opportunities. . . .

POSITIONS:

5. SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB

SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB is a highly skilled specialist in law enforcement investigations and operations, who may also be charged with some limited supervisory related tasks or who possesses advanced forensic skill in such areas as handwriting, fingerprinting, and forged document examinations or other specialized skills

6. SENIOR DISTRICT ATTORNEY INVESTIGATOR IIIB

SENIOR DISTRICT ATTORNEY INVESTIGATOR IIIB is a special designation in the investigative career ladder. This is a highly skilled individual in law enforcement investigations and operations who also assumes functional supervisory responsibilities over subordinate investigators when so designated by the Chief Investigator or his designee. Subject to annual recommendation of the Executive Office and approval by the Board of Supervisors, the number of positions may equal up to 37% of the total Sr. District Attorney Investigator IIB class. . . .

BASIC PROVISIONS:

. . . . SENIOR DISTRICT ATTORNEY INVESTIGATORS IIB and IIIB can expect added responsibilities as may be required by the Chief Investigator. Added responsibilities may include functional supervision, training of other employees, oversight and coordination of special projects, completed staff work, and other work as assigned by the District Attorney and/or Chief Investigator. . . .

**EXCERPT FROM THE CLASS SPECIFICATION OF
SUPERVISING DA INVESTIGATOR B [UX 7]**

CLASS CONCEPT:

Under direction, to supervise the activities of some and non-sworn personnel assigned to specialized criminal or civil units in the Bureau of Investigation, and/or specialized multi-jurisdictional task force teams; to assign, monitor, and evaluate criminal and civil investigations involving the gathering of evidence for the apprehension and prosecution of persons suspected of violating the law; to perform complex, sensitive criminal, civil, and personnel investigations; and to do other work is required.

This class functions as full, first-line supervisors and mid-level managers providing functional direction over specialized criminal or civil investigative units in the Bureau of Investigation. This class may also provide managerial oversight to highly specialized multi-jurisdictional task force teams at the director and/or assistant director levels. This class incorporates direct participation in the policy-making process for distinct operating subunits of the department and in the development of operating agreements, goals and objectives, and personnel related matters related to task forces. This class emphasizes various functional aspects beyond direct supervision including policy determination and formulation. . . .

OPINION BY THE ARBITRATOR

The Union contends the County violated the MOU and/or past practice by unilaterally changing the job duties of the Senior DA Investigator IIIB classification from a temporary or occasional supervisor to a front line or full-time supervisor. The County, however, asserts the assignment of functional supervision to Senior DA Investigator IIIB's is integral to the career plan for the classification and expressly sanctioned by the MOU. A review of all the evidence and argument in this proceeding supports the position of the County. It follows the grievance will be denied.

In any dispute over the interpretation and application of a provision in a collective bargaining agreement, the task of the arbitrator is to ascertain and apply the mutual intent of the parties. It is well settled the most reliable indicator of mutual intent is the words used by the parties in their labor contract. Where the terms of the disputed clause are clear, the arbitrator must give full effect to the meaning of those terms. If the language of a MOU is found to be ambiguous or susceptible to conflicting interpretations, the arbitrator will look to other common indicators, such as bargaining history and past practice, to ascertain the mutual

intent of the parties. Should all of these factors fail to reveal mutual intent, the arbitrator must then determine the most reasonable interpretation in light of all the circumstances presented.

A review of the career plan negotiated by the parties in 2000 confirms the MOU grants the District Attorney broad authority to assign functional supervisory duties to the Senior DA Investigator IIB's. In Article XVII, Section 3., the position includes the following description:

This is a highly skilled individual law enforcement investigations and operations who also assumes functional supervisory responsibilities over subordinate investigators when so designated by the Chief Investigator or his designee.

A "basic provision" contained in that section states the classification:

. . . can expect added responsibilities as may be required by the Chief Investigator. Added responsibilities may include functional supervision, training of other employees, oversight and coordination of special projects, completed staff work, and other work as assigned by the District Attorney and/or Chief Investigator.

From this language, a finding the assignment of functional supervisory responsibilities as described in these provisions is specifically authorized by the plain language of the MOU is manifest.

The Union does not here challenge the occasional or temporary assignment of such duties to Senior DA Investigator IIB's. Rather, RSA objects to the requirement they perform these responsibilities on a full-time basis. Before March 2009, Senior DA Investigator IIB's were rarely if ever utilized on a full-time basis in a supervisory capacity. Instead, according to the Union, that role belongs to the Supervising DA Investigators who had been performing these duties since the inception of the career plan in 2000. But the language of the MOU contains no limitation on the frequency those supervisory duties described in the career plan may be assigned. Absent such restriction, it cannot be found the MOU precludes management from making such assignments to Senior DA Investigator IIB's on a full-time basis.

The evidence reflects budget constraints were the primary concern behind the decision to reallocate functional supervision down the chain-of-command within the strictures of the existing class specifications. The use of "leads" within a bargaining unit to conduct training, oversight, and special assignments are commonly found in a wide variety of classes and crafts in public and private sector employment. When delegated by an employer, those responsibilities are normally given to the most experienced and/or skilled journey-level members of a

bargaining unit. In this case, the career plan drafted by the parties reflects this common industrial practice. Not surprisingly, the more fundamental responsibilities of supervision, such as discipline, performance appraisals, and strategic planning, are not included in the functional supervisory responsibilities identified in the career plan. Rather, those duties are embodied in the class specification for the Supervising DA Investigators and have not been consigned by Chief Horst to the Senior DA Investigator IIIB's herein.

RSA argues the parties never intended Senior DA Investigator IIIB's to become full-time supervisors when the career plan was adopted in 2001. It is recognized this subject was not discussed across the table when the career plan was negotiated and the career plan was not administered in this fashion until the changes at issue were implemented. It is also understood many Senior DA Investigator IIIB's do not welcome such a dramatic shift away from their daily responsibilities as investigators. Nevertheless, there is no showing in this proceeding the parties agreed during negotiations to limit management's right to assign the functional supervision outlined in the career plan to a temporary or occasional basis. Nor were any restrictions placed in the career plan prohibiting the agency from exercising this prerogative on a full-time basis. Because the assignment of these duties is expressly sanctioned by the plain language of the MOU, a finding of violation as alleged by RSA is not established. The grievance is accordingly denied.

AWARD

1. The Department did not violate Article XVII, Section 3, of the MOU when assigning full-time supervisory duties to a Senior District Attorney Investigator IIIB.
2. The grievance is denied.

DATED: June 29, 2010
Santa Monica, California



FREDRIC R. HOROWITZ, Arbitrator

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9 BEFORE IMPARTIAL ARBITRATOR

10 FREDRIC R. HOROWITZ

11 IN THE MATTER OF ARBITRATION
12 BETWEEN,

13 RIVERSIDE SHERIFFS' ASSOCIATION,

14 Union,

15 and

16 COUNTY OF RIVERSIDE,

17 Employer.
18
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**RE: SENIOR DA INVESTIGATOR III-B-
WORKING OUT OF CLASS, No. R0809-019**

POST HEARING BRIEF

Date: February 23, 2010

Time: 10:00 a.m.

