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**IN THE MATTER OF ARBITRATION**

**OPINION AND AWARD**

**between**

**CITY OF COON RAPIDS, MINNESOTA**

**Grievance Nos. 10-PA-1003  
And 10-PA-1009**

**and**

**LAW ENFORCEMENT LABOR SERVICES**

**Gil Vernon, Arbitrator**

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**APPEARANCES:**

**On Behalf of the Union:** Nicholas Wetschka, Business Agent –  
LELS, Inc.

**On Behalf of the City:** Mark J. Girouard, Attorney – Nilan Johnson  
Lewis, PA

**I. ISSUE**

There are two separate grievances before the Arbitrator. The first protests a 150-hour disciplinary suspension issued March 28, 2011. The second protests the termination of the Grievant on March 6, 2012. Accordingly, the issues before the Arbitrator are:

- (1) Did the Employer have just cause to suspend Grievant for 150 work hours in February 2011?
- (2) Did the Employer have just cause to terminate Grievant's employment in March 2012?

## II. RELEVANT CONTRACT LANGUAGE AND CITY POLICY

### A. The Labor Contract

#### ARTICLE 10 DISCIPLINE

10.1 The Employer will discipline employees for just cause only. Discipline will be in one or more of the following forms: (a) oral reprimand; (b) written reprimand; (c) suspension; (d) demotion; or (e) discharge.

### B. City Handbook

#### Section 13.3 Types of Discipline

Corrective disciplinary action may range from an oral reprimand to a suspension (or disciplinary leave of absence). It is not necessary to follow specific “steps” in discipline.

The following actions may be taken against employees for disciplinary reason: (1) Oral Reprimand; (2) Written Reprimand; (3) Reduction in Pay or Demotion; (4) Suspension; and (5) Discharge.

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#### 5. Discharge

If previous disciplinary action has not served to achieve corrective results, or if the nature and extent of the employee’s behavior are such that other disciplinary action is not appropriate, the City Manager may discharge the employee. Prior to discharge, the City Manager will provide to the employee written notification specifying the reason(s) and summary of evidence for discharge, and stipulating that the employee has an opportunity to respond to the charges at a pre-discharge hearing in accordance with federal law as provided for in *Cleveland Board of Education vs. Loudermill* (Section 14.2 of this Handbook).

If, after initial *Loudermill* hearing, the City Manager determines discharge is appropriate, the City manager will provide written notification to the employee specifying the reason(s) for the discharge, the effective date of discharge, and the right to a post-discharge hearing with the City Manager (Section 14.3 of this Handbook).

### III. BACKGROUND AND FACTS

Grievant was terminated from her position as a police officer after some 14 years on the job that included 6 years as a DARE officer. Grievant had a number of counselings, oral reprimand, a written reprimand and a written warning in 2010 concerning what can best be described as performance issues. On February 14, 2011 she was presented with her 2010 performance evaluation that reflected in part a rating of *Needs Improvement* for job knowledge and incident management and a rating of *Unsatisfactory* for professionalism within the department and productivity.

On March 28, 2011 Grievant was issued the following 150 hour suspension in connection with an incident that occurred January 27, 2011:

I have reviewed Captain Wise's investigative report into the complaint of your misconduct for failing to respond to a medical call in January 2011. The investigative report is attached and hereby incorporated into my determination that discipline is warranted. In the report, Captain Wise sustained the complaint of misconduct, noting you violated five Departmental policies, including 3-219, Unacceptable performance, 3-220 Neglect of Duty, 3-211 Responding to Calls, 4-1111 Social Networking, and 4-901 Violation of the Department's Breaks and Meal Periods policy. I concur with Captain Wise's assessment. Pursuant to the Coon Rapids Employee Handbook Section 13.3(4) I am also attaching a copy of previous letters of expectation, verbal or written warnings, unacceptable performance appraisals, discussions, or reprimands you have received.

