

IN RE ARBITRATION BETWEEN:

LAW ENFORCEMENT LABOR SERVICES, LELS,

and

CITY OF NORTH ST. PAUL

DECISION AND AWARD OF ARBITRATOR

BMS Case No. 13-PA-0594 and 13-PA-0550

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September 23, 2013

IN RE ARBITRATION BETWEEN:

LELS,

and

City of North St. Paul.

DECISION AND AWARD OF ARBITRATOR
Charles Kunkel grievances
BMS Case # 13-PA-0594 & 13-PA-0550

APPEARANCES:

FOR THE UNION:

Isaac Kaufman, Attorney for the Union
Charles Kunkel, grievant
Officer Jason Maltby
Officer John Wahlberg
Sgt. Bryan Bomstad
Tim Leier, TRL Consulting; Pension Actuary
Kim Hanson, Finance Department
Gina Mancini, Police Dep't Admin. Ass't

FOR THE EMPLOYER:

Tiffany Schmidt, Attorney for the City
Chief Thomas Lauth
Captain Dustin Nikituk
Steven Tallen, Esq. Tallen and Baertschi
Wally Wysopal, former City Manager
Sgt. Merci Loeks
Officer Jessica O'Hern
Officer Michael Burrell
Michael Mancur, Network Engineer

PRELIMINARY STATEMENT

The hearing was held August 5 & 6, 2013 at the City Offices in North St. Paul, MN. The record was closed on August 6, 2013. The parties submitted Briefs dated August 30, 2013.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period of January 1, 2012 to December 31, 2012. The grievance procedure is contained at Article VII. The arbitrator was selected from a list maintained by the Bureau of Mediation Services. The parties agreed that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES

The City stated the issues as follows: Did the employer have just cause to issue a demotion and an 18-day suspension to the grievant?

Did the employer violate the labor agreement when it allowed the grievant to only bid the day shift and when it prevented him from accessing the records area following his return to work as a patrol officer after serving an 18-day suspension?

The Union stated the issues as follows: Did the City violate the Sergeant's Collective Bargaining agreement by suspending the grievant for 18 days and demoting him from Sergeant to Patrol Officer without just cause? If so what shall the remedy be?

Did the City of North St. Paul violate the Patrol Officer's Collective Bargaining agreement by preventing the grievant from bidding for a 2013 patrol officer shift based on his seniority? If so what shall the remedy be?

The issues as determined by the arbitrator were as follows:

Did the City have just cause to demote and impose an 18-day suspension to the grievant? If not, what is the proper remedy?

Did the City violate Article IX of the Patrol Officer's Collective Bargaining Agreement, CBA, when it allowed the grievant to only bid a day shift? If so what shall the remedy be?

Did the City violate the CBA when it prevented the grievant from accessing the records area following his return to work following his 18-day suspension herein? If so what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

From The Sergeant's CBA, Joint Exhibit A:

ARTICLE X - DISCIPLINE

10.1 The EMPLOYER will discipline employees for just cause only. Discipline will be in one or more of the following terms:

- 1) Oral reprimand
- 2) Written reprimand
- 3) Suspension
- 4) Demotion or
- 5) Discharge

From the Patrol Officer's CBA, Joint Exhibit B:

ARTICLE IX – SENIORITY

9.5 Senior qualified employee shall be given shift assignment preference after eighteen months (18) months of continuous full-time employment

CITY'S POSITION

The City's position is that there was just cause to issue both the demotion and the suspension to the grievant for his actions on June 5, 2012 and for repeatedly leaving early and submitting inaccurate, even fraudulent, time records attesting that he stayed to the end of those shifts. Further, the City claimed that there was no violation of the applicable CBA in limiting the grievant to a day shift bid and for denying him access to the records area upon his return to work as a patrol Officer following his suspension here. In support of this the City made the following contentions:

1. The City asserted that while the grievant has been with the police department for 23 years, he has a somewhat checkered history and has been disciplined in the past for various sorts of offenses. He has also been very disruptive and even downright disrespectful to the Chief. The Chief even characterized some of the grievant's conduct as "mutiny."

2. The grievant was employed as a sergeant and shift supervisor for more than 13 years and as such was responsible for setting the proper example of conduct and of attitude within the department. Leaving early, fomenting disrespect for rules and calling for people to go AWOL were contrary to that job and of his position.