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1 **I. INTRODUCTION**

2 In an April 6, 2009, grievance (RSA Exhibit "1"), RSA alleged that the County of Riverside,
3 hereinafter called the County, violated Article XVII, Section 3 (District Attorney Investigator Career
4 Plan); Article V, Section 10 (Conformance to Plan); and a past practice, of the 2008-2011 Law
5 Enforcement Unit Memorandum of Understanding (RSA Exhibit "14") hereinafter called the Current
6 MOU, between the County and RSA. Since the dispute could not be resolved in the grievance
7 procedure, pursuant to Article XI of the Current MOU, the matter was referred to arbitration.

8 At the hearing held on February 23, 2010, in Riverside, California, Adam E. Chaikin represented
9 RSA, and Bruce Disenhouse represented the County. Each party had the opportunity to make opening
10 statements, introduce evidence, and examine and cross-examine witnesses. Margaret Bourgeois acted
11 as the CSR.

12 By way of background, the grievance arises from the following. Between January 25, 2000
13 (when the District Attorney Investigator Career Plan ("Career Plan") became contractually binding per
14 RSA Exhibit 11), and March 2009, the Senior District Attorney Investigator IIIBs¹ were not tasked with
15 full time (aka front line) supervision of subordinates. Instead, the IIIs' primary function was
16 investigation. The IIIs did not handle the day to day operations of their units. They acted in a
17 supervisory role only when the supervisor was out of the office on vacation, sick, or training.

18 By way of a memorandum dated March 25, 2009 ("Memo"), Chief Investigator Vern
19 Horst informed DA Rod Pacheco that the IIIs would "have responsibility for supervising of
20 subordinate District Attorney Senior Investigators..." (RSA Exhibit 1, Attachment A, page 1) In an
21 effort to excuse this significant change in job duties, Horst sent a second memorandum dated April
22 10, 2009, to all staff setting forth that times were tough economically and that such actions were cost
23 saving measures taken in an effort to save jobs within the office. (County Exhibit 1) In other words,
24 as of March, 2009, the IIIs were improperly forced into the role of full time/front line supervisors so

25 ///

27 ¹ For the purpose of brevity, the words "District Attorney" will be abbreviated by "DA". Also, the
28 words "Senior District Attorney Investigator I, IIB, and IIIB" will be abbreviated by I, II, and III,
 respectively.

1 that the County could save a buck by cutting corners at the expense of the contract between the
2 parties.

3 When RSA challenged the County's improper actions by way of the Grievance procedure
4 as a violation of the Current MOU and/or a past practice, the County mistakenly argued that it could
5 treat the IIIs as full time/front line supervisors because the Current MOU allows for the IIIs to assume
6 functional supervisory duties. However, as set forth below, the County's definition of "functional
7 supervisory duties" is at odds with: the plain meaning of the Career Plan; the Bureau of Investigation
8 policy manual for Riverside DA Investigators; the industry standard; the pre-contract negotiations;
9 and the lengthy past practice of the parties, all of which support a conclusion that "functional
10 supervisory duties" means limited or temporary supervision.

11
12 **II. STATEMENT OF THE ISSUE.**

13 1. Whether the County violated Article XVII, Section 3 of the 2008 through 2011 Law
14 Enforcement Unit MOU and/or a past practice by unilaterally changing the job duties of the Senior
15 District Attorney Investigator III-B classification from a temporary/occasional supervisor to a front
16 line/full time supervisor²; and

17 2. If so, then what is the appropriate remedy. (Transcript ("TR") pg. 9

18 **III. RELEVANT SECTIONS OF THE CURRENT MEMORANDUM OF**
19 **UNDERSTANDING.**

20 Article XVII, Section 3 of the 2008 through 2011 Law Enforcement Unit MOU
21 ("Current MOU") sets forth in pertinent part:

22 Section 3. DISTRICT ATTORNEY INVESTIGATOR

23 CAREER PLAN
24 INTRODUCTION:

25 District Attorney Investigators are veterans of years of

26
27 ² The grievance petition also alleges a violation of Article V, Section 10 (Conformance to Plan).
28 As set forth more fully herein, a conclusion that the County violated Article XVII, Section 3
and/or a past practice, necessarily leads to a conclusion that the County violated Article V,
Section 10.

1 prior law enforcement service. The average experience level
2 of the current investigative staff of the District Attorney's
3 Office is at approximately 18 years. District Attorney
4 Investigators have chosen to forego the pursuit of traditional
5 promotional opportunities normally found within law
6 enforcement agencies (i.e. Sergeant, Lieutenant, Captain,
7 etc.) in favor of a career in the investigative field of the
8 District Attorney's Office.

9
10 District Attorney Investigators, as a group, are senior
11 peace officers possessing extensive education, training, and
12 experience. While their role is somewhat different than their
13 counterparts in other law enforcement agencies, they are
14 equally devoted and dedicated peace officers.

15
16 District Attorney Investigators are expected to have a
17 thorough working knowledge of law enforcement procedures,
18 policies, and tactics. They are required to be experienced
19 criminal investigators with a sound knowledge of the
20 Criminal Justice System. District Attorney Investigators are
21 required to work closely with Deputy District Attorneys in the
22 preparation of cases and the development of prosecution
23 strategies, including countering defense theories. District
24 Attorney Investigators must also be skilled in the preparation
25 of evidence for court presentation.

26
27 The tasks performed by District Attorney Investigators
28 include constant interaction with prosecuting attorneys,
private attorneys, the Public Defender staff, and members of
the Judiciary. District Attorney Investigators are expected to
perform with a minimum of supervision and interact with the
public, law enforcement agencies of all types, and to
professionally represent the District Attorney.

Assignments for District Attorney Investigators
include both initial criminal and civil investigations, follow-
up investigations of criminal and civil violations, and
specialized investigations, when directed to do so by the
District Attorney. These specialized investigations may be
extremely sensitive and may have a wide public interest.

INTENT OF PROPOSAL:

The District Attorney has stated that his intent is not
only to develop a professional career prosecutorial staff, but a
career investigative staff as well. As a result, the Career

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Program has been developed to provide continuing career incentives to DA Investigators, who, because of the organizational structure of the District Attorney Bureau of Investigations, have very limited promotional opportunities.

This program creates a special designation incentive based on exemplary performance, special skills, education, and training. This program will assist the District Attorney in continuing to develop a competent, professional, and career minded investigative staff by offering continuing career incentives to promote the retention of experienced, well trained, and highly skilled investigators.

