

**In the Matter of Arbitration Between
Law Enforcement Labor Services, Inc.
[Kelli Ploumen]**

OPINION AND AWARD

And

BMS Case No. 09-PA-0847

City of Plymouth, Minnesota

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of Law Enforcement Labor Services, Inc.
Isaac Kaufman, Esq.
LELS
St. Paul, Minnesota

On behalf of City of Plymouth, Minnesota
Roger N. Knutson, Esq.
Campbell & Knutson
Eagan, Minnesota

JURISDICTION

In accordance with the Labor Agreement between the City of Plymouth and Law Enforcement Labor Services, Local 18, January 1, 2008-December 31, 2009; and under the jurisdiction of the State of Minnesota Bureau of Mediation Services, the above grievance arbitration was submitted to Joseph L. Daly on November 25, 2009, in the city of Plymouth, Minnesota. Post-hearing briefs were submitted by the parties on December 18, 2009. The decision was rendered by the arbitrator on January 4, 2010.

ISSUE AT IMPASSE

The parties agree the issue is:

1. Did the employer have just cause to suspend Officer Kelli Ploumen for 20 days?
2. If not, what is the appropriate remedy?

THE RELEVANT CONTRACTUAL PROVISIONS INCLUDE:

ARTICLE VI. WORK SCHEDULE

6.1 Work Schedule. The normal work shift shall be one period of eight/ten (8/10) or more consecutive hours within a twenty-four (24) hour period. The normal work week shall be the equivalent of forty (40) hours per week on an annualized basis. The work period shall be a twenty-eight (28) day period, beginning at midnight on January 1, 2005. Except as otherwise provided in this agreement, work schedules and lengths of shift shall be established by the EMPLOYER. Nothing contained herein shall be construed as a guarantee of a minimum or maximum number of hours the EMPLOYER may assign Employees.

ARTICLE VIII. DISCIPLINE

8.1 New Employees and Employees who have been rehired shall be on a twelve (12) month probationary period and may be disciplined or discharged by the EMPLOYER in its sole and exclusive discretion at any time during such twelve (12) months' probationary period. Employees who have completed the probationary period may be disciplined, suspended, or discharged for cause.

8.2 Discipline may be in one or more of the following forms:

1. Oral reprimand;
2. Written reprimand;
3. Suspension;
4. Demotion; or
5. Discharge.

ARTICLE IX. GRIEVANCE PROCEDURE

9.7 The arbitrator shall be empowered, except as limited below, to make a final and binding decision in cases of alleged violation of rights expressly accorded by this Agreement. Limitations on the power of the arbitrator are as follows:

1. They shall have no power to add to or subtract from or modify any of the terms of this Agreement.

9.9 The arbitrator shall have no right to require the EMPLOYER, LELS, or any Employee to perform any act contrary to law or contrary to the provisions of this Agreement.

FINDINGS OF FACT

1. Officer Kelli Ploumen was suspended for 20 days for Neglect of Duty because she was late for work on January 4, 2009. She received the following letter dated January 6, 2009:

SUBJECT: NOTICE OF SUSPENSION CONCERNING NEGLECT OF DUTY

Dear Officer Ploumen,

On 01-04-09 you were scheduled to work a Day Power Watch shift, which started at 1040 hours. Sergeant Kuklok reported her was waiting in the roll call room at 1041 to start roll call and give out his shift expectations for the new trimester. Sergeant Kuklok reported you were not there. At 1042 Sergeant Kuklok observed you drive into the parking lot. He said you went into the locker room to prepare for duty and did not come out of the locker room until 1048. Sergeant Kuklok spoke to you about being here and prepared for duty promptly at 1040. You were issued a work incident report for being late for duty.

You have exhibited a past practice of missing shifts and being late for duty and you have been previously disciplined for this behavior. In the last Union Discipline Grievance proceedings you were involved with, a letter dated November 8, 2007, from Police Chief Goldstein to your Union Representative Dennis Kiesow, had three future stipulations attached to it. These stipulations addressed what would occur if you had any future late for duty episodes. Stipulation Three stated if there was another episode within the next 24 months (from 11/07/07) Officer Crandall would be suspended for 20 days. If there is a second violation within the next 24 months, she would be terminated.

