BEFORE
JEANNE CHARLES WOOD
ARBITRATOR

In the Matter of the Arbitration

Grievance No. 617428
CMS Arbitration Case No. 7416
AFSCME No. 2017-04-44292

Between

AFSCME COUNCIL 31
LOCAL 2081
Union
and

ILLINOIS DEPARTMENT OF
CHILDREN AND FAMILY SERVICES
Employer

Grievant: BRIDGETTE GLICKMAN

APPEARANCES

For the Union:
Scott Miller, Staff Representative, AFSCME Council 31, 205 North Michigan Avenue, Suite 2100, Chicago, IL 60601, SMiller@afscme31.org.

For the Employer:
Kenyatta Beverly, Assistant Deputy Director of Labor Relations, Department of Central Management Services, 100 W. Randolph, Suite 4-500, Chicago, IL 60601, Kenyetta.Beverly@illinois.gov.

OPINION AND AWARD

INTRODUCTION

Pursuant to the Master Agreement between the AFSCME Council 31, AFL-CIO, ("Union") and State of Illinois Department of Central Management Services ("Employer") the parties have designated Jeanne Charles Wood to hear and to decide certain disputes arising between them. The parties presented evidence and arguments on September 26, 2018, in Chicago,

IL and November 29, 2018 by video conference. The parties were provided with a full opportunity to examine and cross-examine witnesses. The Employer's witnesses were Justin Hegy, Neil Skene, Veronica Resa, Christopher Towers, Pete Wessel and Michelle Jackson. Beverly Washington-Cargle, Jennifer Howard, Stephen Mittons and Bridgette Glickman testified on behalf of the Union. The parties opted to make closing arguments at the hearing. The record was closed on November 29, 2018.

ISSUES

The stipulated issues are as follows:

1. Whether the Employer had just cause to suspend Bridgette Glickman (the Grievant) for ten (10) days, and if not, what is the appropriate remedy?

2. Whether the Employer had just cause to suspend Bridgette Glickman (the Grievant) for twenty (20) days, and if not, what is the appropriate remedy?

The Union also presents the following as an issue to be decided:

3. Whether the Employer had just cause to deduct $9,571.65 from Bridgette Glickman's (the Grievant) remuneration to recoup its alleged overpayment of wages at issue in her discipline effective January 5 and 15, 2018, respectively, and if so, what is the appropriate remedy?

The parties agreed that the arbitrator has the authority to determine the issue(s) to be decided. Accordingly, all three (3) of the proposed issues will be addressed herein.

APPLICABLE CONTRACT PROVISIONS

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ARTICLE IX

Discipline

Section 1. Definition

A. The Employer agrees with the tenets of progressive and corrective discipline. Disciplinary action or measures shall include only the following:

a) Oral reprimand;
b) Written reprimand;
c) Suspension (notice to be given in writing); and
d) Discharge (notice to be given in writing).

Disciplinary action may be imposed upon an employee only for just cause. An employee shall not be demoted for disciplinary reasons. Discipline shall be imposed as soon as possible after the Employer is aware of the event or action that gave rise to the discipline and has a reasonable period of time to investigate the matter.

In any event, the actual date upon which discipline commences may not exceed forty-five (45) days after the completion of the pre-disciplinary meeting.

The parties recognize that counseling and corrective action plans are not considered in disciplinary actions.

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Section 7. Removal of Discipline

Any written reprimand or discipline imposed for tardiness or absenteeism shall be removed from an employee's record if, from the date of the last reprimand or discipline, two (2) years pass without the employee receiving an additional reprimand or discipline for such offense. The two (2) year period shall be extended by any leave of absence or disciplinary suspension. Any reprimand for other causes shall be removed from the employee's record based on the above criteria. Such removal shall be at the request of the employee case shall not be used against the employee.

