

IN THE MATTER OF ARBITRATION BETWEEN

**HENNEPIN COUNTY, HUMAN SERVICES
AND PUBLIC HEALTH DEPARTMENT**

“EMPLOYER”

And

**AMERICAN FEDERATION OF STATE
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 5, LOCAL UNION NO. 34**

“UNION”

)
) **BMS CASE NO.09-PA-0562**
)
)
) **DECISION AND AWARD**
)
)
) **RICHARD R. ANDERSON**
) **ARBITRATOR**
)
)
) **June 6 , 2009**

JURISDICTION

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson on April 30, 2009 in Minneapolis, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced by both parties and received into the record. The hearing adjourned on April 30, 2009 and closed on May 13, 2009. The hearing was kept open in the event that the Union wished to examine witnesses after it received a copy of the Employer’s floor plan of the Grievant’s desk location.¹ Timely briefs were received from the parties via E-Mail on May 22, 2009 and by regular mail on May 23, 2009 at which time the record was closed and the matter was then taken under advisement.

This matter is submitted to the undersigned Arbitrator pursuant to the terms of the parties’ collective bargaining agreement, hereinafter the Agreement, which is currently effective from January 1, 2008 through December 31, 2009.² The relevant language in

¹ The Employer was to furnish the floor plan via E-Mail to the Union and the Arbitrator by the c.o.b. on May 7th. The Union would then have three work days in which to request further litigation on the matter. Both parties complied and the hearing was then closed.

² Joint Exhibit No. 1.

Article 7 of the Agreement [GRIEVANCE PROCEDURE] provides for the filing, processing and arbitration of a grievance including the authority of the arbitrator. The parties stipulated that this matter does not involve contract arbitrability or any other procedural issues, and that it is properly before the undersigned Arbitrator for final and binding decision on the merits of the grievance.

APPEARANCES

For the Employer:

Christine Yates, Labor Relations Representative

Jessica Gutowski, Human Services Representative, Eligibility Supports Unit, (HSPHD)

Kristi Martinson, Human Services Supervisor, Aging & Disability Services Unit, HSPHD

Alyssa Ryan, Human Services Representative, & Disability Services Unit, HSPHD

Craig Troska, Information Technology Supervisor, Information Technology and Records Management Unit, HSPHD

Barbara Madden, Information Technology Specialist, Information Technology and Records Management Unit, HSPHD

Judy Regenscheid, Business Information Officer, Information Technology and Records Management Unit, HSPHD

Michael Rossman, Human Resources Generalist, Human Resources Department

Gary Petersen, Human Services Supervisor, Aging & Disability Services Unit, HSPHD

Kathryn Heffernan, Program Manager, Aging & Disability Services Unit, HSPHD

For the Union:

Mathew Nelson, Business Representative

Cathy Ann Cowden, Union Chief Steward

Eric Eberhardt, Grievant and Human Services Representative

THE ISSUE

The parties stipulated to the following issue: *“Was the Grievant Eric Eberhardt discharged for just cause? If not, what shall be the appropriate remedy?”*

BACKGROUND

Hennepin County, hereinafter the Employer or the County, is the most populous and diverse county in the state of Minnesota. The Employer’s Human Services and Public Health Department (HSPHD) provides an array of social, safety net and public health

services to meet the needs of the individuals, families and communities of the County. HSPHD has 80 plus programs that provide services with the single underlying purpose of building better lives, stronger communities, including protection for children and vulnerable adults, public assistance and housing assistance, mental and chemical health, licensing for childcare and foster care facilities, assistance for veterans, and public health.

The American Federation of State County and Municipal Employees (AFSCME), Council 5, Local, Union No. 34, hereinafter the Union, represents a social services unit including Human Services Representatives (HSR) consisting of approximately 1,900 employees. The Union has represented this unit since the 1940's.

HSR Eric Eberhardt, hereinafter the Grievant, had been employed for approximately 24½ years with the Employer. He was most recently employed as an HSR 3 in the Aging and Disability Services Unit (ADSU) of HSPHD³. The Grievant, as other HSR 3s, processes new and pending applications for services including medical assistance, food support, cash, and basic emergency needs.⁴

The Grievant was discharged on October 13, 2008⁵ for violating the Employer's policies on computer use, data practices and outside employment. The discharge was a culmination of a forensic investigation into the Grievant's inappropriate use of his work computer.⁶ The forensic investigation was initiated when an HSR complained to supervision in early March that the Grievant was viewing "nude" pictures of women on his computer. An HSR supervisor also observed the Grievant viewing women "showing a lot of flesh" on the Grievant's computer screen. This was reported to the Grievant's supervisor and the head of the Unit. The Employer then commenced a forensic computer

³ Unless otherwise indicated herein, all HSR's or supervisors work in the ADSU of HSPHD.

⁴ HSR 3s in ADSU work with clients over age 60 in nursing homes or on waived services, which means they receive services to help them live independently.

⁵ Unless otherwise indicated, all dates herein are 2008.

⁶ Unless otherwise indicated herein, all references to the Grievant's computer is his Employer furnished computer.

investigation into these allegations. The investigation was later expanded to include the Grievant engaging in unauthorized access of Minnesota Department of Motor Vehicle (DMV) driver's license records, perpetrating multiple serious breaches of client confidentiality, performing personal business on his computer, and engaging in excessive personal Internet and E-Mail use.⁷ This forensic investigation, involving an examination of the Grievant's computer hard drive and E-Mail account began in early April and culminated in early September.

On September 30th, The Grievant's immediate supervisor, HSR Supervisor Gary Peterson, conducted an investigative interview with him over his alleged misconduct.⁸ The information gathered during the course of the investigation resulted in the Grievant receiving a "Notice of Intent to Dismiss" letter from HSR Supervisor Petersen on October 2nd.⁹ The letter stated inter alia,

...By engaging in the above misconduct, you violated the following policies: Hennepin County Policy on Internet, E-mail and Telecommunications Systems Usage; HSRPHD Data Sharing and Data Privacy; HSRPHD Professional Boundaries: Standards of Conduct; HSRPHD HIPAA/Data Practices Training and Confidentiality and Computer Use Agreement; HSRPHD Conflict of Interest/Outside Employment.

In 2008, 2007, 2006 and 2005, you signed the Hennepin County Human Services and Public Health Department annual oath acknowledging your awareness and responsibility to abide by county policy. Also, your office computer displays the Hennepin County logon banner each and every time you logon, which, by actively selecting "Ok"; is an-acknowledgement of agreement to abide by county computer usage policies.

Further, your actions also violate Hennepin County Human Resources Rule 16.3.g (General Rules of Conduct), which provides in relevant part: "No employee shall conduct himself/herself in any manner which shall reflect negatively on the County. Such conduct will be considered to be misconduct...and shall be subject to disciplinary action." The above-described misconduct most certainly reflects very poorly, on Hennepin County.

⁷ Unless otherwise indicated, all references to his E-Mail are his E-Mail work account.

⁸ Also in attendance at this interview were HSR Program Manager Heffernan, HSR Human Resource Representative Michael Rossman and Union representative (exact title unknown) Wes Volkenant. Employer Exhibit No. 33.

⁹ Employer Exhibit No. 35

The above misconduct in and of itself compels your discharge. Your recent disciplinary history serves to reinforce that conclusion: You received a written reprimand on 9/27/06 for violations of Hennepin County Human Resources Rule 16.3.g and an oral reprimand on 9/19/06 for unwanted touching, of another employee. Based on the nature and extent of the violations/misconduct cited above and your disciplinary history, I have determined that there is just cause to discharge you from County employment...

A Loudermill¹⁰ hearing was held on October 8th wherein the Employer reviewed and considered information gathered during the Employer's forensic investigation that was provided at the Grievant's investigative interview. On October 13th, the Grievant received a letter from Area Director Todd Monson terminating his employment.¹¹ Union representative Matthew Nelson then filed a Step 2 written grievance on behalf of the Grievant on November 7th alleging that the Grievant was terminated without just cause in violation of the Agreement.¹² The Employer denied the Step 2 grievance on December 2nd¹³ at which time the Union notified the Employer that it was filing for arbitration.¹⁴ The undersigned was notified on January 16, 2009 by letter from the Union that I had been selected as the neutral Arbitrator in this matter.