In light of this 11th incident coupled with the aforementioned stipulation, you will receive a 20-day suspension for Neglect of Duty. This suspension will take effect immediately. Your shifts that you will miss are January 8 (training day), 9, 10, 11, 15 (Webb Day), 16, 17, 18, 23, 24, 25, 26, 27, 28, February 2, 3, 4, 5, 9 and 10. During this time period you should not attend any ancillary meetings. You should return to duty on February 11th, 2009.

I will stress again to you that it is very important that you understand that the issue of job responsibility is addressed and that further unsatisfactory work performance will be subject to further discipline action including dismissal.

I truly want to see you succeed as an Officer without Department. If your immediate supervisor or I can be of any assistance please do not hesitate to contact us.

Sincerely,

Scott Webb

Captain, Patrol Commander
Plymouth Police Department [Union Exhibit #2, emphasis in original].

2. Officer Ploumen was scheduled to work the Power Shift, 10:40 a.m. to 9:00 p.m. on January 4, 2009. She testified that she had been informed by her immediate supervisor Sergeant Christopher Kuklok several days before that he had scheduled a roll call in order to go over shift expectations at the beginning of the trimester. Officer Ploumen testified she had received that message. But, as she drove in to work on January 4, 2009, in a snowstorm, she “had not remembered that Sergeant Kuklok had scheduled the roll call.” It is not uncommon for the “Power Shift” not to have a roll call since typically only one or two officers report for duty at that time.

3. Sergeant. Kuklok testified that as he waited in the Police Department Roll Call Room he saw Officer Ploumen drive into the Police Department parking lot at 10:38 a.m. He checked his watch and his cell phone, both of which are synchronized to the United States Naval Observatory master clock time. Sergeant. Kuklok further testified that later he checked the video camera at the parking lot which showed Officer Ploumen entering the parking lot at 10:39:43 - although this clock is not synchronized to the Naval Observatory clock.

Sergeant Kuklok waited until 10:48 when he heard the basement door open outside the locker room. He went to the basement and located Officer Ploumen. Sergeant Kuklok testified that Officer Ploumen told him she had forgotten that there was a roll call and that she had gone to the locker room to put on her uniform but that she had entered the building by 10:40.

4. Policy 503 of the Police Department’s *Policy and Operating Procedure Manual* provides:

REPORTING FOR DUTY: Officers shall report for duty at the time and place required by assignment or orders shall be physically and mentally fit to perform their duties. They shall be properly equipped and cognizant of information required for the performance of duty so that they may immediately assume their duties. Judicial subpoenas shall constitute an order to report for duty under this section. [City exhibit #1].

5. Officer Ploumen testified it is typical for the Day Power Shift not to have roll call. She further testified she arrived on time, but forgot that there was a roll call. She testified she

had arrived before 10:40, had put on her uniform in the locker room and was checking her squad car and equipment in the basement when she was confronted by Sergeant Kuklok. She testified that she left her home on January 4, 2009 at the usual time. Her home is approximately 12 miles from the City of Plymouth, Minnesota Police Department. She testified it was snowing hard and the traffic was slow. She also testified that the clock on her car dashboard showed that she had pulled into the Police Department parking lot at 10:38 a.m. She went to the locker room, got dressed, and walked from the locker room to the squad car where she encountered Sergeant. Kuklok. Sergeant Kuklok told her she was late and “accused me of sneaking around and trying to avoid him.” She denied that she had been late and told Sgt. Kuklok she was not trying to avoid him. She was basing her arrival time on her car clock. Officer Ploumen testified “I was not late in my eyes.” She further testified that she has not had a good working relationship with Sergeant Kuklok.