PROGRAM OBJECTIVES:

1. To offer career growth to SENIOR DISTRICT ATTORNEY INVESTIGATORS that does not force skilled peace officers into management roles that they have chosen not to pursue because there are limited promotional opportunities.
2. To obtain fair and equitable compensation and advancement for demonstrated and career oriented criminal investigation expertise.
3. To define and distinguish between those SENIOR DISTRICT ATTORNEY INVESTIGATORS performing additional functions and possessing specialized skills necessary to successfully investigate and prosecute civil and criminal offenders before the Judiciary and those District Attorney Investigators who are charged with professionally managing and commanding the various operations of the District Attorney's Bureau of Investigation.
4. To provide retention incentive that will assist the District Attorney in maintaining a skilled and experienced investigative staff.

EMPLOYEES AFFECTED:

District Attorney Bureau of Investigation Peace Officers holding the rank of SENIOR DISTRICT ATTORNEY INVESTIGATOR.

POSITIONS:

1. DISTRICT ATTORNEY INVESTIGATOR A & B

DISTRICT ATTORNEY INVESTIGATOR is the first working level of criminal and civil investigation in the District Attorney Investigator series. Individuals in this class are sworn peace officers who perform routine and less complex investigative work. They may possess less investigative experience than a Senior District Attorney Investigator, however, they possess expertise in a highly specialized field of investigation.

2. SENIOR DISTRICT ATTORNEY INVESTIGATOR

SENIOR DISTRICT ATTORNEY INVESTIGATOR is the advanced level position for sworn peace officers within the District Attorney's office. This level of peace officer performs the full range of investigative work and differs from that of the lower level District Attorney Investigator class in that the Senior District Attorney Investigator has had a greater amount of investigative experience and will be involved in more complex investigative work.

3. SENIOR DISTRICT ATTORNEY INVESTIGATOR
A

SENIOR DISTRICT ATTORNEY INVESTIGATOR A's are peace officers who possess the same level of experience as the Senior District Attorney Investigator and perform similar duties, however, they possess an Intermediate P.O.S.T. certificate.

4. SENIOR DISTRICT ATTORNEY INVESTIGATOR
B

SENIOR DISTRICT ATTORNEY INVESTIGATOR B's are peace officers who possess the same level of experience as the Senior District Attorney Investigator and perform similar duties, however, they possess an Advanced P.O.S.T. certificate.

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5. SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB

SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB is a highly skilled specialist in law enforcement investigations and operations, who may also be charged with some limited supervisory related tasks or who possesses advanced forensic skill in such areas as handwriting, fingerprinting, and forged document examinations or other specialized skills applicable to investigative responsibilities for the District Attorney's office. Subject to annual recommendation of the Executive Office and approval by the Board of Supervisors, the number of positions may equal up to 35% of the total Sr. District Attorney Investigator class, but shall initially consist of 16 positions.

The initial salary for Senior District Attorney Investigator IIB shall be established at a rate that is ten (10) salary ranges above that for the Senior District Attorney Investigator B classification.

6. SENIOR DISTRICT ATTORNEY INVESTIGATOR IIIB

SENIOR DISTRICT ATTORNEY INVESTIGATOR IIIB is a special designation in the investigative career ladder. This is a highly skilled individual in law enforcement investigations and operations who also assumes functional supervisory responsibilities over subordinate investigators when so designated by the Chief Investigator or his designee. Subject to annual recommendation of the Executive Office and approval by the Board of Supervisors, the number of positions may equal up to 37% of the total Sr. District Attorney Investigator IIB class.

The initial salary for Senior District Attorney Investigator IIIB shall be established at a rate that is ten (10) salary ranges above that for the Senior District Attorney Investigator IIB classification.

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ELIGIBILITY:

The eligibility requirements for DISTRICT ATTORNEY INVESTIGATOR AND SENIOR DISTRICT ATTORNEY INVESTIGATORS A, B, IIB AND IIIB are outlined in Attachment 1, Qualifications.

PROBATIONARY PERIOD:

Probationary periods for all positions contained in this program, with the exception of the special designation of SENIOR DISTRICT ATTORNEY INVESTIGATOR IIIB, shall be consistent with previously established policy as outline in Article VI, § 1 of the current Memorandum of Understanding between the County of Riverside and Riverside Sheriff's Association.

After appointment, continuing service in the special designation of SENIOR DISTRICT ATTORNEY INVESTIGATOR IIIB shall be at the sole discretion of the District Attorney or his designee. Removal of the Senior District Attorney Investigator IIIB designation is neither a grievable issue under the Grievance Procedure nor subject to appeal under the Disciplinary Procedure of this Memorandum of Understanding.

BASIC PROVISIONS:

Those employees recognized as exemplary performers may be appointed to the SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB classification or IIIB special designation. The District Attorney and/or Chief Investigator shall award the SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB classification and may award the SENIOR DISTRICT ATTORNEY INVESTIGATOR IIIB special designation from established candidate eligibility lists, which shall be developed as a result of an "Assessment Panel". Appointment to the SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB classification or IIIB special designation will not be based solely upon a candidate's current assignment, but upon the candidate's consistent proven ability to perform at an exemplary level.

SENIOR DISTRICT ATTORNEY
INVESTIGATORS IIB and IIIB can expect added

1 responsibilities as may be required by the Chief Investigator.
2 Added responsibilities may include functional supervision,
3 training of other employees, oversight and coordination of
4 special projects, completed staff work, and other work as
5 assigned by the District Attorney and/or Chief Investigator.

6 Employees appointed to the SENIOR DISTRICT
7 ATTORNEY INVESTIGATOR IIB classification shall retain
8 their status through any reassignment within the Bureau of
9 Investigations unless returned to their prior classification
10 either voluntarily or as a result of disciplinary action, in
11 accordance with Article XII of the current Memorandum of
12 Understanding between the County of Riverside and the
13 Riverside Sheriff's Association.

14 Employees assigned to the SENIOR DISTRICT
15 ATTORNEY INVESTIGATOR IIB special designation may
16 return to their prior classification as a SENIOR DISTRICT
17 ATTORNEY INVESTIGATOR IIB either voluntarily or at
18 the discretion of the District Attorney or his designee.

19 An assessment panel shall convene when a vacancy
20 exists. Eligibility lists will be valid for one year after the date
21 they are verified by the District Attorney Department
22 Personnel Coordinator. Vacancies that exist in the SENIOR
23 DISTRICT ATTORNEY INVESTIGATOR IIB classification
24 shall be filled within thirty (30) days from the date the
25 vacancy arises unless an eligibility list has been declared
26 exhausted. In such an instance, a new assessment panel shall
27 convene within ninety (90) days of the date an eligibility list
28 has been declared exhausted and a new list developed and
first convened.

Vacancies that exist in the SENIOR DISTRICT
ATTORNEY INVESTIGATOR IIB special designation may
be filled from a valid eligibility list at the discretion of the
District Attorney or his designee.

An employee holding the classification of SENIOR
DISTRICT ATTORNEY INVESTIGATOR IIB or the special
designation SENIOR DISTRICT ATTORNEY
INVESTIGATOR IIB and who is elected to the position of
president of the Riverside Sheriff's Association shall retain
his/her classification/special designation while serving as the
association president, in accordance with Article VII, § 10 of

1 the current Memorandum of Understanding between the
2 County of Riverside and the Riverside Sheriff's Association.