RELEVANT CONTRACT PROVISIONS

ARTICLE 7 — GRIEVANCE PROCEDURE

Section 4 Arbitration: *If the grievance is not settled in accordance with the foregoing procedure, the UNION may refer the grievance to arbitration within fourteen (14) calendar days after the employee and UNION's receipt of the EMPLOYER's written answer in Step 2. The parties shall mutually agree upon an arbitrator. If the parties are unable to agree on an arbitrator, the selection of an arbitrator shall be made in accordance with the "Rules Governing the Arbitration of Grievances" as established by the Public Employment Relations Act and administered by the State of Minnesota*

¹⁰ The term "Loudermill hearing" comes from a U.S. Supreme Court decision, Cleveland Board of Education v Loudermill Board, 470 U.S. 532 (1985). The purpose of a "Loudermill hearing" is to provide a public employee an opportunity to present his side of the story before the employer makes a decision on discipline. Prior to the hearing, the employee must be given specific written notice of the charges and an explanation of the employer's evidence so that the employee can provide a meaningful response and an opportunity to correct factual mistakes in the investigation and to address the type of discipline being considered.

¹¹ Employer Exhibit No. 36.

¹² Joint Exhibit No. 2.

¹³ Joint Exhibit No. 5

¹⁴ Joint Exhibit No. 4.

Bureau of Mediation Services. The arbitrator shall hear the grievance at a scheduled meeting subject to the availability of the EMPLOYER and the UNION representatives. The arbitrator shall notify the UNION representative and the EMPLOYER of his/her decision within thirty (30) calendar days following the close of the hearing or submission of briefs by the parties, whichever is later, unless the parties agree to an extension thereof. The fees and expenses for the arbitrator's services and proceedings shall be borne equally by the EMPLOYER and the UNION, provided that each party shall be responsible for compensating its own representatives and witnesses. Employees who serve as such representatives or witnesses shall not be compensated at a rate in excess of their base pay rate. If either party desires a verbatim record of the proceedings, it may cause such a record to be made, provided it pays for the record. If both parties desire a verbatim record of the proceedings, the cost shall be shared equally. The arbitrator shall not have the right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this AGREEMENT. The arbitrator shall consider and decide only the specific issue(s) submitted, in writing, by the EMPLOYER and the UNION, and shall have no authority to make a decision on any other issue(s) not so submitted. The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The decision shall be based solely upon the arbitrator's interpretation or application of the express terms of this AGREEMENT and on the facts of the grievance presented. If the arbitrator determines that the grievance is covered by law or statute, or not covered by the express provisions of this AGREEMENT, the arbitrator shall refer the grievance back to the parties without decision or recommendation. The parties may, by written agreement, agree to submit more than one grievance to the arbitrator provided that each grievance will be considered as a separate issue and each on its own merits.

ARTICLE 27 — WORK RULES

The EMPLOYER may establish and enforce work rules that are not in conflict with this AGREEMENT. A copy of the EMPLOYER's formally established departmental work rules shall be available on or about the work site and during the work shift of employees subject to such rules. Upon request, such rules shall also be made available to the UNION. Revisions to such work rules will be labeled as new or amended and shall be posted or disseminated in advance of their effective date.

ARTICLE 32 — DISCIPLINE

Section 1. *The EMPLOYER will discipline employees in the classified service only for just cause.*

Section 2. *Discipline, when administered, will be in one or more of the following forms and normally in the following order:*

- A.** *Oral Reprimand*
- B.** *Written Reprimand*
- C.** *Suspension **
- D.** *Discharge or disciplinary demotion*

Except in situations where less than a full week unpaid suspension of exempt employees is allowed under Federal/State Law, exempt employees may not be suspended from duty without pay for a period of less than one (1) work week as discipline under this Agreement. Rather, where just cause exists, and there is mutual agreement, the EMPLOYER may impose disciplinary reductions in accrued vacation, deferred holiday and/or compensatory time balances. The amount of such disciplinary reductions shall depend upon the seriousness of the offense and the involved employee's record of employment. Disciplinary reductions in accrued vacation, deferred holiday, and/or compensatory time balances shall be treated as a suspension for purposes of the employee's record and progressive discipline.

Section 3. *If the EMPLOYER has reason to reprimand any employee, it shall normally not be done in the presence of other employees or the public.*

Section 4. *Written reprimands, disciplinary suspensions, disciplinary demotions or discharge of permanent employees are appealable up to and through the arbitration step of the grievance procedure contained in this AGREEMENT.*

Section 5. *The EMPLOYER and UNION shall make available to each other all information and evidence that will be used to support a suspension or discharge or defense against such action no later than the Step 2 meeting of the grievance procedure.*

Section 6. Personnel Records.

A. *Investigations which do not result in disciplinary actions shall not be entered into the employees personnel records. A written record of all disciplinary actions other than oral reprimands shall be entered into the employee's personnel record. All disciplinary entries in the personnel office record shall normally state the corrective action expected of the employee.*

B. *An employee who is reprimanded in writing, suspended, disciplinarly demoted, or discharged shall be furnished with a copy of notice of such disciplinary action.*

C. *Upon written request of the employee, a written reprimand shall be removed from the employee's personnel record if no further disciplinary action has been taken against the employee within two (2) years following the date of the reprimand, or if no disciplinary action has been taken against the employee for the same or related offenses within three (3) years following the date of the reprimand.*

D. *Employees shall have access to information contained in their personnel records in accordance with the provisions of the Data Practices Act, as amended.*

Section 7. Union Representation.

Employees will not be questioned concerning an administrative investigation of disciplinary action unless the employee has been given an opportunity to have a union representative present at such questioning. When mutually agreeable, the UNION shall have the right to take up a suspension, demotion, and/or discharge as a grievance at the second step of the grievance procedure, and the matter shall be handled in accordance with this procedure through the arbitration step if deemed necessary.

Section 8. *Disciplinary action shall be taken in a timely manner.*

FACTS

In early March 2008, HSR Jessica Gutowski, who works in the Eligibility Supports Unit (ESU), observed what she described as pictures of women showing a lot of flesh on the Grievant's computer screen. She indicated that she was approximately five feet away when she observed the Grievant, who had his back to her, looking at what she described as "nude images". She testified that she observed this activity at various times of the day while walking by the Grievant's office cubicle located on the 3rd floor while she was on her way from her 3rd floor office cubicle to training classes on the 4th floor. She did not stop to look at them; rather, she would just glance at them as she walked by. She also indicated that at various times the Grievant would hurriedly change screens (she could hear the mouse click) as she was approaching his cubicle. HSR Gutowski further testified that she was a new employee and did not know exactly what to do so she reported what she had seen to her mother. Her mother, who also works for the Employer, reported it to her supervisor who then in turn reported it to Gutowski's supervisor Susanna Vogel. Later, HSR Supervisor Vogel informed her that she was going to report the Grievant's activity.

HSR Supervisor Kristi Martinson, who had 29 years of service, 20 of which were as a supervisor, testified that she has worked with the Grievant for many years and even supervised him during a two to four year period in the late 1990's to the early 2000's. She stated that her cubicle was on the same floor as the Grievant's; and while walking by his cubicle at approximately 6:30 a.m. on March 20th, she observed a number of pictures on the Grievant's computer screen of women showing a lot of flesh. She could not get a very good look at them since there were multiple pictures three or four across and three or four deep on the screen at the same time. They were wallet sized or a little larger. She further

testified that she was approximately eight to nine feet away when she observed these pictures. She did not get a good look, but could tell that there was a great deal of flesh verses clothing showing. Also, the Grievant would quickly click to another screen when he heard her coming. She subsequently reported this incident in an E-Mail to HSR Supervisor Peterson and Program Manager Kathryn Heffernan later that morning.¹⁵

On March 21st, she was working at a copy machine across from the Grievant's cubicle. During the copy-making process, she had to walk past his area a number of times between 6:40 and 7:00 a.m. where she observed him looking at some pictures again on his computer screen. She stated that she could not get a very good look at the pictures because he would quickly click off the screen when he heard her coming; however she could determine that they were non work related pictures of women. She reported this to HSR Supervisor Peterson and Program Manager Heffernan in an E-Mail later that morning.¹⁶

HSR Supervisor Martinson also testified that she would often go by the Grievant's cubicle both prior to March 20th and after, and see non-work related material on his computer screen. She never reported this to a higher authority. She indicated that a lot of the observations were before work time when employees are allowed to do non-work related tasks on the computer like accessing the Internet or reading a newspaper during non-work times. She further stated that there were times after March 21st that she observed what she viewed to be pornography on the Grievant's computer screen; however, she never discussed what she had seen with the Grievant or reported it because she knew there was an ongoing investigation and assumed higher authority knew what was happening.

¹⁵ Employer Exhibit No. 16

¹⁶ Employer Exhibit No. 2.

Information Technology Supervisor Craig Troska, who is in the Information Technology and Records Management Unit (ITRMU), has been with the Employer since 1996. He currently supervises a team of four Information Technology (IT) Specialists that are responsible for maintaining the Employer's 37,000 plus computers. In 2008, he was an IT Specialist whose principal job function was servicing computers. He also was then, and still is, a member of the Forensic Digital Investigative Unit (FDIU) that was responsible for computer investigations that included data gathering and digital evidence processing.