These offenses are very serious and cannot be taken lightly by the Department. Your failure to respond to a call while taking an excessive break and while online on a personal social networking site is a violation of Departmental policy and is a breach of the public's trust. For that reason, I am imposing an unpaid suspension of 150 working hours beginning March 28, 2011 and ending on April 19, 2011. You may grieve this unpaid suspension pursuant to Article 10.7 and Article 7 of the labor agreement. During your unpaid suspension you will not accrue vacations, sick leave, or any applicable holiday hours. In order to provide you with an opportunity to focus on and successfully perform your duties as a patrol officer I am removing you from your D.A.R.E. assignment.

I hope and expect that your performance will improve, however, it is important that you realize if you fail to respond to calls, violate the breaks and meal policy, engage in social networking while on duty in violation of policy, or violate other department policy you will be subject to further disciplinary action up to, and including, discharge.

A grievance was filed and is now before the Arbitrator.

On April 24, 2011 upon her return to active service from the disciplinary suspension she was sent the following letter by her Captain:

As you return to work I want to let you know that now is the time to put the issues of the past months behind you and move forward. I know this time has been trying for you as it has for me. It is my sincere hope that you succeed when you return to work and that you can find enjoyment in this career you have chosen. Toward that end there will be some requirements upon your return to your patrol duties. These requirements will address areas of your recent work performance that were found lacking and they are designed to give you an opportunity to improve. Your supervisors will assist you in meeting the goals that follow.

- **In-Squad Video Camera.** Your supervisors will review correct usage of the In-Squad Video Camera. This will include S.O.P., set-up, and familiarity with function keys, settings, audio and video controls and correct coding of videos. You will meet with your supervisors daily until they decide it is no longer necessary because you are using the system correctly. You won't be penalized for honest, explainable mistakes.
- **Productivity.** You will meet weekly with your supervisor and account for your time spent on patrol. Your supervisor will provide you with productivity medians for your shift for the month previous and you will be expected to produce measurable work quantities at or near the medians for your shift. You are expected to use your free time to engage in self initiated activity. Your performance relating to answering calls and cooperating with fellow officers and supervisors will be monitored daily by your supervisor as they are for all officers.

Your supervisors will provide me with progress reports at 30 and 60 days. If your progress is found to be acceptable in relation to the typical Coon Rapids officer these requirements will end at 60 days. Once again, it is my sincere goal to provide you with all the help and support you need to improve your performance and succeed.

On June 6, 2011 her Sergeant reported to the Captain the results of his 30-day review with Grievant under the Performance Improvement Plan (PIP). The report was generally "positive" and indicated performance levels that were acceptable.

Noted was a noticeable improvement in her attitude and interactions with her co-workers. The session was in the words of the Sergeant “productive”.

A 60-day review was conducted July 6, 2011. Regarding productivity, the Sergeant stated “It is my opinion that Officer Berglund’s productivity has greatly improved and is acceptable in relation to the typical officer on her shift”. He concluded “Her attitude was positive and I felt that this process was productive and successful”. She was then removed from the PIP.

On July 26, 2011 Grievant was given an oral reprimand about incorrect statute entries on traffic tickets. In August, she was counseled about productivity and I-cop issues.

On September 16 she was given an oral reprimand for incorrect I-cop entries. Her supervisor continued to monitor her performance and attendance. However, the next discussion with her was not until December 21, 2011 when I-cop and response issues were discussed. A missing report was discussed the next day and a meeting was held December 23 about I-cop issues and not following certain orders. To summarize her supervisor’s written notes, Grievant was not cooperative to put it lightly.

The Supervisor continued to monitor Grievant’s performance including a standard year-end review of patrol statistics. A written reprimand was issued January 30, 2012 that read as follows:

I.) On 12-21-11, I instructed you to complete the report for a call that you handled under case # 11-266539 that occurred on 11-24-11, for which there was no report on file. I directed you to turn the report in to me prior to the end of that C shift, which you acknowledged.

During that same shift, I learned that the ICOP system in the squad that you were driving was malfunctioning, and directed you to write up a repair order for that squad/video system, and turn it into Sgt Keasling, which you acknowledged.