3 INSIGNIA:

4 An employee holding the position of SENIOR
5 DISTRICT ATTORNEY INVESTIGATOR IIB or IIIB shall
6 have a "Badge" and an "I.D. card" issued to him/her,
7 identifying the employee as a SENIOR DISTRICT
8 ATTORNEY INVESTIGATOR IIB or IIIB.

9 APPOINTMENT PROCESS:

10 When notification of the testing process is made via
11 the Bureau of Investigation, employees meeting the eligibility
12 requirements may apply for placement on the candidates
13 eligibility list by completing a standardized county application
14 form and submitting the application to the District Attorney
15 Department Personnel Coordinator. Employees shall attach
16 one copy each of his/her resume (not to exceed five pages)
17 and last two performance appraisal records to the application.

18 Separate assessment panels shall evaluate applicants
19 for the guidelines that will be developed by the Chief
20 Investigator or designee(s). The interviews will be SENIOR
21 DISTRICT ATTORNEY INVESTIGATOR IIB classification
22 and IIIB special designation. Assessment panel evaluations
23 shall be based upon the applicant's application, resume,
24 education, law enforcement experience, exemplary
25 performance, and performance appraisal records.

26 Candidates will be given oral interviews by the
27 assessment panel. Each member of the assessment panel shall
28 utilize a standardized rating form with designed to elicit
responses demonstrating the applicant's knowledge, skills and
abilities. In addition, SENIOR DISTRICT ATTORNEY
INVESTIGATORS IIB and IIIB will be required to submit a
completed staff work project, designed by the Chief
Investigator and management staff, to be evaluated by the
assessment panel. All applicants shall be given the same
project to be evaluated.

The District Attorney and/or Chief Investigator shall
select candidates from the appropriate eligibility list for
appointment to the SENIOR DISTRICT ATTORNEY
INVESTIGATOR IIB and IIIB positions. Applicants must

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meet position requirements by the cut-off date for submission of applications to be eligible for participation in the testing process.

The District Attorney Department Personnel Coordinator shall be responsible for computing each applicant's final score. All rating forms for an applicant shall be averaged to obtain the applicant's final score. Applications with a final score of 80% or greater shall be placed on the appropriate eligibility list in descending order of scores. A separate eligibility list shall be developed for both the SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB classification and the SENIOR DISTRICT ATTORNEY INVESTIGATOR IIIB special designation. The Chief Investigator shall issue a formal memorandum to each applicant, identifying the names of those applicants who have been placed on the appointment eligibility list. Applicants may contact the District Attorney Department Personnel Coordinator for their individual examination results.

The District Attorney and/or Chief Investigator shall appoint employees to the SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB classification and the SENIOR DISTRICT ATTORNEY INVESTIGATOR IIIB special designation from the top six candidates on the respective eligibility lists.

ASSESSMENT PANEL:

An assessment panel under this program shall be comprised of five (5) members. The assessment panels shall be comprised of members as designated by the District Attorney and/or the Chief Investigator provided, however, the first panel shall not consist of anyone below the level of Supervising Investigator or Supervising Deputy District Attorney. An initial testing process will be required to fill all Senior District Attorney Investigator IIB positions.

QUALIFICATIONS

SENIOR DISTRICT ATTORNEY INVESTIGATOR A

1. Possession of valid California driver's license.
2. High School graduate (or GED equivalent).
3. Completion of 30 semester or 45 quarter units at a state recognized college or university is desirable.

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4. Two years of criminal or civil investigative experience in a sworn status for a civilian governmental law enforcement agency that included, as a primary responsibility, the performance of field investigations.
 5. Possession of an Intermediate P.O.S.T. certificate.

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SENIOR DISTRICT ATTORNEY INVESTIGATOR B

- 7
8
1. Meet all qualifications of a SENIOR DISTRICT ATTORNEY INVESTIGATOR A.
 2. Possession of an Advanced P.O.S.T. certificate

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SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB

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Option 1:

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1. One year experience as a SENIOR DISTRICT ATTORNEY INVESTIGATOR B with the County of Riverside.
 2. Completion of 90 semester or 135 quarter units from a state approved or accredited college or university, or a combination of equivalent P.O.S.T. training points and college units (a maximum of 20 semester or 30 quarter units may be substituted with equivalent P.O.S.T. training points).

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Option 2:

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1. Two years experience as a Senior District Attorney Investigator B with the County of Riverside.

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SENIOR DISTRICT ATTORNEY INVESTIGATOR IIIB

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1. One year experience as a SENIOR DISTRICT ATTORNEY INVESTIGATOR IIB with the County of Riverside.

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NOTE:

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The training hours conversion formula will conform to college and P.O.S.T. standards as follows”

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24 Hour P.O.S.T. course semester unit	equals	½	college
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40 Hour P.O.S.T. course semester unit	equals	1	college
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1 80 Hour P.O.S.T. course equals 2 college
semester units

2 3 semester units equals 4.5 quarter units

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4 TESTING

5 1. SENIOR DISTRICT ATTORNEY INVESTIGATOR
6 IIB scoring guidelines for Assessment Panel Evaluators:

7 All scores are based on a 100 point evaluation process. 70
8 points or higher are required for placement on the eligibility
list.

- 9 a. Evaluation of experience an positional performance –
10 80 points
11 b. Evaluation of highest level of education – 2 to 5 as
12 follows:
13 i. 35 college units – 2 points
14 ii. Associates degree or equivalent units – 3
15 points
16 iii. Bachelors degree – 4 points
17 iv. Masters degree – 5 points
18 c. Written Examination – 5 points
19 d. Oral Interview – 10 points

20 2. SENIOR DISTRICT ATTORNEY INVESTIGATOR
21 IIB scoring guidelines for Assessment Panel Evaluators:

22 All scores are based on 100 point evaluation process.
23 70 points or higher are required for placement on the
24 eligibility list.

- 25 a. Evaluation of experience and positional
26 performance – 80 points
27 b. Evaluation of highest level of education – 2 to
28 5 points as follows:
i. 35 college units – 2 points
ii. Associates degree or equivalent units –
3 points
iii. Bachelors degree – 4 points
iv. Masters degree – 5 points
c. Written Exam – 5 points
d. Oral Interview – 10 points

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IV. FACTS

A. TESTIMONY OF RSA WITNESS RON GARCIA

Garcia is currently a Commander, formerly known as a Supervising DA Investigator, for the Riverside County DA's office. (TR. 25: 9-15) During 2006 (and prior to his promotion as a Commander), Garcia acted as a III. In his capacity as a III, Garcia acted as a supervisor only when his Supervising DA Investigator "was not immediately available; either on vacation or out of the office." (TR. 25:3-8; 26:4-9).