In late March or early April, IT Supervisor Troska was directed by his supervisor ITRMU Business Information Officer Judy Regenscheid, who also is the Manager of the FDIU, to conduct a forensic investigation of the Grievant's computer. IT Supervisor Troska surreptitiously pulled the Grievant's computer hard drive after the Grievant left work on or about April 8th. He put the Grievant's confiscated hard drive in a safe after he made a true copy that was then returned the Grievant's computer.

As late as September, there were still reports that the Grievant was accessing inappropriate images on his work computer screen. HSR Representative Alyssa Ryan reported to HSR Supervisor Martinson on September 10th that she walked by the Grievant's cubicle and observed him looking at a picture of a kneeling semi-nude woman on his computer screen. HSR Supervisor Martinson corroborated what HSR Representative Ryan reported, adding that she also indicated that another worker (unnamed) on her team had seen the same type of picture on the Grievant's computer. HSR Supervisor Martinson reported her conversation with employee HSR Representative Ryan by E-Mail dated September 10th at 7:48 a.m. to Program Manager Heffernan and HSR Supervisor Peterson.¹⁷

¹⁷ Employer Exhibit No. 3.

IT Supervisor Troska testified that he began the forensic investigation in late May. He did not begin to examine the Grievant's hard drive immediately after he "pulled it" because he was busy on other investigations. He also had his regular IT service duties to perform. During the course of his investigation, he identified 243 images of scantily clad women wearing lingerie, bras and underwear, thongs, body suits or swim wear. Almost all of the images were in sexually suggestive poses.¹⁸ Several images are partially nude women covering their breasts with their hair, hands or scarves or other garments. Some images are of fully nude women laying face down on a couch or bed exposing side views of their breasts and buttocks.

An examination of Employer Exhibit No. 6 reveals that all the images were created¹⁹ on the Grievant's computer between January 7th and April 8th, the date the Grievant's hard drive was confiscated.²⁰ The last access dates vary from the date they were created until April 8th, with the access times occurring primarily during his work hours—6:30 a.m. to 3:00 p.m.

IT Supervisor Troska further testified that 181 images were in the Grievant's computer profile and 61 images were in his computer recycle bin. Although he was not able to determine the exact sources of the images that the Grievant had viewed, he was able to determine that many were in a folder labeled Myspace pictures or My Documents/Myspace pictures. Thus, it was highly probably that the Grievant downloaded them from the social network website Myspace. The Grievant testified that he copied the images to a folder, which he later downloaded to a flash drive to install on his home computer, adding that, none were on his computer screen very long.

¹⁸ Employer Exhibit No. 5

¹⁹ Hereinafter, all references to "created" will refer to items being downloaded from Internet or copied from USB flash drive or CD.

²⁰ Seven of the images may have been created earlier since their modified date was in January 2007.

According to IT Supervisor Troska, the Grievant visited 13,121 non-County Internet websites from March 18th until April 8th.²¹ The vast majority of the “hits” were of pictures and/or individual profiles from the MySpace website. On March 18th, the Grievant was switching from one website to another throughout the whole day except for the period shortly after noon that may have been his lunch break. This also happened on numerous other dates during that time period.

IT Supervisor Troska’s investigation also revealed that the Grievant had been using his computer to operate multiple personal businesses.²² Troska found 230 documents, graphics and Excel spreadsheets related to the Grievant’s business activity involving a company called Crystal Treasures, which provides commercial and home inventory insurance services.²³ The vast majority of this business activity material was downloaded in August 2007 to a folder labeled My Documents with a sub-folder named Crystal Treasures.²⁴ All of the files showed an access date of September 13, 2007 with the exception of one document that was accessed on March 28, 2008.

The Grievant also had 38 Internet Favorites involving this company saved to his computer in a folder labeled Big EB’s Business.²⁵ The Favorites appear to have been downloaded from a USB flash drive or CD since the created date is primarily August 2007 and the modified dates range from 2002—2006. The last access date for 33 of the 38 Favorites was September 13, 2007, three had October 16, 2007 dates, one had a November 9, 2007 date and the final Favorite had an access date of January 31, 2008.

²¹ Employer Exhibit No. 11.

²² Troska testified that the investigator routinely examines a computer for personal use during the course of a forensic investigation.

²³ Employer Exhibit No. 6. This Exhibit also contains the file path for the documents together with sample documents; and approximately 240 company or personal contact names, names addresses, telephone numbers and E-Mail addresses.

²⁴ Troska testified that it appeared most were copied from a USB flash drive or CD because the date the folder was created was different (later) than the date the original file was modified, which reflected 2006 and 2007 dates. According to Troska, employees received flash drive compatible computers in late 2006 or early 2007.

²⁵ Favorites are bookmarks for websites that allow easy access. Employer Exhibit No.10.

IT Supervisor Troska discovered a number of materials related to the Grievant's church activity as a Deacon. There were 25 documents, four graphics and three Excel worksheets under his profile that were created on his computer on August 7 and 8, 2007 with the exception of one created on March 14th in a folder labeled My Documents with sub-folders named Church Deacons-ess and Eric's Church Misc.²⁶ The last access date was primarily the creation date with the exception that four graphics were last accessed on November 14, 2007, one Excel work sheet had an August 31, 2008 date, two documents had September 13, 2007 dates and two had March 19, 2008 dates.

IT Supervisor Troska also found 14 documents on the Grievant's computer that appear to be articles from Christian authors and/or websites.²⁷ The documents were downloaded or created in June and August 2007 and last accessed on August 10, 2007.²⁸ Finally, IT Supervisor Troska found that the Grievant had downloaded 258 Internet Favorites that were church related. All were created on August 7, 2007 at 10:28 a.m.; however, they were downloaded from files that were modified beginning in 2002.²⁹ 229 were last accessed on March 13th before his work day began (5:47 a.m.),³⁰ 14 were accessed on August 8, 2007 at 10:28 a.m. and 15 were accessed on November 8, 2007 at 9:33 a.m.

During the course of his testimony, IT Supervisor stated that he uncovered evidence on the Grievant's computer that he was involved in other business ventures.³¹ One venture involved a company called New Visions Investments that appeared to be a real

²⁶ Employer Exhibit No. 8.

²⁷ Employer Exhibit No. 9.

²⁸ Troska testified that the similar access and creation dates are the result of the Grievant loading copied files from a back-up utility the County has. This is usually done when a new computer is involved. Thus, you cannot tell from the data (on Exhibit No. 9) when the Grievant last accessed a particular document.

²⁹ Employer Exhibit No. 7.

³⁰ Once again the Favorites were copied from a back-up. Thus, you cannot tell from the data (on Exhibit No. 7) when the Grievant last visited a particular Favorite site.

³¹ They will be further discussed later herein.

estate “flipping” business. There were also files or documents on the Grievant’s computer related to three photography businesses.

IT Supervisor Troska testified that he never informed the Grievant that his hard drive had been pulled and copied; nor was he ever informed that he was being investigated for viewing alleged naked pictures of women on his computer. Troska also testified that he did not, nor did anyone in management direct him to, erase any of the inappropriate images on the Grievant’s hard drive. He also did not block, nor was he directed to block, any site that the Grievant had been accessing to view the images even though it is a relatively easy task.

IT Supervisor Troska completed the investigation and issued his report to Manager Regenscheid on September 8th. She testified, which was corroborated by Troska, that he would apprise her at periodic status meetings of inappropriate images as he found them. This occurred between the time Troska started his investigation (late May) until his final report was issued. He also testified that his investigative time on the Grievant’s case during that period amounted to approximately 10-20% of his total work time. He did not keep a record of his investigative hours; however, he usually averaged approximately 200 hours per investigation. He further stated that he did not know how many other concurrent investigations he was involved in during the Grievant’s investigation; however, it was more than one.

Senior Information Technology Specialist (SITS) Barbara Madden, who works in the ITRMU as well as the FDIU where she handles E-Mail investigations, testified that Manager Regenscheid assigned her to do a forensic investigation of the Grievant’s work E-Mail account in March 2008. She was directed by Manager Regenscheid to look for

pornographic or other inappropriate images in the Grievant's work E-Mail account.³² The Grievant's E-Mail account was "captured on March 21st"; however, she did not begin her actual investigation until April 16th because of prior investigative commitments. She was able to retrieve 10,669 E-Mails from a period dating from March 2001 to September 2008.