6. Since Officer Ploumen was hired in May 2002, she has received work incidence reports, a written reprimand and several suspensions for similar misconduct. They include:

May 2002	late
June 13, 2002	late
June 20, 2002	late; work incident report.
November 14, 2002	late
November 19, 2002	late
November 21, 2002	missed shift
March 13, 2003	late
May 4, 2003	missed shift; written reprimand.
December 9, 2003	missed shift; two day suspension, stayed for six months.
February 16, 2004	late; previous two day suspension and four day suspension added; fourth day stayed for six months.
April 5, 2004	meeting with employee and union representative; fourth day suspension dropped.
June 3, 2004	missed shift; seven day suspension; two days stayed for one year with no other repeat offenses.
May 16, 2005	missed training

February 28, 2007	missed shift; four day suspension, with 24 month period set for any future offenses.
October 16, 2007	late; fifteen day suspension; five days stayed for one year.
December 16, 2007	contacted Hennepin County Dispatcher to call in sick with no attempt to contact shift supervisor; work incident report.
January 4, 2009 [City Exhibit #2]	late; twenty day suspension

Officer Ploumen was not disciplined for being late or for missed shifts in 2008. During 2008 she was off work or on light duty for approximately half the year due to a car accident while participating in a high-speed pursuit. January 4, 2009 was her fourth day back from her extended six-month injury leave.

When Officer Ploumen was suspended for fifteen days in October 2007, 5 days were stayed by Chief Michael Goldstein subject to three stipulations. They were:

Stipulation 1

Any late-to-duty (shift, assignment, detail, court, etc.) circumstances outside of situation beyond her control, e.g. inclement weather, traffic crashes, etc., within the next six months (from the time of the infraction), will result in termination.

Stipulation 2

If there is another episode after the six-month timeline and within one year, Officer Crandall (Ploumen) will serve a 20-day suspension along with the five days that have been stayed from this event. If there is a second violation within the next year, she will be terminated.

Stipulation 3

If there is another episode within the next 24 months, Officer Crandall (Ploumen) will be suspended for 20 days. If there is a second violation within the next 24 months, she will be terminated. [emphasis added].

Based upon the information provided by Officer Crandall (Ploumen), I am suspending the timeline for Stipulations 1-3 until the City has had time to work with Officer Crandall (Ploumen) regarding a condition that might require the City to consider an accommodation under the ADA. Once the appropriate notification is made and the documentation is provided, the City will engage in the required interaction regarding accommodation. It

is my expectation that Officer Crandall (Ploumen) will provide the necessary information to start this process within six weeks [City Exhibit #2, Chief Goldstein's letter Nov. 8, 2007].

7. Officer Ploumen testified at the arbitration hearing that she suffers from Adult Deficit Hyperactivity Disorder [ADHD], which was diagnosed in 2004. She has been taking medication since then to deal with the ADHD. Officer Ploumen has not presented documentation to the City concerning the Adult Deficit Hyperactivity Disorder, even though she had informed the City in November 2007 that she had a ADHD and sought an accommodation. City Manager Ahrens had explained in a letter dated March 19, 2009, "Neither Officer Ploumen nor the City completed the accommodation process [paperwork]. The benefit for doing so rested with Officer Ploumen. She had one year during which to gain the benefit of the completed accommodation process." [Joint Exhibit #2, Ms. Ahrens' letter March 19, 2009]. To the date of the Arbitration Hearing on November 25, 2009, Officer Ploumen had yet not completed the required paperwork to obtain an accommodation as required by the Americans with Disabilities Act. See 29 C.F.R. §1630.9 (1997).

8. The January 4, 2009 incident was within 24 months of the prior 2007 infractions. As a result, Officer Ploumen was suspended for 20 days in accordance with the prior warning:

You have exhibited a past practice of missing shifts and being late for duty and you have been previously disciplined for this behavior. In the last Union Discipline Grievance proceedings you were involved with, a letter dated November 8, 2007, from Police Chief Goldstein to your Union Representative Dennis Kiesow, had three future stipulations attached to it. These stipulations addressed what would occur if you had any future late for duty episodes. Stipulation Three stated if there was another episode within the next 24 months (from 11/07/07) Officer Crandall (Ploumen) would be suspended for 20 days. If there is a second violation within the next 24 months, she would be terminated... you will receive a 20-day suspension for Neglect of Duty." [Joint exhibit #2, Webb letter Jan. 6, 2009].