Finally, you handled an incident in which some street signs had reportedly been struck by a vehicle and were down, ICR #11-286608. I directed you to fax a copy of the report to CR Public Works so the signs could be repaired, and you acknowledged.

You did not comply with any of the above orders and when I confronted you on 12-22-11, you were argumentative, rude and disrespectful.

You were issued a verbal warning by Sgt Hawley on 12-29-10 for insubordination.

This is a direct violation of **General Order 3-223, Insubordination**, which states: *Failure or deliberate refusal of any member to obey a lawful order by a supervisor, shall be insubordination. Ridiculing a supervisor, disrespectful, insolent, or abusive language toward a supervisor is insubordination. This will include orders relayed from a supervisor by or through an officer of the same rank.*

II.) On 12-22-11, you told me that Sgt Bautch had given you permission to use sick leave for the remainder of that C shift, which was untrue, and you left without completing a time-off slip or having it signed by me or any other supervisor.

This is a direct violation of **General Order 3-104, Conduct**, which states: *Members shall maintain a level of conduct in their departmental affairs which is in keeping with the highest standards of the law enforcement profession. Members shall not participate in any incident or conduct themselves in such a manner whether on or off-duty, which tends to impair their ability to perform as law enforcement personnel by bringing discredit to themselves or disrepute to the department, or that which tends to impair the operation and efficiency of the department or member.*

This is also a direct violation of **Section 13.2, Causes for Disciplinary Action, listed in the Coon Rapids City Employee Handbook**, which states: *The following may be just cause for verbal reprimand, written reprimand, suspension, demotion or dismissal, but will not constitute the only causes for verbal reprimand, written reprimand, suspension, demotion, or dismissal:*

8.) *Make false or misleading statements while conducting City business, or falsifying any reports, records, or documents.*

III.) You worked the C shifts of 1-5-12, 1-6-12, 1-7-12 and 1-8-12. You ended each shift without completing all of your required paperwork, or obtaining permission to hold your reports from me or any other supervisor.

You turned in the reports for ICR #s 12-004617 and 12-004624 on 1-8-12 at approx 0530 hrs, from the C shift of 1-6-12. You turned in the reports for ICR #s 12-005259, 12-005257 and 12-005248 on 1-9-12 at approx 0145 hrs, from the C shift of 1-7-12, along with the report for ICR # 12-003606 from a call handled by you three days earlier (1-5-12). You turned in the report for ICR # 12-005785 and 2-6 Parking Citation 24139 on 1-9-12 at approx 2200 hrs, from the C shift of 1-8-12, along with two reports for ICR #s 12-005176 and 12-005266 from calls handled by you two days earlier (1-7-12).

You were issued a verbal warning by me on 1-28-11 to complete all of your required paperwork by the end of your shift or obtain permission from a supervisor to hold your reports.

This is a direct violation of **General Order 4-1101(II), Report Writing-Timeliness**, which states: *All incident reports should be completed before the end of the shift. Recognizing that this is not always possible, members shall obtain the permission of the Watch Commander before holding any reports until the next day.*

Be advised that any future violations of Department policies, regulations or procedures may result in further progressive discipline.

According to Article 7 of L.E.L.S. local #207 current union contract, you may file a grievance. According to Article 10 of the same contract, you shall read and acknowledge by signature this letter of reprimand.

Grievant signed the letter with the notation "I disagree with statements in this letter". Employer notes indicate several other "oral reprimands" were also issued during the course of the aforementioned meeting. Grievant's performance continued to be monitored. On February 29, 2012, without mentioning any specific incidents since her last formal discipline (the written reprimand on January 30, 2012), a "Notice of Intent to Terminate" was issued. It read as follows:

You are hereby notified that you are suspended without pay effective immediately for five work days following receipt of this letter. You are further notified of the City's intent to discharge you from your position with the City. This action is taken in accordance with Article 10 of the 2011-2013 Labor Agreement between the City of Coon Rapids and Law Enforcement Labor Services Local 207 and Section 13 and 14 of the City of Coon Rapids Employee Handbook on Personnel Policies and Procedures.