SITS Madden testified that she discovered an E-Mail from the Grievant's personal E-Mail to his work E-Mail account dated April 10th where the subject was J_ H_³³ that contained a website page.³⁴ When she opened the link to a Myspace profile that was contained in the E-Mail she saw an image of a woman with an exposed pubic area. She further testified that the link was no longer available when she was preparing for this arbitration so the image was not available for the hearing.

SITS Madden testified that she uncovered 3,037 E-Mails for the period October 12, 2000 through September 8th related to five personal businesses that the Grievant was involved in.³⁵ The E-Mails³⁶ were exchanged between the Grievant and various business partners or associates involved in Crystal Treasures, New Visions and his photography businesses Royal Inspirations and Big EB's. There were also E-Mails related to another unnamed photography business where the Grievant did free-lance work. A review of the Exhibit reveals that the vast majority of the E-Mails were sent to him from business associates at various times of the day and evening. The Grievant also sent the vast majority of his E-Mails to the business associates primarily during his work day.

SITS Madden also discovered a number of E-Mails related to breaches of the Employer's data privacy and client confidentiality policies.³⁷ She stated that the E-Mails

³² The Grievant's E-Mail account was accessed from the Employer's server and digitally copied.

³³ Full names of clients or other third party individuals will not be disclosed for confidentiality reasons.

³⁴ Employer Exhibit No. 12.

³⁵ Employer Exhibit No. 14.

³⁶ Unless otherwise indicated herein, all E-Mails involve the Grievant's work E-Mail address.

³⁷ Employer Exhibit No. 13. pg. 1.

disclose that the Grievant improperly promoted his personal business to an individual who had been in his office seeking welfare assistance in order to avoid home foreclosure. The substance of the Grievant's visit with this individual is contained in an E-Mail dated September 17, 2002 that was sent to the Grievant's New Visions business partner.³⁸

SITS Madden stated that the Grievant further breached client confidentiality and failed to safeguard private welfare data. She testified that the aforementioned E-Mails also disclosed that he sent two screen prints from MAXIS, the State's electronic human services case management system, from his work E-Mail account to his personal E-Mail address on July 16, 2003. The screen prints included clients' home addresses and telephone numbers, social security numbers, birth dates, income information, along with the clients' children's names, birth dates and social security numbers. The Grievant also sent a client's name, home address and telephone number on April 2, 2004 to his home E-Mail address. These clients were not assigned to the Grievant or his team, and he had no work-related reason to access the information.³⁹ The Grievant also did not have authorization to send any of the above data to his personal E-Mail address. SITS Madden also testified that the Grievant violated client confidentiality by disclosing to a friend H__ O__ that her mother was a welfare client in an E-Mail on August 4, 2004. The disclosure was contained in the subject of the E-Mail that stated, "*Re: just to say hello - Eric from welfare office - saw your mother A_ today*".

SITS Madden further stated that the Grievant violated the Employer Policy regarding maintaining appropriate professional boundaries with client's families. The Policy requires employees to, "*Maintain professional, role appropriate relationships. Prohibited activity*

³⁸ The Grievant admitted during his testimony that he informed the individual in the E-Mail that he sent to his New Visions business partner on September 17, 2002 that he would contact him in his personal business capacity.

³⁹ SITS Madden stated that other E-Mails revealed that one of these clients belonged to the Grievant's church who asked him in a later E-Mail for assistance in obtaining financial aid from the Employer.

*includes, but is not limited to, socializing with clients and their families, financial exploitation or entering into unapproved business arrangements with clients...engaging in or seeking relationships for emotional needs, especially if it appears that such relationships might reasonably interfere with your objectivity, might cause harm or exploit the client, or might otherwise interfere with your ability to provide effective services to the client or have the appearance of impropriety. Personal self-disclosure should be kept to a minimum and should always be done in the best interests of the client, not the worker...”*⁴⁰

The Grievant's interaction with H__ O__ violated this Policy. Also the Grievant's expressed desire to develop a personal relationship with K__ (last name unknown) in an E-Mail (late June 2007) violated this Policy.⁴¹ K__ had contacted the ADSU on behalf of her father to assist him with the services he had either applied for or was receiving.

SITS Madden also stated that the Grievant had access to DMV records to determine if an individual seeking welfare assistance had a vehicle. She discovered during the course of her E-Mail investigation that the Grievant improperly browsed restricted data from the DMV data base for seven individuals who were not clients of the Grievant. Between 2006 and 2008, the Grievant used the DMV database to make the following inquiries of driving records, motor vehicle plates, and vehicle identification numbers. He made three inquiries of T_ C_ on April 17, 2007; two inquiries of himself on May 4 and 16, 2006; eight inquiries of D_R_ or women with the same name on May 16, 2006 and six inquiries on March 3, 2008; one inquiry of G_ J_ on June 6, 2006, two inquiries of C_ J_ on August 24, 2006; three inquiries of K_ K_ on August 24, 2006; and four inquiries, using various names, of A_ M_ on November 1, 2006. In his testimony, the Grievant, acknowledged looking up

⁴⁰ Employer Exhibit No. 25.

⁴¹ Employer Exhibit No. 13.

the DMV records of R_, M_ and C_ was inappropriate; however, he stated that the others must have been clients because he has no idea who they are.⁴²

SITS Madden further testified that she discovered E-Mails related to the Grievant's position as a church Deacon; and those involving Bible Study and the development of a website for his church.⁴³ Although she discovered a hundred plus E-Mails, she only documented 31 in the Exhibit because she felt she needed to concentrate on other aspects of the investigation; adding that documenting the hundred plus E-Mails would require a substantial amount of time which she did not have at that point in the investigation. The 31 E-Mails covered the period January 18th through March 21. Fourteen of the E-Mails were sent by the Grievant at various times during his work-day while the remaining E-Mails were sent to the Grievant both during and outside his work-day.

SITS Madden also testified that she uncovered 699 religious devotional or inspirational E-Mails during her investigation. She stated that he had a folder of devotional messages from which he would daily select one message to send to a list of 136 recipients both inside and outside the Employer.⁴⁴ The E-Mails cover the period January 14, 2007 through September 9th with the vast majority being sent during his early work hours. The Grievant acknowledged sending inspirational messages to individuals outside work and to co-workers including at least one supervisor. He had been doing this before his work-day started for at least the last fifteen years. SITS Madden further testified that she uncovered a list of websites that the Grievant subscribed to⁴⁵. There were approximately 72 such websites that included both religious and non-religious entities. She further testified that

⁴² Union Exhibit No. 4.

⁴³ Employer No. 16.

⁴⁴ Employer Exhibit No. 17.

⁴⁵ Employer Exhibit No. 18.

she did a sampling of the subscription E-Mails that the Grievant received during a one month period. For the month of June 2008, they averaged 49 per day.

The Grievant testified that New Visions was in operation for a five-year period from October 12, 2000 through September 20, 2005. During this time period he sent a total of 287 E-Mails for an average of 57 E-Mails per year or basically one per week; and in turn he had a total of 1,033 E-Mails sent to him for an average of 207 E-Mails per year or basically four per week.⁴⁶ He further testified that he also reviewed the E-Mails attributed to Crystal Treasures for a three-year period from September 20, 2005 through September 8, 2008. During that time period, he sent a total of 149 E-Mails for an average of 49 per year or less than one per week. In turn, he received 1,505 E-Mails that averaged 502 E-Mails per year or basically 10 per week.⁴⁷ The Grievant stated that Royal Inspirations or Big EB's started on March 29, 2004 and ended almost immediately. During its short tenure, he sent 12 E-Mails and received five.⁴⁸

During the course of her investigation SITS Madden testified that she discovered that the Grievant was spending an excessive amount of time socializing by E-Mail with acquaintances and friends. She prepared an Exhibit with 508 social E-Mail conversations that were stored his in folders on his work computer.⁴⁹ Many of the E-Mails, especially the conversations he had with an individual who works with Dell Computer, were in one of these folders. According to SITS Madden, it appears the relationship started when the Grievant was having problems with a new home computer. They became friends and exchanged E-Mails from January 2005 to September 2008. Most of the E-Mails are

⁴⁶ Union Exhibit No 5.

⁴⁷ Id.

⁴⁸ Id

⁴⁹ Employer Exhibit No. 19.

lengthy; and like the others in the Exhibit, the vast majority were sent during the Grievant's work hours.

During her testimony, SITS Madden indicated that she spent approximately 300 hours in her investigation of the Grievant's work E-Mail account. She also indicated that she was concurrently involved in seven other investigations.

