

IN THE MATTER OF ARBITRATION BETWEEN

<p>Law Enforcement Labor Services, Inc., "Union" or "LELS"  and  B.P.D. of Blaine, Minnesota, "Employer" or "Blaine PD".</p>	<p>BMS Case No. 13-PA-0148 &amp; 13-PA-0581 Issues: Written Reprimand and Suspension Date initially contacted by Parties: 09/06/2013 Hearing Site: B.P.D. Hall, Blaine, Minnesota. Hearing Dates: 12/19/2013; 01/03/2014; 01/28/2014. Briefs Submission Date: 02/24/2014. Award Date: 04/21/2014. Labor Arbitrator: Harry S. Crump</p>
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**JURISDICTION**

Pursuant to Article 7 of the 2011 – 2013 Collective Bargaining Agreement ('CBA' or "Contract") this matter was heard on December 19, 2013, January 03 and 28, 2014 at the B.P.D. Hall, Blaine, Minnesota. The parties are signatories to the above-referenced CBA. The Grievant complied with Steps 1, 2 and 3 of the Grievances Procedures, as defined by Section 7.1 of the CBA, this matter was unresolved and appealed to arbitration for final and binding determination. The parties had agreed to consolidate the July 11, 2012 and the December 12, 2012 Grievances for arbitration purposes. This matter is properly before the Arbitrator. Appearing through their designated representatives, the parties received a full and fair opportunity to present their case, witnesses' testimony was sworn and cross-examined, and exhibits were accepted into the record. Consistent with a "Stipulation and Protective Order" that was issued and cognizant of protection's afforded private personnel data pursuant to the Minnesota Government Data Practices Act, Minn. Stat. 13.01, *et seq.*, the Grievant is identified herein as "Grievant" and other witnesses to the use of initials in the post-hearing briefs and award. The parties waived the provision in Article 7, § 7.5.2 of the CBA that requires a decision within 30-days of the record's close. The Hearing was closed on February 24, 2014 when Post-Hearing Briefs were filed with the Arbitrator. Thereafter, the present matter was taken under advisement. Also, the parties agreed that the Arbitrator is to retain post-award jurisdiction for 60 days for the sole purpose of ruling on disputes over the award's enforcement.

**Appearances:**

**For the Employer:**

Susan K. Hansen	Attorney at Law
Chris Olson	Blaine (B.P.D.) Police Chief
Terry Dussault	B.P.D. H.R. Director
Sheri Chesness	B.P.D. H.R. Coordinator
Michelle Soldo Esq.	Investigator
William Everett, Esq.	Investigator
Fran A. Sepler, Esq.	Investigator
J.S.	B.P.D. Detective (Det.)
D.M.	B.P.D. Detective (Det.)
B.O.	B.P.D. Sergeant (Sgt.)
D.P.	B.P.D. Lieutenant (Lt.)

**For the Union:**

Isaac Kaufman	General Counsel, LELS, Inc.
Grievant	B.P.D. Detective (Det.)

**INTRODUCTION**

On July 10, 2012 Grievant was issued a letter of Reprimand for working a Reimbursable Police Service (RPS) overtime program while serving as the on-call Detective without making (allegedly) arrangement to have anyone cover the Grievant's assigned duties, as required, by Grievant's superiors' numerous directives and Departmental procedures. (Jt. Ex. 2). The Grievant acknowledged her error in email and verbal communications with her superiors. On July 11, 2012, The [Grievant] signed a grievance report making the following affirmative representations of fact, "Detective [Grievant] did have Detective [J.S.] cover her 'on call' for the period of time in which the RPS job was worked. Detective [Grievant] did advise Sgt. [B.O.] of the switch." The Grievant's statements in this report were (allegedly) false. (Joint Ex. 3)

"At least three essential qualities are required of law enforcement personnel; honesty, integrity and reliability. " Department of Natural Resources, State of Minnesota and Minnesota Conservation Officers Association, BMS Case No. 98-PA-166 (Powers, 1998). The Grievant's actions in making false statements were contrary to the Departmental policies relating to conduct unbecoming a police officer and officer integrity. Her conduct in making (allegedly) false statements warrants the four day (32 hour) suspension that was imposed on December 11, 2012.

**STATEMENT OF ISSUES**

Whether the Written Reprimand of Grievant was for just cause? If not, what is the appropriate remedy?

Whether the four days (32 hours) suspension without pay of the Grievant was for just cause? If not, what is the appropriate remedy?

### **RELEVANT CONTRACT PROVISIONS**

#### ARTICLE 10 - DISCIPLINE

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

- a) oral reprimand
- b) written reprimand
- c) suspension
- d) demotion
- e) discharge

### **RELEVANT B.P.D. POLICY PROVISIONS**

#### **GENERAL ORDER 369.01 — SUBJECT: DETECTIVE "ON-CALL" REQUIREMENTS AND PROCEDURES**

##### **POLICY:**

It is the policy of the Blaine Police Department that designated Detectives be available for call out assignments during periods of time outside the normal duty schedule. This availability is accomplished by an "On-Call" procedure as detailed in this General Order.

##### **369.01 GENERAL PROVISIONS:**

A. Qualified Detectives will be assigned by the Investigation Division supervisor to "On-Call" status for a period of 1 week commencing at 0800 hours on a Monday to 0800 hours on the following Monday.

- 1. The "On-Call" Detective should only be contacted once it is determined that normal "On-Duty" Detective staff is not available.

##### **369.01 DETECTIVE ON-CALL GENERAL PROVISIONS:**

F. Qualified Detectives assigned to "on-call" status must maintain themselves physically and chemically able to respond to contacts and callbacks to duty.

##### **328.03 EMPLOYEE OBLIGATIONS**

"Employees are responsible to be present and ready to perform their respective duties at their "Designated Place of Duty" at the time assigned...."

### **300.03 PRINCIPLES GOVERNING CONDUCT OF SWORN OFFICERS:**

- A. Officers of the Blaine Police Department shall conduct themselves, whether on or off duty in accordance with the Constitution of the United States the Minnesota Constitution, all applicable laws, ordinances and rules enacted or established pursuant to legal authority, and the Policies, Procedures, Rules and General Orders of the City of Blaine and the Blaine Police Department.
- B. Officers of the Blaine Police Department shall refrain from any conduct in an official capacity that detracts from the public's faith in the integrity of the criminal justice system, the law enforcement profession, the City of Blaine and its Police Department.
- D. Officers of the Blaine Police Department shall not, whether on or off-duty, exhibit any conduct which discredits themselves the law enforcement profession, the City of Blaine and the department. Officers shall not exhibit any conduct that impairs their ability of that of other Officers or the Department to provide law enforcement services to the community.

## **PERSONAL CONDUCT**

### **102.3 CONDUCT UNBECOMING AN OFFICER**

A police officer is the most conspicuous representative of government, and to the majority of the people they are a symbol of stability and authority upon whom they can rely. An officer's conduct is closely scrutinized, and when their actions are found to be excessive, unwarranted, or unjustified, they are criticized far more severely than comparable conduct of persons in other walks of life. Since the conduct of an officer or civilian employee, on or off-duty, may reflect directly upon the department, an officer must at all times conduct themselves in a manner which does not bring discredit to themselves, the department, the City or the law enforcement profession.

### **102.6 INTEGRITY**

The public demands that the integrity of its law enforcement personnel be above reproach, and the dishonesty of a single departmental member may impair public confidence and cast suspicion upon the entire department. succumbing to even minor temptation can be the genesis of a malignancy which may contribute to the corruption of countless others. Department employees must scrupulously avoid any conduct which might compromise the integrity of themselves, their fellow officers, or the department, and has the obligation to report the dishonesty of others.

### **102.8 COMPLIANCE WITH LAWFUL ORDERS**

The department is an organization with a clearly defined hierarchy of authority. This is necessary because unquestioned obedience of a superior's lawful command is essential for the safe and prompt performance of law enforcement operations. The most desirable means of obtaining compliance are recognition and reward of proper performance and the positive

encouragement of a willingness to serve. If there is a willful disregard of lawful orders, commands, directives, or policies, retraining of personnel and/or disciplinary action may be necessary.

#### **102.10 ATTENTION TO DUTY**

As most police work is necessarily performed without close supervision, the responsibility for the proper performance of an officer's duty lies primarily with the officer themselves. An officer carries responsibility for the safety of the community and their fellow officers. They discharge that responsibility by the faithful and diligent performance of their assigned duty. Anything less violates the trust placed in them by the people and will not be tolerated by the department.

#### **STATEMENT OF FACTS AND BACKGROUND**

The Grievant has been employed by the Blaine ("B.P.D.") Police Department for 16 years. In 2006, she was promoted to the classification of Detective in the B.P.D. investigation division after serving as a provisional Detective for two years. (Testimony of Grievant) Prior to this proceeding, Grievant had had no discipline since 2004. (Testimony of Chief Christopher Olson)

Before being hired by the Employer, Grievant served as a Community Service Officer with the Richfield Police Department for two years. She has a Bachelor's degree in sociology from Augsburg College, and a Master's degree in police leadership and education from St. Thomas University. (Testimony of Grievant)

Grievant's regular work hours are from 8:00 a.m. to 6:00 p.m., four days a week. She also serves as the On-Call Detective for one out of every six weeks. (Testimony of Grievant) The Police Department's on-Call Detective Policy provides that a Detective's on-call status runs continuously from 0800 hours on Monday morning to 0800 hours the following Monday morning. The on-call Detective must be available for call out assignments during periods of time outside the normal duty schedule. (Id.; Union Ex. 1)

#### **POSITION OF PARTIES**

##### **A. Employer's Position**

The Blaine Police Department has different types of overtime assignments. As part of the Department's Reimbursable Police Services ("RPS") overtime program, the Department contracts with outside private entities to provide police services for a fee. The Department is contractually obligated to provide the specified police services during the hours covered by the contract with the outside private entity. The Department also utilizes "special overtime" in order to augment the Employer's ability to provide police services. Special overtime does not involve an outside private

entity and there are no contractual obligations associated with special overtime.

When a Detective is on-call, their ability to work RPS overtime is restricted. Specifically, in order to work an RPS overtime shift, the on-call Detective must first make arrangements with another Detective to cover the on-call time during the RPS overtime shift. The Detective must also notify their Sergeant of the substitution in on-call coverage. (Testimony of Grievant)

The Grievant was the on-call Detective from Monday, June 18 through Monday, June 25, 2012. On Tuesday, June 19, an available RPS overtime assignment was posted. The assignment in question was on Sunday, June 24 from 9:00 a.m. until 12:00 p.m. at the Blaine Soccer Complex as part of the North American Soccer Challenge. The Grievant bid for the overtime assignment on Wednesday, June 20. (Employer Ex. 1, Tab 1)

Sergeant B.O. is the Sergeant assigned to the investigative division. On June 19 or June 20, 2012, the Grievant asked Sergeant B.O. for clarification on working RPS overtime assignments while serving as the on-call Detective. The Grievant asked, "we can't work RPS when we're on-call, correct?" Sergeant B.O. confirmed a Detective may not work RPS overtime assignments while on-call, but a Detective may work special overtime while on-call. (Testimony of B.O.; Employer Ex. 1, Tab 24, Tr. 20, 25-26) Sergeant B.O. has never approved a Detective to work RPS overtime when on-call even when a substitution in on-call coverage is allowed. (Testimony of B.O.)

Lieutenant D.P. is in charge of the investigative division. He and Sergeant B.O. work as a supervisory team. (Testimony of Grievant) On June 21 or 22, 2012, the Grievant asked Lieutenant D.P. what type of overtime she could work while on-call. The Lieutenant reminded the Grievant the on-call Detective could not work RPS overtime assignments unless another Detective was covering the on-call time. (Testimony of D.P.; Employer Ex. 1, Tab. 25, Tr. 18- 19)

Detective J.S. is serving a two year assignment as a provisional Detective. He is 90 percent certain the Grievant did not request that he cover her on-call responsibilities for June 24, 2012. Detective J.S. was in the Arrowhead region north of Duluth, Minnesota working a search and rescue mission with the Civil Air Patrol from Monday, June 18 through Thursday, June 21. He was frequently out of cell range during the search and rescue mission. (Employer Ex. 1, Tab 23, Tr. 2) Detective J.S. does not recall the Grievant contacting him to request he cover her June 24 on-call responsibilities. If the Grievant had contacted him, he would have as a matter of standard operating procedure told her to send him an email and he would have made a

notation in the e-Briefing software program. Detective J.S. does not recall receiving an email from the Grievant regarding on-call coverage. (Testimony of J.S) There was no change made in the e Briefing software program. ( Employer Ex. 1, Tab 2)

Sergeant B.O. is extremely organized and detail-oriented, meticulous about paperwork, very strict about the Detectives' schedule, and adept with computers. He was saving all emails from the Grievant during 2012 in a special archive folder for Detectives. (Testimony of Grievant and B.O.) He has no record of receiving notification from the Grievant or anyone else that another Detective was covering the Grievant's June 24, 2012 on-call responsibilities. Sergeant B.O. has no recollection of the Grievant informing him someone was covering her June 24 on-call responsibilities. ( Testimony of B.O. Employer Ex. 1, Tab 24, Tr. 34)

On Sunday, June 24, 2012, the Grievant worked an RPS overtime assignment from 9:00 a.m. until 12:00 p.m. at the Blaine Soccer Complex. The Grievant was on-call at the time she worked the overtime assignment on June 24. The Grievant's regular duty shift started at 12:00 p.m. on June 24 however this does not alter the fact the Grievant remained on-call from 9:00 a.m. until 12:00 p.m. on June 24.

On June 26, 2012, the Grievant went into Lieutenant D.P.'s office with her time card before she left on vacation on June 27 and quickly explained to him that her work hours would not add up to 80 hours for that pay period. ( Testimony of D.P.; Employer Ex. 1, Tab 25 {D. P. statement}, Tr. 19; Employer Ex. 1, Tab 36 {Grievant statement}, Tr. 43) Lieutenant D.P. found the Grievant's rapid explanation of her time card to be confusing. (Testimony of D.P.; Employer Ex. 1, Tab 25 {D. P. statement}, Tr. 19)

When the Lieutenant reviewed the Grievant's time sheet on June 27, 2012, he noticed the Grievant worked a three hour overtime detail on June 24 that she labeled "traffic." (Employer Ex. 1, Tab 9) The Grievant was serving as the on-call detective on June 24 and the Department's e-Briefing software program and schedule showed that the Grievant was the on-call Detective for June 24. ( Employer Ex. 1, Tabs 2-3) Based on this documentation, the Lieutenant became concerned the Grievant may have worked an RPS overtime assignment on June 24 without securing coverage for her on-call time.