3. The City noted that the events that gave rise to this entire matter arose on June 5, 2012. The grievant was in the break room at approximately 7:15, some 15 minutes or so prior to the end of his shift, when he approached Officer Burrell and stated, "let's go and be AWOL together," or words to that effect. While there was some dispute about what exactly he said, the implication was clear, that he and an officer under his command should "go AWOL" and leave early.

4. The city noted that the shift ended at 7:30 a.m. and that officers are not to leave early without the express permission and approval of their supervisors – this included the grievant as well. Officers are not to set their own shifts and are responsible for staying on duty with their duty equipment on and accessible until the end of their shifts. If they want to leave they must go through the proper procedures – they cannot simply decide to leave on their own. Further, the grievant could have checked with his supervisors if he wanted to leave early yet he did not.

5. Sergeant Loeks, who was also in the break room, noticed this statement and found it not only odd but also violative of applicable rules to suggest that both he and another officer "go AWOL." She also noted that prior to 7:30, she noticed that the grievant's vehicle was no longer in the parking lot. Further the video security system showed the grievant in his civilian clothes walking to his truck at 7:22 a.m. – some 8 minutes early.

6. Troubled by this Sergeant Loeks reported this to upper management who immediately started an investigation and found that indeed the grievant left early that day as well as on 5 other days. The City asserted that this demonstrated an egregious and possibly dangerous pattern whereby the grievant was out of uniform and even gone from the department.

7. The grievant was shown to have left 5 to 9 minutes early on 6 occasions, including June 5, 2012. The City argued that this was verified by video evidence from the security cameras around city hall all of which showed the grievant in civilian clothes walking to his truck or leaving in it well before 7:30 a.m. on these occasions.

8. The City pointed to several communications from the Chief that indicated leaving even a minute early is an AWOL incident. See City Exhibit 4, which states in part “Regardless of whether it is one minute or one hour, arriving late or leaving early from a schedule shift without prior approval from a supervisor is ‘absent without leave’ (AWOL) ... this type of behavior or indifference is subject to disciplinary action, including possible termination.” The grievant was well aware of this clear policy yet chose to ignore it or at least be cavalier about complying with it. In either case, the City asserted, the grievant’s scofflaw attitude toward these clear directives of management cannot be tolerated.

9. The City also pointed out that the grievant filled out his duty forms indicating that he worked until 7:30 on all of these occasions and argued that this is nothing short of theft of time. The forms have a clear warning that the officer is stating “under the penalty of perjury” that the time submitted is accurate. It was clear that when he left early these forms were knowingly inaccurate.

10. The city asserted that it investigated the grievant’s leaving time and found that he left early on at least 6 occasions and that his actions constituted perjury since he acknowledged that the time was accurate. The city asserted that he had not sought permission from superior officers and violated clear policy against leaving early by as many as 41 minutes over the course of these 6 days.

11. The City considered criminal charges against the grievant and was prepared to go forward with those charges but decided not to – not because they felt there was insufficient evidence to do so but to avoid the publicity and embarrassment to everyone concerned. It was felt that the matter would be best handled internally through appropriate discipline rather than by a very public and very distressing criminal trial.

12. The City noted that the surveillance clocks are accurate and that they are in sync with the clocks in and around city hall. The City countered the union’s claim that the clocks were “off” and asserted that many are in fact atomic clocks accurate to within a few seconds. Further, that they are coordinated with other clocks. Thus the claim that the grievant left when he “thought” it was 7:30 cannot be true.

13. Further the grievant could easily have simply looked at his cell phone, which also has the correct time yet it was apparent that he either did not or chose to ignore that. The City argued that the grievant knowingly left early without permission on at least 6 occasions and that his intent is not relevant – he was responsible for making sure he stayed ready for duty until the end of his shift.

14. The City further asserted that the seriousness of these actions coupled with the grievant’s troubled past warranted the 18 day suspension – 3 days for each of the days he left early without permission. Further, these actions are inconsistent with the position of shift supervisor and Sergeant and the Chief felt that he could no longer trust the grievant to act and conduct himself in a way that reflected that position. Accordingly, the Chief determined to demote the grievant to a patrol officer, instead of firing him immediately.

15. The City further asserted that this level of discipline is appropriate given the egregious falsification of the time submissions and because leaving early could well mean that in an emergency the grievant would not have been available to assist. This could create a potentially dangerous situation for the safety of the public and other officers.