As stated earlier, Judy Regenscheid is the Manager of the FDIU who opened a forensic investigation after she received reports that the Grievant was viewing inappropriate images on his computer. Employer Exhibit No. 4 introduced through her describes Digital Forensics as the *"acquisition, authentication, reconstruction, examination and analysis of data held on, or retrieved from, computer storage media in such a way that the information can be used as evidence in a court of law"*. The role of the investigators is to *"examine computer hardware, software and other digital sources using legal procedures to obtain evidence that proves or disproves allegations. They are trained specialists who know computers, the rules of evidence gathering and how to work with law enforcement and other authorities."* The investigator also *"gathers and preserves evidence according to Federal Rules of Evidence. The investigator has three basic tasks — finding, preserving and preparing evidence. Their work must be done in a methodical manner and achieve results that are scientifically repeatable. Digital evidence must be gathered with proper retrieval procedures and assurance of accurate information. The investigation results must be of a quality to enable legal or civil recriminations."* The scope of the investigations involve but are not limited to *"Violations of County or departmental policy; Violations of HR rules; Violations of Data Practices Act; internal and external security breaches; Inappropriate use of County computer hardware, software or systems; Inappropriate use of other digital equipment or systems; Client, employee or vendor fraud/misuse of county-wide services (in conjunction with HSRPHD Fraud Unit*

and other agencies); and Violations of civil or criminal laws (criminal investigations may be in conjunction with local law enforcement).”

Manager Regenscheid testified that there are four employees in the FDIU unit, three of whom, including IT Supervisor Troska, had other full-time jobs with the Employer. During the time period relevant herein, one of the part-time investigators had pre-approved leave and another was out on medical leave. She further testified that they get approximately 50 investigation requests a year of which approximately 40 are actively processed.

Testimony by and Exhibits offered through various Employer witnesses established that the Employer has comprehensive policies involving the use of a work computer for personal and business use. There are also State, County and Department policies governing client confidentiality, data privacy, and the use of internet and E-Mail for personal reasons. There are also policies that govern personal conduct. According to these witnesses, violations of these policies formed a part of the basis for the Employer's decision to terminate the Grievant.

Manager Regenscheid further testified that the Employer maintains a “Confidentiality and Computer System Use Agreement” that governs the appropriate and inappropriate use of computers and information related to the Minnesota Government Data Practices Act (DPA) that all employees of the HSPHD must sign annually. This document is transmitted electronically to each employee who must check off in a box that they have read and understand each item. They must also sign it electronically to show that they will abide by the policies.

The Grievant electronically signed and checked off each item in the documents distributed between 2005 and 2008.⁵⁰ The following are the relevant provisions he agreed to in the Use Agreement he signed on February 17, 2005.

While working with data...provided by or made available through Hennepin County:

I will collect, access, maintain, alter, use and disseminate data only if it is necessary and allowed to perform the duties for which I have been hired and to the extent authorized by law.

I am not permitted to process or maintain cases of friends or relatives on my own case load.⁵¹

I am not permitted to use system access privileges to view non-work related private and confidential information on individuals and/or nonpublic and protected nonpublic information.

I will provide for the security of all private, confidential, nonpublic, and protected nonpublic information for which I am responsible and may have access.

I will provide access to private, confidential, nonpublic and protected nonpublic information only to authorized parties in accordance with approved procedures and to the extent authorized by law...

I acknowledge that I have read and understand these statements. If I violate or ignore any of them, I understand that I may be disciplined in a manner consistent with Hennepin County Human Resources Rules.

The Employer had County system-wide and/or HSPHD E-mail, Internet and Data Privacy Policies in effect during the time period relevant to the Grievant's forensic investigation. These Policies have been periodically updated. The Data Sharing and Data Privacy Policy with an effective date of January 31, 2005 provides in part,⁵²

Minnesota Statutes, Chapter 13, the Minnesota Government Data Practices Act, and particularly M.S. 13.46, Subd. 2(a) establishes that data on individuals collected, maintained, used, or disseminated by the welfare system is private data on individuals... Private data is not

⁵⁰ Employer Exhibit No. 20. Prior to 2005, the Grievant signed a similar paper version of this document.

⁵¹ This provision changed in the Use Agreement he signed on March 8, 2007 and March 11, 2008 to read, "I am not permitted to process, maintain or view private data of any person without a legitimate business reason for doing so even if the information is not released to anyone else. This includes browsing data about me, relatives, acquaintances or celebrities."

⁵² Employer Exhibit No. 23.

available to the public, but must be made available, upon request, to the individual it relates to.”

Manager Regenscheid testified that all of this and other Employer’s policies, which will be discussed later herein, have been disseminated to its employees directly or through E-Mail or apprised that they are available on the Employer’s system-wide website.⁵³ The same is true each time a Policy is updated. Further, employees are reminded each time they boot up their computer with a message that reads,

“I acknowledge and understand that County policies regarding the use of computer resources provide no expectation of privacy and that my computer activity may be monitored. I also understand that inappropriate use is considered serious and can result in discipline, up to and including termination, contract cancellation or prosecution.”

The Employer has a Data Sharing and Data Privacy Policy that references Minn. Stat. § 13.46, Subd. 2(a), which provides that *“data on individuals collected, maintained, used or disseminated by the welfare system is private data on individuals...”*⁵⁴ Manager Regenscheid testified that the Grievant violated these data sharing and confidentiality policies when he sent MAXIX client data to his home computer on two occasions in July 2003 and on one occasion in April 2004. They were also violated when the Grievant accessed DMV records for his own personal use in May, June, August and November of 2006, April 2007, and March 2008. The Grievant further violated the policies when he promoted his personal business to a prospective welfare client in September 2002. Finally, the Grievant disclosed to a friend in August 2005 that her mother was his welfare client.

⁵³ The Grievant testified that he did not remember seeing a lot of the Policies because there *“was so much information coming out, it was hard to look at”* or *“he just skimmed through it”*

⁵⁴ Employer Exhibit No. 23.

Manager Regenscheid testified that the Employer has a comprehensive Internet, E-Mail and Telecommunications Systems Usage Policy, which dates back as far as 1997.⁵⁵ All employees including the Grievant receive these Policies usually via E-Mail or have access to them via the Employer's website. Supervisor Peterson further testified that whenever there was a change in the Policy, it would be discussed in his team meetings.

The Policies acknowledge that County employees, "*will comply with the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13 (MGDPA) as it relates to the access and monitoring of public access computer usage. (See: IT Policy Manual . Policy 1: Information Management and Security Policies and Standards.)*" The Policy further provides that, "*Users shall not intentionally access or view content on the Internet, send E-Mail, voice or video transmission that contains content that is illegal, contrary to county or departmental policy, or that may be discriminatory, harassing or disruptive to other employees, including but not limited to, any sexually explicit, derogatory, abusive or threatening images, cartoon jokes, or other materials, or any inappropriate or profane use of language, unless any of the above is required for the performance of assigned job duties*".⁵⁶

In another section of this Policy on personal Internet use it states, "*...does not contain or imply harassing, demeaning or sexually explicit statements or materials.*" Finally, the Policy provides that, "*Users shall not download any files, software, programs, or similar material for personal use, including but not limited to any material that they are prohibited from accessing or viewing.*"

Manager Regenscheid testified that the Grievant violated the Policies by accessing

⁵⁵ Hennepin County Administrative Manual Policy, General Information and Procedure Internet, E-Mail and Telecommunications Systems Usage (October 1997 and August 2002 Employer Exhibit No. 38 and 39); (September 1, 1997 Employer Exhibit No. 40); (revised April 1, 2004 Employer Exhibit No. 41); and (April 2009 Employer Exhibit No. 23).

⁵⁶ Employer Exhibit No. 21 and 40.

material of a sexual nature as evidenced by the 243 images of scantily clad women found on his computer. Human Resource (HR) Specialist Mike Rossman, who participated in the decision to terminate the Grievant, testified that this act was the key factor in assessing a termination penalty for the Grievant's misconduct.

Manager Regenscheid also testified that the Employer's Policies provide in part that, *"Users shall not use the systems for unapproved charitable endeavors, solicitation of funds, advertisements, political messages, private business activities, or other unapproved non-business related purposes that result in additional expense to the county or interferes with productivity."*⁵⁷ The Grievant violated the Policies by engaging in personal business ventures as evidenced by the 230 documents, graphics, Excel spreadsheets and 38 business-related Favorites that were discovered on the Grievant's computer. A significant number (3,037) of business-related E-mails were also discovered on his computer.

The Grievant also conducted business as a church Deacon while at work. Thirty-two documents graphics, spreadsheets and 258 Favorites were found on his computer. In addition, a significant number of church-related E-mails were discovered as well as the fact that he sent out religious E-mails to 138 addresses every work-day.