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ARTICLE XII

Hours of Work and Overtime

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Section 6.

f) "Late Arrival and Unauthorized Absence" There shall be no general policy of docking for late arrival. Employees who are repeatedly late may be docked until the problem has been

corrected over a reasonable period. However, this shall not limit the Employer's right to dock for unauthorized absence and/or resort to the disciplinary procedure of this Agreement for excessive late arrival and/or unauthorized absence. The threshold between late arrival and unauthorized absence is one hour after the starting time**.**

APPENDIX C MEMORANDUM OF UNDERSTANDING

AFFIRMATIVE ATTENDANCE POLICY

1. The Employer recognizes personal problems may affect employee attendance and encourages utilization of the Personal Support Program.

2. Unauthorized absences shall be those absences for which time is not approved. The threshold between late arrival and unauthorized absence is one hour after the starting time. Although tardiness is not considered an unauthorized absence under this agreement, employees are expected to report to work on time each day as scheduled. Any negotiated tardiness policies shall remain in full force and effect during the life of the Master Agreement unless otherwise negotiated by the parties.

   Where current practices exist, any unauthorized absence which is less than a ½ day will be treated under Article IX of the Master Contract as misuse of time inclusive of all other time related infractions (including late arrival, extended breaks and lunch hours, leaving work without authorization, etc.) as one progressive and corrective disciplinary track. However, such absences shall not be subject to #8 of this agreement.

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8. Unauthorized absences shall be subject to the following corrective and progressive disciplinary action:

   A.

Occurrence	**Unauthorized absence with call-in**
1st	Counseling
2nd	Oral reprimand
3rd	Written reprimand
4th	2nd Written reprimand
5th	1 day suspension
6th	3 day suspension
7th	5 day suspension
8th	7 day suspension
9th	10 day suspension
10th	15 day suspension
11th	20 day suspension
12th	Discharge

B. Each day of unauthorized absence shall be considered a separate offense for the purposes of progressive discipline.

C. Each day of unauthorized absence without a call-in shall be considered as two offense, and appropriate progressive discipline shall be administrated pursuant to Paragraph 8.A. above.

Under this Affirmative Attendance Agreement, except for the last offense before discharge, no employee will serve any suspension time. Employees will be given the usual notice of a suspension but will be expected to report to work and lose no wages. An employee will only serve five (5) days of actual suspension time for the last offense prior to discharge.

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BACKGROUND

This matter concerns the Union's claim that the Employer violated the collective bargaining agreement ("CBA") when it suspended Bridgette Glickman ("Grievant") for ten (10) days for falsification of attendance records and misuse of time, and twenty days for unauthorized absences. All the dates at issue occurred from January 6, 2016 through July 18, 2016.

About the Grievant

The Grievant is a long-term employee of the State of Illinois' Department of Children and Family Services ("Department" or "DCFS") having begun her employment on July 16, 2004. At the time in question, she was employed as a Public Service Administrator in the Communications Division. Grievant's duties included, among other things, managing and directing statewide marketing programs for the Department; developing polices and procedures; coordinating public education via mass media; and serving as the spokesperson to major media networks, the general public and public education partners. Grievant accomplished her work both onsite at the Department's offices and off-site in the community through the attendance of meetings and events. Specifically, Grievant testified that from 2003-2005 she was involved with

a program on television to showcase hard to place children in the care of the Department. In 2007, a community outreach position was created for her to incorporate all the projects with which she had been involved. She wrote and produced a television show. Grievant explained that she also met with Chicago aldermen in their offices and connected with community organizations to promote the programs of the Department. The goal of her efforts was to promote the positive side of DCFS. She testified that her time spent in the office and outside of the office was about a 50/50 split. Grievant had no record of disciplinary action until September 13, 2013, when she was suspended for three (3) days for unprofessional conduct in connection with using profanity toward a supervisor.[1]

The Building at 1911 S. Indiana

The Communications Division is housed at the Department's headquarter offices in the James R. Thompson Center ("JRTC") located at 100 W. Randolph, in downtown Chicago. However, Grievant was approved to work remotely at the Department's office located at 1911 S. Indiana ("1911 building") in Chicago to accommodate her childcare needs upon becoming a foster parent. At the 1911 building, each employee is assigned a personal code ("key code") to use to enter the garage with their car or to access the elevators and suite of offices on each floor. The first floor of the 1911 building contains an elevator near the main street entrance to the facility. There is also an employee entrance that requires the use of a code on the main level of the building. Once inside the building, it is possible for employees, as a group, to use the elevators in the main lobby and on each floor without entering their individual entry code.