16. The city also noted that while other officers may take off their duty belt in order to sit down and fill out necessary forms near the end of their shifts, this is very different from the grievant's actions to take off all of his uniform and equipment. It would take approximately 7 minutes to put it all back on again and that could well cost precious time in an emergency if he were to be needed. The City thus distinguished those situations where an officer takes off his or her gun and duty belt but stays in the duty room with their uniform on from this situation.

17. The City further asserted that unless the level of discipline is truly outrageous the arbitrator must leave it alone and cited various arbitral decision for the proposition that it is not for the arbitrator to substitute his or her judgment for that of management. Here the Chief has made it quite clear in repeated communications both written and verbal to the officers and to the grievant that one may not leave early from a schedule shift without permission.

18. The City argued that this does not constitute double jeopardy as the union claimed. The specific language of Article X states that "Discipline will be in one or more of the following terms" and includes demotion as well as suspension. Further this is not a situation where the employer decided to suspend an employee and later decided to change that to something more serious; the city elected to impose both the suspension and the demotion due to the seriousness of the grievant's actions here and argued that both were reasonable and necessary to send the proper message to the grievant.

19. The Chief denied any personal animus that figured into this decision and asserted that he has been more than fair with the grievant despite his disruptive attitude and actions over the course of time. He noted that this is not the first time the grievant has submitted false reports and that he once caught him doing so in the 1990's and called him on it. The City asserted that it is the grievant who harbors personal animus against the Chief due to petty jealousy over the Chief's promotion to that job.

20. Further the City and the Chief asserted that the grievant needed more direct supervision given these offenses. The grievant typically worked the night shift when there are few supervisors around. He needed to be on duty during the day so his actions could be more thoroughly scrutinized and so he could be watched. Accordingly, he was restricted to bidding only on day shifts as a legitimate and necessary exercise of managerial authority to make sure that the grievant was complying with the directives to stay until his shift ended. The city asserted that this was not disciplinary but rather was necessary to assure compliance.

21. The City asserted that this is consistent with the language of the CBA reflected above since the grievant is not “qualified” under the language of Article IX. He has not been in continuous employment as a patrol officer for 18 month and that language does not apply to guarantee him his bid.

22. Finally, the City claimed that the request to allow the grievant access to the records room is moot. The policy changed and now no officers are allowed in that area. This was due to a BCA audit of the department. If officers need something they can go to the counter and request it but they are no longer allowed back there. Thus this grievance should be denied also.

The City seeks an award denying all grievances in their entirety.

UNION’S POSITION

The union took the position that there was not just cause for the discipline in this matter. In support of this position the Union made the following contentions:

1. The union asserted that the grievant is a 23+ year veteran officer with the City of North St. Paul and that he is well respected by virtually all of the officers he supervises. While he has had some issues with the current Chief, those issues are based on the Chief’s dislike for him. The union pointed to a finding in a prior award by Arbitrator Bard that specifically noted that the Chief harbored a personal animus toward the grievant that is a factor at least in the decision to discipline him and on the degree of discipline imposed. Arbitrator Bard found that “in fact there is evidence that an animus [by the Chief] may have existed” and overturned the warning issued to the grievant in August 2012.

2. Thus, there is no discipline in the grievant's file over a written reprimand yet the Chief now seeks to jump to an 18 day suspension as well as a demotion that will cost the grievant over \$114,000.00 in retirement benefits due to the loss of Sergeant's pay. The union asserted that the level of discipline is far and away unreasonable for the allegations even if they are proven to be true – which the union vehemently denied.

3. The union also pointed to grievances filed by the grievant in this matter going back to 2008 which drew the ire of the Chief. Chief Lauth attempted to suspend the grievant after he filed those grievances but the parties agreed to a settlement whereby the grievant would participate in the Metro Gang Strike Force and not be under the day-to-day supervision of Chief Lauth. After returning from that assignment however, the grievant had to bring a lawsuit to regain his former position after the Chief violated the earlier agreement and sought to demote the grievant at that time to patrol officer. The union argued that it is apparent, even obvious, that the Chief harbors considerable dislike for the grievant on an inappropriate personal level and has sought to demote him in the past without success.