HR Generalist Rossman testified that the Employer has a Conflict of Interest/Outside Employment Policy that has been in effect since October 2005. The Policy provides in part that: *"Department staff should not engage in work or earn income...that causes a conflict of interest with the department or their current work"*.⁵⁸ The Policy defines a "conflict of interest" as *"A situation in which an employee's outside employment or activities conducted for private gain or interest are incompatible or inconsistent with public*

⁵⁷ Id.

⁵⁸ Employer Exhibit No. 27.

duties or employment and/or result in the employee not working in the best interests of Hennepin County". The Policy also provides: "Before accepting any outside employment (paid or unpaid) that might conceivably be a conflict of interest with their employment responsibilities, each HSPHD employee must seek authorization for such employment by completing the 'Outside Employment Disclosure Data Sheet'".

HR Generalist Rossman testified that the Grievant did not notify his supervisor or any other management representative of his outside employment/activity with his Crystal Treasures business or any other business in which he was involved. Since his personal business activities required and/or resulted in him having to conduct duties related to that business while at his job brings such outside employment within the definition of a conflict of interest. Further, because he conducted personal business during the work-day and using Employer equipment, it is, in and of itself, in conflict and incompatible with the fact that he is being compensated by the Employer to perform work for which he was not hired. This also results in the Grievant not working in the best interests of the Employer, which further violates this Policy.

HR Generalist Michael Rossman, who advises HSPHD management on the Conflict of Interest/Outside Employment Policy, testified that if the Grievant had sought supervisory approval to engage in private business activities during his work day that would have required him to use his computer to work on Word documents, Excel spreadsheets, graphics, E-Mails and the Internet, he would not have advised approving such employment. Adding that, it would be incompatible with his position with the Employer; and thus, violate this Policy.

The Grievant also subscribed to 75 websites from which he received an unusually large number of E-mails each day from the subscription services. This violated the Employer's Policies that provide in part, "*Users shall not subscribe to external distribution*

*lists, notification services, or other E-Mail or telecommunications services that are not reasonably related to the performance of assigned job duties and that adversely affect system performance by slowing communication routing and/or increasing communication storage space.”*⁵⁹

The Policies also allow for occasional personal use of the Internet and E-Mail provided that such use inter alia, *“does not contain or imply harassing, demeaning or sexually explicit statements or materials”*; or *does not interfere with the employee’s or any other employee’s job duties or routine business activities”*; or *“is not for political, religious, unlawful or illegal practices, personal financial profit, or other promotional activities”*; or *“does not contain or imply harassing, demeaning or sexually explicit statements or materials.”*⁶⁰ In addition the Policies provide that, *“Any personal use of the Internet, E-Mail or Telecommunications systems which affects the privacy or security of information or affects work performance shall not be considered incidental personal use.”*⁶¹

Manager Regenscheid defined occasional use as that use that involves short periods of time such as using a phone to call someone to tell them you will be late; rather than engaging in long and/or repeated personal conversations. The Grievant violated the Policies by his excessive browsing of the internet. This is reflected in the discovery of over 13,000 Internet “hits” during the short period of March 18th through April 8th, most of which occurred during his work-day. The Grievant also violated the Policies by his excessive personal E-mail activity in excess of 4,000 contacts during a seven-year period.⁶²

⁵⁹ Employer Exhibit No 21 and 40.

⁶⁰ Id.

⁶¹ Id.

⁶² This includes business, personal and church-related.

The evidence at the hearing established that the Grievant had a very positive work record. All of the 25 “Summary of Ratings” he received during his tenure were fully capable or higher. The five higher ratings (highly commendable) were for the evaluation periods ending in April 1992, 1995-1997, and 2004.⁶³ The evidence also established that the Grievant had a prior history of discipline dating back to 1997.⁶⁴ These included,

September 27, 2006 — Written Reprimand for leaving a meeting prematurely and sending a hostile e-mail to team members during a September 19, 2006 oral reprimand.

September 19, 2006 — Oral Reprimand for the unwanted touching of another employee (exact date unknown).

December 7, 2001 — Oral Reprimand for inappropriate behavior on November 8, 9, and 16, 2001 toward another employee and refusing to stop the behavior when directed to do so by a supervisor.

March 16, 2000 — Three-Day Suspension for threatening a client, who was yelling at him, on March 3, 2000 that he would “go up side his head”.

April 4, 1997 — Oral Reprimand for excessive personal copying on March 28, 1997.

March 19, 1997 — Oral Reprimand for excessive personal copying 287 pages off the Internet on March 13, 1997.

Finally, the evidence adduced at the hearing established that the parties have negotiated a “just cause” progressive disciplinary procedure that is contained in Article 32 (Discipline) of the Agreement. The Article states, “*The Employer will discipline employees in the classified service only for just cause.*” In addition, “*Discipline, when administered, will be in one or more of the following forms and normally be in the following order: A. Oral Reprimand B. Written Reprimand C. Suspension D. Discharge or disciplinary demotion.*” HR Generalist Rossman testified that the numerous violations and the severity of the violations together with the Grievant’s disciplinary history warranted deviating from the progressive disciplinary policies of the Agreement.

⁶³ Union Exhibit No. 1

EMPLOYER POSITION

The Employer's position is that it had just cause to discipline the Grievant. The Employer argues that the Grievant engaged in the following serious misconduct that warranted discipline:

- The Employer's Policies and Confidentiality and Computer Use Agreement prohibit the use of its computers to access sexual content. When the Grievant downloaded over 240 sexually explicit images on his computer he violated the Policies and Use Agreement.
- The Grievant committed multiple serious data privacy violations. Welfare data collected on HSHPD clients is private data. The HSHPD Data Sharing and Data Privacy Policy references Minn. Stat. § 13.46, Subd. 2(a), which provides that "*data on individuals collected, maintained, used or disseminated by the welfare system is private data on individuals...*" In addition, numerous Employer Policies address the requirement that HSHPD employees to properly safeguard private welfare data. He violated the Policies when:

The Grievant failed to properly safeguard private welfare data by sending two screen prints from MAXIS to his home E-mail address. The screen prints included clients' home addresses and telephone numbers, social security numbers, birth dates, income information, along with the clients' children's names, birth dates and social security numbers. These clients were not assigned to the Grievant's team and he had no work-related reason to access the information.

The Grievant also improperly browsed restricted data on the DMV database. Between April 17, 2007 and March 3, 2008, the Grievant accessed the DMV records of seven individuals who were not HSHPD clients.

- The Grievant's blasé attitude about these serious breaches of data privacy and client confidentiality demonstrates how little he appreciated the importance of properly protecting data provided to HSPHD by those seeking welfare assistance and/or to which he only had access by virtue of his position with HSPHD. For a 20+ year employee, this was a surprising and troubling breach of trust.
- The Grievant conducted personal business on his computer in violation of County and HSPHD Policies that prohibit such activity. The forensic investigation revealed that the Grievant operated multiple personal businesses on his computer. The Grievant used his computer to store hundreds of documents, graphics, Excel spreadsheets and Internet business favorites on folders dedicated to his business ventures. He also used his work E-Mail account extensively to communicate with business associates. The Grievant also used his computer to conduct business related to his position as a church Deacon. In this regard, he maintained files and folders that stored documents, graphics, Excel spreadsheets and religious Internet Favorites on his computer. In addition, he also used his work E-Mail account for this purpose.
- The Employer's Policy requires that the Grievant get approval to conduct outside activities that are conducted for private gain or are incompatible or inconsistent with their employment. The Grievant failed to abide by this Policy before he engaged in personal business activity.
- The Grievant improperly promoted his personal business to an individual seeking assistance from the Employer. By doing so the Grievant exhibited a serious breach of public trust and violated the Employer's Policy on Standards and Conduct.
- The Grievant engaged in excessive personal Internet and E-mail activity on his computer during work hours. He was a frequent visitor to the MySpace website as

evidenced by the sample of over 13,000 hits generated on his computer for a three-month period in 2008. The evidence disclosed that he had frequent personal E-Mail contacts, many which were lengthy, with friends and business associates. He also received many website subscriptions to his work E-Mail address. All of this activity violated the Employer's Internet and E-Mail Policies.

- The Grievant's attempted relationships with H__ O__ and K__ violated the Employer's Policy requiring appropriate professional boundaries with clients' families.

The Employer further argues that its Internet, E-Mail, Data Privacy and Standards of Conduct Policies were clearly transmitted to the Grievant. In addition, the Grievant annually signed the User Agreement. Finally, the Grievant acknowledged every time he booted up his computer that he understood the Employer's Policies on the use of his computer and the consequences if he did not.

The Employer also argues that it conducted a full and fair investigation. It was justified in investigating the Grievant when it was brought to management's attention that the Grievant was viewing inappropriate images on his computer. The investigation proved that the Grievant engaged in serious misconduct involving the use of his computer. The investigation was also thorough and culminated in an investigative interview in the presence of a Union official before any discipline was levied.