On June 27, 2012, Lieutenant D.P. sent the Grievant an email reminding her she had received directives about working RPS while serving as the on-call Detective and asking if she had arranged for someone to cover her on-call time:

(Grievant), I am doing your time card and have a question. You came into my office yesterday and said that you would have 90 hours this check because you owed us 10 from the last. I understand that that but you said you worked traffic OT and that it was Special OT and you had even asked before the weekend for me to clarify what you could work when you were on call. I told you that you could only work special OT when on call and I know that both Ski and Stephen have both given that as a directive in the past. When I look at your time card and was trying to code the OT it looks like it was for RPS traffic control at the sports center. Did you have someone else covering your on call? I am on vacation next week so I will ask in roll call this am if anyone covered this for you. Please let me know.

(Employer Ex. 1, Tab 5 [emphasis added]). Lieutenant D.P. checked with the other Detectives in roll call on June 27 and all of them reported they did not cover the Grievant's June 24 on-call responsibilities. (Employer Ex, 1, Tab 25 {D. P. statement}), Tr. 21) The Grievant responded to Lieutenant's email on July 10, 2012 at 8:11 a.m. when she returned to the office following her vacation:

"I spoke with B.O. about this. This was not listed as RPS but special OT. I worked the event with B.O."

(Employer Ex. 1, Tab 5) The Grievant sent the Lieutenant a second email at 8:43 a.m.:

Was this the joyful noise concert? Or the soccer traffic in the morning? Both were special OT. I can check and make a printout for you. I think I put that with my time card.

Please let me know. I did clarify with B.O. that we could work special OT otherwise I would not have signed up for it. Please let me know if I am wrong.

(Employer Ex. 1, Tab 6 {emphasis added}). The Grievant sent the Lieutenant a third email at 9:09 a.m.:

I looked at the OT list and you are right. I am sorry I guess I got it mixed up with the carnival when I was looking at it. It was my error. I will make sure it doesn't happen again.

(Employer Ex. 1, Tab 7 {emphasis added}).

Lieutenant D.P. determined to issue the Grievant a written reprimand for her repeated conduct of working an RPS overtime assignment while serving as the on-call Detective

despite numerous directives to the contrary. (Testimony of D.P., Joint Ex. 2) During the morning of July 10, 2012, Lieutenant D.P. and Sergeant B.O. met with the Grievant to administer the written reprimand. Lieutenant D.P. informed the Grievant she was being issued a written reprimand for the RPS overtime assignment and referenced the issue had been an ongoing battle since 2008.<sup>2</sup>

The Grievant was given a copy of the written reprimand and told to read it. After a pause in the conversation, the Grievant said, "okay." Later in the meeting, the following was stated:

DP: I'll get you copies of everything I have. I'm not trying to hide anything. I'm being up front with you. I can't have two set s of rules. The rules always been like this.

[G]: This was an honest mistake, I was looking at both the RPS and special overtime, I clarified with Brian. I ! know I'm not supposed to work the RPS, I explained that in the thing and if this is, that's fine, it is what it is. You need to do what you have to do. I'll file a grievance, and we'll go. It's fine. It is what it is. It was an honest mistake and that's fine. The one that you're speaking of, even though it was wrong, and that's fine. The 2008 one when I wasn't supposed to work overtime and I did, I had someone cover for me. So it's fine, whatever, it's good, so, it is what it is.

(Employer Ex. 1, Tab 21, Tr. 2 {emphasis added}). The Grievant had the written reprimand in hand when she made these comments and knew she was being reprimanded for working a June 24, 2012 RPS overtime assignment while on-call. (Testimony of Grievant; Employer Ex. 1, Tab 36 {Grievant statement}, Tr. 55) At no time during the meeting did the Grievant suggest she had made arrangements for Detective J.S. to cover her June 24 on-call responsibilities. Nor did the Grievant suggest during the meeting she had informed Sergeant B.O. of a substitution in on-call coverage for June 24. (Employer Ex. 1, Tab 21)

After the Grievant's disciplinary meeting with Lieutenant D.P. and Sergeant B.O., the Grievant went to Sergeant B.O.'s office and told him she remembered informing him someone was covering her June 24, 2012 on-call responsibilities. The Grievant stated she thought she had Detective D.M. covering for her, but when she talked to D.M. about this, he stated he did not cover for her, and he suggested she may have talked to Detective J.S. When Sergeant B.O. asked the Grievant if she had

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<sup>2</sup> In 2008, the Grievant was issued a counseling memo in which she was reminded working an RPS overtime assignment while on-call is unacceptable. The Grievant was told in order to bid for an RPS overtime assignment, she would need to find another Detective to cover her on-call time and follow proper procedures. Employer Exhibit 2.

talked to Detective J.S., the Grievant indicated she had not spoken with him because he was in Minneapolis.<sup>3</sup> (Employer Exhibit 1, Tab 22, Tr. 2-3; Tab 24, Tr. 34-35, 43-44)

Sergeant B.O. told the Grievant if there was a substitution in on-call coverage, the change would be entered in the Detectives' schedule. The Sergeant accessed the schedule in the Grievant's presence and they noted no change had been made in the on-call coverage. The Sergeant then suggested they look at the e-Briefing software. The Grievant agreed if there was a substitution in on-call coverage, the change would be entered in e-Briefing. The Sergeant accessed the e-Briefing program in the Grievant's presence and they noted no change had been made in the on-call coverage. (Employer Ex. 1, Tab 22, Tr. 2-3; Tab 24, Tr. 35-36, 42)

The Grievant then told Sergeant B.O. she had sent him an email informing him someone was covering her June 24, 2012 on-call responsibilities. The Sergeant did not recall receiving an email from the Grievant. The Sergeant was saving all emails from the Grievant in an archived computer folder labeled Detectives, and he accessed the archive folder in the Grievant's presence. The found no such email. (Employer Ex. 1, Tab 22, Tr. 2; Tab 24, Tr. 38, 42-45) Based on the Grievant's statements, Sergeant B.O. believed she had "no idea" who was covering her on-call responsibilities and she was "grasping at stuff" that might tend to exonerate her. (Employer Ex. 1, Tab 22, Tr. 3; Tab 24, Tr. 36-37, 40)

The Grievant contacted Detective D.M. and asked if he had agreed to cover her June 24, 2012 on-call time. Detective D.M. informed the Grievant he had not agreed to cover the on-call and he was out of town the weekend of June 23-24. The Grievant informed D.M. she was going to check with Detective J.S. (Employer Ex. 1, Tab 34 {statement of D.M.}, Tr. 7-8)

On July 10, 2012, the Grievant telephoned Detective J.S. and asked if he remembered covering her June 24 on-call responsibilities. The Grievant informed J.S. she would have only asked him or Detective D.M.; she had spoken with D.M. and D.M. informed her he did not cover the on-call. Detective J.S. told the Grievant he did not remember her asking him to cover her June 24 on-call and if she had, he would have told her to send him an email. Detective J.S. checked his emails and found no emails from the Grievant. The Employer's Information Technology staff restored his deleted emails to the extent they were able to do so and no emails from the Grievant were found. (Testimony of J.S.; Employer Exhibit 1, Tab, 23, Tr. 3; Tab 26, Tr. 11-14; Employer Exhibits 6-7)

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<sup>3</sup>Detective J.S. was assigned to a training rotation in Minneapolis at the time. ( Testimony of J.S.)

The Grievant subsequently telephoned Detective J.S. The Grievant asked if he remembered talking with her about the June 24 on-call coverage and she suggested the conversation occurred around the same time Detective J.S.'s daughter was last sick. Detective J.S. always informs his wife when he is on-call so she does not make family plans to go anywhere. J.S. spoke with his wife and she didn't remember him being on-call on June 24. In addition, the last time J.S.'s daughter was sick was June 6 long before the date the June 24 on-call assignment was posted. (Employer Ex. 1, Tab 23, Tr. 3-4, Tab 26, Tr. 16-17)

On July 11, 2012, the Grievant requested the Union to file a grievance on her behalf. She read the grievance report and signed it before the Union steward submitted it to Lieutenant D.P. (Testimony of Grievant) The Grievant made the following affirmative representations of facts in the grievance report, "Detective [Grievant] did have Detective [J.S.] cover her 'on call' for the period of time in which the RPS job was worked. Detective [Grievant] did advise Sgt [B.O.] of the switch." (Joint Ex. 3)

The content of the Detective Grievant's grievance report concerned Lieutenant D.P. given the factual differences between the representations in her grievance report versus her statements in the July 10, 2012 emails and disciplinary meeting with Lieutenant D.P. and Sergeant B.O. (Testimony of D.P., Employer Ex. 1, Tab 25, Tr. 28-29)

Given these concerns, Lieutenant D.P. took clarifying statements from Detective J.S. and Sergeant B.O. Detective J.S. reported Detective Grievant did not ask him to cover her June 24 on-call responsibilities and he did not agree to do so. (Employer Ex. 1, Tab 23) Sergeant B.O. reported Detective Grievant did not inform him another Detective was covering her June 24 on-call responsibilities. (Employer Ex. 1, Tab 22) Lieutenant D.P. requested Chief of Police Chris Olson initiate an internal affairs investigation. (Employer Ex. 11)

A thorough internal affairs investigation conducted by outside investigator/Attorney Bill Everett substantiated the Grievant falsely represented that Detective J.S. was covering her June 24 on-call and that she advised Sergeant B.O. of the switch in on-call coverage. (Employer Ex. 1) As result of this substantiated misconduct, Chief of Police Chris Olson issued the Grievant a 4 day (32 hour) disciplinary suspension. (Joint Exhibit 10)

## **B. UNION'S POSITION**

The Detective Sergeant B.O. reports to Lieutenant D.P., who is in charge of the Investigations unit. (Testimony of D.P.) When Lieutenant D.P. was a Sergeant in or about 2004, D.P. was Grievant's

direct supervisor. In that capacity, D.P. told Grievant that he did not like her and did not know how to supervise her. Since then, D.P. and Grievant have had a very poor working relationship and generally avoid each other in the workplace. (Testimony of Grievant) On October 23, 2012, D.P., B.O. and Grievant met in D.P.'s office to discuss some concerns with Grievant's job performance. (Union Ex. 3) Prior this meeting, D.P. told B.O. that he wanted to discipline Grievant, but B.O. was able to talk him out of it. (Testimony of B.O.) During the meeting, D.P. stated that "there was a communication breakdown. . . We need to start building back a team here somehow, because there is a lack of communication amongst all of us." B.O. echoed this sentiment:

"There was a communication breakdown there. . . . Sorry for the intercommunication. . . . We all need to increase [communication] as a whole. Maybe that will be our goals for the year. We all need to do our part. I need to, obviously, communicate better of what my expectations are. So you guys don't go, I don't know what to do. . And you know, there was some communication issues here."

(Union Ex. 3).

At the arbitration hearing, B.O. confirmed that there were significant communication problems within the Investigations unit -- what he described as a "six-way divide" among the officers in the unit. (Testimony of B.O.)

The B.P.D.'s payroll system recognizes numerous different categories of overtime. One is Special overtime, which is paid directly out of the B.P.D.'s budget to provide police coverage for parades and other special events. Another is Reimbursable Police Service (RPS) overtime, which occurs when the B.P.D. contracts or arranges to provide police services for a third party entity and is then reimbursed by the third party for the cost of those services. (Testimony of Chief Olson; Testimony of D.P.; Testimony of B.O.) Only officers who volunteer beforehand to be on the RPS list are eligible to bid for RPS overtime. If there is an RPS shift to be filled but no one bids for it, one of the officers on the RPS list can be ordered to work the shift. Grievant has been on the RPS list for a number of years. (Testimony of Grievant)

The Police Department's On-Call Detective policy does not address whether and under what circumstances an On-Call Detective is allowed to work RPS overtime shifts. (Union Ex. 1) During her on-call week in July 2008, Grievant worked an RPS shift at a golf tournament on Monday, July 28. She was also scheduled to work RPS shifts at the golf tournament on Tuesday, July 29; Thursday, July 31; and Friday, August 1. On July 29, 2008, Lieutenant Dan Szykalski issued a memorandum to Grievant that stated in part:

"If you are working an overtime shift that was being paid by someone else (RPS) while on-call, [that is] unacceptable. . . . You will need to do one of

two things. Find someone to switch with you and take your on-call time with those proper procedures in doing so, or use the proper procedure as it relates to the RPS list to get your overtime spots filled. . . ."

(B.P.D. Ex. 2)

Subsequent to Lt. Szykulski's memorandum, Grievant bid for and worked RPS overtime while on-call on a number of occasions; on all such occasions, she made arrangements with another Detective to cover her on-call duties during the RPS overtime shift and communicated those arrangements to her supervisor. It was Grievant's understanding that working RPS overtime while on-call was permissible as long as she followed these procedures. The Sergeants whom she usually asked to cover her on-call duties were Sergeant D.M. and Sergeant J.S. (Testimony of Grievant)

The means of documenting and communicating schedule adjustments for On-Call Detectives has changed over the years. When Grievant first became a Detective, these changes were documented on paper only; a schedule adjustment form was initialed by both Detectives and approved by the supervisor, and copies of that form were distributed to the command staff and other relevant departments. (Union Ex. 6; Testimony of Grievant)

About four years ago, when Lieutenant D.P. took over the Investigations unit, this form was phased out. Around the same time, the Police Department began using a computerized system called E-Briefing to centralize and disseminate information around the department. (Testimony of D.P.) But the record shows that prior to the June 2012 incident that is the subject of this arbitration, when a Detective agreed to cover another Detective's on-call hours for a short period of time, that scheduling change was typically *not* entered into the E-Briefing system; instead, the assigned On-Call Detective would carry his or her phone and, if a call came in requiring a response, would forward that call to the Detective who was covering the on-call hours. (B.P.D. Ex. 1, Tab 29 {Statement of Det. T.J.}, pp.5-6; B.P.D. Ex. 1, Tab 34 [Statement of Det. D.111], p.6; Testimony of Grievant)

The Grievant worked, in June 2012, several overtime shifts within a short time frame in June 2012, including:

- The Joyful Noise concert on June 8 from 1500 to 2000 hours (RPS overtime)
- The National Soccer Challenge on June 9 from 1000 to 0000 hours (RPS overtime)
- The Blaine Blazin' 4<sup>th</sup> ("BB4") Parade on June 23 from 1030 to 1500 hours (Special overtime)
- The National Soccer Challenge on June 24 from 0900 to 1200 hours (RPS overtime)

(B.P.D. Ex. 1, Tabs 9 and 13; Testimony of K. H.)