DECISION AND RATIONALE

The City contends it has imposed progressive discipline on Officer Ploumen for the repeated misconduct. Two, four, seven and fifteen-day suspensions have not changed her behavior. The City argues a 20-day suspension is appropriate and will hopefully change her behavior resulting in her showing up for work on time. Chief Goldstein on three prior occasions has reduced her suspensions conditioned upon her showing up for work on time. It has not worked. There is no basis for reducing her suspension a fourth time.

The Union contends: 1) Sgt. Kuklok and Officer Ploumen have had a problematic working relationship in the past; 2) The roll call for the powershift is held only sporadically; 3) she was not late for work; 4) Officer Ploumen did not call in on January 4, 2009 because she was trying to “fly under the radar” and not attract attention to herself; 5) She forgot that a roll call had been scheduled; 6) There was no internal affairs investigation and consequently the City improperly failed to investigate the matter; 7) There was insufficient proof of misconduct in that the Sgt. Kuklok’s testimony implies that the City holds its employees to a single, universal standard for punctuality; 8) There was disparate treatment since two other officers who were late had received only written reprimands as discipline and no unpaid suspensions; 9) The penalty imposed by the City is too severe and disproportionate to the alleged violation.

Officer Ploumen, other than tardiness, is a good police officer. But she has a problem with tardiness which has caused her to be progressively disciplined. Her explanation is that she has Adult Deficit Hyperactivity Disorder [ADHD], which was diagnosed in 2004. While she has told the Chief she has this disability, she has not followed through on the paperwork required to obtain an accommodation under the Americans with Disabilities Act. It is incumbent on her to get the proper doctor’s diagnosis and reports so her employer can be sure that she does in fact have the disability and then attempt to accommodate her. When the disability and/or the need for accommodation is not obvious the employer is entitled to know that the employee has a disability and has a need to be accommodated. The employer may ask the employee for reasonable documentation about her disability and her functional limitations. See 29 *C.F.R.*

§1630.9. Officer Ploumen has not provided such documentation even though it is incumbent on her to get such medical documentation. Consequently the Americans with Disabilities Act will not be applied in this specific incident.

It is clear that the Chief has given her a number of breaks in order to deal with her problem of tardiness. But as the Chief testified at the arbitration hearing “no other officer has this kind of late problem” and “enough is enough.” The Chief testified that “being on time is paramount for those who work in patrol. If someone is late, then I must require someone else to work overtime. Being at roll call to go through shift expectations is important. When roll call starts at 10:40, the officer must be at roll call on time and in uniform.” She was not in uniform at 10:40, nor was she in the roll call room at 10:40.

The City has proven by clear and convincing evidence that it had just cause to suspend Officer Ploumen for 20 days. The City exercised progressive discipline, investigated the matter properly [an internal affairs investigation is not necessary]. Officer Kuklok provided clear and convincing proof that she was late by checking both his watch and his cell phone and by observing Officer Ploumen in the parking lot. Officer Ploumen herself testified she had forgotten about the roll call that day and did not show up to the roll call room. Punctuality for a police officer is important. Being present and ready to go at the roll call is covered in policy 503 of the Police Department’s *Policy and Operating Procedure Manual*. Discipline, policies, command and control are essential realities of a police officer’s job. Being a few moments late would typically not justify a 20-day suspension under ordinary circumstances. However, based on Officer Ploumen’s past history of discipline around tardiness, a 20-day suspension is not too severe. While other officers were late, no other officers had the tardiness record of Officer Ploumen. There is just cause to suspend her for 20-days under the progressive discipline policy adopted by the City of Plymouth Police Department.

1/4/2010
Date

Joseph L. Daly
Arbitrator