The City has decided to terminate your employment based on departmental policy violations, including: Unacceptable Performance, SOP 3-219; Responding to Calls, SOP 3-211; Neglect of Duty, SOP 3-220; In-squad Video Cameras, SOP 4-506; Insubordination, SOP 3-233; Making a False Statement Employee Handbook Policy 13.2 (8); Conduct, SOP 3-104; Report Writing, SOP 4-1101; and Absence without Leave, Employee Handbook Policy 10.12 (see attached Summary of Performance). In addition, your annual Performance Evaluations as completed by your immediate supervisors have continuously documented a failure to fulfill your duties and responsibilities at the level required of your position in one or more categories continuously since 2007. As one example, in early in 2011 (IA 11-01) you served a 15 day suspension for unacceptable performance, neglect of duty, responding to calls, social networking and breaks and meals policy violations. In that suspension letter dated March 28, 2011, you were cautioned that continuing policy violations would make you subject to further disciplinary action, up to and including discharge. The department has taken many steps to improve your performance action, up to and including discharge. The department has taken many steps to improve your performance since 2007 without success. In particular, your performance over the last two years, despite intensive coaching, supervision and discipline, has not improved and has in many ways regressed.

You have a right to respond to the charges as provided by the United States Supreme Court in *Cleveland Board of Education v. Loudermill*. I have scheduled this hearing for Monday, March 5<sup>th</sup> at 10:00 a.m. in City Manager Matt Fulton's office. You also have the right under Coon Rapids Civil Service Commission rules to a public hearing on the allegations behind the City's intent to terminate you from employment. Should you wish such a hearing the request must be made in writing within 15 days of receipt of this notice.

The final termination letter was issued March 6, 2012 reading as follows:

A *Loudermill* Hearing was scheduled for you on Monday, March 05, 2012 at 10:00 a.m. in regard to the termination of your employment with the City of Coon Rapids. However, you did not appear at this scheduled hearing; nor did you contact me in regard to your employment with the City. You did not take advantage of the opportunity offered by the City to present any evidence or argument regarding the termination of your employment with the City.

Your employment with the City of Coon rapids is hereby terminated effective Tuesday, March 6, 2012. Your last paycheck will be direct deposited to your account on Friday, March 9, 2012. The reasons for your termination were outlined in the Notice of Intent to Terminate letter that was provided to you by Chief Brad Wise on February 29, 2012. A copy of that letter is enclosed for your reference.

Pursuant to Section 14.3 of the City's Employee Handbook on Personnel Policies and Procedures, you are entitled to a post-discharge hearing with the City Manager. To schedule this meeting, you must provide written notification of your request to Human Resources within 15 calendar days after receiving written notice of your discharge. You

also have the right under Coon Rapids Civil Service Commission rules to a public hearing on the City's termination of your employment. A request for this hearing must be made to Human Resources within 15 calendar days of receipt of your Notice of Intent to Terminate, which was provided to you on February 29, 2012.

#### **IV. OPINION AND DISCUSSION**

##### **A. The Suspension**

The Arbitrator agrees with the City that the Grievant is guilty of misconduct in connection with the medical call of January 27, 2011. Additionally, while the quantum of discipline is firm, it is not unwarranted considering the seriousness of the event. The evidence shows the time she spent at the fire station exceeded the bounds of a normal break even if she was permitted to take breaks without calling in. More importantly, there is no level of analysis which would excuse her failure to either respond or at the very least check to see if her assistance was needed. It is not an endearing picture to know she was at a computer on Facebook while medical emergency alarms designed to wake firemen up from a deep sleep were going off. This is all apparent enough even without the direct testimony of the firemen.

##### **B. The Termination**

The record of evidence before the Arbitrator is extensive, organized, detailed and was well presented at the hearing. And of course the Arbitrator could not possibly have made up his mind without taking significant time to study it and without waiting for post-hearing briefs. Nonetheless, the Arbitrator left the hearing

baffled, perhaps as baffled as Grievant's supervisor, as to why Grievant could not or would not do some very simple aspects of her job (such as using and correctly inputting I-cop data). It was particularly baffling after she seemed to have turned it around during her PIP.

