

BEFORE THE ARBITRATOR

In the Matter of the  
Arbitration between

Minneapolis Park & Recreation Board

And

Lt. Rob Goodsell  
Grievance  
BMS Case No. 11-PA-0382

Police Officers' Federation of Minneapolis

Appearances:

Attorney Roger N. Knutson, Campbell Knutson, P.A., on behalf of Minneapolis Park & Recreation Board.

Attorney Christopher K. Wachtler, Collins, Buckley, Sauntry & Haugh, P.L.L.P., on behalf of the Police Officer's Federation of Minneapolis.

**ARBITRATION AWARD**

The above-captioned parties, hereinafter referred to as the MPRB and the Federation respectively, are parties to a collective bargaining agreement providing for final and binding arbitration. The undersigned was selected from a panel provided by the Minnesota Bureau of Mediation Services pursuant to said agreement. Hearing was held in St. Paul, Minnesota on February 1, 2, and 23, 2011. No stenographic transcript was made. Briefs were filed and the hearing was declared closed on March 24, 2011. All parties were given the opportunity to appear, present evidence and testimony, and to examine and cross-examine witnesses. Now, having considered the evidence, the positions of the parties, the contractual language and the record before her, the undersigned issues the following Award.

**ISSUE:**

The parties framed the issue as follows:

Did the Board have just cause to terminate the grievant, Rob Goodsell? If not, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS:**

ARTICLE 5  
SETTLEMENT OF DISPUTES

Section 5.9 – Arbitration Expenses The fees and expenses of the Arbitrator shall be divided equally between the MPRB and the Federation provided, however that each Party shall be responsible for compensating its own representatives and witnesses...

## ARTICLE 10 OVERTIME

Section 10.3 – Call-Back Minimum Employees called to work during scheduled off-duty hours shall be compensated in the form of compensatory time off at the rate of one and one-half (1 ½) hours for each hour worked with a minimum of four (4) hours' compensatory time off earned for each such call to work. The minimum of four (4) hours shall not apply when such a call to work is an extension of or early report to a scheduled shift. This provision shall not apply to situations arising out of Section 9.5, Temporary Change in Shifts.

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Section 10.6 – Special Overtime Practices.

Subd. (d) Extra-Duty Assignment. Employees may be offered “extra duty” time by the MPRB, or others under the authority of the MPRB, which may be in addition to the normal monthly schedule. Such assignments shall be made available to employees first on a voluntary basis using an equitable system to be developed by the parties. If there are not enough volunteers, the Employer may assign employees to work Extra Duty assignments by inverse seniority. An employee who works an Extra Duty assignment will be compensated for such hours worked at the rate of one and one-half (1 ½) times the officer's current hourly rate of pay....

## ARTICLE 4 DISCIPLINE

Section 4.1 The MPRB will discipline employees who have completed the required probationary period only for just cause...

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### **BACKGROUND:**

The grievant, Lieutenant Robert Goodsell, hereinafter referred to as the grievant, has been employed by the MPRB since 1987. He became a sworn Patrol Officer in 1988 and was promoted to Sergeant in August of 1997 and to Lieutenant in October of 2004. He also served as Captain from January of 2010 through April of 2010 during which time he was the Acting Chief of the Park Police. There are no prior disciplines and his performance ratings have been very positive. He has also received numerous departmental awards and commendations.

In July of 2010, the grievant was informed that complaints about him were under investigation and he was placed on paid investigatory leave. The MPRB hired Attorney Penelope Phillips to investigate the allegations. As a result of the investigation in which

a number of individuals were interviewed, including the grievant, on September 7, 2010, the grievant was sent a notice of a predetermination [Loudermill] meeting in which he was advised that the MPRB was considering discipline up to and including discharge based upon three allegations. The predetermination meeting was held on September 13, 2010 and the grievant was represented by Counsel and the Federation. He was terminated by letter dated September 14, 2010 with the reasons being the same as those listed in the predetermination notice.

On October 5, 2010, Phillips, the investigator retained by the MPRB, issued a report containing a summary of the allegations and her findings. The report tracked the September 14 discharge letter in that it articulated three general areas of investigation and the alleged policy violations. Those were (1) evidence tampering by retaining a nut that fell off of the 35W bridge upon its collapse; (2) double charging for work hours; and (3) conducting an "eBay business" during work time on the work computer.

The Federation filed a grievance challenging the termination which is the subject of the dispute before the undersigned.

In late October, the MPRB hired another attorney investigator, Karen Kurth, to analyze three years of time records for the grievant. It also hired a computer usage expert, Scott Johnson (not to be confused with Chief Bradley Carl Johnson) to analyze and interpret various computer usage reports, in particular, one entitled Surf Control, upon which the MPRB had relied in making the termination decision.

The Federation, in preparation for the arbitration of this grievance, also hired a computer usage expert, Mark Lanterman, to analyze the grievant's computer usage from the reports relied upon by the MPRB and to make his own reports regarding the type of usage in which the grievant engaged.

## **POSITION OF THE PARTIES:**

### **MPRB**

The MPRB asserts that it fired the grievant for three reasons: (1) evidence tampering; (2) double charging for work hours; and (3) conducting an eBay business during work time with his work computer. It stresses that the charges standing individually and cumulatively constitute serious misconduct warranting immediate discharge. The grievant's years of service and lack of disciplinary history do not mitigate the seriousness of his misconduct. That misconduct is even more appalling because the grievant was a police supervisor charged with enforcing the law and supervising other officers. Law enforcement officers are held to a high standard of conduct and are expected to carry out their duties without undermining the public's confidence in them or the agency they represent.