The Employer also alleges that termination was the appropriate discipline in light of the following.

- The Grievant's misuse of his computer was flagrant, especially when you consider his long tenure with the Employer. This, along with his demonstrated lack of appreciation for the seriousness of his misconduct and for the Employer's Policies that govern employees' computer use, which he was reminded of each and every

time he logged onto his computer, were highly relevant factors in determining the appropriate penalty.

- The Grievant also had a history of misconduct that was reviewed before the decision to terminate him was made. The Grievant was formally disciplined six times. He did not grieve any of the disciplinary actions, which is tantamount to an admission of guilt. Although, this history of discipline was considered, the Employer would have taken the same termination action, absent the prior discipline, because of the seriousness of the Grievant's misconduct.
- Even the Union recognized the severity of his misconduct. Shortly after the Grievant's dismissal, Co-Chief Steward Cliff Robinson warned members in the Union's monthly newsletter of the perils of using their work computer for personal activities.⁶⁵ He stated,

I recently had to stand by as another of our members was fired for misusing the County computer that was assigned to him. I had to stand by, because there was nothing the Union could do to protect members who misuse their computer. The computer on your desk belongs to the County! It is put there for you to work on. It is not there for you to play with! There are certain things you cannot do and places you can never go. You cannot look at PORN of any kind at all. You can not use the County computer to store information about another job or business that you may have, or use the computer to run another business. You cannot go to certain web sites, such as the Department of Motor Vehicles, and look up information for which you have no business reason to look up. The same goes for any other web site that contains private information for which you have no business reason to look. Maybe the best way to stay out of trouble is to follow this rule of thumb: do nothing on the County's computer that you would not be comfortable showing your supervisor.

UNION POSITION

The Union's position is that the Employer did not have just cause to discharge the Grievant. The Union argues that:

⁶⁵ Employer Exhibit No. 37.

- HR Generalist Rossman testified that he was most concerned about the Employer's liability in creating a hostile work environment because the Grievant was allegedly looking at inappropriate pictures of women on his computer. If the Employer was so concerned why wasn't the Grievant immediately confronted when HSR Supervisor Martinson saw the alleged improper pictures, or when HRS Gutowski first reported seeing nude images or immediately after IT Supervisor Troska found the images on his computer. Instead the Employer waited seven months to confront the Grievant.
- The allegation that the Grievant had a picture of a nude woman on his computer triggered the Employer to do a full forensic investigation on all his computer usage. Rather than just checking on his computer for any offending pictures, the Employer went overboard and checked everything on his computer.
- The Employer went overboard in investigating the Grievant based on HSR Gutowski's and HRS Supervisor Martinson's allegations. They were not in the best position to see precisely what they alleged to have seen because of the positioning of the Grievant's desk and the distance from the computer relative to where they were standing when they allegedly observed the images. A review of the floor plan (Employer Exhibit No. 43) shows she must have been at least seven feet away from the screen and then she would have been parallel with the Grievant's computer screen and would have no view of the screen. The further Ms. Gutowski walked away from the Grievant's cubicle the less chance she would have had to see his computer screen clearly (at least 15-20 feet before she would have had somewhat of a view of the computer screen).
- Contrary to the Employer's assertions, there is not one nude picture in Exhibit No. 5, which the Employer introduced at the hearing. They are admittedly improper

pictures for a work computer but there were no naked pictures on it. MySpace does not allow nudity on its web site and will take any nudity off its web site. Also, SITS Madden alleged that she saw a nude image on a website (Exhibit No. 12), yet could not produce a picture of the alleged nude image at the hearing.

- The Grievant testified that the pictures that he had on his computer were of friends that he met on the MySpace Internet website. His home computer has a telephone Internet connection. The Employer's wireless system was much faster so he would download the pictures mainly in the morning before work to a flash drive to take home. The Employer's Internet Policy allows employees to use the Internet before work, during break and after hours.
- The Employer needed to deal with the allegations made by HSR Gutowski and HSR Supervisor Martinson immediately and then the Grievant should have received reasonable discipline based on Article 32 and let him know he cannot do that again. The pictures may have been inappropriate for the work place. However, a better course of action for the Employer would have been to tell the Grievant to stop doing it and give him the proper discipline for this activity.
- The Employer also had all the pictures they needed to review by April 6th. They could have told the Grievant to stop looking at the pictures or blocked him from viewing the MySpace website. They did neither. Instead they launched a full forensic investigation. The best way to describe what the forensic investigation did was like having a fishing boat with a giant fishing net dragging everything off the bottom of the ocean to see what will get caught in the net. As a result the Employer dug up the Grievant's computer use going back to 2000, some eight years before he was terminated.

- The Employer has no Policy that requires that employees report any outside jobs held, rather, the Policy only requires employees to report outside jobs that may result in a conflict of interest. The only potential conflict of interest occurred in 2004 when he was buying and selling homes and he referred his client to the president of his company. He did this out of empathy and concern for his client and not to make money. Nothing happened from this exchange and the Grievant did not profit from it. This mistake does not warrant termination.
- The Grievant admitted he accessed the DVM system to look up the ages of three different people. He should not have done this. It was a mistake, but it does not warrant any more than a written reprimand and notice that any further violations would result in more serious discipline.
- The Grievant was accused of excessive E-Mail socializing particularly with someone from Dell Computer. These E-mail exchanges violated no Employer Policy. Also the E-mails that he sent to co-workers and to others were not inappropriate. He sent inspirational messages out before work every day, some to at least one supervisor during the past eight years. He was never told that this violated the Employer's Policies.
- HR Generalist Rossman also was concerned about the Grievant's productivity. There is no record that the Grievant's alleged inappropriate computer activity before and after work and during breaks negatively impacted his productivity. Rather, all of his performance reviews were "fully capable" or "highly commendable". This is not the performance of an employee who is not productive. In fact, his last performance review (March 2008) was "fully capable", with many elements "highly commendable". There was no record that he was not productive in this or any other performance review.

- Article 32 Section of Agreement states, “*Disciplinary action shall be taken in a timely manner*”. The Employer violated this provision when it waited over seven months after it began its investigation to terminate him. The Employer knew almost immediately during the investigation about the alleged improper images. Additionally, SITS Madden had captured all of his E-mail by April 20th.
- The Employer also violated the Grievant’s Weingarten⁶⁶ rights when it did not let the Grievant know what the subject matter of the investigation was or give him time to meet with his Union representative before his investigative interview.

It is also the Union’s position that termination was not the appropriate discipline under all of the circumstances herein, especially since the Grievant had a 24-year history of productive employment.

OPINION

The issue before the undersigned is, “*Whether the Employer had just cause to discharge the Grievant; and if not, what shall be the appropriate remedy?*” This issue presents a well-settled two-step analysis. First, whether the Grievant engaged in activity which gave the Employer just and proper cause to discipline him; and second, whether the discipline imposed was appropriate under all the relevant circumstances.⁶⁷ It is the Employer’s burden to establish that the Grievant engaged in conduct warranting discipline and that the appropriate discipline was termination.

The Employer presented overwhelming evidence that the Grievant downloaded sexually explicit content, conducted personal business, accessed DMV records for personal reasons, transmitted client information to his home computer for personal reasons, and engaged in excessive Internet browsing on his work computer. Evidence

⁶⁶NLRB v. Weingarten 420 US 251 (1975)

⁶⁷Elkouri & Elkouri, HOW ARBITRATION WORKS p. 948(6th ed. 1997).

further disclosed that the Grievant also attempted to develop personal relationships with relatives of clients and used his position to refer a client to one of his personal business ventures. In addition, the evidence established that the Grievant used his work E-mail account to pursue personal business activities, for excessive personal socializing, and to receive website subscription services that he had previously downloaded on his computer. The evidence also disclosed that the Grievant failed to get approval to conduct outside business activity with respect to one of his personal business ventures, New Visions Investments.⁶⁸ Finally, the evidence firmly established that the majority of the Grievant's aforementioned activities were engaged in during his work-times.

The Grievant's computer and E-mail use described above violated numerous Employer Policies and directives including the HSHPD Confidentiality and Computer Use Agreement; HSHPD Data Sharing and Data Privacy Policy; Hennepin County Administrative Manual Policy, General Information and Procedure Internet, E-Mail and Telecommunications Systems Usage Policy; HSHPD Standards of Conduct Policy; Hennepin County Human Resources Rules, Section 16, Rules of Conduct Policy; HSHPD Conflict of Interest/Outside Employment Policy; and Minnesota Data Practices Law.