The Joyful Noise and National Soccer Challenge details all included some duties directing traffic. (Testimony of Grievant)

Grievant was assigned as the On-Call Detective from Monday, June 18 to Monday, June 25, 2012. Following her regular practice, Grievant requested to switch two of her regular work days to work straight time shifts on Saturday, June 23 and Sunday, June 24. This change was approved by the Detective Sergeant, B.O. Grievant confirmed the change in an email to B.O. (Testimony of Grievant)

The June 24 National Soccer Challenge overtime shift was posted on June 19, 2012 at 1447 hours. On June 20, both Grievant and another officer on the RPS list, B.B., bid for the shift. (B.P.D. Ex. 1, Tab 1) Before entering her bid, Grievant asked D.M. to cover her on-call duties during the hours of the National Soccer Challenge shift, but D.M. informed her that he would be out of town that day. Grievant then asked J.S. to cover her on-call duties, and J.S. agreed. Grievant confirmed this arrangement via an email to J.S. She also sent an email to her supervisor, B.O., notifying him of the scheduling change, and confirming that her straight time shift on June 24 would not begin until 1200 hours, after the RPS shift. (Testimony of Grievant) On June 20 at 1606 hours, Sgt. Jeff Warner assigned the June 24 overtime shift to Grievant. (B.P.D. Ex. 1, Tab I) Sgt. Warner had reason to know that Grievant was the On-Call Detective that week, but did not check with Grievant to find out if she had arranged coverage for her on-call duties. (Testimony of Chief Olson; Testimony of B.O.; Testimony of Grievant)

Grievant worked the overtime shift at the National Soccer Challenge on Sunday, June 24, 2012. There were no incidents during those hours requiring the involvement of an On-Call Detective; had there been any such incidents, Grievant would have called J.S., who had agreed to cover her on-call duties at that time. (Testimony of Grievant)

After the National Soccer Challenge detail, Grievant worked a regular straight time shift from 1200 to 2300 hours. She also worked regular shifts on Monday, June 25 and Tuesday, June 26. On June 26, she stayed at the office until 1900 hours, including .5 hours of overtime working on an order for protection (OFP) case. (B.P.D. Ex 1, Tab 9; Testimony of Grievant) Because this was the last day that she was scheduled to work during that pay period, she completed and signed her time card. Ordinarily she would give her time card to the Detective Sergeant, B.O., but he was away on vacation. D.P., the Lieutenant in charge of the Investigations unit, was gone for the day, so Grievant put her time card in his mailbox. She then left for a two-week vacation. (Testimony of Grievant)

The Union's position on the events of July 10, 2012. Grievant returned to work for the 0800 roll call on July 10, 2012. (Testimony of Grievant) At 0811 hours, she read for the first time an email that D.P. had sent her on June 27:

"[Grievant], I am doing your time card and have a question. You came into my office yesterday and said that you would have 90 hours this check because you owed us

10 from the past. I understand that that [sic] but you said you worked traffic OT and that this was Special OT and you had even asked before the weekend for me to clarify what you could work when you were on call. I told you that you could only work special OT when on call and I know that both [Lt. Szykulski] and Stephen have both given that as a directive in the past. When I look at your time card and was trying to code the OT it looks like it was for RPS traffic control at the sports center. Did you have someone else covering your on call? I am on vacation next week so I will ask in roll call this am if anyone covered this for you. Please let me know."

(B.P.D. Ex. 1, Tab 5 ).

D.P. was asking about the National Soccer Challenge detail on June 24; however, D.P. did not specify in his email which date or which overtime event he was concerned about, (Id.; Testimony of D.P) When she first read this email, Grievant (who had just returned from a two-week vacation) did not have an independent recollection of the dates of the various overtime shifts that she had worked during the previous month. She had not yet reviewed her time card to refresh her recollection. Because the email referred to "traffic OT," Grievant, initially thought that D.P. was referring to the Joyful Noise concert, at which she had directed traffic. She did not recall that the Joyful Noise concert had taken place on June 8, prior to her on-call week. (Testimony of Grievant) Grievant sent a reply email to D.P.:

"I spoke with [B.O.] about this. This was not listed as RPS but special OT. I worked the event with [B.O]"

(B.P.D. Ex. 1, Tab 5)

This email demonstrated that Grievant thought D.P.'s email was referring to the Joyful Noise concert, because Grievant and B.O. had in fact worked the Joyful Noise concert together. (Testimony of Grievant)

At 0843 hours, Grievant sent D.P. another email. She still had not reviewed her time card and still did not know what event D.P. was asking about in his June 27 email:

"Was this the joyful noise concert? Or the soccer traffic in the morning? Both were special OT. I can check and make a printout for you. I think I put that with my time card. Please let me know. I did clarify with [B.O.] that we could work special of otherwise I would not have signed up for it. Please let me know if I am wrong."

(B.P.D. Ex. 1, Tab 6; Testimony of Grievant)

D.P. did not respond to either of these emails from Grievant. Grievant checked the overtime list and realized that she had been incorrect in describing the Joyful Noise concert as Special overtime. (Testimony of Grievant)

At 0909 hours, Grievant sent a third email to D.P.:

"I looked at the OT list and you are right. I am sorry I guess I got it

mixed up with the carnival when I was looking at it. It was my error. I will make sure it doesn't happen again."

(B.P.D. Ex. 1, Tab 7)

The "carnival" that Grievant referred to in this email was the Joyful Noise concert. The "error" that Grievant was admitting to was confusing the Joyful Noise concert (RPS overtime) and the Blaine Blazin' 4<sup>th</sup> parade (Special overtime) in her earlier emails. She still did not know, and had no reason to know, that the shift that D.P. was concerned about was the June 24 National Soccer Challenge shift. (Testimony of Grievant)

At that time, D.P. and B.O. had a good working relationship as the supervisors in charge of the Investigations unit. They had an agreement in place that D.P. would not issue any discipline to Grievant without B.O.'s input. Prior to reprimanding Grievant in connection with the June 24 RPS shift, D.P. discussed the matter several times with B.O. B.O. did not believe that discipline was warranted and tried — unsuccessfully -- to dissuade D.P. from issuing the reprimand. (Testimony of B. O)

Later on the morning of July 10, 2012, Grievant met with D.P. in D.P.'s office. D.P. recorded this meeting without Grievant's knowledge.<sup>4</sup> Grievant was not advised that she could have Union representation at this meeting. (B.P.D. Ex. 1, Tab 21; Testimony of Grievant). D.P. gave Grievant a written reprimand for working the RPS overtime shift on June 24 without arranging coverage with another Detective for her on-call duties. (B.P.D. Ex. 1, Tab 21; Joint Ex. 2) This was the first time that Grievant became aware that the June 24 RPS shift was the subject of D.P.'s concern. (Testimony of Grievant) Grievant told D.P., "This was an honest mistake, I was looking at both the RPS and special overtime" — referring, again, to her confusion between the Joyful Noise concert and the Blaine Blazin' 4<sup>th</sup> parade in the emails that she had sent that morning. She told D.P. it was her intention to file a grievance over the written reprimand, because she was certain that she had arranged coverage during the June 24 RPS shift and had not committed the violation described in the reprimand. (Id.; B.P.D. Ex. I, Tab 21)

Grievant went to talk to D.M., who reminded her that she had asked him about covering her on-call duties on June 24, but that he had been on vacation. This refreshed Grievant's recollection that it was J.S. who had agreed to cover those hours. Grievant spoke to J.S., who told her that he did not recall whether or not this had taken place. (Testimony of Grievant) J.S. looked for the email that Grievant had sent him to confirm the scheduling change, and he was unable to find it; however, it is J.S.' practice to delete emails from his files on a regular basis. (Id.; Testimony of J.S. ) Grievant did

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<sup>4</sup> This meeting was recorded using a B.P.D.-issued recording device. However, D.P. also owns a recorder that looks like a pen, which he has used to secretly record conversations with Grievant on other occasions. *Testimony of D.P.*

not otherwise try to convince or persuade J.S. She did not mention that she had spoken to D.M. first. (Testimony of Grievant)

Grievant also went to talk to her supervisor, B.O., and reminded him that she had sent him two emails: the first to request moving two of her regular shifts to the weekend of June 23-24; and the second to inform B.O. that she would be working the National Soccer Challenge RPS shift on the morning of June 24, that she had arranged for J.S. to cover her on-call duties during those hours, and that she would begin her straight-time shift at 1200 hours. (Testimony of Grievant) B.O. generally places emails from Detectives in a special folder. However, he also regularly deletes emails to stay within the data storage limit set by the B.P.D.'s information services (IS) department. B.O. had left on vacation in late June 2012, and had cleared out his email folders before leaving. When Grievant asked about the two emails pertaining to her hours on June 24, B.O. was unable to locate either of the emails. (Id.; Testimony of B.O.)

Grievant contacted the B.P.D.'s IS department to try to recover the emails that she had sent to J.S. and B.O. (B.P.D. Ex. 1, Tab 12; Testimony of Grievant) By then it had been approximately 20 days since Grievant had sent these emails; IS staff told her that emails deleted from employees' files can be recovered from the B.P.D.'s server for 7 to 10 days, but are not recoverable after that. (Testimony of Grievant)

Union files Grievance about written reprimand, and Suspension. Grievant informed her Union steward, Officer Jason Oman, of her intent to file a grievance and gave him information about the June 24 RPS overtime shift and the written reprimand. (Testimony of Grievant) Officer Oman completed a Grievance Report form based on that information, which Grievant signed and filed. The form stated in part:

"NATURE OF GRIEVANCE: Employee was advised she couldn't work a RPS job while on 'on call' status. Memo dated July 29, 2008 from Lieutenant Dan Szykulski stated a RPS job could be worked while the Detective is 'on call' if that Detective could find another Detective to switch with so the shift was covered. [Grievant] did have [J.S.] cover her 'on call' for the period of time in which the RPS job was worked. Grievant did advise [B.O.] of the switch."

The Grievance Report form asserted that the written reprimand violated Article 10 (Discipline) of the labor agreement. (Joint Ex. 3)

After Grievant had filed this grievance, D.P. told B.O. that he wanted Grievant fired. This was before the B.P.D. had conducted any further investigation into the content of the Grievance Report. (Testimony of B.O.)

On August 8, 2012, D.P. sent Chief Olson a memorandum requesting an investigation into Grievant's conduct. (B.P.D. Ex. 1, Tab 17.) The same day, Police Chief Chris Olson issued a Statement

of Complaint, alleging that Grievant had not been truthful in her Grievance Report. (B.P.D. Ex. 11.) The B.P.D. retained an outside investigator, William Everett, to investigate this complaint. Mr. Everett interviewed both D.P. and B.O. on August 15, 2012. (B.P.D. Ex. 1, Tabs 24 [Statement of B. O.] and 25 [Statement of D.P.]). In his investigative report, Mr. Everett noted a discrepancy between how D.P. and B.O. described the rules governing On-Call Detectives working RPS overtime: D.P. said that this was allowed as long as another Detective agreed to cover on-call duties during the hours of the RPS shift, while B.O. — the Detective Sergeant and Grievant's direct supervisor at that time -- stated that for an On-Call Detective to work an RPS shift was not allowed under any circumstances.<sup>5</sup> (B.P.D. Ex. 1 (Investigation Report), p.28; Testimony of William Everett)

Mr. Everett also took statements from members of the B.P.D.'s IS staff. These employees explained the procedures they had followed to try to locate the emails that Grievant had sent to J.S. and B.O. about the June 24 RPS shift. The IS staff told Mr. Everett that if Grievant had sent the emails during the time frame in question, they could not say with certainty whether those emails would be recoverable. (B.P.D. Ex. 1, Tabs 31-33; Testimony of Everett)

Mr. Everett took a formal statement from Grievant on September 12, 2012. (B.P.D. Ex. 1, Tab 36 [Statement of Grievant]). Grievant answered all of Mr. Everett's questions truthfully. (Testimony of Grievant) Grievant told Mr. Everett that she had been confused by D.P.'s June 27, 2012 email -- which she read after returning from a two-week vacation on July 10 — in which D.P. had raised questions about an overtime assignment, but had not explained what date or what event he was referring to. Grievant told Mr. Everett repeatedly that she "didn't know what [D.P.] was talking about." (B.P.D. Ex. 1, Tab 5; Statement of Grievant, pp.40-45; Testimony of Everett)

Grievant was represented at the interview by Union attorney Isaac Kaufman. Near the end of the interview, Mr. Kaufman provided Mr. Everett with a screen shot from the Police Department's overtime bidding system indicating that Detective B.J. had bid for and been assigned an RPS overtime shift at the USA Cup on Friday, July 20. (B.P.D. Ex. 1, Tab 16); Statement of Grievant, pp.90-91) B.J. was the On-Call Detective that week, and did not arrange for another Detective to cover his on-call duties during the hours of the RPS shift. (Testimony of Grievant) The screen shot was attached as an exhibit to Mr. Everett's investigative report, but Mr. Everett did not question B.J. about it or mention this apparent violation in the body of his report. (B.P.D. Ex. 1, Tab 16; Testimony of Everett) The record also shows that B.J. bid for and was assigned an RPS overtime shift at the USA Cup on

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5. B.O. also testified at arbitration that an On-call Detective working an RPS shift should not be considered a serious violation. B.O. believes that if a true emergency like a homicide were to occur while the On-Call Detective was working RPS overtime, the B.P.D. would certainly direct the Detective to leave the RPS detail to respond to the emergency. (Testimony of B.O.)