With regard to the evidence tampering charge, the grievant responded to the scene of the 35W bridge collapse on August 1, 2007. It is undisputed that shortly before he left

the scene, a firefighter showed him a large nut that had come off the bridge. The grievant took the nut back with him to the office in spite of a general order not to remove any evidence from the scene. Upon returning to the office, he proudly displayed the nut to several employees including then Chief Brad Johnson. He left the nut in his office and went home. The nut remained unaccounted for in his office.

When the Minneapolis Police Department was informed that the grievant had removed evidence from the scene, Captain Mike Martin from the Minneapolis Police Department and a National Transportation Safety Board investigator went to the grievant's home. Martin and the investigator were livid and threatened to prosecute him. The grievant then took them to his office where they retrieved the evidence. The following day, they accompanied him to the scene where he attempted to explain what happened.

The MPRB believes that the grievant took the nut as a souvenir or to sell on eBay despite his claims that he was securing evidence. The grievant's investigation does not suffice because it leaves a very important question unanswered: Why take one particular item when there were countless pieces of the bridge at the scene and make no effort to turn it over to investigators actively gathering evidence. The grievant knew that the MPRB did not have a property room and he knew, or should have known, that evidence should not have been removed from the scene. Instead he proudly displayed the evidence to fellow employees including the Chief. Had the Minneapolis Police Department not received a call, the evidence would never have been recovered. Former Chief Brad Johnson's failure to take action does not lessen the significance of what the grievant did. On the day of the collapse there were five known fatalities, eight missing persons and 88 people hospitalized. The grievant's actions interfered with a major investigation, compromised a crime scene and violated Provisions 5-105 and 10-401 of the Profession Code of Conduct. He did not use "reasonable judgment" in carrying out his duties and responsibilities. He took a potentially key piece of evidence and treated it as his personal souvenir or memento. He failed to deliver it or turn it over to the custody of the Property and Evidence Unit as required by Park Board policy. Although the misconduct occurred on August 1, 2007, the MPRB administration did not learn of it until 2010. Once it became aware of what had happened and that Chief Johnson had known about this and done nothing, the Chief was promptly terminated.

With regard to the double charging for work hours, Kurth, the MPRB's investigator, examined the grievant's time records for the period from January 1, 2008 to July 15, 2010. She found that the grievant had "double charged" the MPRB anywhere from 33.0 to 50.5 hours during that period analyzing duty officer tab and payroll sheets, Park and Recreation Daily Time Reports, extra duty job and assignment sheets, facility use permits for special events, the grievant's payable time reports and the parties' Labor agreement. The tab sheets were used to determine the specific hours during which the grievant worked his normal nine-hour shift and included a section to record "time on duty" and "time off duty." Daily sheets were used to determine which special events the grievant worked and how many hours of overtime he was paid for each event. The facility use permits, when available, were used to confirm information on the assignment

sheets. The grievant's time reports were used to verify the number of regular shift hours, compensatory time and event time paid as overtime.

After ascertaining what the grievant's regular work hours were, the investigator compared the regular shift time with the times he recorded for working an extra duty event on the same day. Her findings for 2010 were that the grievant had overcharged the MPRB for between 2.0 and 11.5 hours including double-charging for time worked on January 3, April 19, May 1, 15 and 28. He recorded time worked at an event or events which overlapped with time worked on his regular shift. With regard to 2009, the analysis showed the same double charging for between 30 and 38 hours. For 2008, the grievant charged the MPRB for 1 hour on July 23, 2008.

In response to this charge, the grievant argues that he logged four hours of extra duty time even if he did not work four hours because that was the guaranteed minimum and even though the event sheets said he timed in and out at certain specified times, the times were not accurate. The grievant could produce no written policy or verification that he was to be paid for four hours even though he worked much less. His testimony that he remembers how many hours each of the events lasted and which hours he actually worked is not credible, and is undocumented and conflicts with the written documentation.

Section 10.3 of the parties' collective bargaining agreement provides a "call-back minimum" of four hours when an employee is "called to work during scheduled off-duty hours." The rules for "Extra-Duty Assignment," however, do not provide for a four hour minimum. Section 10.6 Subd. (d) which applies to extra duty assignments reads: "An employee who works an Extra Duty Assignment will be compensated for such hours worked at the rate of one and one-half times the officer's current hourly rate of pay."

The grievant, as a supervisor, was in charge of assigning extra duty without oversight by anyone. The extra duty timesheets were sent to one office and regular duty timesheets to another. Until the investigator undertook her forensic analysis, no one knew what the grievant was getting away with. The MPRB had terminated another employee for double-dipping that was far less extensive. The grievant violated 3-811 of the rules of conduct which states that no city employee shall be compensated more than once for the same time period and that an employee shall not submit time documents that will result in being paid twice, in any way, for the same hours on the City payroll.

The MPRB also alleges that this double-dipping constituted misappropriation of City property, funds, or money and criminal or dishonest conduct unbecoming to a public employee when such conduct was committed while on duty or off duty.

The City claims that the Grievant used his MPRB e-mail address and his MPRB computer while on duty to operate a personal eBay business. It notes that in his initial statement the grievant asserted that he only used his eBay account for MPRB-related work. He subsequently backed off that assertion when the facts caught up with him. According to his eBay Feedback Profile, between January 2008 and July 2010, he made

over 230 feedback comments to other eBay buyers and sellers, most being related to items that he sold. His profile reveals that he was not simply unloading items from his garage and basement but operating a retail business buying inventory and then selling it. He attempted to defend his actions by testifying that leaving the feedback comments only took a minute or two but these minutes were logged when he was being paid by the MPRB to work, not run his private business.