Testimony established that these Policies and updates were widely disseminated to all employees by hard copy or through the Employer's website or through Employer E-mail transmissions. In addition, the Grievant's supervisor (HSR Supervisor Peterson) testified that whenever there was a Policy change or update, he would hold team meetings to discuss them. The Grievant does not deny receiving them, but made the remarks that

⁶⁸ The Employer's Policy governing outside activity is somewhat indistinct; however, it appears to apply to this company.

there “*was so much information coming out, it was hard to look at*” and “*I just skimmed through it*”. This hardly constitutes a plausible defense to his actions.⁶⁹

Thus, the evidence has clearly established that the Employer has sustained its burden of proof and had just cause to discipline the Grievant. It must now be determined if the Grievant’s termination was the appropriate discipline under all the circumstances herein. Arbitrators are generally reluctant to modify disciplines imposed by employers. However, absent contrary contract language, arbitrators do have the authority to review penalties imposed by management⁷⁰.

More serious offenses such as drug policy violations, theft, work place violence and failure to obey a legitimate direct order usually justify harsh penalties, including long suspensions and discharge even when there is a progressive disciplinary policy in effect.

Less serious offenses such as tardiness, absences without prior approval, minor plant rule or policy violations, and poor work performance call for milder progressive discipline in order to correct behavior even if it is the second or third offense. Arbitrators are also willing to modify disciplinary penalties and impose lesser discipline or impose progressive corrective discipline especially where there are mitigating circumstances present.⁷¹

Although just cause has no universally accepted definition, arbitrators often determine the existence of just cause and the appropriateness of the disciplinary penalty by applying the well-known “Seven Tests Standard”. Arbitrator Daugherty, in GRIEF BROTHERS COOPERAGE, 42 LA 555, 558 (1964), first articulated these tests.⁷² In these cases Professor Daugherty notes that a negative answer to any of these questions may well

⁶⁹ A more plausible explanation for him not knowing about a specific Policy or Policy change is that he was too busy using his computer to download or view sexually implicit or provocative images of women or being engaged in personal business activity or being involved in extensive E-mail socializing and extensive personal Internet activity.

⁷⁰ Elkouri & Elkouri, HOW ARBITRATION WORKS, pgs. 953-964 (6th ed. 1997)

⁷¹ Id., p.964.

⁷² See also. ENTERPRISE WIRE CO., 46 LA 359 (Daugherty 1966).

mean that there is insufficient cause for the discipline imposed. These tests are as follows:

1. *Did the Company give to the employee forewarning or foreknowledge of the possible consequences of the employee's conduct?*
2. *Was the Company's rule or managerial order reasonably related to the orderly efficient and safe operation of the Company's business?*
3. *Did the Company before administering the discipline to the employee make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?*
4. *Was the Company's investigation fair and objective?*
5. *At the investigation, did the "judge" obtain substantial evidence of proof that the employee was guilty as charged?*
6. *Has the Company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?*
7. *Was the degree of discipline administered by the Company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Company?*

The evidence established that the Grievant had foreknowledge of the consequences of his actions. Employees, including the Grievant, are put on notice that violations of the Employer's Policies and the Computer Use Agreement are subject to discipline, even termination.⁷³ Also, the computer banner that pops up every time an employee logs onto the County system threatens discharge for a violation of the Employer's Policies.⁷⁴

It is hard to argue that the Employer's Policies are not reasonably related to the orderly efficient and safe operation of the Company's business or did the Union argue otherwise or present any evidence to the contrary at the hearing. There is also no evidence that the Employer treated the Grievant disparately. Again, the Union never argued this test nor did it present any evidence to the contrary at the hearing.

The evidence demonstrated that the Employer conducted a complete, fair and impartial investigation. The Employer also conducted an investigative interview and convened a Loudermill hearing at which time the Grievant had a chance to give his side of

⁷³ Employer Exhibit No. 20, 23, 25, 29, and 38.

⁷⁴ Employer Exhibit No. 24.

the story. The initial investigation was conducted to determine if the Grievant had sexually explicit pictures of scantily clad or nude women on his computer. As a part of the Employer's forensic investigation policy, the Grievant's hard drive and E-mail account were examined. When other Policy violations were uncovered, the investigation was expanded. The expanded investigation then took several months during which time the forensic investigators expended a total of 500 plus hours on the Grievant's investigation. The expanded investigation required the two forensic investigators to examine hundreds of files, documents, folders and thousands of E-Mails. During the investigation they had their full time duties that resulted in their being able to spend only 10-20% of their total work-time on forensic investigations. In addition, they had other ongoing forensic investigations. It is, therefore, understandable why the forensic investigation took so long.

Finally, the Employer took into consideration the Grievant's past disciplinary record when it imposed the termination penalty, although it avers that termination would be an appropriate penalty absent any prior history of discharge. The Employer argues that the Grievant's misconduct was a serious breach of its Policies. It also represented "*a serious breach of the trust that had been placed in him as an employee whose function was to serve a vulnerable client population*".

As stated earlier, mitigating circumstances may justify a lesser penalty than an employer imposes. There were not sufficient justifiable mitigating circumstances present herein to overturn or lessen the Grievant's termination penalty. The Union argues the Grievant's 24-year tenure is a mitigating factor against termination. Under some circumstances, this may be true. However, in the instant matter his tenure exacerbates the Grievant's misconduct. It should be expected that an employee with 24 years of service would know better than to engage in the kinds of flagrant misconduct underlying his termination.

A positive work record may also mitigate against termination under certain circumstances. The record disclosed that the Grievant had above average performance reviews and that he was never cited for being unproductive, something the Union argues demonstrates that he was not wasting time on personal endeavors. This, however, does not diminish the seriousness of his flagrant violations of the Employer's Policies. It is conceivable that he would have been more productive and subsequently achieved higher performance ratings. Perhaps less time spent on personal activities would have enabled him to process more clients or serve his existing clients better.

The Union also argues that the Employer's action in not putting an immediate stop to the Grievant's accessing sexual content is a mitigating factor that should also lessen the Grievant's penalty. The Union cites the hearing testimony of HR Generalist Rossman that the main cause for the Grievant's termination was the sexual images on the Grievant's computer screen that were viewed by employees. This could be viewed as a hostile work environment and subject the Employer to potential legal action.

The Union makes a valid point. In certain civil and criminal investigations it may be appropriate to allow the investigated activity to continue in order not to compromise the investigation or to build a solid case for litigation. I do not know the reason why the images were not removed and/or the website not blocked. By not taking action to remove the inappropriate images from the Grievant's computer, the Employer continued the possibility of employee exposure to the images. Nevertheless, even if the Employer erred, this does not diminish the seriousness of the Grievant's conduct. Moreover, the Grievant, as the record reflects, engaged in equally serious misconduct that is unacceptable in any work place.

The Union also alleged that the Employer violated the Grievant's Weingarten rights in conjunction with the investigative interview when it failed to inform the Grievant or the

Union representative about the nature of the interview and also failed to allow the Grievant to speak privately with the Union representative prior to the interview. The Union did not, however, present evidence to substantiate this allegation. Even assuming arguendo that the Employer did violate the Grievant's Weingarten rights, as alleged, such conduct does not negate the Grievant's termination.⁷⁵

The Union also argues that the Employer's lengthy investigation violated Article 32 Section 8 of the Agreement: however, this issue is not before this Arbitrator nor did it have any impact in the ultimate penalty levied on the Grievant. Even assuming arguendo that it was and the Employer violated this provision, such conduct does not negate the Grievant's termination, especially since the Grievant was not prejudiced by the delay by any Employer action during the investigation. The Grievant could hardly have been prejudiced when he did not even know that he was being investigated. However, it might have been a different matter if the basis for the discharge occurred after the Employer knew of the Grievant's misconduct, failed to confront him on this and then used this additional conduct as a basis for his discipline. Such is not the case here. Except for a few personal E-mails involving inspirational messages⁷⁶ that the Grievant sent out during work time, all the conduct that he was disciplined for occurred before the Grievant's hard drive was pulled.

Termination, which is industrial capital punishment, is the harshest penalty that an Employer can levy. However, based on all the facts in evidence, the Employer was completely justified in its actions. In view of the foregoing, the Employer had just cause to

⁷⁵ See TARACORP INDUSTRIES 273 NLRB 221 223 (1984)

⁷⁶ The Grievant had been sending out inspirational messages for fifteen years. It is doubtful that the few messages sent out after the investigation started had a significant or any impact on the termination decision.

discipline the Grievant and the appropriate discipline was termination. I will, therefore, dismiss the grievance in its entirety.

AWARD

IT IS HEREBY ORDERED that the grievance be and hereby is dismissed in its entirety.

Dated: June 6, 2009

Richard R. Anderson, Arbitrator