Wednesday, July 18; again, B.J. did not arrange coverage with another Detective, even though this shift fell during his on-call week. (Union Ex. 9; Testimony of Grievant) B.J. was not investigated or disciplined for this conduct.<sup>6</sup> (Testimony of Chief Olson) When Grievant asked B.J. about this, B.J. replied that he had a different understanding of the policy regarding overtime for On-Call Detectives. (Testimony of Grievant)

Mr. Everett concluded that, contrary to Grievant's statement, J.S. had not agreed to cover her on-call duties during the June 24, 2012 RPS shift at the National Soccer Challenge. (Investigation Report, pp.30-33) Mr. Everett based this conclusion in part on the fact that this scheduling change was not entered into the E-Briefing system — even though the record shows that, in fact, such changes typically are not entered into E-Briefing. (Testimony of Everett; Statement of Det. Johann, pp.5-6; Statement of D.M., p.6.) (D.P. was unaware that these changes usually are not entered into E-Briefing, even though he is the Lieutenant in charge of the Investigations unit. Testimony of D.P.)

On December 11, 2012, the B.P.D. suspended Grievant for four days (32 hours), based on the content of the Grievance Report that she had filed to challenge the July 10 written reprimand. (Joint Ex. 10) Grievant filed another grievance to challenge the suspension. (Joint Ex. 11) The parties later agreed to consolidate the two grievances for arbitration purposes.

The Union position of events of March - April, 2013. On March 5, 2013, D.P. stated in an email to B.O. that the Grievant had not been entering information properly into the Police Department's investigations database. D.P. wrote that "we need to address that" — which B.O. understood to mean that D.P. intended to impose additional discipline on Grievant. On March 6, B.O. met with D.P. to advise him that he had checked the database, and that, in fact, Grievant's use of the database was better than all of the other Detectives except for J.S. The team of B.O. and D.P. dissolved after meeting because of differences in management styles.

### **A. Employer's Arguments**

The Employer's argument began with the claims that the Grievant's Written Reprimand and 4 Day Suspension were for "just cause," as this phrase was defined by the Minnesota Supreme Court in 2002. *Hilarious v. Cargill*, 646 N.W. 2nd 142 (Minn. 2002) Per the Court's definition, The Employer's disciplinary action was shown to be for "real cause", as distinguished from "arbitrary whim or caprice."

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<sup>6</sup> In or about February 2012, Grievant filed a lawsuit against the B.P.D. in federal court, which was pending at the time of the dispute over the June 24, 2012 RPS shift. In a supplemental response to a discovery request by the B.P.D., Grievant stated: "In July 2012, Defendant issued Plaintiff a written reprimand in relation to an overtime detail. Plaintiff is aware of male officers who have engaged in similar conduct and have not been disciplined." *Union Ex. 8*. This referred in part to the RPS shifts that B.J. worked during his July 2012 on-call week without arranging coverage with another Detective. *Testimony of Grievant* Grievant also supplied information about B.J.'s RPS shifts during her deposition in the federal lawsuit. (Union Ex.10.)

Following an exhaustive and documented B.P.D. internal affairs investigation, the Grievant was found, the Employer maintained, to have violated numerous B.P.D's 102 Policies, General Order 300 and Code of Conduct, including the following: 102.3, "Conduct Unbecoming an Officer"; 102.6, "Integrity" which demands an employees to be "(honest) and avoid any conduct which might compromise (the)ir integrity;" 102.8, "Compliance With Lawful Orders;" 102.10, "Attention To Duty;" 300, "Code of Conduct;" 300.03, "Principles Governing Conduct of Sworn Officers," Paragraphs A, B., and D;" 328.03, "Employee Obligations;" and 369.01, "Detective "On-Call" Requirements and Procedures." (Union Ex. 1, p. 2, ¶ F., Employer Ex. 4, and Jt. Ex. 10)

The Employer contended that the Grievant had knowledge of her obligations as the on-call Detective and of the Employer's expectations regarding her conduct. Police Department General Order 328.03 establishes the requirement that employees are responsible to be present and ready to perform the duties at their designated place of duty at the time assigned. (Employer Ex. 4.) Police Department General Order 369.0 requires the on-call Detective to be available for call outs during periods of time outside of the normal duty schedule. Union Exhibit 1, p. 1. The on-call Detective must be physically able to respond to callbacks to duty. (Union Ex. 1, p. 2, ¶ F.)

The Employer maintained that there is no question the Grievant had full knowledge of her responsibilities to obtain substitute coverage for her on-call responsibilities before bidding for an RPS overtime assignment and to notify the Sergeant of the substitution in coverage. The Grievant admits understanding these requirements and her responsibilities as the on-call Detective. (Testimony of Grievant; Employer Ex. 1, Tab 36 [Grievant Statement]), Tr. 18 (. . . "[Y]ou just call your partner or ask your partner and you talk about it and then you go to the supervisor and say I'm switching with so and so. He's covering this and um, usually you can follow up with an email, but it's not required that you do that.").

Still further, the Union introduced an on-call Detective Schedule Adjustment form that was used historically prior to 2012 and a new form that was implemented after this incident in June 2012. (Union Exs. 6-7.) The Grievant admittedly understood it was her responsibility to obtain coverage for her on-call responsibilities before bidding for an RPS overtime assignment and to notify the Sergeant of the substitution in coverage. The absence of an on-call Detective Schedule Adjustment form in June 2012 did not in any way confuse the Grievant regarding her responsibilities to obtain substitute on-call coverage and notify her Sergeant. (Testimony of Grievant.)

Further, the Police Department Policy 102.3, Conduct Unbecoming an Officer, provides Officers

must at all times conduct themselves in a manner that does not bring discredit to themselves. Similarly, Policy 102.6, Integrity, requires employees to be truthful and avoid any conduct which might compromise their integrity. (Employer Ex. 4.)

Further, a law enforcement officer is required to conform to the "highest degree of both honesty and accuracy." See e.g., Mower County and Law Enforcement Labor Services, Inc., BMS Case No. 11-PA-0560 (Jacobs, 2011) (employee terminated for falsifying timesheets and sleeping on the job). Law enforcement officers are held to a higher standard than other employees. This stems in part from the oath that law enforcement officers take and the standards of conduct as set forth in Department's 102 Policies and the Code of Conduct set forth in General Order 300. (Employer Ex. 12.)

Further, officers should conduct themselves with integrity. Chief Olson emphasized that officers are held to a high standard to be truthful in all matters regardless of whether an officer is completing a police report or a grievance report. There are no exceptions carved out in the Policies or General Orders for statements made in grievance reports versus police reports. The standards of conduct set forth in the Police Department Policies and General Order apply in all matters including grievance reports. (Testimony of Chief Olson.)

Further, the Grievant does not dispute her obligation to comply with Blaine Police Department Policies. The Grievant admitted she is to be truthful. The Grievant has violated these tenets.

The Employer maintained that the investigation was thorough and fair and establishes that the Grievant engaged in the conduct set forth in the Suspension Notice. The investigation of the conduct that led to the written reprimand was conducted by Lieutenant D.P. (Employer Ex.1.) Based on Lieutenant D.P.'s review of the Grievant's timesheet, the Lieutenant was concerned the Grievant may have worked an RPS overtime assignment on June 24, 2012 without securing coverage for her on-call time. Sergeant B.O. responded to an email inquiry from Lieutenant D.P. and reported he had directed the Grievant the previous week she could only work special overtime and not RPS overtime while on-call. (Employer Ex.1, Tab 5.) On June 27 in roll call, Lieutenant D.P. asked the other Detectives if they had covered the Grievant's June 24 on-call responsibilities and all of them reported they did not cover the Grievant's June 24 on-call. (Employer Ex. 1, Tab 25, [D. P. statement], Tr. 21.) Lieutenant D.P. asked the Grievant via email correspondence if she arranged for someone to cover her on-call time. (Employer Ex. 1, Tab 5.) The Grievant responded to Lieutenant D.P.'s inquiry and

ultimately stated it was her error. (Employer Ex. 1, Tab 7.)

Still further, the Grievant's after-the-fact claims she did not know what the Lieutenant was talking about in the email inquiry are self-serving and not reliable. The Lieutenant's June 27 email specifically referenced that he is reviewing her timecard. Lieutenant D.P. stated he was trying to code the overtime for what appears to be RPS traffic control at the sports center. The Lieutenant asked the Grievant a straight forward question, "Did you have someone else covering your on call?" The Grievant had just submitted her June 18-June 26 time card to the Lieutenant. There is only one reference on the time card to overtime for traffic and that occurred on June 24. The Grievant's one week on call rotation had just occurred Monday, June 18 through Monday, June 25, 2012.

Further, the Grievant claims she was referring to June 9, 2012 when she stated it was her error in her email response to Lieutenant D.P. (Employer Ex. 1, Tab 36 [Grievant statement], Tr. 50-54.) At the hearing, the Grievant could not credibly explain what error she was referring to in the email. On June 9, the Grievant worked an RPS overtime assignment. She was not on duty or on call on June 9 and her ability to work RPS overtime was unrestricted. There was no need for the Grievant to have someone cover on-call for June 9 because she was not on-call that date. June 9 was not included in the timecard she had just submitted to Lieutenant D.P. Detectives are on-call one week out of every six weeks, the Grievant had just been on-call June 18 through June 25 and it is not plausible that the Grievant did not know when she was on-call. Moreover, the Grievant modifies her work schedule the week she is on-call to better suit her on-call responsibilities -- a fact that would make the week one is on-call stand out even more.

Further, at no time in any of the Grievant's email responses did she state she was confused by his inquiry; she did not know what date the Lieutenant was referring to; she did not know what time card the Lieutenant was referring to; she required further clarification before she responded to his email inquiry or she needed to first review her timecard in order to respond. (Testimony of Grievant; (Employer Ex. 1, Tabs 5-7.) If an employee is genuinely confused about a superior's inquiry, it is reasonable an employee would ask the superior to clarify their inquiry.

Further, The Employer maintained that at no time during the disciplinary meeting on July 10, 2012 when the Grievant was given and read the written reprimand did the Grievant clarify that when she stated "it was her error" in her email responses to Lieutenant D.P. from that morning, she was referring to June 9 and not June 24. Moreover, at no time during the disciplinary meeting did the Grievant contend that Detective J.S. was covering her on-call. Nor did she claim in the

disciplinary meeting she had advised Sergeant B.O. of the switch. (Employer Ex. 1, Tab 21.)

Still further, the Grievant ultimately testified on cross-examination she can't explain what she meant in her emails. The reason the Grievant can provide no reasonable explanation is because the only plausible explanation is that the Grievant was acknowledging an error on her part for the June 24 RPS overtime assignment while also serving as the on-call Detective.

Further, The investigation of the conduct that led to the four day suspension was conducted by outside investigator/Attorney Bill Everett. The Grievant made no claim at the hearing that the investigation was not thorough and complete, or that it was in any way biased. The Employer has submitted proof that the Grievant engaged in the conduct for which she was suspended.

Further, the Employer maintained that the investigation established the Grievant falsely represented that Detective J.S. was covering her June 24, 2012 on-call on her grievance report. (Employer Ex. 1.) Detective J.S. testified he is 90 percent certain the Grievant did not request he cover her on-call responsibilities for June 24. The June 24 RPS overtime assignment was posted on June 19 and the Grievant bid for it on June 20. If the Grievant had requested Detective J.S. to cover her June 24 on-call responsibilities, she would have had to do so sometime between June 19 and June 24. Detective J.S. specifically recalls being in the Arrowhead region working a search and rescue mission with the Civil Air Patrol from Monday, June 18 through Thursday, June 21. He was frequently out of cell range during the search and rescue mission. He worked his regular shift at the Blaine Police Department on Friday, June 22. He was scheduled to participate in a Civil Air Patrol training mission on Saturday, June 23. He specifically recalled needing to prioritize Sunday, June 24 as a "family maintenance day." (Testimony of J.S.; [Employer Ex. 1, Tab 23 and 26].)

Further, the investigator found Detective J.S. demonstrated a clear recollection of his schedule, activities and stressors that existed during the relevant time period and found his recollection was credible and well-accounted for. (Employer Ex. 1, p. 30.) Detective J.S.'s description of these events has not changed over time from his initial July 12 statement to Lieutenant D.P. to his August 21 statement to Attorney Everett to his testimony in this proceeding.

Further, Detective J.S. has a routine practice he followed when he agreed to cover another Detective's on-call time. In these circumstances, Detective J.S. (1) routinely asked the other Detective to send him an email as a reminder, (2) he personally entered the change in on-call coverage into the e-Briefing system regardless of the duration of the on-call coverage, and (3) he ensured that notice has been provided to Sergeant B.O. (Testimony of J.S.; Employer Exhibit 1,

Tab 26 Tr. 3-6.) No email reminder from the Grievant to Detective J.S. has been recovered. While it is theoretically possible, given the time limitation on Employer's network backup system, the email could have been irretrievably deleted from the Grievant's computer, Detective J.S.'s computer and Sergeant B.O. computer, Detective J.S. does not recall the Grievant contacting him to request he cover her June 24 on-call responsibilities and he does not recall receiving an email from the Grievant regarding on-call coverage. (Testimony of J.S.) Sergeant B.O. does not recall receiving any email notification regarding Detective J.S. covering the Grievant's on-call responsibilities for June 24. Sergeant B.O. was saving all emails from the Grievant during 2012 in a special archive folder for Detectives and no email was found in that folder. (Testimony of Grievant and B.O.) Moreover, there was no change entered in on-call coverage in the e-Briefing system. (Employer Exhibit 1, Tab 2.) There is no evidence to suggest Detective J.S. departed from his usual routine of requiring an email from the requesting Detective, entering the change in e Briefing or verifying that notice has been provided to Sergeant B.O.

Further, the Grievant has no independent recollection to serve as the basis for the representation on her grievance report that Detective J.S. was covering her June 24, 2012 on-call. The Grievant asked both Detective D.M. and Detective J.S. if they had covered her on-call time. The fact she asked both Detectives this question contradict the existence of any independent recollection on the Grievant's part. ( Testimony of Everett; Employer Exhibit 1, p. 33.)

Further, The Employer contended the investigation established the Grievant falsely represented she advised Sergeant B.O. of a switch in on-call coverage for June 24, 2012. (Employer Exhibit 1.) On June 19 or June 20, the Grievant asked Sergeant B.O. for clarification on working RPS overtime assignments while serving as the on-call Detective. The Grievant asked, "we can't work RPS when we're on-call, correct?" Sergeant B.O. confirmed a Detective may not work RPS overtime assignments while on-call, but a Detective may work special overtime while on-call. ( Testimony of B.O.; Employer Exhibit 1, Tab 24, Tr. 20, 25-26.) Sergeant B.O. testified unequivocally the Grievant did not advise him of a switch in on-call coverage for June 24. (Testimony of B.O.)