The MPRB's Surf Control report for the period from May 2009 to July 2010 indicates that the grievant spent sixteen hours shopping on the internet during this period including signing into eBay 206 times and making numerous PayPal payments. The Federation expert argued that the Surf Control report was wrong and that during this period when the grievant worked 223 days, he only made 77 eBay transactions. Whether the grievant signed in to eBay 206 or 77 times, and whether the Surf Control calculation is correct or that of the Federation expert is correct, the grievant was nevertheless still operating a personal business on MPRB time, using a MPRB computer and e-mail address and using MPRB time to leave feedback. Because he did not have remote access to a computer, this was all done from his desk at the MPRB offices.

The grievant attempted to defend his actions arguing that he made a number of police-related searches and purchases on EBay. In fact, he made only three eBay purchases for the MPRB and countless purchases for himself, including a 2007 Mercedes Benz for \$25,000. Other MPRB employees have been disciplined for inappropriate use of the Internet. None of the previous Internet misconduct involved usage as egregious as the grievant's operation of a personal business. With respect to the one employee whom the grievant alleged was operating an Internet business from work, the MPRB claims that it was not made aware of this until the grievant testified that this was the case.

In the MPRB's view, the grievant violated its Technology and Electronic Communications policy by unacceptable use of MPRB technology and conducting a non-approved business. He also violated the Department's On-Duty Code of Conduct, Section 5-106 - which requires employees to devote their entire attention to the business of the Department and forbids conducting personal or private business while on duty.

The MPRB asserts that it has proven all three charges against the grievant and that they constitute just cause to discharge him. It requests that the discipline be affirmed and that his grievance be dismissed in its entirety.

### **Federation**

The Federation maintains that the MPRB failed utterly and completely to prove its case for termination of the grievant. It claims that the MPRB conducted a vindictive, ill-conceived and incompetently-handled "witch-hunt." According to the Federation, the MPRB misinterpreted and intentionally ignored evidence and policies and conducted a flawed and incompetent investigation that was neither fair nor objective. It requests the arbitrator to reinstate the grievant with full back-pay and makes an additional

extraordinary request: leave to move the arbitrator for reimbursement of certain witness fees and costs.

According to the Federation the just-cause inquiry involves two steps. First, a determination must be made as to whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or behavior warranting discipline. If such proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances.

Because the accusations of “double-dipping” and spending too much non-work related time on the work computer infer that the grievant stole time from the MPRB, the Federation contends that at the very least, the clear-and-convincing standard should apply if not the beyond-a-reasonable doubt criminal standard. The Federation also argues that the Daugherty seven tests should also be employed in the analysis along with serious consideration of the concept of progressive discipline giving the grievant an opportunity to correct behavior through reprimand and imposition of lesser forms of discipline.

In the instant case, the MPRB has met neither the preponderance of evidence nor the clear-and-convincing standard of proof with regard to all but a sliver of the allegations. With regard to that sliver, the MPRB has made no showing that lesser forms of discipline would have been futile in terms of working toward correction of the grievant’s behavior. No lesser discipline was imposed and termination is far too severe a sanction.

First, the MPRB presented as pre-discharge evidence alleged misconduct which was discovered post-discharge. Much of the evidence upon which it relies as a basis for termination was “discovered” and disclosed post-termination. Citing arbitral precedent, the Federation argues that most arbitrators hold that discharges “must stand or fall upon the reasons given at the time of the discharge.” Drawing the distinction between subsequently discovered evidence and subsequently discovered grounds, the Federation maintains that Kurth’s report contained additional dates on which the MPRB asserted that the grievant “double-dipped”--- additional grounds for the termination of which the MPRB was not aware at the time of discharge or even a month later when Phillips issued her report. Here the MPRB articulated the specific grounds for termination in the September 14, 2010 discharge letter and Phillips’ October 5 report which included two specific instances of alleged “double-dipping”. The MPRB now seeks to add not additional evidence about these two instances, but new grounds in the form of additional examples of alleged misconduct, which should be rejected.

The Federation also asserts that the MPRB failed to obtain substantial and credible evidence of wrongdoing relying instead upon sloppy and ill-conceived investigations to support the termination. It points to MPRB witness, Assistant Superintendent for Operation Services Michael Schmidt’s acknowledgement that he made the decision to fire the grievant based upon hearsay evidence in the form of Phillips’ report, not retaining Kurth or Johnson until much later in October. The Federation notes that the MPRB failed to call Phillips as a witness and declined to offer

her report, which it suggests was likely because her investigation revealed no wrongdoing on the grievant's part. The Federation also stresses that the number of eBay connections while at work in Phillips' report, 1339, is patently incorrect and acknowledged as incorrect by the MPRB's own expert witness. While Phillips interviewed a number of witnesses, they failed to testify at the hearing and her report went beyond findings of fact and actually reached conclusions about policy violations. Because of her failure to testify, her entire report is hearsay and should be disregarded. Since the MPRB failed to present any additional evidence regarding the double charge allegation for hours on July 4, 2008, the arbitrator should disregard this as a basis for the termination.

Because the investigation was neither objective nor fair, and contained no viable proof of wrongdoing, there is no credible evidence that the grievant committed terminable offenses.