4. Turning to the events of June 5, 2012, the union noted that the grievant was assigned to the night shift from 2300 (11:00 p.m.) to 0730 hours (7:30 a.m.). The union argued that the grievant is a responsible officer who fully understands that he cannot set his own shift and that he is responsible for staying until the end of his assigned shift unless he gets permission to leave early from a supervisor. The union asserted that he has never done that and would never do that and that he stayed until the end of his shift on June 5, 2012.

5. The union noted that around 7:15 a.m. the grievant was in the break room near the end of his shift and left the room to go to the locker room, use the restroom and change into his civilian clothes. As he left he made an offhand comment to Officer Burrell to “go AWOL.” This was intended and taken as a joke – it was not a serious comment and was a frequently used comment by multiple officers in the department.

6. The union pointed to the testimony of Officer Burrell – who was called by the city - that he took it as a joke; did not see it as disrespectful and never intended to “go AWOL” as a directive of his supervisor.

7. The union further introduced evidence that the AWOL term is frequently used around the department and that people take it as a joke – no one takes it seriously. Others have used it without consequence or discipline. The union asserted that this comment and the city’s reaction to it was vastly overblown and was motivated by the personal issues between the grievant and the Chief.

8. The union and the grievant asserted that he then went upstairs to change clothes, which took perhaps 90 seconds or so – far less time than the estimate put forth by the city. The clock on the wall in the break room read sometime between 7:15 and 7:20 a.m. when the grievant left. He was still in city hall and was still in uniform at that time. No one testified that they saw the grievant leave early – the sole evidence is the security camera clock that shows him leaving at 7:22 that day.

9. The union then asserted that sometime *after* 7:30 on June 5, 2012 Officer Burrell saw the grievant coming back downstairs from the locker room to his vehicle. This of course means that he did *not* leave early. Further, the grievant does not always park his vehicle in the same place. This of course means that the mere fact that Sergeant Loeks did not see his truck in one parking lot means only that he parked it somewhere else. The union asserted that there was inadequate proof that he actually left early at least by the clocks inside city hall.

10. One of the main issues raised by the union in the matter was whether the clocks inside city hall are synchronized and whether the grievant was looking at a clock that showed him leaving at the appropriate time. The union asserted most vehemently that the clocks are not synchronized and that the grievant left when the clocks he looked at read 7:30. The union put on several witnesses to testify that the clocks in and around city hall are inconsistent with each other, some are broken completely and others are now gone. The union showed cell phone camera pictures that showed that wall clocks are off by several minutes at least when compared to cell phones.

11. Even the city's expert acknowledged that there is "drift" of the wall clocks since they are battery operated and are not set to any central atomic time keeping device. The union asserted that the city noon fire whistle sounds at noon yet many of the clocks are off by several minutes at least. Finally in this regard, the union noted that even during the tour of city hall during this matter, several of the clocks in various places had different times on them.

12. The union further argued that the clocks are not all in fact "atomic" clocks nor are they in sync with one another. Further, there is no policy regarding which clock officers are to consult to determine when their shift ends nor is there any requirement that the officers check the security camera clocks; even if they could.

13. The union asserted that other officers have taken off important pieces of equipment well prior to the end of their shifts without consequence and further argued that the grievant is being held to a different standard. Sergeant Bomstad for example acknowledged that he frequently takes off his duty belt and firearm before his shift in order to sit and fill out any paperwork before the end of his shift. He has not been disciplined for this even though supervisory personnel know about it.

14. The union also argued that to both suspend and demote the grievant constitutes double jeopardy. Despite the language of Article X the union asserted that in this instance this discipline is in effect disciplining the employee twice for the same offense. It is no different than a suspension while criminal charges are pending and then terminating someone after they are finalized.

15. The union next turned to the question of the shift bid and pointed to what it called clear contract language allowing shift bidding by seniority after 18 months of continuous employment. It doesn't say 18 months as a "patrol officer" as the city seems to suggest. Neither is there any exception to that language for disciplinary purposes. The management rights article relied upon by the City is thus trumped by the clear language of Article IX and the grievant must be allowed to bid his shift per the contract. Thus to the extent that the grievant remains subject to the patrol officers' labor agreement he must be allowed to exercise his bidding rights per the clear language.