Further, both the Grievant and Sergeant B.O. described the Sergeant as detail-oriented and meticulous about the schedule. The Grievant testified that if she obtained a substitute for her on call coverage, her standard practice was to notify Sergeant B.O. via email and she consistently and regularly followed that practice. (Testimony of Grievant.) The e-Briefing program and

schedule reflect that the Grievant was the on-call Detective on June 24. (Employer Ex. 1, Tabs 2-3.) Sergeant B.O. has no record of receiving notification from the Grievant or anyone else that another Detective was covering the Grievant's June 24 on-call responsibilities. Sergeant B.O. has no recollection of the Grievant informing him someone was covering her June 24 on-call responsibilities. (Testimony of B.O.) He stated, ". . . I can't say for 100%, but I don't remember her ever doing that. And I pretty much remember everything." (Employer Ex. 1, Tab 24, Tr. 34.)

Finally, the Employer contended that the Grievant's statements were false. If the statements were true, there would be a notation in e-Briefing or the schedule and at least some passing recollection by Detective J.S. or Sergeant B.O. None of these things exist.

The Employer contended that the inconsistencies between the Grievant's Garrity statement and her testimony under oath at the grievance arbitration hearing negatively impact her credibility. When arriving at the truth of a matter, Arbitrators consider whether conflicting statements made by a witness ring true or false and will credit or discredit the testimony according to the Arbitrator's impressions of the witnesses' *vera* Employer. (Elkouri & Elkouri, How Arbitration Works (6th ed., 2003), p. 414.) Inconsistencies in the testimony of a witness ordinarily detract from the witness' credibility. *Id.* at 415. The criteria used to determine the credibility of witness testimony include consistency with prior statements made on the same subject in other forums. Safeway Stores, Inc. and Food & Commercial Workers, Local 7, 96 LA 304, 310 (Coyle, 1990). Inconsistency in testimony can render a witness' statements "worthless." Robins Air Force Base and AFGE, Local 987, 90 LA 701, 702 (Byars, 1988) p. 702.

Further the Employer contended that the Grievant was interviewed by Attorney Everett under a Garrity Warning. The Garrity Warning directed the Grievant to provide truthful and complete information. The Grievant read and signed the Garrity warning before Attorney Everett asked her any questions. (Testimony of Grievant; Employer Ex. 1, Tab 36.)

Further, The Grievant testified under oath at the grievance arbitration hearing. The Grievant claimed during her testimony that she did not have a conversation with Lieutenant D.P. on or about June 26, 2012 regarding her time card. The Grievant claimed Lieutenant D.P. was untruthful in his testimony regarding the conversation. The Grievant's testimony directly contradicts her Garrity statement when she described the June 26, 2012 conversation with the Lieutenant as follows:

Q: Okay, and in Lieutenant [D.P.]'s email to you he referenced that you had had a conversation with him the day before, which I assume would have been June 26th?

I'm looking at the second sentence of his message to you.

A: Yep, that would have been Tuesday, yes.

Q: And, can you tell me about that conversation please.

A: I can, I turned in my timecard and I explained to him that I had worked, it would say 90 hours on there, but um, I had already taken a payback day.

(Employer Ex. 1, Tab 36 [Grievant statement), Tr. 43.)

Further, the Employer maintained that during the Grievant's testimony at the grievance arbitration hearing, she claimed she provided notification to Sergeant B.O. that Detective J.S. was covering her on-call responsibilities via email communication. She specifically denied discussing the matter with Sergeant B.O. verbally. The Grievant's testimony directly contradicts her Garrity statement when she described she had two conversations with Sergeant B.O. about changing her schedule and in the second conversation she claimed she informed Sergeant B.O. that Detective J.S. was covering her call time on June 24:

Q: Tell me about that.

A: I went down and I asked Sergeant Owens, I said you know we talked about this, and he said well I don't recall talking about this. And he said he didn't know that Lieutenant Pelkey was going to write me up. This, when he came in and got me it was the first time he knew about it. And I said well, you switched my schedule. I said I talked to you about this. I said I told you that Jim was covering and I asked you if you wanted to switch it in the schedule to show that I wasn't coming in at 8, I was coming in at noon. Because if you look at my schedule, he's the only, well he's not the only one, but sergeants and um the captain and whatever can change it. Usually if you can see here on the 9th and 10th, Saturday Sunday, off. Saturday Sunday off. When I'm on call, I work Saturday and Sunday. It has you down as D1. D1 is usually the hours of 7 to 5.

Q: Okay.

A: My shift is D2. I usually work 8 to 6.

Q: Okay.

A: So when he switched this for me in the computer, I had told him that Jim was covering for me on Sunday and that I wasn't going to be in until noon, and I asked him to switch it in the computer and he said that was fine he didn't need to.

...

Q: Alright. So at some point you went in and talked to Sergeant B.O. about working the three hours of RPS on June 24th.

A: Yes and I, I went in and talked to him about switching my schedule also.

Q: Okay, alright.

A: And he switched my schedule and then when I, Jim told me that he could work for me, and then I went back and told him on Sunday that I would be in at

12 after my overtime detail and he said that was fine. I asked him to switch it in the computer. And he said that was fine, whatever I worked was fine.

(Employer Ex. 1, Tab 36 [Grievant statement], Tr. 56-59) (emphasis added). The Grievant's reliability is further challenged by her contradictory statements within her Garrity interview where she initially described one conversation with Sergeant B.O. and later described two separate conversations with Sergeant B.O. (Testimony of Everett; Employer Exhibit 1, Tab 36 [Grievant statement], Tr. 56-59.)

Further, the Employer maintained that the Grievant testified that she originally asked Detective D.M. to cover her June 24 on-call responsibilities but he informed her he could not. (Testimony of Grievant.) The Grievant's testimony is contradicted by Detective D.M.'s Garrity statement wherein he reported the Grievant only contacting him about this matter after June 24, 2012:

Q: The first conversation would have been her asking you if you had covered the shift, or had agreed to cover the call time.

A: Right, she approached me and asked.

Q: And you said no.

A: Right.

Q: Okay, and in fact you were out of town over the weekend of the 24th.

A: M-hm.

Q: Okay, and then in a later conversation she said something about having sent an email to Owens and Schilling.

A: Yes.

Q: So I've got the sequence correct?

A: Yep.

(Employer Exhibit 1, Tab 34, Tr. 8-9.)

Finally, the Employer maintained that the Grievant's credibility is negatively impacted by the fact she has made inconsistent statements and changed her account of the facts. These inconsistencies seriously undermine the Grievant's credibility.

Fairweather's treatise Practice and Procedure in Labor Arbitration sets forth the principle that proper credibility presumption is against the grievant since the grievant has the most to lose or gain from the proceeding.

Another criterion employed to a large extent by arbitrators, is to assess the motives to be served by the respective witnesses. The following example illustrates the general application of this criterion in a discharge case: G, the grievant, testifies that fact X did not exist. F, the foreman, testifies contra that fact X did exist. Solely on these facts, the testimony of grievant would not be

afforded as much credibility as the foreman's testimony because the grievant would be more likely to perjure himself to save his job. Grievant has more at stake and therefore the motive is greater. The foreman, on the other hand, prima facie, has no motive to testify one way or the other, and presumably would not be inclined to perjure himself. If a strong motive can be shown on the part of the foreman or that the foreman harbors ill-will or malice toward the grievant, the findings more often will be for the grievant.

Fairweather, Practice and Procedure in Labor Arbitration, 238-39 (3rd ed. 1991) (emphasis added) citing 37 LA 912, 914 (Mueller, 1962); School Service Employees Local 284 and Robbinsdale School District No. 281, BMS Case No. 08-PA-374 (Wallin, 1998) ([W]here credibility assessments are necessary to resolve conflicting evidence and contentions in this dispute, as a general matter, the Employer's evidence is entitled to the greater weight.")

Further, The Employer contended that the written reprimand and 4 day suspension of the Grievant Is appropriate. The Grievant's discipline was extremely reasonable. In reaching the decision to issue the written reprimand, Lieutenant D.P considered the repeated instances in which the Grievant had been notified of the restrictions on working RPS overtime assignments while serving as the on-call Detective. In addition to the verbal directives issued by Lieutenant D.P. and Sergeant B.O. in June 2012, these same directives were addressed with all Detectives in early 2012 and twice in 2011. Moreover, in 2008, the Grievant was issued a written counseling memo in which she was reminded working an RPS overtime assignment while on-call is unacceptable. The Grievant was told in order to bid for an RPS overtime assignment, she would need to find another Detective to cover her on-call time and follow proper procedures. (Employer Ex. 2.)

Further, the Employer maintained that the Grievant's discipline was extremely progressive. In reaching the decision to suspend the Grievant for four days, Chief Olson considered the Grievant's prior length of service and record of employment which included a two day (16 hour) suspension for misconduct related to an off-duty DWI. (Employer Ex. 15.) He also considered the financial impact associated with a disciplinary suspension. He intended the discipline to be progressive and constructive in nature and not punitive. For these reasons, the Chief determined to impose a four day suspension and not a longer disciplinary suspension or termination. (Testimony of Olson.)

Further, the B.P.D. noted that another Blaine Police Department employee was issued a four day suspension for misconduct in violation of similar policies including Police Department General Order 300.03 Code of Conduct and Policy 102.6, Integrity, which requires employees to be truthful and avoid

any conduct which might compromise their integrity. (Employer Ex. 14.)<sup>4</sup> Other officers have been terminated for providing false statements. For example, a Mower County deputy was terminated for conduct including falsifying timesheets. Mower County and Law Enforcement Labor Services, Inc., BMS Case No. 11 -PA-0560 (Jacobs, 2011).

Finally, the Employer noted that the Union, in their opening statement, contended the suspension of the Grievant will have a chilling effect on the right to file grievances. There is no allowance in Blaine Police Department policies or the Public Employment Labor Relations Act for a law enforcement officer to make false statements. The right to file a grievance does not provide a law enforcement officer with the right to make false statements. The Grievant did not claim on her grievance report that she "treated unfairly." The Grievant made affirmative representations that were false. An employee's right to file a grievance does not insulate them from disciplinary action for violating Department policies and expectations relative to truthfulness.

Lastly, The Employer argues that the discipline of the Grievant does not constitute disparate treatment as compared to other situations at the Employer of Blaine. The concept of disparate treatment has been described as follows:

Disparate discipline exists when employees engage in the same misconduct under the same or substantially similar circumstances in the presence of the same or substantially similar mitigating factors but are assessed with significantly different penalties.<sup>5</sup>

Continuing, there is no evidence of conduct similar to the Grievant's conduct and the circumstances therein.

The Employer maintained that Detective B.J.'s RPS overtime assignment described in Union Exhibit 9 and Employer Exhibit 13 occurred during the normal duty schedule when other Detectives were working their normal schedule and available to respond to calls. Police Department General Order 369.0 requires the on-call Detective to be available for call outs during periods of time "outside of the normal duty schedule." (Union Ex. 1, p. 1.) There is no evidence Detective B.J. was unavailable for a call out during the time outside of the normal duty schedule. Moreover, there is no evidence Detective B.J. violated a prior written counseling memo or acted contrary to verbal directives given to him by Lieutenant D.P. or Sergeant B.0. (Testimony of Olson.)

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<sup>4</sup> The Union highlighted the fact that this Officer's testimony was found to not be credible during the arbitration over his four day suspension. Union Exhibit 14, p. 23. During the course of this Officer's testimony, he corrected his statements. But for the Officer's self-correction, the Chief would have taken action against the Officer for providing false testimony. Testimony of Olson.

<sup>5</sup> See School Service Employees Local 284 and Robbinsdale Area Schools, BMS Case No. 98-PA-374 (Wallin 1998).

The Employer argues that the Union highlighted a 2010 incident when Detective J.S. allegedly made untruthful statements to Sergeant B.O. and Detective J.S. was not suspended. Sergeant B.O. informed the Employer of this alleged issue for the first time in November 2013 in the weeks immediately prior to the present grievance arbitration hearing. Sergeant B.O. did not at any time alert the Chief or Human Resources to this issue in the three years since 2010. Sergeant B.O. did not provide this information to Mr. Everett during his investigation. (Testimony of B.O.) Upon notification of this issue, the Employer retained the services of outside investigator/Attorney Michelle Soldo in December 2013. Ms. Soldo found the claim that Lieutenant D.P. failed to discipline Detective J.S. for providing false information was not substantiated. (Testimony of Soldo; Employer Ex. 10.)

Ms. Soldo found that in approximately November 2010, Sergeant B.O. had an informal discussion with Detective J.S. about an undocumented verbal complaint regarding remarks Detective J.S. allegedly made to a Police Explorer whom J.S. supervised. Sergeant B.O. did not document his discussion with J.S. Detective J.S. initially told Sergeant B.O. he did not recall the alleged discussion with the Explorer and Sergeant B.O. did not believe J.S. For approximately 45 to 60 minutes, Sergeant B.O. questioned and challenged J.S.; announced he was leaving the room to make a phone call and left J.S. waiting in his office while he called another Sergeant to report that J.S. was lying; and Sergeant B.O. returned to his office and threatened to report the matter to Chief and/or start an administrative investigation. At that point, Detective J.S., who reportedly had no reason to doubt the Explorer's account, said he might have had the alleged discussion with the Explorer. (Employer Ex. 10.)

When Sergeant B.O. called the other Sergeant and told him he believed J.S. lied to him, the Sergeant advised B.O. to place J.S. on paid leave for the remainder of the day and discuss the matter with the Chief. By his own account, Sergeant B.O. did not place J.S. on leave or talk to the Chief. Instead, Sergeant B.O. talked to Lieutenant D.P. The next day, Sergeant B.O. and Lieutenant D.P. met with J.S. and discussed J.S.'s alleged conduct. J.S. was verbally directed to refrain from engaging in the alleged conduct in the future and both J.S. and B.O. considered the matter resolved. (Testimony of Soldo; Employer Ex. 10.)

Sergeant B.O. believed J.S.'s conduct warranted a documented verbal counseling or written reprimand. The record indicates that J.S. received an undocumented verbal counseling and he resigned from his Explorer Advisor post. Sergeant B.O. did not document the verbal counseling and he concluded

the matter was resolved at that time. (Testimony of Soldo; Employer Exhibit 10.) As a Sergeant, B.O. has the independent authority to suspend an employee without pay for up to five days. (Employer Ex. 20.) Sergeant B.O. in exercising his authority to discipline, decided to issue J.S. an undocumented verbal counseling.