After his promotion to Commander, Garcia had some IIIs on his teams. (TR. 26:17-20) Prior to the Memo, the IIIs on Garcia's teams did not run the day to day operations of their units; rather, a sergeant held that position. (TR. 26:21-25; 27:1-6) However, subsequent to the Memo, the IIIs on Garcia's teams oversee the teams; supervise the teams; and run the day to day operations of the units. (TR 27:7-25; 28:1-7)

B. TESTIMONY OF RSA WITNESS DARRYL DROTT

Drott is currently a labor representative III with RSA. (TR. 32:1-5) Drott participated in the negotiation of the District Attorney Investigator Career Plan ("Career Plan") on behalf of RSA. (TR. 32:6-14) Drott attended all of the negotiations concerning the Career Plan. (TR. 35:12-20) During negotiations, Chief Deputy/Chief Investigator Kirfman and the RSA negotiating team discussed the purpose of the Career Plan. The discussions confirmed that the purpose of the Career Plan was to ensure that the DA Investigators would be recognized as Career Investigators and would forego opportunities to move into management and supervision; the lengthy experience and training as investigators was of great need to the Department and would be rewarded appropriately. (TR. 33:19-25; 34:1-5) The III series in particular was designed to reward tenure and performance as a II. (TR. 41:21)

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1 The parties also discussed the scope of the supervisory duties that would be given to the IIIs.
2 RSA did not want the IIIs to act in the capacity of the day to day supervisor which was the role of the
3 Supervising DA Investigator. RSA did not want the IIIs to perform the duties of the Supervising DA
4 Investigators while receiving less pay. RSA communicated that concern to the County negotiating
5 team. Rather, the IIIs would act as functional supervisors- meaning that they would lead the team in a
6 limited temporary purpose such as specific assignments or programs. (TR. 34:6-25; 35: 1-5)

7 C. TESTIMONY OF RSA WITNESS LEANARD ORTIZ

8 Ortiz was hired as an investigator I in 1998. (TR. 43: 19-25) He was promoted in 2006 to a II
9 and promoted again in October 2008 to a III (which rank he currently holds). (TR 44:1-11) Ortiz
10 became a III, rather than a Supervising DA Investigator, because he wanted to be a career investigator
11 and compensated for his expertise rather than promoting to a supervisor. (TR. 47:20-25; 48:1-6)

12 Beginning in approximately 2000 (when the III series came into effect), Ortiz observed that the
13 IIIs did not have any supervisory responsibilities from 2000 to March 2009, when the Memorandum
14 ("Memo") was sent out by Chief Investigator Vern Horst. (TR. 44:19-25; 45:1-21)

15 Prior to the Memo (and in his capacity as a III), Ortiz's primary function was to locate
16 individuals wanted on homicide warrants. He had no supervisory responsibilities, and he did not run
17 the day to day operations of the unit. (TR. 46:1-15) Rather, the Supervising DA Investigator acted as
18 the supervisor. (TR. 46:16-18) However, subsequent to the Memo, Ortiz was informed that he would
19 supervise the unit, and he now runs the day to day operations of the unit. (TR. 46:19-25; 47:1-6)

20 D. TESTIMONY OF RSA WITNESS TIM GARCIA

21 Garcia was hired in 2004 as a I. He promoted to a II and then promoted again to a III in October
22 2008 (which rank he currently holds). (TR. 53:1-21) When he was hired in 2004, he observed that
23 the IIIs would only take on a supervisory role in the event that there was not a supervisor present- only
24 when a Supervising DA Investigator was either ill or not on duty would a III assume the role on a
25 temporary basis. (TR. 53:22-25; 54:1-13)

26 Prior to March 2009, in his capacity as a III, Garcia's primary function was investigative duties.
27 (TR. 55:24-25; 56:1-2) Garcia's primary function as III was similar to his primary function as a II
28 except that he did more in terms of training and writing reports. (TR. 56:12-17) Prior to March 2009,

1 Garcia had no supervisory responsibility duties whatsoever as a III, and he did not run the day to day
2 operations of the unit. (TR. 56:18-24) Prior to March 2009, he was not sent to Supervisory school
3 (TR. 57:22-25; 58:1-18)

4 However, as of March 2009, Garcia was tasked as a supervisor (even though he remained a III).
5 In his capacity as a III, he now has eight individuals that report to him; requesting time off; turning in
6 their timecards; assigning them work; reviewing their work, counseling them on quality of work;
7 training them; and mentoring them. He now runs the day to day operations of the unit. (TR. 56:25;
8 57:1-18) In addition, subsequent to March 2009, Garcia was sent to Supervisory school and has
9 attended classes on leadership and other supervisory responsibilities. (TR. 57:22-25; 58:1-18)

10 **E. TESTIMONY OF RSA WITNESS THOMAS REID**

11 Reid was hired by the DA's office as a I in 2004. He promoted to a II and promoted again to a III
12 in 2008 (which rank he currently holds). (TR. 62:3-15) When Reid was promoted from a II to a III, he
13 took on more of a mentoring role for the investigators and began to cover for the supervisor when the
14 supervisor was on vacation or gone for the day. (TR. 64:19-25; 65:1-3)

15 Prior to the Memo, and in his capacity as a III, Reid did not run the day to day operations of the
16 unit or supervise the unit unless the Supervising DA Investigator had a day off, was in training, or was
17 on vacation. (TR. 62:21-25; 63:1-6)

18 Subsequent to the Memo, Reid no longer works as an investigator. Instead, he supervises 11
19 investigators, 6 investigative technicians, and clerical. He now does nothing except for run the day to
20 day operations of the unit. (TR. 63:7-20)

21 **F. TESTIMONY OF RSA WITNESS PAULA NOTTINGHAM**

22 Nottingham was hired by the DA's office in 2002 as a I. She promoted to II and then promoted to
23 III in 2005 (which rank she currently holds). (TR. 66:20-25; 67:1-7) Prior to March 2009, and in her
24 capacity as a III, Nottingham had no supervisory responsibilities unless her supervisor was gone, in
25 which case she would step in and handle the day to day functions for a short period of time until her
26 supervisor returned. (TR. 67:8-17)

27 Subsequent to the Memo, Nottingham acts as a front line supervisor for her team. She now
28 performs the functions that had been performed by the Supervising DA Investigators. (TR. 68:7-21)

1 **G. TESTIMONY OF RSA WITNESS JULIE LOWREY**

2 Lowrey was hired by the DA's office in 2004 as a I. She was promoted to a II and promoted
3 again to a III in 2008 (which rank she currently holds). (TR. 71:24-25; 72:1-15) When Lowrey was
4 promoted from a II to a III, she began to act as a supervisor when her supervisor was on vacation or
5 sick; her work load increased; she began preparing monthly reports; and she began assisting in grant
6 writing. (TR. 74:8-25; 75:1-19)