16. The essence of the union's argument is that the grievant did not leave early, there is no evidence that he did other than the security camera clock which may well have been off by as many as 8 or more minutes from clocks inside city hall, Officer Burrell saw him leaving after 7:30, and that the grievant never intended the AWOL comment to be taken seriously. The discipline is far too severe even if the arbitrator believes that he left early and may well constitute double jeopardy in this instance. Finally that the clear language of Article IX requires shift bid by seniority without exception.

The Union seeks a ruling that the City did not have just cause for the discipline imposed herein and an award making grievant whole for all back pay and accrued contractual benefits. The union also seeks a ruling that the city violated the CBA by only allowing him to bid on a day shift in violation of the applicable provisions of Article IX.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

The grievant is a 23-year veteran of the North St. Paul Police department. Prior to his demotion he had served 13 years as a Sergeant. He has received extensive training in supervision. As will be discussed more below, he has had a somewhat troubled relationship with the current Chief and has had some discipline in the past. At the time of the incident on June 5, 2012 he had no discipline over the level of a written reprimand.

As noted, the grievant has had a tumultuous relationship with the current Chief. There was some evidence that the two have had disputes in the past over filing of paperwork when they were both patrol officers. When Chief Lauth became Chief there was some disappointment by the grievant and the two have locked horns ever since.

By way of background, at one point in 2008 the grievant filed grievances over a schedule change and the Chief sought to suspend the grievant for various charges. In July of 2008 the city and the union reached a mediated resolution of these disputes and the grievant was assigned to a position with Ramsey County.

He performed that job until 2011 and upon his return disputes about his position arose yet again. The grievant filed a lawsuit and that too was eventually settled with the grievant being allowed to return to work as a Sergeant in the department.

The grievant was issued a written reprimand in August 2012. That was reversed by Arbitrator Bard who referred to the disputes between the Chief and grievant but did not sustain the grievance on that basis. The events of June 5, 2012 will be discussed more thoroughly below but upon his return from the suspension herein, the grievant was not allowed to bid on a shift by seniority. The Chief asserted that the grievant was not “qualified” within the meaning of the language of Article IX since he had not worked 18 continuous months as a patrol officer. Moreover, the chief asserted that the grievant needed closer supervision and should therefore be allowed only to work during the day shift instead of the night shift, when many senior officers are not on duty. He was further disallowed from accessing the records department and the evidence showed that this was department wide. No patrol officers are allowed to access those records by going back into the records department following an audit by the Bureau of Criminal Apprehension, BCA.

There is no question that the Chief and the grievant do not get along. This is unfortunate indeed and does not allow for a functional department but the arbitrator is without power to require that the two somehow put their personal dislike for each other behind them and at least arrive at a place where they can work together as professional law enforcement officers serving the citizens of North St. Paul. It would be best of course if they do in the future.

The union asserted throughout the case that the personal disputes between the two were the basis not only of the charges but also the degree of discipline meted out in this case. The result here was not based on the notion of personal animus but rather on the events of June 5, 2012 and the evidence pertaining to the charges that the grievant initially left early on multiple occasions.

There was also no question that officers are not permitted to alter their shifts without permission of a superior officer. On that point the union agreed but asserted that the issue here was not whether the grievant desired to alter his shift but rather whether he left early.

The evidence also showed that the department expects the night shift officers to remain in uniform until the end of their shift at 7:30. The grievant was no exception to this rule. He filled out his time sheets as ending his shifts at 7:30 for each of the days at issue in this matter, including June 5, 2012. As is somewhat typical, the grievant filled out these sheets in advance expecting that he would end his normal shift at the normal time of 7:30. There was also no question that the department expects that these will be turned in accurately and timely and that the officer who signs them does so in good faith and that they work until the end of their assigned shift.

As discussed more below, the Chief and Captain Nikituk commenced an investigation and determined that the grievant had violated policy by asking Officer Burrell to go AWOL, had left early on at least 6 occasions and had done so without permission or authorization by a superior officer, as the policy requires. They determined that an 18-day suspension – 3 days for each day he left early – as well as a demotion was appropriate discipline for these alleged violations. The city asserted that the grievant was unfit for a supervisory position due to the AWOL comment and for his cavalier attitude toward his duty shift. The union pointed out however that he remained in the position of Sergeant without apparent problem for approximately 3 months following the June 5 2012 incident.

It is against that backdrop that the events of June 5, 2012 and the other charges of leaving early as well as the grievance on the shift bid now proceeds.