Finally, the Employer contends a four day disciplinary suspension is appropriate for the Grievant's offenses. The Employer, in noting relevant arbitral precedent, argues that It is an accepted principle in labor relations that unless the discipline imposed by management is arbitrary, capricious or discriminatory, a grievance arbitrator should not substitute his judgment for that of the employer,<sup>6</sup> The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved – in other words, where there has been abuse of discretion.

The Employer responds to the Union's argument that Lieutenant D.P. does not like the Grievant and is out to get the Grievant suspended or terminated was not supported by the record. The Lieutenant did not suspend or terminate the Grievant; the Lieutenant only discipline imposed is the July 10, 2012 written reprimand. (Joint Ex. 2.) The Lieutenant was not involved in the decision to utilize the services of outside investigator/Attorney Everett to investigate the claims against the Grievant nor did the Lieutenant reviewed Mr. Everett's investigation. Chief Olson made the decision to issue a four day suspension to the Grievant and Lieutenant D.P. was not involved in the decision in any way. (Testimony of Olson and D.P.)

Continuing, the Grievant has previously made claims against Lieutenant D.P. The Employer retained the services of outside investigator/Attorney Fran Sepler to investigate 13 separate allegations of retaliation and reprisal made by Grievant. Many of the claims made by Grievant in this proceeding have been previously made and investigated. The Sepler investigation extended over four months, included interviews with 12 separate witnesses and the review of numerous documents. Ms. Sepler concluded that Grievant has been treated in an excessively lenient manner and the times when she was treated more harshly than other Detectives for failing to answer her phone, she did not receive any discipline or work-related consequences. (Employer Exhibit 17.)

Sergeant B.O. testified regarding a March 6, 2013 alleged confrontation with Lieutenant D.P. The Employer contended the these arguments are a transparent attempt to distract attention

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6. This view was expressed in Great Atlantic and Pacific Tea Co., Inc., 71-2 ARB ii8564:

away from the misconduct of the Grievant. Ms. Soldo's December 2013 investigation included inquiry into Sergeant B.O. allegations regarding D.P.'s treatment of him . .See Stipulation of Parties.

(Employer Ex. 1, tab 24, Tr. 34-36)

Further, Sergeant B.O. testified at the hearing that the Grievant did not advise him of a substitution in the June 24 on-call coverage. He has never allowed a Detective to work RPS overtime assignments while on-call even if another Detective was covering the on-call. In 2012, the Grievant was insisting that everything be communicated via email and he was saving all emails from the Grievant and found no email in his archive folder regarding a notice of change in coverage. After the July 10, 2012 disciplinary meeting in which the written reprimand was imposed, the Grievant came into B.O. 's office and claimed she had previously informed him someone was covering her on call. Sergeant B.O. informed D.P., the Grievant had made a "blatant lie." (Employer Exhibit 18.) Sergeant B.O. believed the Grievant was not being truthful. (Testimony of B.O.) Sergeant B.O.'s testimony in this regard included statements of fact and not "opinions."

Further, Lieutenant D.P. characterized his relationship with Sergeant B.O. since March 2013 as a "divorce." Both D.P. and J.S. question B.O.'s motives in raising these issues now as it relates to their own attempts to seek promotion and other employment. Regardless of the Union's efforts to distract attention away from the Grievant's conduct and any conflicts B.O. may have with D.P., the March 2013 meeting between D.P. and B.O. does not change the facts in the present matter.

For, all the above reasons, Employer contends that it has fairly investigated the matter before assessing the penalty, and has met its burden of proof that the Grievant committed the alleged conduct, the arbitrator should not interfere with the employer's determination of the penalty.

### **B. Union's Argument**

The Union's argument began with the claim that the Grievant 's written reprimand received on July 10, 2012 was not for "just cause" as articulated in Enterprise Wire Co. and Enterprise Independent Union, ; "The Seven Key Tests" from the Enterprise Wire.<sup>A</sup> are:

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A. Arbitrators have frequently adopted the seven-element test for just cause articulated in Enterprise Wire Co. and Enterprise Independent Union, 46 LA 359 (1966)(Daugherty, Arb.). See also Koven & Smith, Just Cause: The Seven Tests, 2nd ed. (1992).

1. **Notice:** Did the employer give the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?
2. **Reasonable rule and order:** Was the employer's rule reasonably related to business efficiency and the performance the employer might reasonably expect from an employee?
3. **Investigation:** Did the employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. **Fair investigation:** Was the employer's investigation conducted fairly and objectively?
5. **Proof:** At the investigation, did the decision-maker obtain substantial evidence or proof that the employee was guilty as charged?
6. **Equal treatment:** Has the employer applied the rules, orders, and penalties evenhandedly and without discrimination to its employees?
7. **Penalty:** Was the degree of discipline administered by the employer 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 employer?

The Union argues that this Arbitrator has explicitly endorsed the seven tests from *Enterprise Wire* as an appropriate standard for just cause. [T]he Seven Key Tests, in the form of questions, represent the most specifically articulated analysis of the just cause standard as well as an extremely practical approach. A 'no' answer to one or more of the questions means that just cause either was not satisfied or at least was seriously weaken[ed] in that some arbitrary, capricious, or discriminatory element was present."

The Union, continues, based on the evidence in the record, it is clear that there are several of the elements of the Seven Tests for just cause that the Employer cannot satisfy with respect to the Written Reprimand given to Grievant on July 10, 2012. The Union identified and addressed the elements most likely to support the Union's arguments.

1. Lack of notice

"Even if [an] arbitrator finds that a rule complies with the collective bargaining agreement and is for a lawful objective, the arbitrator may find [that] the employees or the union were not adequately notified of the rule or the consequences of a violation. . . . A rule will not be enforceable

unless the employee has either actual or constructive notice of that rule," Brand, *Discipline and Discharge in Arbitration* 77-78 (1998). "Just cause requires that employees be informed of a rule, infraction of which may result in suspension or discharge, unless conduct is so clearly wrong that specific reference is not necessary." *Id.* at 395.

In this case, the supposed reason for Grievant's written reprimand is that she worked an RPS overtime shift on June 24, 2012 without arranging for another Detective to cover her on-call duties, and without notifying her supervisor of the change. In assessing whether there was sufficient notice of the rules regarding RPS overtime for On-Call Detectives, it should be first be noted that at the time in question, communication within the Investigations unit was very poor: not only did Grievant and D.P. generally avoid each other, but there was what B.O. described as a "six-way divide" within the unit as a whole, (Testimony of Grievant; Testimony of B.O.) In their meeting with Grievant on October 23, 2012 to discuss issues with her work performance, both D.P. and B.O. acknowledged serious communication problems among the Detectives and their supervisors. (Union Ex. 3.)

Furthermore, inasmuch as there are any rules governing RPS overtime for On-Call Detectives, the record shows that B.P.D. supervisors and Employer administrators cannot agree on what those rules actually are. It necessarily follows that those rules have never been clearly or consistently communicated to Grievant and the rest of the Detectives. With rules that are neither clearly stated nor clearly understood, there has been neither actual nor constructive notice of the consequences of Grievant's alleged conduct for purposes of discipline.

The official policy for On-Call Detectives makes no mention whatsoever of RPS overtime shifts. (Union Ex. 1.) In the absence of a written policy, the Police Department supervisors have significantly different understandings of whether and under what circumstances On-Call Detectives are allowed to work RPS shifts. The July 29, 2008 memorandum from Lt. Szykulski stated that an On-Call Detective may work RPS overtime, as long as he or she has arranged for another Detective to cover his or her on-call duties. (Employer Ex. 2.) D.P., the Lieutenant in charge of the Investigations unit, described the rule the same way in his statement to Mr. Everett and in his testimony at the arbitration hearing. (Statement of D.P., pp.11-13; Testimony of D.P.) Yet B.O., who was the Detective Sergeant and Grievant's direct supervisor at the time in question, told Mr. Everett and testified at the hearing that an On-Call Detective is not allowed to work RPS shifts *at all*, regardless of whether another Detective agrees to cover the on-call duties. (Statement of B.O., pp. 19-21; Testimony of B.O.) B.O. testified that he was informed of this rule by D.P. and Detective Tom Johann when he first became Detective Sergeant in 2011. (Testimony of B.O.) Mr. Everett noted in his

investigative report that D.P. and B.O., the two supervisors with direct authority over the Investigations unit, had "varying understandings" of the restrictions on On-Call Detectives working overtime. (Investigation Report, p.28.)

Similarly, Employer Human Resources Director Terry Dussault testified at his deposition in Grievant's federal lawsuit that "there's a written directive that says that you can't sign up for RPS when you're on call." (Union Ex. 11.) The record is unclear what "written directive" Mr. Dussault was referring to, given that, noted discussed above, the On-Call Detective policy contains no such provision. (Union Ex. 1.) Moreover, Mr. Dussault made no mention of On-Call Detectives being allowed to work RPS shifts if they arrange coverage for their on-call duties indicating that his understanding of the rule was similar to B.O.'s, and significantly different from Lt. Szykulski's and D.P.'s.

The police supervisors are not even able to agree on when a Detective is in on-call status. In his deposition testimony in Grievant's federal lawsuit, Chief Olson stated that he did not "know of any other officers [who] have been found to work RPS overtime while on call," without coverage from another Detective, (Union Ex. 12.) But at the arbitration hearing, the Union proffered evidence that Detective B.J. had worked RPS shifts during his on-call week on July 18 and 20, 2012, without another Detective covering his on-call duties, and that B.J. had not been investigated or disciplined for this conduct. (Union Ex. 9; Employer Ex. 1, Tab 16; Testimony of Grievant.) When confronted with this evidence, D.P. could offer no explanation. (Testimony of D.P.) Yet on rebuttal, Chief Olson testified that B.J. had not violated policy, because he worked these RPS shifts during weekday office hours, when On-Duty Detectives are available to answer calls. (Testimony of Chief Olson) This distinction — between weekday office hours and other days and times of the week -- contradicts the plain language of the On-Call Detective policy, which provides that on-call status runs continuously from 0800 hours on a Monday to 0800 hours the following Monday, without interruption. (Union Ex. 1.) Chief Olson's testimony also contradicted Lt. Szykulski's 2008 memorandum, in which Grievant was criticized for bidding to work four RPS overtime shifts during her on-call week; Lt. Szykulski termed this "unacceptable," even though the shifts that Grievant was scheduled to work — like B J.'s shifts in July 2012 — fell during weekday office hours. (Employer Ex. 2; Testimony of Grievant.)

In issuing her a written reprimand, the Employer accused Grievant of violating a rule that governs On-Call Detectives working RPS overtime -- yet taken together, the facts above show that that rule has been a "moving target," and has not been properly communicated to Grievant and the other Detectives. The written reprimand therefore fails for lack of notice, a basic element of just cause.

## 2. Lack of fair investigation

The Union continues, Section 10.6 of the labor agreement states that "[e]mployees will not

be questioned concerning an investigation of disciplinary action unless the employee has been given an opportunity to have a Union representative present at such questioning," (Joint Ex. 1.) This mirrors the well-known "*Weingarten* rule," which provides that a unionized employee has a right to Union representation whenever she is being asked questions that she reasonably believes could result in discipline, (*NLRB v. J Weingarten, Inc.*, 420 U.S. 251 (1975)) D.P. blatantly violated this rule when he summoned Grievant to his office on July 10, 2012 and confronted her about the RPS shift that she had worked during her on-call week on June 24. D.P. compounded this violation of Grievant's rights by recording the meeting without her knowledge, (Employer Ex. 1, Tab 21; Testimony of D.P.) These are not insignificant points, because the transcript of that meeting — at which Grievant was secretly recorded and neither offered nor afforded Union representation — eventually became an attachment to Mr. Everett's investigative report and one of the Employer's primary exhibits in this case. (Employer Ex. 1, Tab 21.)

D.P.'s conduct in confronting Grievant about the RPS overtime issue without offering her Union representation and without notifying her that the meeting was being recorded is especially troubling in light of D.P.'s longstanding animosity toward Grievant, going back to at least 10 years ago, when he told Grievant that he did not like her and did not know how to supervise her. The only reasonable conclusion is that the Employer's investigation in the present case was not fair or objective.

### 3. Lack of proof

The Union continues, throughout the Internal Affairs investigation and the grievance proceeding, Grievant has steadfastly maintained that she arranged for J.S. to cover her on-call duties during the RPS shift on June 24, 2012, and that she notified her direct supervisor, B.O., of this scheduling change. (Testimony of Grievant) Although J.S. and B.O. do not recall this taking place, there is still insufficient evidence to prove that Grievant worked the RPS overtime without coverage, as the Employer alleges.

The Employer contends that Grievant admitted her wrongdoing in her emails to D.P. on July 10, 2012, and during her secretly recorded meeting with D.P. later that day. (Employer Ex. 1, Tabs 5-7, 21.) But in fact, as Grievant stated repeatedly during the investigation and at the arbitration hearing, until she received the written reprimand, *she did not know what D.P. was talking about.* (Testimony of Grievant) Grievant returned from a two-week vacation to find an email from D.P., in which he raised concerns about "traffic OT" on her timecard, but did not bother to specify what date or which event she was referring to. (Employer Ex. 1, Tab 5.) Grievant had worked numerous overtime shifts during the weeks prior to her vacation, including several that included traffic duties, and as a result was understandably confused by D.P.'s email. (Employer Ex. 1, Tabs 9 and 13;

Testimony of Grievant) She testified that she initially assumed that D.P. was referring to the Joyful Noise concert — an explanation borne out by her statement in one of her emails she "worked the event with [B.O.]," because Grievant and B.O. had in fact worked at the Joyful Noise concert together. *Id.*; (Employer Ex. 1, Tab 5.) Grievant described the Joyful Noise event in her emails as Special overtime, but later checked the overtime list and realized that the event was actually classified as RPS overtime; this was the "honest mistake" that she referred to at the meeting in D.P.'s office. *Id.*; (Employer Ex. 1, Tabs 6 and 21.) Contrary to the Employer's arguments, these statements were not, and should not be construed as, admissions that Grievant worked the June 24 RPS shift without arranging coverage for her on-call duties.