With regard to the nut taken in the 35W bridge collapse, the Federation points out that the grievant showed the nut to Chief Johnson upon returning to the office after the collapse. Johnson instructed him to go home because he was physically and mentally exhausted. The grievant told Johnson that the nut would be locked in the grievant's office. Johnson appeared and testified that he had no problem with this and that it was not uncommon for officers to delay logging items of evidence, citing various examples. Minneapolis Inspector Martin's testimony and feelings aside, Johnson testified Captain Martin and Minneapolis Police Chief Dolan were not concerned about the matter in the long run once they realized that the grievant had not taken the nut home as a souvenir. While Captain Martin testified that an order went out over the radio advising responders not to remove anything from the scene of the bridge collapse, the grievant testified that he never heard this order. Chief Johnson testified that he never heard it either, or that he was unaware of it. Martin conceded that what the grievant did with the nut, i.e. locking it in his office, was permissible insofar as the chain of custody was concerned. The Minneapolis Police Department, the NTSP and the FBI never investigated the grievant for his actions in taking the nut and he was never disciplined or reprimanded by Chief Johnson although he was well aware of the incident.

According to the Federation, MPD Policy 5-105, subd. 17 grants officers discretion as to when they must forward property to the Property & Evidence Unit. MPD Policy 10-401.1 was not violated as there was no misdemeanor arrest, the MPRB facility contained no temporary precinct lockers, there was no felony arrest and there was no video surveillance or digital media. MPD 10-117 was not violated either. The Federation stresses that Chief Johnson did not find any violations of these policies in August of 2007 and it is inconceivable that 3 years later, Schmidt, a civilian manager with no law enforcement experience, can legitimately cite them in support of the termination. These actions with respect to the nut taken following the bridge collapse three years ago do not warrant any discipline whatsoever, and provide no basis for termination.

With respect to the allegation that the grievant used his work computer to conduct an eBay business during work time, the Federation insists that the grievant did not violate

the MPRB's Technology and Electronic Communication Policy. The policy, in pertinent part, states that employees "may use MPRB's technology and electronic systems primarily for work related matters" and permits employees "infrequent and limited personal use that does not interfere with the conduct of their duties or MPRB business."

The grievant acknowledged that he has a personal embroidery business which he conducts off-duty, on his own time and that Chief Johnson was aware of it. Emails received on the work computer regarding embroidery orders were forwarded to the grievant's personal computer. The MPRB's termination letter does not accurately reflect what the grievant was told about conducting personal business on work time. According to the Federation, the MPRB failed to establish that the grievant was selling items on eBay during work time. No witness ever saw the grievant on eBay at work for extended periods of time. Chief Johnson confirmed that everyone in the office utilized the work computers for personal use including eBay but this was on a limited basis and usually during lunch or other break periods.

Chief Johnson was aware that the grievant used eBay and testified that the grievant saved the department money by purchasing specific equipment such as batteries for cell phones and a projector on eBay. The Federation asserts that the majority of items that the grievant researched or purchased on eBay from his work computer were for use by him or other police officers in the course and scope of their work duties.

With respect to the forensic evidence regarding the grievant's computer use, Scot Johnson acknowledged that he did not perform a forensic computer analysis of the grievant's work computer. Only the Federation's expert witness performed such an analysis. Citing his resume, the Federation claims that either the MPRB expert was not capable of performing such an analysis or the MPRB did not ask him to do so because they did not want to pay him to do more extensive work. Either possibility seriously undercuts the validity of the Employer's investigation.

Both experts testified that 1339 was not an accurate number of actual connections with eBay and related sites and not reflective of the grievant's actual visits to eBay or time spent on eBay. This was the number that Schmidt used to support termination and the number that the MPRB refused to abandon on cross examination even as its own expert confirmed that it was erroneous. Johnson testified that the number of connections with eBay was "more like 282" over the course of a year. Lanterman, the Federation's witness testified that the maximum was more like 77 eBay visits occurring during the relevant time period, including connections initiated by email accounting for an extremely small percentage of the grievant's total time spend at work during the relevant period.

Although Johnson testified that the grievant was selling items on eBay during work time, there is no evidence of this because Johnson never pointed to any specific part of the Surf Control Report that showed this or proved it and there were no witnesses testifying to this effect. The grievant denied ever selling any items of a personal nature on eBay during work time. Johnson testified that he was not looking at the number of

times the grievant visited eBay but looking at the ‘quantity’ of activity. Only the MPRB policy is relevant as a standard in this case and that policy allows limited and infrequent personal use that does not interfere with one’s job duties.

The grievant admitted occasionally leaving feedback comments which he maintained took minutes or seconds to accomplish. Kurth, in her report tracked the instances of feedback that the grievant left on items he purchased on eBay. She was, however, unaware that the grievant was permitted to purchase items on eBay for the benefit of the department or that he did so. Furthermore, she did not track the length of time that it took the grievant to leave feedback on eBay during work time. Lanterman, in contrast, was able to determine that, in fact, many of the instances of feedback that Kurth looked at were not left using the grievant’s work computer. Lanterman found only 11 instances of feedback left from the grievant’s work computer going back to the fall of 2009 which took approximately 12 minutes to complete.

According to the Federation’s expert, the work that the MPRB’s expert performed on the grievant’s computer on October 29, 2010 modified and corrupted every date and time stamp for the grievant’s email and internet usage. The MPRB’s Surf Control Reports differed from the electronic CVS file date that it supplied him and a large amount of data modification had occurred on the grievant’s computer after his suspension causing spoiling of the evidence resulting in Johnson’s investigation being flawed, tainted, and incomplete.