The Arbitrator walked away from the hearing too with the impression that her supervisors were sincere in their efforts to help her. An effort was made in the PIP to move forward and with positivity. If the aim of Grievant's supervisors had been punitive, the PIP evaluations would have been salted with notations of inadequate performance and actionable conduct. Of course Grievant deserves much credit as well during the PIP.

As much as the Arbitrator walked away from the hearing with these impressions, there also was a nagging notion that termination for a veteran officer in these circumstances didn't quite fit in spite of extensive efforts at correcting her performance.

It was the Union's brief that brought this notion into focus. The Union wrote: "In the instant case, although the Employer may have provided sufficient notice of its expectation of Ms. Berglund, it did not provide sufficient notice of the penalties". The Union is also right in its observation that all the policy violations cited in the termination letter had already been addressed in prior forms of discipline (mostly oral and written reprimands) and that no new violations since

those forms of discipline were issued were cited in the notice of intent to terminate or the termination letter. In this regard, an employee's past record is relevant in deciding the quantum of discipline for a contemporaneous and precipitating incident of misconduct.

The larger and more important point here relates to the nature of the progressive discipline and whether it was adequate to put Grievant on notice that her job was in jeopardy by February of 2012. A close examination of the record shows it was not in this set of circumstances.

Before examining this conclusion it may be helpful to reinforce the importance of progressive discipline in performance related cases in particular. Progressive discipline, also known as corrective discipline, is a form of notice both as to expectations and the consequences of undesirable conduct in the workplace. It is not only a well-established tenet of the "just cause" standard that these parties incorporated into their labor contract, it is also part of the City's policy. See Section 13-3. The object of progressive discipline is not to be punitive but to correct behavior and such efforts should be demonstrated to be ineffective before termination is imposed as a last resort. There are, of course, serious circumstances where discharge is appropriate without reliance on progressive discipline and/or that would justify skipping normal steps in the disciplinary process.

As best can be determined, the only time Grievant was put on notice that her conduct could result in discharge was in the 150 suspension letter. Significantly, not one time in an oral or written reprimand or warning after that is there documentation that Grievant was told she was inching toward the precipice of discharge.

This is particularly important in this case because Grievant successfully completed her PIP. This certainly doesn't fully reset the progressive discipline sequence to square one but when the next discipline following the 150 hour suspension was an oral reprimand, it certainly gives the impression Grievant had significantly walked back from the proverbial edge.

The Grievant's formal discipline wasn't elevated beyond an oral reprimand until January 30. Even then only a written reprimand was issued along with several oral reprimands. Oddly, these multiple oral reprimands were issued during the same meeting/counseling session which suggests an effort was being made to build a record. This leaves—in addition to the lack of any specific warning as to consequences—no impression that Grievant's disciplinary penalties were progressing toward discharge. Discipline such as termination without prior notice as to the possible penalties of future misconduct does not easily lend itself to the conclusion that an employee is beyond the reach of corrective efforts. Thus, the discharge cannot stand.

While reinstatement and the expungement of her record of any reference to the termination is clearly warranted, the Arbitrator believes no back pay is appropriate in order to impress upon Grievant that her tenure with the City is clearly near the end if she doesn't turn it around very quickly. She shouldn't accept reinstatement unless she is fully committed to fully achieving satisfactory performance in all aspects of her duties. If she isn't fully committed perhaps she will fit someplace else better. It is her choice in all respects.

**AWARD**

The suspension in question was for just cause. The termination was not for just cause. The Grievant is entitled to reinstatement and expungement of the termination from her record. There shall be no back pay. The reinstatement is ordered to take place as soon as practical. The Arbitrator will retain jurisdiction in the event of dispute over the remedy.

(Signature on original)

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Gil Vernon  
Arbitrator

Dated this 18<sup>th</sup> day of December, 2012.