7 **H. TESTIMONY OF COUNTY WITNESS TONY PRADIA**

8 Pradia is currently the Assistant Chief Investigator at the DA's office. (TR. 78:25; 79:1-5) Pradia
9 attended the negotiation of the Career Plan. (TR. 85:24-25; 86:1-2) At the Arbitration, Pradia testified
10 that he could not recall if there was a discussion about the types of responsibilities that fell within the
11 scope of functional supervisory responsibilities to be performed by the IIIs. (TR. 93:3-6)

12 Pradia acted as a III from 2000 to 2002. (TR. 93:20-25; 94:1-3) In his capacity as a III, Pradia
13 only acted as a supervisor if his supervisor was out of the office sick, on vacation, or at training. (TR.
14 94:16-20)

15 Pradia confirmed that prior to the Memo, the IIIs did not run the day to day operations of their
16 units, and that subsequent to the Memo, the IIIs do run the day to day operations of their units. (TR.
17 97:7-16)

18 **I. TESTIMONY OF COUNTY WITNESS RICHARD TWISS**

19 Twiss is currently an assistant Chief Investigator with the DA's office. (TR. 102:19-22) Twiss
20 confirmed that he never acted as a III. (TR. 106:24-25; 107:1) Twiss also confirmed that prior to the
21 memo dated April, 2009, the Supervising DA Investigator acted as the front line supervisor. (TR.
22 11:14-18) However, subsequent to the memo dated April, 2009, the Supervising DA Investigators no
23 longer perform that function. Instead, the IIIs are the front line supervisors. (TR. 113:13-25; 14:1-6)

24 **J. TESTIMONY OF COUNTY WITNESS DAVID HUSSEY**

25 Hussey is currently a III with the DA's office. (TR. 115:8-10) Hussey confirmed that in
26 approximately February/March 2009, his job duties changed in that he was given the additional duty to
27 supervise his unit. (TR. 116:19-25)

28 ///

1 K. TESTIMONY OF COUNTY WITNESS ARTHUR L. HORST

2 Horst is currently the Chief Investigator for the DA's office. (TR. 18:23-25) Horst confirmed
3 that in approximately September 2009, the title of Supervising DA Investigator was changed to
4 Commander. (TR. 20:1-4)

5
6 **V. THE COUNTY VIOLATED ARTICLE XVII, SECTION 3 OF THE**
7 **CURRENT MOU AND/OR PAST PRACTICE BY UNILATERALLY**
8 **CHANGING THE JOB DUTIES OF THE SENIOR DISTRICT ATTORNEY**
9 **INVESTIGATOR III-B CLASSIFICATION FROM A**
10 **TEMPORARY/OCCASIONAL SUPERVISOR TO A FRONT LINE/FULL TIME**
11 **SUPERVISOR**

12 As evidenced by the witness testimony set forth above, between January 25, 2000 (when the
13 career plan became contractually binding per RSA Exhibit 11), and March 2009, the IIIs were not
14 tasked with full time (aka front line) supervision of subordinates. Instead, the IIIs' primary function
15 was investigation. The IIIs did not handle the day to day operations of their units. They acted in a
16 supervisory role only when the supervisor was out of the office on vacation, sick, or training.

17 By way of a memorandum dated March 25, 2009 ("Memo"), Chief Investigator Vern Horst
18 informed DA Rod Pacheco that the IIIs would "have responsibility for supervising of subordinate
19 District Attorney Senior Investigators..." (RSA Exhibit 1, Attachment A, page 1) In an effort to
20 excuse this significant change in job duties, Horst sent a second memorandum dated April 10, 2009, to
21 all staff setting forth in pertinent part:

22 We are witness to the most critical economic crisis of our
23 lifetime. County governments, including our own, have been
24 adversely affected by declining property values, home
25 foreclosures, and the loss of other State generated revenue
26 sources. We are currently under an imposed maximum fill
27 rate, and a hiring freeze. Mandatory furlough days for
28 managers are said to be on the horizon as well. We must do
 more with less. Allocating all of our resources in the most
 effective manner is more important today than it has ever been
 in our agency's history.

(County Exhibit 1)

 The Memorandum continued by claiming that such actions were cost saving measures taken in
an effort to save jobs within the office. (County Exhibit 1) In other words, as of March, 2009, the IIIs

1 were improperly forced into the role of full time/front line supervisors so that the County could save a
2 buck by cutting corners at the expense of the contract between the parties. As set forth below, by
3 unilaterally changing the job duties of the III classification from a temporary/occasional supervisor to a
4 front line/full time supervisor, the County violated Article XVII, Section 3 of the Current MOU and/or
5 past practice.

6 **1. The plain reading of the MOU supports RSA's position**

7 The Career Plan, at Article XVII, Section 3 of the Current MOU provides that the IIIs will
8 engage in only functional supervisory responsibilities. (RSA Exhibit 14, page 63) "Functional" by its
9 nature means temporary or limited supervisory responsibilities. If the parties had intended otherwise,
10 they would not have included the word "functional" preceding the term "supervisory responsibilities".
11 As such, tasking the IIIs with full time supervisory responsibilities violated the plain language of the
12 Current MOU.³

13 **2. Assuming arguendo that the term "functional" is ambiguous, the Arbitrator may**
14 **consider parol evidence**

15 Assuming arguendo that the term "functional" is ambiguous, the arbitrator may consider parol
16 evidence. Pursuant Elkouri & Elkouri, *How Arbitration Works* (Sixth edition):

17 The parol evidence rule does not exclude extrinsic evidence
18 offered to interpret the terms of an agreement, at least where
19 the language is "ambiguous," (footnote omitted) because the
20 evidence is not directed to the determination of the content of
the agreement, but rather to the meaning of the terms.

21 (Elkouri & Elkouri, page 440)

22 ///

23 ///

24 ///

25 ///

26 ³ In addition, because the County is working the IIIs out of class, the County also violated Article
27 V, Section 10 of the Current MOU (conformance to plan section) which provides that "no
28 regular employee shall be assigned to exercise the powers or perform the duties of any
classification other than their own classification for an accumulated period of 480 hours or
more during any one calendar year..." (RSA Exhibit 14, page 18, Article V, Section 10)

1 (a) **The exhibits introduced at the hearing support RSA’s interpretation that**
2 **“functional” means temporary or limited**

3 The exhibits introduced at the hearing support RSA’s position that the term “functional
4 supervisory responsibilities” means limited or temporary supervision. For example, the Bureau of
5 Investigation policy manual for Riverside DA Investigators (“policy manual”) sets forth at (c):

6 **In the absence of a supervisor or designee**, Senior
7 Investigators II-B and III-B shall have the **temporary**
8 authority of a supervising investigator as may be necessary to
9 meet the needs of the bureau of investigation or attorney staff.
10 While acting in such **temporary** capacity they shall be vested
11 with the full authority and responsibility of a supervising
12 investigator.