Lanterman testified that Surf Control, as a measurement, was not accurate and was out of date. The other documents provided also failed to establish a violation as the vast majority were unsolicited emails sent to the grievant by eBay. One document, Exhibit 10, which shows the purchase of the vintage front for a Harley motorcycle, was made on July 8, 2010. The grievant testified that he made the purchase on his couch on vacation and Union Exhibit 32 confirms that he was on vacation on that date. Another, Exhibit 11, shows the grievant bidding on two items from June 7 through June 10, 2010. To the extent that it shows eBay activity related to the grievant, these are simply emails being sent from eBay to the grievant and Union 32 confirms that he was not working during the times on June 7 through 13 when he made bids regarding the items. Exhibit 11 shows very minimal limited eBay activity on the grievant’s part while on duty.

Lanterman’s conclusions based upon spreadsheets of the grievant’s activity establish that while he did engage in some personal computer use, it was limited and infrequent and not in violation of the MPRB policy as enforced at the time. The Federation points to two other employees who misused technology. One was not investigated or disciplined and the other was subjected to “counseling” rather than discipline. In sum, the MPRB failed to present credible evidence that the grievant violated the policy at issue; and the evidence that it did present was discredited upon a closer analysis or overcome by Lanterman’s testimony and conclusions which were un rebutted.

With respect to the twenty-two instances of alleged double-dipping, the Union maintains that all should be rejected except the initial two contained in the Phillips investigative report and that they are hearsay. Assuming that the arbitrator will reject the Kurth report regarding double-dipping as “new grounds” for termination, the only date in that report that corresponds to the Phillips report is May 15, 2010. This is the only date that the arbitrator should consider with respect to the double-dipping allegation. Nevertheless, the Federation offered evidence on the remaining instances contained in the Kurth report. In concluding that there were instances of double-dipping, Kurth relied upon the extra-duty job assignment spreadsheets (EDJAS) in making her conclusions. She conceded however, that they were documents created by the grievant used in scheduling and were not an official document maintained by the MPRB. She also noted that if the EDJAS were wrong, this could affect her findings and that she was not informed that the times on the event permits could be inaccurate. Moreover, she was only informed about the 4 hour minimum call out pay for extra-duty assignments after she had completed her analysis and report. She freely admitted that this could account for the overlap that she found on certain dates.

Whether Schmidt was aware of it or not, there was a long-standing past practice of granting a 4-hour minimum call out pay for those who worked extra-duty assignments which the grievant did not initiate. Chief Johnson, Shane Stenzel and Nadia Eberhardt and Jan Halvorson in Payroll all reviewed the grievant’s time sheets including extra-duty timesheets. There is only one example of overlapping time for which the grievant could not provide a good explanation in the three year period reviewed.

No one was called to testify that the grievant was not working an event when his schedule or timesheet showed that he was working that event or that he was not where he was supposed to be at any time during the period of review. Kurth’s review was based strictly on the timesheets and materials provided by the MPRB. A union witness, Officer Joe McGinnis, corroborated the grievant’s testimony with regard to at least two instance on July 11, 2009 and August 21, 2009 and corroborated the fact that coordinator duties performed by extra-duty special event coordinators often took place in the days leading up to the event but were pay-rolled on the date of the event. For at least 16 years, according to McGinnis and Stenzel, this is how the MPRB operated and paid for extra-duty assignments. Many officers other than the grievant were paid in exactly the same manner as the grievant without having been investigated or having received any discipline. Chief Johnson and Chief Jacobs were aware of the system and had no objections. Chief Johnson also testified that the practice with regard to extra-duty coordinator pay was to payroll it on one day even if the actual work was spread out over a number of days and that officers working extra-duty were not required to document if they worked fewer than four hours on an event.

The Federation notes that no evidence was introduced to suggest that the grievant worked coordinator hours for extra-duty events during his regular shift at any time during the examined period. Stenzel confirmed that permit times do not always track with actual event times and that officers are often needed outside of the permit time slots and/or that events can go longer or end sooner than the permit time.

The Federation distinguishes the cases of another employee terminated for double-dipping in 2007 in that the employee admitted he lied about double charging for hours while working for the MPRB and teaching classes at the same time. He was charged criminally. That employee double-dipped on 132 occasions during roughly a two year period. The Federation stresses, that save for the March 5, 2009 anomaly, the MPRB has failed to meet its burden on the double-dipping allegations and that these cannot stand as a basis for termination.

The Federation makes several concluding arguments regarding the manner in which the termination was conducted. It contends that the firing authority's ignorance of the policies he used as a basis for termination, the failure to understand that the computer evidence upon which the MPRB relied to support the termination was not what he thought it to be, and the failure to acknowledge applicable extra-duty payroll policies and practices easily explaining the overlaps are all inexcusable.

Because the Federation was forced to spend significant amounts of money to rebut the computer evidence presented, the Federation requests an extraordinary remedy, i.e., that the arbitrator grant it leave to move for reimbursement of expert witness fees, in particular, the fees for Lanterman's affidavit, testimony and other materials. It requests that the discharge be overturned and that the grievant be reinstated with full back pay.

## **DISCUSSION:**

The MPRB has alleged that the three grounds for the grievant's termination suffice both separately and in the aggregate to support a termination for cause. Therefore, they will be considered both as separate and cumulative grounds in this analysis. The Federation requests that the undersigned apply a stronger standard of proof given the serious nature of the grounds alleged, in particular, the improper use of the work computer and the "double-dipping" charges. It submits that these two allegations allude to the stealing of time from the MPRB and should be considered under at least a clear and convincing evidentiary standard. While it may be true that the stricter standard is appropriate, for purposes of this discussion, a preponderance of evidence standard will be employed.