The Employer also contends that Grievant did not send emails to J.S. and B.O. to confirm the June 24, 2012 scheduling change. It is true that these emails could not be retrieved. However, the record shows that by the time Grievant inquired about these emails on July 10, 2012, after receiving her written reprimand from D.P., at least 20 days had elapsed since she recalls sending the emails. (Testimony of Grievant; Employer Ex. 1, Tab 12.) Both J.S. and B.O. have a practice of regularly deleting emails from their in boxes, in order to avoid running over the data storage limits placed on them by the Employer's IS department. (Testimony of J.S. and B. O.) Notably, the Employer does not dispute that B.O. approved Grievant working her regular straight-time shifts during the weekend of June 23-24, 2012; yet B.O. was unable to find the email that Grievant sent him confirming this change either. (Testimony of Grievant) Moreover, deleted emails are maintained on the Employer server for 7 to 10 days, but are irretrievable after that; this means that, had Grievant's emails to J.S. and B.O. been deleted, by the time Grievant approached the IS department about those emails on July 10, they would no longer have been retrievable. *Id.*; (Testimony of Everett) IS staff acknowledged to Mr. Everett that they "were not able to determine with certainty that their efforts at recovering emails would have produced messages [Grievant] may have sent during the timeframe at issue." (Investigation Report, p.25, fn.16.) Grievant has consistently asserted that she sent those emails, and the Employer has been unable to prove otherwise.

Finally, the Employer contends that the change in on-call coverage on June 24, 2012 could not have been approved, because it was not entered into the E-Briefing system. (Employer Ex. 1, Tab 3.) But two other Detectives told Mr. Everett that prior to June 2012, when an On-Call Detective made arrangements for another Detective to cover on-call duties for a short period of time, that change typically was not entered into E-Briefing. (Statement of Det. Johann, pp.5-6; Statement of D.M, p.6.) (This came as a complete surprise to D.P., the Lieutenant in charge of the Investigations unit.

(Testimony of D.P.) Therefore, the fact that the change in on-call coverage on June 24, 2012 was not entered into E-Briefing is of no probative value.

#### 4. Unequal treatment

"Arbitrators recognize that proper discipline requires consistency in rule enforcement. Consistency requires that rules be enforced evenhandedly and without discrimination.. . All employees who engage in similar acts of misconduct should receive the same degree of discipline unless some reasonable basis exists for different treatment." *Discipline and Discharge in Arbitration* at 80-81. As discussed above, evidence shows that Detective B.J. engaged in the same conduct for which Grievant received her written reprimand — namely, working an RPS shift during his on-call week, without arranging for another Detective to cover his on-call duties. In fact, B.J. did this twice, on July 18 and 20, 2012. (Employer Ex. 1, Tab 16; Union Ex. 9) Yet B.J. was not investigated or disciplined for violating policy in this regard. (Testimony of Chief Olson; Testimony of D.P.)

The Employer cannot claim that it was unaware of B.J.'s conduct, because Grievant's Union representative made Mr. Everett aware of that conduct and provided documentation to Mr. Everett during Grievant's formal statement. (Statement of Grievant, pp.90-91) Mr. Everett included the documentation in the investigative record, but considered B.J.'s conduct beyond the scope of his investigation and did not make any further inquiries. (Employer Ex. 1, Tab 16; Testimony of Everett) Grievant also put the Employer on notice of B.J.'s conduct during her deposition in her federal lawsuit on March 19, 2013, when she stated under oath that she was "aware of male officers who have engaged in similar conduct and have not been disciplined." (Union Ex. 10.) The Employer's only explanation for this inconsistent enforcement was Chief Olson's rebuttal testimony that B.J. had worked his RPS shifts during weekday office hours. (Testimony of Chief Olson) For reasons already discussed, this explanation fails because the distinction between weekday office hours and other days and times of the week contradicts both the terms of the On-Duty Detective policy and the testimony of other police supervisors. (Union Ex. 1; Employer Ex. 2; Testimony of D.P.)

#### B. There is No Just Cause for the Four-Day Unpaid Suspension

The Union continues that the Grievant received a four-day (32-hour) unpaid suspension for grieving her written reprimand. (Joint Ex. 1a) For the reasons set forth above under the seven-test *Enterprise Wire* standard, the reprimand grievance was entirely valid and should be sustained; it follows that the four-day suspension should also be struck down. However, there are also several independent reasons why the four-day suspension clearly was not supported by just cause.

1. Public policy, the Union argues further why the 32-hours unpaid suspension was not supported by just cause. It is the codified public policy of the State of Minnesota "to promote orderly and constructive relationships between all public employers and their employees." Public Employment Labor Relations Act (PELRA), Minn. Stat. § 179A.01(a). In accordance with this public policy, it is recognized that "[u]nresolved disputes between the public employer and its employees are injurious to the public as well as to the parties," and that "[a]dequate means must be established for minimizing [such disputes] and providing for their resolution." Minn. Stat. § 179A.01(c). In this case, the labor agreement between the Employer and the Union includes a detailed, multi-step grievance procedure, as required under PELRA. Minn. Stat. § 179A.20, Subd. 4; (Joint Ex. I) This procedure demonstrates an agreement by the parties that if an employee files a grievance to challenge an action taken by the Employer, the Employer will have the opportunity to defend the merits of its action through the steps of the process, up to and including arbitration. It is understood that if the Employer's action is justified and complies with the terms of the contract, that action will be upheld.

After receiving her written reprimand on July 10, 2012, Grievant filed a grievance to challenge it; the Employer denied the grievance, asserting that the reprimand was supported by just cause and therefore complied with the labor agreement. (Joint Exs. 3-8) The dispute over the merits of that written reprimand -- whether Grievant violated policy as described in the reprimand, and whether the reprimand was an appropriate form of discipline -- is one of the issues now properly before the Arbitrator. Yet instead of relying on the agreed-upon grievance procedure to resolve that dispute, the Employer took the extraordinary step of giving Grievant *additional* discipline, namely, the four-day (32-hour) unpaid suspension. (Joint Ex. 1a) Even more incredibly, according to B.O.'s testimony, D.P. wanted to terminate Grievant in retaliation for filing her grievance. (Testimony of B.O.) To the Union's knowledge, it is unprecedented for an employer to impose additional discipline because the employer disagrees with the content of an employee's grievance. Mr. Everett, a former licensed peace officer and highly experienced investigator who has participated in dozens of Internal Affairs investigations, testified that he has never seen such a disciplinary action before. (Testimony of Everett). Similarly, Grievant's Business Agent, Dennis Kiesow, filed a Declaration in Grievant's federal lawsuit stating that in his 15-plus years as a Business Agent, no other officer has been disciplined based on the content of a grievance. (Union Ex. 13)

The Arbitrator should be very concerned by the chilling effect that the Employer's action is likely to have on Union members' exercise of their contractual rights: if those employees know that grieving a disciplinary action could result in additional discipline — simply because the Employer disagrees with the

stated reasons for the grievances — this will naturally discourage the employees from filing such grievances. It is self-evident that this will not promote an orderly or constructive relationship between the Employer and the Union or minimize disputes between the parties, as public policy requires. No matter what the Arbitrator decides regarding the merits of the underlying written reprimand, the Employer cannot be allowed to impose additional discipline under these circumstances.

2. Lack of proof. The Union argues further. In *Employer of Oakdale and Law Enforcement Labor Services, Inc.*, BMS Case No. 09-PA0836 (Orman 2009), the grievant was accused of lying to his supervisors about failing to complete a theft report. In analyzing the evidence in that case, Arbitrator Orman noted that lying is a "stigmatizing behavior" for a law enforcement officer; accordingly, instead of the "preponderance of the evidence" standard applicable in ordinary discipline cases, Arbitrator Onnan applied the higher "clear and convincing evidence" standard. *See also* Elkouri & Elkouri, *How Arbitration Works* 949-952 (6 ed. 2003); *SuperValu, Inc. and International Brotherhood of Teamsters, Local 120*, BMS Case No 10-RA-0104 (Scoville 2010). In the present case, the notice of suspension given to Grievant states unequivocally that Grievant made false statements in her Grievance Report. (Joint Ex. 10.) Chief Olson acknowledges that for Grievant to have such a finding in her employment record has very serious implications for her law enforcement career, particularly under the Brady/Giglio rule.<sup>7</sup> (Testimony of Chief Olson) Accordingly, because the allegation of making false statements is highly stigmatizing, the Employer must be required to prove that allegation by clear and convincing evidence.

As discussed in detail above, the Employer has not proffered sufficient evidence to prove that Grievant worked the June 24, 2012 RPS overtime shift without coverage for her on-call duties, and without notifying her supervisor. Even assuming, for the sake of argument, that Grievant committed these violations, it is entirely possible that she remembered these events differently when she completed the Grievance Report — that is, after returning from her two-week vacation and receiving the written reprimand, she may have sincerely believed that she *had* arranged coverage of her on-call duties during the RPS shift, even if this turned out not to be the case. If the Arbitrator determines that

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<sup>7</sup>Under the U.S. Supreme Court decisions in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), a criminal prosecutor must disclose exculpatory evidence to the defendant, including evidence bearing on the credibility of prosecution witnesses.

this is what happened, then there cannot be just cause for the four-day suspension, because Grievant was not knowingly or deliberately untruthful. *See Clay County and Law Enforcement Labor Services, Inc.*, BMS Case #13-PA-0118 (Lundberg 2013)(where Deputy made statements during his statement later shown to be inaccurate, but a credible explanation was provided, there was "no reason to believe that [he] was lying"). It is also important to note that Grievant has no documented history of untruthfulness. (Testimony of Chief Olson) Ultimately, the Employer cannot prove by clear and convincing evidence that Grievant made untruthful statements on her Grievance Report.

3. Unequal treatment. The Union maintains that recently, in *Employer of Blaine and Law Enforcement Labor Services, Inc.*, BMS Case #12- PA-1103 (Bognanno 2013), the same parties to the present case arbitrated over a suspension given to an officer for his handling of an impounded vehicle. In his award, Arbitrator Bognanno ruled that the officer's sworn testimony concerning the impounding procedure and documentation was "not credible". The Employer contends in the present case that it has the right to discipline employees for untruthfulness, regardless of the format or venue in which that untruthfulness appears — yet despite Arbitrator Bognanno's finding that the grievant had been "not credible" (*i.e.*, untruthful) under oath, the Employer gave that officer no additional discipline. This further demonstrates that Grievant has been singled out and subjected to unequal treatment for her alleged misconduct.

Finally, noting the arguments set-forth above, The Union concluded that the Grievant's written reprimand was without just cause and therefore violated the terms of the labor agreement. The reprimand should be reversed and removed from Grievant's file. The Grievant's four day (32-hour) unpaid suspension was also without just cause and in violation of the terms of the labor agreement. The suspension should be reversed, and Grievant should be made whole in all respects.

### **DISCUSSION & OPINION**

The Union argues that the Grievant's written reprimand received on July 10, 2012 was not for just cause and the Employer cannot satisfy the just cause standard of the Seven Key Tests, which is in the form of seven key questions. A "no" answer to one or more of the questions means that just cause either was not satisfied or at least was seriously weakened in that some arbitrary, capricious, or discriminatory element was present. The Union argues in it's post-hearing brief that the Seven key Tests Standard were not satisfied with respect to the written reprimand, and not satisfied with respect to the 32 hours suspension from duty without pay. The Arbitrator will analyze and opine the evidence under

the Seven Key Tests Standard for both grievances based upon clear and convincing evidence.

First, the Union argues that the Grievant or Union were not adequately notified of the rule or the consequences of a violation. The Grievant admitted during the AI investigation that she had full knowledge of her responsibilities to obtain substitute coverage for her on-call responsibilities before bidding on overtime assignments and to notify the sergeant of the substitution in coverage. The Grievant admitted understanding these requirements and her responsibilities as the on-call Detective. It is the Arbitrator's opinion that the Grievant knew the rules and had both actual and constructive notice of the consequences of Grievant's conduct. In 2008 the Grievant was reminded by directives and a written counseling memo regarding her conduct that is unacceptable in working a RPS overtime assignment while on-call. The memo stated a RPS job could be worked while the Detective is "on-call" if that Detective could find another Detective to switch with so the shift was covered. The undersigned opines that the Employer has satisfied this Notice requirement.

Second, The Union argues that there was a lack of fair investigation, and a violation of Article 10.6 of the CBA when the Grievant was summoned to Lt. D.P. office on July 10, 2012 and confronted her about the RPS shift she worked on July 10, 2012. Based on a review of the Grievant's timesheet, Lt. D.P.'s was concerned the Grievant may have worked an RPS overtime job on June 24, 2012 without securing coverage for her on-call time. On June 27, 2012 in roll call, all of the other Detectives reported to Lt. D.P. that they did not cover the Grievant's June 24, 2012 on-call. Lt. D.P. asked the Grievant via email correspondence if she arranged for someone to cover her on-call. The Grievant responded to Lt. S.P. inquiry and ultimately stated it was her error. Lt. D.P. then issued the Grievant upon arrival at Lt. D.P. office. She took and read the letter of reprimand while standing in Lt. D.P.'s office. The undersigned opines that the Grievant was surprised and left Lt. D.P.'s office to file a grievance. There was no violation of Article 10.6 of the CBA. The undersigned continues to opine that the Employer did make an effort to discover whether the Grievant did in fact disobey a rule of management before administering the discipline to the Grievant, and the Employer's investigation was conducted fairly and objectively. The undersigned opines that the Employer did have proof at the investigation that the Grievant was guilty as charged. Employer has satisfied the third, fourth, and fifth requirements of the of the Seven Tests standard.

The Union argues there was unequal treatment because Det. B.J. had not been investigated or disciplined for working a RPS shift during his on-call week on July 18, and 20, 2012, without another Detective covering his on-call duties was misplaced. Chief Olson testified at the arbitration hearing,

that Det. B.J. had not violated policy, because he worked these RPS shifts during weekday office hours, when On-Duty Detectives are available to answer calls. The undersigned opine that the Employer applied the rule evenhandedly and without discrimination to its employees, and also has satisfied the sixth requirement of the Seven Tests standard.