13 (Exhibit 4 (c), emphasis added)

14 In addition, the list of the IIIs’ duties and responsibilities (attached to the policy manual) sets
15 forth that the IIIs will “Serve as the acting supervisor of a unit or a work group **in the absence of a**
16 **supervising investigator.**” (Exhibit 4, emphasis added) As such, the policy manual and the list of
17 duties and responsibilities are County created documents that specify in no uncertain terms that a III
18 will act as a supervisor only “in the absence of a supervisor or designee” and only on a “temporary”
19 basis.

20 (b) **RSA’s interpretation of the term “functional supervision” is in line with the**
21 **industry standard**

22 The Los Angeles Police Department policy manual defines “functional supervision” as “the
23 **temporary** supervision of employees not normally under the command of one designated to furnish
24 specialized or technical knowledge necessary to the accomplishment of department objectives.”
25 (Exhibit 5, last page of Exhibit, emphasis added) As such, the definition of “functional supervision”
26 by the LAPD policy manual supports the conclusion that RSA’s interpretation of the term is consistent
27 with the industry standard.

28 (c) **The pre-contract negotiations support RSA’s interpretation of the term**
 “functional supervisory responsibilities”

 Elkouri & Elkouri sets forth that:

 Pre-contract negotiations frequently offer a valuable aid in the
 interpretation of ambiguous provisions. [footnote omitted]

1 Where the meaning of the term is in dispute, it will be deemed,
2 if there's no evidence to the contrary, that the parties intended
3 it to have the same meaning as that given it during the
4 negotiations leading up to the agreement.

(Elkouri & Elkouri at 453)

5 Drott, who attended the negotiation of the Career Plan, confirmed that RSA had expressed its
6 concern to the County at the table that RSA did not want the III designation to act as a "broad day to
7 day supervisor". (TR. 34:6-25; 35:1-5) Rather, it was understood by the parties that the term
8 "functional supervisor" would give Chief Kirfman "an opportunity to place them [IIIs] in a lead role
9 for specific assignments or programs to lead the team in a **limited temporary** purpose in a supervisory
10 role." (TR. 34:6-25, emphasis added) As such, the pre-contract negotiations supports RSA's
11 interpretation of the term "functional supervisory responsibilities" to be limited or temporary, rather
12 than full time or front line supervision.

13 **(d) The past practice of the parties supports RSA's interpretation of the term**
14 **"functional supervisory responsibilities"**

15 In the instant case, the evidence is overwhelming that there is a past practice which supports
16 RSA's interpretation of the term "functional supervisory responsibilities" as limited or temporary
17 supervision. RSA's witness (Ron Garcia, Ortiz, Tim Garcia, Reid, Nottingham, and Lowrey)
18 collectively testified that from the inception of the Career Plan in January 2000 until March, 2009, the
19 IIIs did not act as full time or front line supervisors; did not run the day to day operations of the units;
20 and only acted as supervisors when the Commander (aka Supervising DA Investigator) was on
21 vacation, sick, in training, or out of the office for other reasons. County witness Pradia confirmed that
22 prior to March, 2009, the IIIs did not run the day to day operations of their units. (TR. 96:23-25; 97:1-
23 16)

24 The conduct of the parties may be used to fix a meaning to words and phrases of uncertain
25 meaning.⁴ The Public Employment Relations Board has described a valid past practice to be one that
26 is "regular and consistent" or "historic and accepted".⁵ To determine whether there is a past practice,

27 ⁴ *Phelps Dodge Copper Prods Corp.*, 16 LA 229, 233 (Justin, 1951), cited in *How Arbitration*
28 *Works*, Elkouri & Elkouri (6th Ed. 2003).

⁵ *California State Employees Association, SEIU Local 1000* (2002) PERB Dec. No. SA-CO-
237 (26 PERC ¶ 33058, pg. 18).

1 the policy must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily
2 ascertainable over a reasonable period of time as a fixed and established practice accepted by both
3 parties.⁶ If a binding past practice is established, then it is also a well settled arbitral principle that the
4 past practice becomes a condition of employment which is binding on the parties.⁷ In addition, when a
5 past practice is established, it confers a right on the employees and becomes a working condition,
6 which cannot be unilaterally terminated.⁸

7 In addition, as set forth in Elkouri & Elkouri:

8 The custom or past practice of the parties is the most widely
9 used standard to interpret ambiguous and unclear contract
10 language. It is easy to understand why, as the party's intent is
11 most often manifested in their actions. Accordingly, when
12 faced with ambiguous language, most arbitrators rely
13 exclusively on the party's manifestation of intent as shown
14 through past practice and custom. Indeed, use of past practice
15 to give meaning to ambiguous contract language is so common
16 that no citation of arbitral authority is necessary.

17 (Elkouri & Elkouri at 623)

18 For over eight years (January 2000-March 2009), the parties treated the term "functional
19 supervisory responsibilities" as temporary or limited supervision when the Supervising DA
20 Investigator was out of the office. As such, the County's conduct and treatment of "functional
21 supervisory responsibilities" was unequivocal; clearly enunciated and acted upon; and readily
22 ascertainable over a reasonable period of time as a fixed and established practice accepted by both
23 parties.

24 As such, the evidence introduced at the Arbitration supports a conclusion that there was a past
25 practice and that the County's conduct (the March 25, 2009, memorandum and actions subsequent
26 thereto) was a significant departure from the past practice and a violation of the Current MOU and/or

27 ⁶ *Riverside Sheriffs' Association v. County of Riverside*, 106 Cal.App.4th 1285, 1291 (2003).

28 ⁷ *Michigan Department of State Police*, 97 LA 721, 722 (Kanner, 1991).

⁸ *City of Tampa, Florida*, 74 LA 1169, 1173 (Wahl, 1980). See generally, *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 311 (1989) [Collective bargaining agreements may include implied as well as express terms]; *Bonnell/Tredegear Indus.* [Can become an implied term of a collective bargaining agreement]; *How Arbitration Works*, Elkouri & Elkouri, 632 (6th Ed. 2003) [Surveying circumstances in which arbitrators give employer custom "binding practice" effect as an implied term of the agreement].

1 the past practice. Specifically, the RSA witnesses testified collectively that on or about March, 2009,
2 the duties of the IIIs were changed from investigators that acted as supervisors on a limited/temporary
3 basis to full time/front line supervisors. The IIIs were tasked with running the day to day operations of
4 their units and supervising multiple individuals. Currently, the IIIs rarely, if ever, act as investigators.

5 The County's witnesses confirmed the same. County witness Pradia confirmed that subsequent
6 to the Memo, the IIIs now run the day to day operations of their units. (TR. 96:23-25; 97:1-16) In
7 addition, County witness Hussey testified that in approximately February/March, 2009, his job duties
8 changed, and he received the additional duty of supervising individuals in his units. (TR. 116:18-25;
9 117: 1-6)

10 In addition, since the time of the Memo, the County has begun sending the IIIs to Supervisory
11 school, even though the IIIs were not sent to Supervisory school prior to the Memo. (TR. 57:22-25;
12 58:1-18) Further, the exhibits evidence the County's departure from the past practice by now treating
13 the IIIs as supervisors:

14 1. The Memo (attachment A to RSA Exhibit 1) sets forth that the IIIs will "supervise"
15 subordinate DA Investigators.