JUNE 5, 2012 INCIDENT

The operative incident that gave rise to these charges and the grievances occurred at the end to the grievant's night shift on June 5, 2012. The grievant worked the night shift and returned to the station. The day shift starts work at 7:00 and the night shift ends at 7:30 so there is a half hour overlap. The night shift typically uses this time to fill out paperwork and do other necessary matters while at the police station in city hall

The grievant arrived in the squad room sometime after 7:00 a.m. that day. Officers are not required to remain in the squad room but can move about the facility freely. At approximately 7:15 the grievant spoke briefly to Officer Burrell and made a comment to the effect of, "let's go up and change Burrell, we can go AWOL together." There was some inconsistency about the exact words used but there was some reference to being "AWOL," which everyone understands is the military acronym for being "away without official leave."

The city asserted that to be AWOL in a paramilitary operation like a police department is a serious statement not to be joked about or made light of, almost analogous to "joking" about having a bomb in a TSA line at an airport. The evidence however on this record showed otherwise. It was clear that this comment and comments similar to it are made frequently around the department and that no one really takes them seriously. Likewise, no one, including Officer Burrell, who was called by the city as one of its main witnesses, took this particular statement seriously. Neither was there any evidence that the grievant was either ordering or enticing Officer Burrell or anyone in that squad room to "go AWOL" with him.¹

¹ Indeed, the evidence showed clearly that there were several people in the squad room within easy hearing distance of the conversation between the grievant and Officer Burrell, including some other personnel that the union asserted did not get on well with the grievant either. It strains credibility to assert that he would have made a statement to this effect within earshot of those people if he really were serious about "going AWOL." On this record the conclusion, which formed a major part of the disciplinary decision, that the grievant was truly asking a subordinate officer to go AWOL" was without adequate evidentiary support.

Moreover, the grievant then left the squad room around 7:15 or 7:20 according to the testimony of those who were present, and went upstairs. As noted there is no requirement that officers stay in the squad room – in fact many do not and go to the sergeant’s office or other places within city hall to either fill out paperwork or simply await the end of their shift.

The evidence further showed that the grievant went upstairs and changes into civilian clothes and left the building – the time this happened was of considerable dispute. The security camera on the exterior of the building showed him in the parking lot with his civilian clothes on walking to his truck at 7:22 a.m. At some point Sergeant Loeks noted that the grievant’s truck was not in the parking lot that is visible from the squad room. She jumped to the conclusion that he had left early, although it was clear from the testimony and the video evidence that the grievant does not always park his vehicle in the same place every day. Thus the fact that his truck was “gone” could well have been due to parking it somewhere else that day not visible from the squad room windows.

When the AWOL comment was reported to the Chief and Captain Nikituk, they commenced an investigation to see if the grievant had left early on any other days. They reviewed outside security camera footage and determined that the grievant left early on at least 5 other occasions by a few minutes. The total number of minutes they asserted he left early in the aggregate was 41 minutes over the course of 6 separate days. There was sufficient evidence that the security cameras showed the grievant leaving before 7:30 on the clocks attached to those cameras. The question though is whether there was sufficient evidence to establish that the grievant knowingly and intentionally left early in violation of department policy and contrary to the time sheets he filled out and submitted to the department for payroll purposes.

Two things militated against the conclusion that the grievant intentionally left early. First, there was evidence that Officer Burrell passed the grievant coming down the stairs from the locker room sometime after 7:30 that day – at least by the clock Officer Burrell was using.

Second, there was the hotly disputed issue of the clocks in and around city hall. This was the cause of considerable factual dispute between the parties. The city asserted that the clocks are in sync and that if the security cameras showed the grievant leaving early he must have left early whether he used his cell phone or some other clock in city hall. The union asserted that the clocks are not at all in sync with one another and that it is entirely possible that the grievant looked at a clock that showed him leaving at 7:30 or after. This, coupled with the claim that the clocks in and around city hall showed inconsistent and different times, leads to an equally plausible conclusion here that the grievant may well have thought he was leaving on time.