Third, The Union argues there was insufficient evidence to prove that the Grievant worked the RPS overtime without coverage, as the Employer alleges. Following an exhaustive and documented B.P.D. contracted with an independent internal affairs investigation/Attorney Bill Everett; the Grievant signed a Garrity Warning before being interviewed by an independent investigator. By signature, she promised to be truthful and complete in the information she imparted.; further, the Grievant testified under sworn oath at the arbitration hearing. nevertheless, the Grievant testimony was found not credible and not plausible that, as the Grievant had steadfastly maintained, she had arranged for Det, J.S. to cover her on-call duties during the RPS shift on June 24, 2012, and that she notified her direct supervisor, Sgt. B.O., of the scheduling change. The AI investigations established that the testimonies of the Employer 10 witnesses were creditable when they denied agreeing to coverage of the Grievant's call outs, and denied that she had notified her superior about the change in scheduling. The undersigned opines it's reasonable to conclude that the Grievant had no proof of independent documents to support her assertions. The Employer satisfied the above element of the Seven Tests standard.

Fourth, the Union argues that there was unequal treatment of the Grievant when the Employer did not discipline Det. B.J. for engaging in similar conduct as the Grievant. The concept of disparate treatment exist when employees engage in the same misconduct under the same or substantially similar circumstances in the presence of the same or substantially similar mitigating factors but are assessed with significantly different penalties. There is no evidence of conduct similar to the Grievant's conduct and circumstances. Chief Olson testified at the arbitration hearing that Det. B.J. RPS overtime assignment occurred during the normal duty schedule when other Detectives were working their normal schedule and available to respond to calls. General Order 369.0 requires the on-call Detective to be available for call outs during periods of time "outside of the normal duty Schedule." There is no evidence that Det. B.J. was unavailable for a call out during the time outside of the normal duty schedule;that he violated a prior written counseling memo or acted contrary to verbal directives given by Lt. D.P. or Sgt. B.O.. The Employer had satisfied the Fair Investigation element.

Fifth, the Union, finally, argues that there is no just cause for the four-day unpaid

suspension for grieving her written reprimand for reasons set forth under the Seven-Tests Enterprise Wire standard, and other independent reasons of Public Policy, Lack of Proof and Unequal treatment. The Union cited the PELRA and argues the purpose of PELRA is to promote orderly and constructive relationships and minimize disputes between all public employers and their employees through the grievance procedure. That employees would be naturally discourage from filing such grievances if the employees know that grieving a disciplinary action could result in additional discipline simply because the Employer disagrees with the stated reasons for the grievances, and that the Arbitrator should be very concerned by the "chilling effect" that this Employer's action is likely to have on Union members of their contractual rights. Also, that the Employer should not be allowed to impose additional discipline under these circumstances. The undersigned opine that there is no allowance in B.P.D. polices or PELRA for law enforcement officer to make false statements. The right to file a grievance does not provide a law enforcement officer with the right to make false statements, nor insulate them from disciplinary action for violating B.P,D policies and expectations relative to truthfulness. The Grievant did not claim on her grievance report that she was "treated unfairly." The Grievant make affirmative representations that were false. The undersigned opines that the Employer has satisfied the Public Policy purpose to promote orderly and constructive relationships between all public employers and their employees.

Next the Union, in citing the City of Oakdale (Orman 2009) Grievance, argues that lying is a "stigmatizing behavior" for a law enforcement officer; accordingly, instead of the "preponderance of the evidence" standard applicable in ordinary discipline cases, the Arbitrator should applied the higher "clear and convincing evidence" standard. accordingly, the Employer has not proffered sufficient evidence to prove that Grievant worked the June 24, 2012 RPS overtime shift without coverage for her on-call duties, and without notifying her supervisor. The Union argues that the Grievant returning from her two-week vacation and receiving the written reprimand, she may have sincerely believed that she had arranged coverage of her on-call duties during the RPS shift, even if this turned out not to be the case. If the Arbitrator determines that this is what happened, then there cannot be just cause for the four-day suspension, because the Grievant was not knowingly or deliberately untruthful. The Grievant was the subject of AI investigation by an independent investigator that did a thorough and complete investigation, the Grievant signed the Grievance Report, and, in the course of the AI, The Grievant acknowledged understanding the content of that Grievance Report. At no time did the Grievant make a claim at the hearing that the investigation was not thorough and complete, that it was in any way

biased. The Investigator determined that the Grievant's representation that Det. J.S. covered her call time on June 24, 2012 was false, and the Grievant's representation that she had notified Sgt. B.O. of the change in the on-call coverage was false. The undersigned opines that there is no evidence in this record to support the Union's argument that Grievant was "not knowingly or deliberately untruthful. also, the Clay County Case is distinguishable from the present grievance case. In the present case, the Grievant's representation was later shown to be "false," but no credible explanation was provided, as oppose, to the Clay County Case where the Deputy's statement was later shown to be "inaccurate," but a credible explanation was provided.

The written reprimand and the 32 hours suspension without pay were issued because of alleged violations of the following General Orders and Policies:

A. B.P.D.s General Orders 369.01 F., "Detective on-call General Provisions," 328.03, "Employee Obligations," 102.8, "Compliance with Lawful Orders," and 102.10, "Attention to Duty" and 102.6, "Integrity" were the General Orders and and Personal Conduct policies that the Employer argues the Grievant allegedly violated when she signed and submitted time sheet for the pay period of June 18, 2012 through July 1, 2012 that showed the Grievant had worked a RPS overtime on June 24, 2012 from 0900-1200. Its the Arbitrator's opinion that these General Orders and Policies applied to the Grievant. During that time period the Grievant was the on-call detective and had no independent recollection<sup>a</sup> of making arrangements with anyone to cover her assigned duties as required. The Grievant, in the opinion of the undersigned, failed to substantiate that anyone had been available, willing and agreed to cover for the Grievant. An A.I. investigation determined that the Grievant representations of obtaining coverage and notifying her supervisor were false. Its the opinion of the undersigned, the Employer has proven that the Grievant's conduct violated the above General Orders and Policies for following reasons:

The two (2) General Orders 369.01 F, and 328.03 established the requirements that the Grievant is responsible to be present and ready to perform the duties at their designated place of duty at the time assigned, and required the on-call Detective to be available for call outs during periods of time outside of the normal duty schedule. In the opinion of the Arbitrator, both General Orders applied to the Grievant. Although no call outs were required, the Grievant could not leave the RPS overtime event

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<sup>a</sup>The Grievant maintained the she had Det. J.S. to cover the June 24 on-call assigned duties. Det. J.S., however, did not agree to cover the Grievant's call time on June 24, 2012. In this regard, arbitral notice is made of the fact that the record is replete with contradictory statements by the Grievant that she could not recall who she had to cover her assigned duties, However, by the 'process of elimination' she reasoned it had to be Det. J.S. Arbitrator review of the record discloses the Grievant's above representation is not creditable.

until it was completed. This resulted in the Grievant being physically "unavailable" to respond to callbacks to duty. Its the opinion of the undersigned that the Employer has proven the Grievant's conduct violated the above General Orders.

B.P.D. policy 102.8, "Compliance with Lawful Orders," is necessary because unquestioned obedience of a superior's lawful command is essential for the safe and prompt performance of law enforcement operations....If there is a willful disregard of lawful orders, commands, directives, or policies, retraining of personnel and /or disciplinary action may be necessary. The Grievant admitted having full knowledge of her responsibilities to obtain substitute coverage for her on-call responsibilities before bidding for an RPS overtime assignment and to notify the Sergeant of the substitution in coverage. In the opinion of the Arbitrator, policy 102.8 applied to the Grievant because Sgt.B.O. told the Grievant that she could work Special OT and not RPS. also, several days before working the RPS event Lt. D.P. told the Grievant that she could work special OT and Not RPS. At the start of 2012 in a meeting where all of the detective were present, Sgt. B.O. and Lt. D.P. covered in detail when the on-call detective is working they cannot work RPS, only Special OT. Lt. Johnson informed Lt. D.P. when he was overseeing the Investigations Division prior to Lt. D.P. taking over in 2011 that Lt. Johnson reminded the Grievant twice verbally of the same procedure. In a memo to the Grievant dated July 29, 2008 from Lt. Szykulski he indicated he told the Grievant it was unacceptable to work RPS because the department was being contracted by an outsider to cover a specific event and you were not free to leave in the event the on-call detective was needed. In that memo he directed [Grievant] to give [her] shift away or to find another detective to cover [her] on call. Its the Arbitrator opinion, the Employer had proven that the Grievant's conduct willfully disregarded a lawful directive of her superior in violation of the above policy.

B.P.D. policy102.10, Attention to Duty establishes that most police work is necessarily performed without close supervision, the responsibility for the proper performance of an officer's duty lies primarily with the officer themselves. This policy is applicable to the Grievant. The undersigned opine that the Grievant knew and understood what was the proper performance for this RPS assignment, however, she did not take responsibility for obtaining coverage and left her on-call shift without coverage. The Employer has proven that the Grievant's conduct violated the above policy.

B. B.P.D. policy 102.3, "Conduct Unbecoming an Officer," B.P.D policy 102.6, "Integrity," B.P.D. policy 102.8, "Compliance with Lawful Orders", B.P.D. policy 102.10, Attention to Duty", and B.P.D. General Order 300.03, "Principle Governing Conduct of Sworn Officers", Paragraphs A, B, and

D, are the Policies and General Orders, which the Employer argues that the Grievant allegedly violated when the Grievant filed the grievance report that represented that Det. J.S. had covered her on-call work status on June 24, 2012, and that she had notified Sgt. B.O. of the change in the on-call coverage. The Grievant signed this Grievance Report, later, acknowledged she understanding the content of this Grievance Report, and AI investigation determined Grievant representations in the grievance were false. For this conduct Grievant received a Notice of Disciplinary Action-Suspension from duty Without Pay for the following reasons:

B.P.D. policy 102.3, the Conduct Unbecoming an Officer, ....establishes that an officer's conduct is closely scrutinized, and when their actions are found to be excessive, unwarranted, or unjustified, they are criticized far more severely than comparable conduct of persons in other walks of life. Since the conduct of an officer, of civilian employee, on or off-duty, may reflect directly upon the department, an officer must at all times conduct themselves in a manner which does not bring discredit to themselves, the department, the City or the law enforcement profession. Policy 102.3 is applicable because Grievant's account of events leading up to grievances were not credible or plausible, and certainly reflect in a manner which may bring discredit to herself, the department, the City or the law enforcement profession. The undersigned opines that the Grievant's conduct in making false statements are unjustified and lack good reason for bring other officers' credibility into question of events that the Grievant demonstrated she had no independent recollection of the events. Its the opinion, of the Arbitrator that the Employer has proven the Grievant's behavior was unbecoming a police officer; a violation of B.P.D. policies 102.3, and calling in question the following policies: 102.6 and 303.03 (A) (B) and (D)<sup>4</sup>.

B.P.D. policy 102.6, Integrity<sup>3</sup> requires B.P.D. employees to scrupulously avoid any conduct which might compromise the integrity of themselves, their fellow officers, or the department, and has the obligation to report the dishonesty of others. The false representations of the Grievant call into question the trustworthiness and integrity of the Grievant and the B.P.D.. In the opinion of the Arbitrator, the Employer has proven the above policies, including policy 102.6 were violated by the Grievant.

B.P.D. policies 102.8 and 102.10 for the above reasoning applies herein and the Employer had proven these policies were violated by Grievant's assertions of coverage and notification.

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4 "truthfulness" is the common thread that binds together the qualities of Integrity, Conduct unbecoming an officer, and the Principle Governing Conduct of Sworn Officer.

3 See: [m.dictionary.com/definition/integrity](http://m.dictionary.com/definition/integrity) means the quality of being honesty, truthfulness and fair.

Based upon the satisfaction of the Seven Tests standard, the violations of the above references General Orders and Policies, on the above analysis, the undersigned concludes that the Employer has proved by clear and convincing evidence its allegations that the Grievant violated the above identified General Orders and Policies and therefore the Employer had just cause to impose a Written Reprimand and a four-day (32 hours) Suspension From Duty Without Pay disciplines of the Grievant.

### **FINDING OF FACTS & CONCLUSION OF LAW**

Based upon all the facts, circumstances, analysis and finding as discussed above the:

1. The Employer has just cause to issue the Grievant a written reprimand.
2. The Employer has just cause to impose a four day (32 hours) suspension from duty without pay for the Grievant.
3. The disciplines were reasonable and progressive.
4. The Employer had proven that the Grievant violated all of the B.P.D. General Orders and Policies that were cited above.
5. The Employer satisfied the seven key tests<sup>a</sup> for determining whether it had just cause to impose disciplinary action for Grievant' misconduct in violation of Article 10 of the CBA.
6. Because the allegation of making false statements is highly stigmatizing to law enforcement officers, the Arbitrator applied the clear and convincing burden of proof in determining the above conclusions.
7. The Employer's disciplines of the Grievant are sustained in full.
8. The discipline of the Grievant was intended to be progressive and constructive in nature and not punitive. The Employer consider the Grievant prior length of service and record of employment.
9. All other allegations of ill-will, claims in other venue, differences in management styles, stale and close management issues were dismissed, had no impact or were irrelevant in the Arbitrator's conclusions.

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a "Just Cause The Seven Key Tests"

**STATEMENT OF ISSUES**

1.) Whether the Written Reprimand of Grievant was for just cause? If not, what is the appropriate remedy?

In accordance with Article 10.1 of the CBA, the Employer has proven by clear and convincing evidence that it had just cause to issue a written reprimand to the Grievant for violations of B.P.D. Policies and General Orders: 102.10; 102.8; 328.03; 369.01 for working a Reimbursable Police Overtime Job on June 24, 2012 from 0900-1200.

2.) Whether the four days (32 hours) suspension without pay of the Grievant was for just cause? If not, what is the appropriate remedy?

In accordance with Article 10.1 of the CBA the Employer has proven by clear and convincing evidence that it had just cause to impose a four days (32 hours) suspension from duty without pay to the Grievant for violations of B,P,D. Policies and General Orders 102.3; 102.6; 102.8; 102.10; 300.03, ¶,A, B, and D for officer misconduct.

**AWARD**

**After study of the testimony and other evidence produced at the hearing, on the arguments of the parties (in post-hearing written briefs), on that evidence in support of their respective positions, and on the basis of the above discussion, summary of the testimony, analysis and conclusions, I make the following award:**

**1. The Union Grievances for BMS Case Nos. 13-PA0148 & 13-PA0581 are DENIED in their entirety as set forth herein.**

**2. The Employer's Disciplines of a Written Reprimand, and a Four Day (32 hours) Suspension without pay are sustained in full as set forth herein.**

Dated: April 21, 2014

*Harry S Crump*

Harry S. Crump, Labor Arbitrator