### Tampering with Evidence

The grievant admitted that he removed a nut from the scene of the bridge collapse and brought it back to his office, although he denied hearing a radio broadcast order instructing responders to refrain from doing so. This lack of judgment on his part, as the MPRB stresses, is egregious, no matter what his motivations for doing so were. However, it is evident that his supervisor, Chief Johnson, was aware of his actions and completely condoned them while assuring the Minneapolis Chief of Police that he would take care of the matter. Chief Johnson was clearly aware of the grievant's behavior in removing the nut and chose to refrain from even "counseling" the grievant, let alone issuing him an oral or written reprimand. Arbitrators have not hesitated to disturb penalties where the employer has essentially condoned the violation of a rule. The fact

that the grievant was not disciplined for his actions from 2007 to 2010 when the Chief, other employees, and other outside authorities involved in investigating the bridge collapse were aware of his actions supports the Federation's argument that his behavior had been excused and tolerated.<sup>1</sup> There are also serious due process issues with charging the grievant for this behavior three years after its occurrence. The grievant's bad judgment and conduct, as outrageous as it may be with respect to this incident, cannot be used to support a decision to discharge him under the circumstances.

#### Conducting an eBay Business during Work Time with the Work Computer

The grievant was charged with violations of MPRB Policy on Technology & Electronic Communications, the MPD Policy Manual 5-106, On-Duty Code of Conduct (#3), prohibiting employees from conducting personal or private business while on duty; and violation of Civil Service Rule 11.03 B. 8., misappropriation of city property, funds or money. The discharge letter stated that the grievant, using his work computer, was repeatedly on eBay during working time and working hours. It stated that the grievant had been told by Chief Johnson that he was not allowed to use MPDR computer resources to conduct his personal business. The discharge letter stated that the grievant used his police department e-mail address to buy and sell items on eBay and that during a one year span he accessed eBay approximately 1,339 times.

The grievant admitted occasional, infrequent use of his work computer to leave feedback on items that he purchased. He claimed that some of the time spent on eBay was for items used in the scope of his duties or for the benefit of the department. He denied excessively using the computer at work and felt that his behavior with respect to his personal use comported with the MPRB Policy on Technology & Electronic Communications.

The Policy on Technology & Electronic Communications permits "infrequent and limited personal use that does not interfere with the conduct of [employee] duties or MPRB business." It also prohibits the staff from using a MPRB email account as one's personal email address. Listed under unacceptable use of MPRB Technology is the following: "(2) conducting any non-approved business;" and "(5) making any unauthorized purchases."

The grievant denied operating an eBay business from his work computer. He admitted that he was operating a personal embroidery business from his home and that he and Chief Johnson had discussed use of the work computer when fellow officers sought to make contact for purchases during office hours on the work computer. According to both the grievant and Chief Johnson, they agreed that the grievant was to forward any emails received on the work computer and/or email to his personal email and deal with

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<sup>1</sup> See *How Arbitration Works*, Elkouri & Elkouri, Sixth Edition, p. 995. Also *Chivas Prods*, 101 LA 546, 550 (Kanner, 1993), where an employee discharged for smoking marijuana was reinstated because his behavior had been condoned by the employee's supervisor, who had smoked marijuana in the presence of the employee. See also *Eberle Tanning Co.*, 71 LA 302,306 (Sloane 1978) imputing supervisory knowledge of rule violations to the employer.

them when off duty. No real evidence was presented to suggest that the grievant deviated from this arrangement.

Rather, the question before the undersigned is whether the grievant's use of the work computer for personal business, particularly involving buying and selling on eBay, violated the Technology & Electronic Communications policy. To a great extent the conclusion reached must rest on which of the two dueling experts is to be believed. Both Scot Johnson and Mark Lanterman, the parties' respective experts, impressed the undersigned as knowledgeable in their area of expertise. Both explained that the Surf Control Report did not indicate that the grievant accessed eBay from his work computer 1,339 times. MPRB expert Johnson acknowledged that he did not perform a complete forensic report on the grievant's work computer. His review consisted of analyzing the Surf Control Report and the grievant's email related to eBay, including giving feedback, and PayPal. His analysis revealed that the grievant went to an eBay site or was on an eBay site approximately 282 times. Johnson stressed that his review of the Surf Report and the eBay feedback e-mails led him to the conclusion that the grievant was buying and selling during his work hours. He testified that he based his conclusion by looking at the emails going into the grievant's work account, the grievant's regular access of the eBay log-in site while at work, and on his leaving of feedback. On cross-examination, he stated that he did not arrive at his conclusion based on the quantity of the grievant's eBay interactions, but on the content of the interactions and his previous experience in investigating computer misuse for other employers.

Lanterman, the Federation's expert witness, performed a full forensic investigation. He claimed that he did not vary from the standard approach in making his analysis following accepted protocols. Lanterman testified that there was lots of activity on the grievant's work computer in October of 2010 after he had been terminated. He felt that the plugging in of a USB thumb flash drive in October could corrupt and modify all data contained on the computer. He also testified that the Surf Control Report is not used now as it is considered older and outdated. Lanterman ran the MPRB's Surf Control Report through another program, Semantic because he believed that a number of categories used by Surf Control were inaccurate. Semantic categorized sites visited in a more detailed fashion and showed a decrease in connections identified as shopping. While the Surf Control Report identified 3285 connections as shopping/auctions, the Semantic program reported only 1264 connections.