As part of this case the parties took a tour of city hall. During this tour the arbitrator had the opportunity to view the physical layout of the squad room, the locker room and layout of city hall and where the grievant went that day. The clocks were off during that tour by as much as 7 minutes from one room to the next, including the room in which the hearing was held as opposed to the break room next to it.²

There is no policy regarding which “official” clock the officers are to use to determine when their shift ends. The city asserted that the grievant could have used his cell phone to determine if it was 7:30 before he left. The city also asserted that it takes approximately 7 minutes to get off all of one’s duty gear and uniform and don civilian garb. The grievant indicated that it takes him approximately 60 to 90 seconds to do this.

² Arbitrators should never conduct their own “investigation” of cases but the parties specifically made a tour of city hall part of the record in this case. It was during that tour that these clocks were observed and after the union had asserted that they were not in sync with one another. The clock that was supposed to be in the locker room was gone on the day of hearing. It was not clear how long it had been missing. There were other clocks in city hall that were not working at all. Some were battery operated wall clocks and the batteries may well have simply died. On this record, the union’s claim that the clocks were not in sync was shown to be accurate.

There was no actual evidence to determine this one way or the other. Presumably it takes the grievant some time to take off and properly store his duty gear and uniform and while it may not take 7 full minutes, the notion that it takes only a minute and a half seems unlikely too. The truth, as it is many times lies somewhere in between. Here as noted herein, it is likely that the grievant may well have been less than diligent in making sure he remained in uniform and ready for an emergency believing that he was changing after his shift was over and was leaving at an appropriate time. He may well have left somewhat early but on this record would have done so inadvertently, perhaps negligently but not intentionally.

The city asserted that even if the clocks were off by a few minutes the fact that the grievant left at 7:22 according to the security camera clocks, which are “atomic” clocks and are accurate to within a few seconds of the accurate time, the grievant must have left early and taken off his duty gear prior to 7:30 in order to be in the parking lot by 7:22. There was some merit to this assertion. Thus even though there was insufficient evidence to suggest that the grievant was intentionally leaving early there was some basis to claim that he was less than diligent in making sure he was not leaving early on a few occasions.

At this point, there was insufficient evidence to support the city’s claim that the grievant was inappropriate in making the AWOL comment or that anyone took it seriously. Further, there was some evidence to suggest that the clocks are indeed off a few minutes and thus no supportable claim that the grievant left intentionally or that he was intentionally disobeying the rule against leaving early without permission. There was some evidence to show that he was less than diligent in determining when to leave if only by a few minutes. Police departments exist to respond to emergencies and emergencies do not keep a time clock. While the grievant was not needed on any of these instances, the indication is that he might have been – thus the reason for making sure that the officers stay in uniform ready to respond until the end of their assigned shifts.

Both parties cited *Mower County and LELS*, BMS # 11-PA-0560 (2011) where the grievant, also a law enforcement officer, was terminated in part for falsifying his time records. That case presented very different facts and a very different sort of analysis. First, the deputy there not only falsified time records but acknowledged sleeping on the job multiple times for as much as 20 minutes per time. Second, there was evidence that he intentionally falsified his records in an effort to leave early to visit his children who lived in a distant location. Third, the amount of time involved was some 34 hours and involved leaving as much as an hour or more early on multiple occasions.

The City noted that this arbitrator observed in the *Mower County* case that “Whether there was or was not any intent to defraud this type of evidence demonstrates at the very least a lack of care in filling out these forms. This is especially troubling where, as here, the errors and discrepancies resulted in a direct financial gain to the officer making the error. As every law enforcement officer knows, their jobs require the highest degree of both honesty and accuracy and that even a minor misstatement in a report can be grounds to jeopardize an investigation or a prosecution.” The city argued that since the termination was sustained there it must be here as well given the discrepancies present in the grievant’s time records. This conclusion however assumes that the grievant truly knew he was leaving early. It was clear in *Mower County* that the deputy there did know that he was leaving early and fraudulently submitted records to cover that fact; the evidence here is far less clear. This is a very different case.

On this record, the basis or the demotion was largely based on the AWOL comment and the assertion that the grievant was enticing another officer to go AWOL. Because there was insufficient evidence to support this claim the demotion is overturned and the grievant is ordered reinstated to his former position as a Sergeant with the department with full back pay and accrued benefits.

Further, the main basis of the suspension was that he left early on 6 occasions. As noted above, there was insufficient evidence to establish that the grievant intentionally left early. However, having said that, since the security camera clocks showed him leaving as much as 8 to 9 minutes early and he would have had to take some time to change clothes there is some evidence that he was less than diligent in making sure he was there until the end of his shift in uniform.