16 2. The job description of the Supervising DA Investigator was changed. The job description
17 had stated that the Supervising DA Investigator would act as "full, first line supervisors and mid-level
18 managers". (RSA Exhibit 7) However, the job description for the Supervising DA Investigator (aka
19 Commander) was recently changed and now sets forth that the position will act only as mid-level
20 managers. (RSA Exhibit 8) The County's witnesses confirmed at the Arbitration that the IIIs have
21 been tasked with taking over the day to day operations of the units, which was previously handled by
22 the Supervising DA Investigator. (TR. 113:23-25; 114:1-6)

23 3. Exhibit 9 is an email dated February 5, 2010, from the County to several IIIs instructing them
24 to apply to the Supervisory school. The attachment to the email states that to be considered for the
25 Supervisory school, the applicant must "currently serve as a full time, first level supervisory peace
26 officer". As such, the email would not be sent to the IIIs unless the County viewed the IIIs as full
27 time/first level supervisors

28 4. Exhibit 15 is an out of office reply dated February 16, 2010, from Commander Jose

1 Rodriguez setting forth that he is out of the office, and if assistance is needed, to ask for "Unit
2 Supervisor" Tom Reid. (As Reid testified at the hearing, he is currently a III.)

3 (e) **The County's Arguments have no Merit**

4 It is expected that the County will argue that the term "functional supervisory responsibilities"
5 means that the IIIs may be used as full time or front line supervisors. As set forth in detail above, the
6 plain meaning of the language, as well as the pre-contract negotiations and past practice, provide
7 otherwise. If "functional" meant that the Chief Investigator could task the IIIs as full time/front line
8 supervisors at his whim, then why would the parties include the language "functional"? The only
9 plausible answer is that the disputed language is not subject to the County's interpretation.

10 The County will also likely argue that it is not fair that the IIIs perform primarily the same tasks
11 as the IIs and are paid more. However, whether the IIIs are overpaid is not relevant. The County's
12 "fairness" argument is not a defense; rather, it is only an excuse that does not justify its violation of the
13 Current MOU.

14 In any event, the County fails to grasp that the IIIs receive more compensation than the IIs as a
15 reward for their tenure and experience as envisioned by the parties when the career plan was
16 negotiated. (TR. 41:21) The IIIs have paid their dues and are justifiably entitled to receive more
17 compensation than those investigators lower in the chain. (Further, several of the IIIs at the
18 Arbitration testified that their duties had changed from the time that they were promoted from II to III:
19 i.e., providing additional training; providing mentoring; writing additional reports, etc.)

20 Likewise, the County's argument concerning the slight difference in language used for the
21 descriptions of IIs and IIIs is misplaced. At the Arbitration, the County noted that the Current MOU
22 states that IIs may be charged with "some limited supervisory related tasks", and that IIIs may assume
23 "functional supervisory duties". (RSA Exhibit 14, pages 62-63, at paragraphs 5 and 6 under the
24 heading "Positions") It may be presumed that the County is attempting to argue that IIIs must have
25 more duties/responsibilities because of the difference in terminology.

26 However, the County's argument is quickly undermined by the remainder of the Career Plan.
27 The Current MOU goes on to state that **both** IIs and IIIs can expect added responsibilities including
28 "functional supervision". (RSA Exhibit 14, page 63, second paragraph under the heading "Basic

1 Provisions”) As such, the parties contractually agreed that the IIs and IIIs would both engage in
2 limited/temporary supervision. Of course, the County’s position (if accepted) would lead to the absurd
3 result of also tasking the IIs as full time/front line supervisors- a position which the County has not
4 (and will not) take. On the other hand, RSA’s position makes perfect sense. The Current MOU states
5 that the IIs will have “limited supervisory related tasks” and “functional” supervisory responsibilities.
6 The only way to reconcile those two terms is to define the term “functional” as temporary/limited.

7 **VI. RESERVATION OF JURISDICTION.**

8 RSA respectfully requests that the Arbitrator set forth in the opinion and award that he has
9 retained jurisdiction over this matter.

10 **VII. CONCLUSION.**

11 For all of the foregoing reasons, RSA respectfully requests that the Arbitrator:

- 12 1. Sustain the grievance;
- 13 2. Declare that the County violated Article XVII, Section 3, and Article V, Section 10, of the
14 2008 through 2011 Law Enforcement Unit MOU and a past practice by unilaterally changing the job
15 duties of the Senior District Attorney Investigator III-B classification from a temporary/occasional
16 supervisor to a front line/full time supervisor;
- 17 3. Declare that the County is required to comply with Article XVII, Section 3, and Article V,
18 Section 10, of the 2008 through 2011 Law Enforcement Unit MOU and a past practice by treating the
19 Senior DA Investigator III-Bs as temporary/occasional supervisors rather than front line/full time
20 supervisors; and
- 21 4. Order such other and further relief as the Arbitrator deems proper.

22
23 Dated: April 12, 2010

HAYES & CUNNINGHAM, LLP

24
25 *Adam E. Chaikin*

26 By: _____

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BEFORE BOARD OF SUPERVISORS

IN THE MATTER OF ARBITRATION
BETWEEN,
RIVERSIDE SHERIFFS' ASSOCIATION,
Union,
and
COUNTY OF RIVERSIDE,
Employer.

RE: SENIOR DA INVESTIGATOR III-B-
WORKING OUT OF CLASS, GRIEVANCE
NO. R0809-019

PROOF OF SERVICE

RECEIVED/RIVERSIDE COUNTY
ASSESSMENT/APPEALS DIVISION
CLERK/BOARD OF SUPERVISORS
2010 JUL -6 AM 10:00

I am employed in the County of San Diego, State of California. I am over the age of 18, and not a party to the within action; my business address is 3258 Fourth Avenue, San Diego, CA 92103.

On July 2, 2010, I served the documents named below on the parties in this action as follows:

DOCUMENTS SERVED:

**APPEAL BY RIVERSIDE SHERIFFS' ASSOCIATION OF ARBITRATOR'S DECISION
RE: SENIOR DA INVESTIGATOR III-B- WORKING OUT OF CLASS, GRIEVANCE
NO. R0809-019**

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SERVED UPON:


Counsel for County of Riverside
Bruce Disenhouse
Kinkle, Rodiger and Spriggs
3333 Fourteenth Street
Riverside, CA 92501

COUNTY OF RIVERSIDE
c/o Clerk of the Board
4080 Lemon Street, 1st Floor
Riverside, CA 92501

BY THE FOLLOWING MEANS:

[xx] **BY U.S. MAIL.** I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same date with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. I declare that I am employed in the office of a member of the bar of this court, at whose direction this service was made. Executed on July 2, 2010 at San Diego, California.



SARAH HOLKO