Lanterman noted that the Surf Control Report, at the end of each browsing session, added 3 minutes of time to the alleged browsing session. He claimed that the real purpose of the Surf Control Report system was to block an employee from going to an inappropriate site. He compared times set forth in Surf Control versus the true amount of time spent over a fourteen month period from May 15, 2009 to July 20, 2010 utilizing the electronic version provided by the MPRB. The Surf Control Report showed that the grievant spent 178 hours and 51 minutes in shopping/auctions activities. The actual time spent when Lanterman compiled by hand the actual browsing time reviewing 10,883 entries, was 23 hours and 26 minutes. Lanterman also noted that the electronic version of the Surf Control report provided was different from the printed version. Lanterman

concluded that the grievant engaged in eBay sessions on work time 77 times and that this included all email connections. He disputed the MPRB's contention that the grievant made 39 purchases and noted only one eBay purchase and that the time spent was 21 minutes. Lanterman testified that the grievant received or sent money a total of 10 times.

With respect to eBay feedback data, Lanterman noted that not all feedback considered was left from the grievant's work computer. Out of 38 feedback entries upon which the MPRB was relying, the grievant only left feedback for 11 entries during which he spent a total of 12 minutes. In sum, Lanterman stressed that the personal browsing time in which the grievant engaged including 3 hours and 44 minutes for pop-ups was 23 hours and 26 minutes. Based on 2320 work hours, this is .15% of his work time or 1.01% in total browsing.

The MPRB has the burden of establishing improper use of the grievant's work computer during work time. Given Lanterman's testimony, notwithstanding Johnson's conclusions, it is determined that it failed to meet its burden. Looking at the detailed background reports of the grievant's computer usage provided by Lanterman, it is concluded that the grievant's eBay/shopping/auction usage while on work time or utilizing his work computer was infrequent. The MPRB did not prove by a preponderance of the evidence that the grievant violated the Policy on Technology and Electronic Communications or Policy Manual 5-106 or Civil Service Rule 11.03 B. 8. This charge cannot support the discipline imposed.

### Double-Dipping

This is a very serious allegation which is buttressed almost exclusively by Kurth's report (Employer Exhibit 8) and testimony. Kurth testified that she was retained in November of 2010 to perform a payroll-timekeeping analysis of the grievant's work and pay. Acknowledging that the goal was to determine whether the grievant was double charging for time worked on events and regular shift time, she focused on determining which extra duty events the grievant worked, the specific times he was working those events, the hours of overtime for which he was paid as set forth in Park and Recreation Board Daily Time Reports (DTRs).

Kurth compared the event hours reported on the DTRs to the overtime hours reported on the grievant's Payable Time Report (PTR) to attain an accurate count of the claimed overtime hours worked and paid. She also reviewed and recorded time in and time out as reflected on the Duty Officer Tab and Payroll Sheets (Tab Sheets) from January 1, 2008 to July 15, 2010 to attain an accurate record of what specific hours the grievant worked on his regular shift, i.e. recordings of "time on duty" and "time off duty." Once she had an accurate time frame for grievant's regular shift hours, Kurth looked to see if he worked extra duty events on the same day by reviewing the EDJAS to obtain the time frame of each event. If there was overlap, she recorded the number of hours of overlapped time. Where there were multiple events worked by the grievant on the same day, she compared the time frame worked for each event to determine if there was an overlap in time worked for multiple events. She also pulled Event Permits

(Permits) for dates where there appeared to be an overlap in order to obtain confirmation of the date and times of the events. She then compiled this information onto a spreadsheet and set forth her analysis of years 2008, 2009, and 2010.

Looking strictly at these records, Kurth concluded that the grievant overcharged or double charged the MPRB for between 2.0 and 11.5 hours in 2010. This included double-charging for time worked on January 3, April 19, May 1, May 15, and May 28. On those dates, he recorded time worked at an event or events which overlapped with time worked on his regular duty shift. With respect to 2009, the records showed that the grievant double charged the MPRB for between 30 and 38 hours involving the dates of January 4, March 5, May 2, May 19, June 6, June 13, July 4, July 11, August 20, August 21, September 16, September 26, November 22, November 29, and December 13. Applying the same technique to 2008, Kurth noted that the grievant double charged the MPRB for 1 hour on July 23, 2008. The Phillips report contained an additional allegation of double-dipping on July 4, 2008.

It should be noted that the MPRD bears the burden of establishing the double-dipping and that there are problems with Kurth's utilization of the EDJAS which the parties admitted was not designed to reflect actual worked hours and by whom but was just utilized as a scheduling tool. There is also a problem with reliance upon the permits for special events, because as Stenzel testified, the permits may not reflect the actual time that events begin and certainly do not reflect when they end. Kurth, herself, on cross-examination, admitted that she could not pinpoint exactly how many hours the grievant is alleged to have double-dipped. She also conceded that a four hour minimum pay practice could account for some of the over-lapping hours but was not aware that an officer was entitled to extra coordinator pay for each event, although this was reflected in the permits. She also acknowledged that taking these two practices into consideration, it was possible that there might be no overlap.