Several options were considered on this record. Simply sustaining the grievance in its entirety was considered given the paucity of evidence that the grievant was intentional in his actions here or that he was somehow flaunting the Chief's authority as was suggested here. This was strengthened by Arbitrator Bard's decision herein that had overturned the prior written warning. However, there was some evidence to suggest that the grievant left early, albeit unintentionally, on several occasions.

Accordingly, the most appropriate penalty is to sustain the grievance with respect to the suspension and reduce that penalty to a written warning not to leave early and to verify the time before leaving the department. Thus the 18-day suspension is overturned and the grievant is to be made whole for all back pay and benefits lost as the result of the suspension in this matter. That discipline will be replaced with a written warning.

DOUBLE JEOPARDY

As noted herein, there was insufficient evidence to support the demotion and insufficient evidence to support the claim that the grievant intentionally left early even though there was some evidence that he should have been more careful about when he was leaving since he may have left a few minutes early on some of these occasions. Thus the discussion of double jeopardy may seem moot but some brief discussion may be appropriate.

The language of the discipline article clearly gives the city the right to impose one or more disciplinary sanctions. Moreover, this is not a situation analogous to the ones raised by the union – i.e. where a grievant is given a final disciplinary sanction only to have a more serious one imposed later.

This is a situation where the city imposed that it believed to be the appropriate sanction which included both a suspension and a demotion – both of which are contemplated by the discipline discharge article cited above. Thus on this record, the city’s actions did not constitute double jeopardy even if there had been sufficient evidence to warrant the sanctions.

SHIFT BIDDING GRIEVANCE

The evidence showed that the Chief felt that the grievant could not be trusted to leave when his shift was ending and needed greater supervision. He thus restricted the shift bid to only the day shift and did not allow the grievant to bid on the shift of his choice given his seniority. He further asserted that the grievant was not qualified within the meaning of that article.

A review of that clear language of Article IX puts this issue to rest quickly. That article reads simply as follows: “Senior qualified employee shall be given shift assignment preference after eighteen months (18) months of continuous full-time employment.”

There is no exception for discipline. Moreover, while the Chief asserted that this action was not taken for disciplinary reasons the city asserted that it was taken because the grievant “hadn’t conducted himself in a manner appropriate for a city employee.” In other words, that was exactly why the action was taken – for disciplinary reasons.

Further, the city contended that the grievant was not qualified because he did not have 18 months continuous employment “as a patrol officer.” The language does not require that. More importantly, even if it did, the grievant had been with the city for 23 years – approximately ten of which were as a patrol officer. Thus while this too may be moot since the grievant will be reinstated to his former position as a sergeant, it is clear that the city violated the grievant’s shift bidding rights under the labor agreement.³

³ It was noted that the disciplinary grievance arose under the sergeants’ CBA while the shift bidding grievance arose under the patrol officers CBA. It was not entirely clear what impact the determination to reinstate the grievant as a sergeant would have on his shift bidding rights. The intent of this award is to first rule that the shift bidding rights were violated and second to make the grievant whole for any lost pay or benefits, if any.

ACCESS TO THE RECORDS DEPARTMENT

The union did not address this issue in its brief but there was some argument about it at the hearing. The grievant was restricted from entering the records department apparently due to an audit by the BCA. There was evidence to suggest that this policy was applied to all officers, not just the grievant. The grievant is thus appropriately restricted consistent with the rule as applied to all similarly situated officers. Thus, to the extent that the rule is applied to all similarly situated officers and to the extent that this matter is still a part of this grievance, the city's position is sustained and the grievance denied.

AWARD

The disciplinary grievance is **SUSTAINED IN PART AND DENIED IN PART**. The grievant's demotion is overturned and the grievant ordered reinstated to his former position as a sergeant with the department with all back pay and accrued contractual benefits. This reinstatement is to be accomplished within five (5) business days of this Award.

Further, the 18-day suspension is also overturned and the grievant is to be made whole for all lost time and accrued contractual benefits. The 18-day suspension is to be replaced with a written warning as set forth above.

The grievance with respect to the grievant's shift bidding rights is sustained as set forth above.

The grievance regarding access to the record department is denied as set forth above.

Dated: September 23, 2013

Jeffrey W. Jacobs, arbitrator