The grievant had an explanation for each and every allegation of double-dipping except one, on March 5, 2009. A large part of his defense involved what he and other witnesses claimed was a past practice with regard to pay for extra-duty assignments, namely that officers would receive a minimum of 4 hours call out pay at time and one half, even if the extra duty assignment ran shorter than 4 hours. Moreover, the grievant and other witnesses testified that when they coordinated an extra duty assignment, they were entitled to an additional hour of coordinator pay. The grievant also testified without rebuttal, that per past practice when an event cancelled within 24 hours, the officer scheduled to work it received 2 hours of extra-duty pay. It is clear that there is no mention of any of these past practices in Section 10.6, subd. (d) of the collective bargaining agreement, which addresses extra duty pay. Similarly, Section 10.3, which does provide for minimum call back pay at the time and one half rate in the form of compensatory time with a four-hour minimum for being called back in, makes no mention of extra duty assignments as being part of the four hour minimum pay benefit, coordinator pay for extra duty, or receipt of a minimum of 2 hours of extra duty pay for cancellation within 24 hours.

Although the contract did not provide for any of these practices, the evidence at hearing established the existence of the first two practices without qualification. Chief Johnson was aware of these practices with respect to extra duty and assented to them. His knowledge and assent over a long period of time along with the knowledge of others in the department establishes these practices as implied conditions of employment under the agreement. While it is clear that Schmidt and perhaps other Board members were unaware of the existence of these past practices, it is nevertheless also clear that Chief Johnson, Shane Stenzel (the person who communicated to the public about the four hour minimum for extra duty special events), and the employees in payroll were all aware of these practices and complied with them. Johnson was emphatic in testifying that the officers were not required to document that they did not work a full four hours for the four hour extra duty minimum and that he knew they received a little extra for coordinating the events.

While the undersigned must concur with the MPRB that these “practices” constituted a pretty sweet deal for the officers in general, and the grievant in particular, as he was the chief scheduler/assigner, coordinator, and person who worked a majority of the extra duty events available. Nevertheless, based upon the MPRB’s continuous assent to the practices, it cannot be concluded that the grievant “double-dipped” in instances where he was merely following the established past practices. Furthermore, the Federation presented numerous instances wherein other officers working alongside the grievant at the special events and then working their shift charged the MPRB just as the grievant did and were neither investigated nor disciplined, although some of the other officers did not receive coordinator pay on these occasions. For example, on January 3, 2010, if the grievant “double-dipped”, so did Officers Chad Berdahl, Robert Helmeke and McGinnis, who worked alongside the grievant on the New York Giants NFL detail. This is also the case for the December 30, November 29, November 22, August 20 and 21, and January 4, 2009 NFL details.

The July 4, 2008 date wherein the grievant’s time sheet suggests that he worked 33.75 hours in a 24 hour day was satisfactorily explained as reflecting payment for various hours at double time and a quarter which was changed to calculation at straight time. Although it appeared that he worked 33.75 hours, he worked 18 actual hours.

The vast majority of the other dates cited as examples of double-dipping, e.g., July 23, 2008 date, September 16 and September 26, 2009 date, involve the four hour minimum pay and various hours of extra-duty coordinator pay or cancellation pay. From scrutinizing the underlying records upon which Kurth referred, given the grievant’s and his co-workers’ testimony, it cannot be concluded with any degree of certainty that the grievant actually double-dipped except for the one occasion for which he could not account.

The undersigned does have problems with the way that the grievant, and presumably other officers, accounted for the hours for which they should be paid, especially where “coordinator” pay was listed on days when the coordination did not occur. The fact that the grievant was in charge of the extra-duty assignments makes his

accounting practices with respect to his pay all the more suspicious as the MPRB alleges. Suspicion and skepticism do not, however, constitute proof of “double-dipping,” especially here, where the practice was instituted before Johnson became Chief, and all of the officers who volunteered for extra duty assignments, received this coordinator pay, cancellation pay, and minimum of four hours per assignment irrespective of the hours worked. The MPRB has not met its burden of proving that the grievant’s behavior warranted his discharge.

However, some discipline is appropriate. The grievant admits that on one of the dates, he could not account for the hours overlap. Given his status as a lieutenant in charge of the extra-duty assignments who should have known how important accurate time accounting for payroll purposes is. His casual/careless practice of placing the types of pay set forth above on dates different from when he actually worked is just unacceptable, notwithstanding the lax overseeing of the payroll time sheets on the part of the Chief, Stenzel, and the payroll clerks. Therefore, a one-day suspension is appropriate.

The MPRB is, of course, entitled to follow established labor law in abrogating any past practices with which it cannot abide in negotiations at the appropriate time. It cannot, however, sustain the discharge of a long-term employee with no previous discipline based upon the record before the undersigned.

The Federation has asked for the extraordinary remedy of ordering payment for its expert’s fees with respect to his investigation, testimony, and document preparation. The collective bargaining agreement makes no provision for such a remedy, as the Federation concedes in its brief. In fact, the collective bargaining agreement requires the opposite. Section 5.9 of the agreement contains language requiring each party to compensate its own representatives and witnesses. The Federation request for extraordinary relief is denied.

Accordingly, it is my decision and

### **AWARD**

1. The MPRB did not have just cause to terminate the grievant, Rob Goodsell.
2. The MPRB did have just cause to impose a one day suspension upon the grievant for shoddy payroll accounting practices.
3. The MPRB is ordered to reinstate the grievant to his former position and to make him whole for any lost wages, seniority, benefits, that he would have received but for the improper termination with the exception of one day’s pay and a one-day suspension which is to be entered upon his record.

4. The Federation's request for an extra-ordinary remedy of payment of expert's fees and costs is denied.

Dated this 20th day of April, 2011, in Madison, Wisconsin.

By /s/ Mary Jo Schiavoni

Mary Jo Schiavoni, Arbitrator