[1] Any prior unauthorized absences referenced in the record have been given no consideration pursuant to Article IX, Section 7 referenced *supra*.

However, vehicles entering the garage do so separately with the employee using his/her personal entry code.

There is also a stairwell where a code must be used to access the suite of offices above the 4th floor. Christopher Towers who supervises facilities and security at the 1911 building testified that most employees enter the building through the employee entrance. He testified that it is rare, but possible to maneuver through the building without entering a code. He acknowledged that some employees do park across the street instead of using the attached parking garage. Union witness Beverly Washington-Cargle ("Washington-Cargle") testified that, occasionally, she has not entered her key code while making her way to her work area. AFSCME Local 2081 President Stephen Mittons who works in the 1911 building confirmed that entering the building without using the assigned key code occurs often. He explained that on the day of the hearing, he entered the building without using his code and had conversations with two (2) supervisors before ever logging onto his computer.

About the Timekeeping Process and Attendance Rules

Employees of the Communications Division report their time and attendance on a bi-weekly basis by submitting to designated timekeepers two (2) forms: The Daily Staff Attendance Report and the Employee Request Form for Use of Benefit Time. The Daily Staff Attendance Report is used by employees to note their arrival/departure times on a daily basis. The Employee Request Form for Use of Benefit Time form requires a supervisor's signature; the Daily Staff Attendance Report does not. During the time in question, Grievant's workday from January 2016 through March 2016 began at 9:30 am and ended at 6:00 p.m. Beginning April of 2016, her work hours were 9:00 a.m. until 5:30 p.m.

The parties have negotiated an Affirmative Attendance Policy ("the policy"). The policy defines an unauthorized absence as an absence which has not been approved. Under this policy, an unauthorized absence for less than ½ day is treated as misuse of time and is *not* subject to the corrective and progressive disciplinary actions set forth in Paragraph 8A. of the policy. A charge of misuse of time is subject to the progressive and corrective disciplinary provisions of Article IX (Discipline) of the CBA. Paragraph 8A. permits graduated levels of discipline for each occurrence of an unauthorized absence. The policy also states that the threshold between late arrival and unauthorized absence is one (1) hour after the starting time.

Grievant explained that she would usually submit her attendance reports about two (2) days before they were due, upon reminder by the secretary. Grievant testified that she would use her calendar to fill in the times and time was not recorded contemporaneously with arriving and departing each day. Grievant acknowledged that the rules require her to capture for her time each day on the timekeeping forms.

Grievant testified further that she is not aware of a rule that allows the Employer to use her computer login or Outlook calendar as a timekeeping method. While explaining her practices, she stated that it is not her usual process to log onto the computer upon arrival. She testified that there are other events that may occur prior to logging onto her computer such as speaking to co-workers, checking phone messages, getting coffee, or going to the restroom. In explaining late entry of her key code to the building, she explained that she would often park her car in the lot across the street from the building upon arrival, but later move it to the building parking garage to transfer voluminous materials that she must carry.

Union Stewards Washington-Cargle and Jennifer Howard confirmed that there is no general policy that computer login time is used to determine an employee's timeliness for

arriving to work. Specifically, Washington-Cargle explained that, as a supervisor, she does not examine computer login times and there is no rule that directs employees to login at a certain time. Also, she does not use the Outlook calendar as a tool for assessing an employee's timeliness. Further, she has no knowledge of a rule that allows this type of monitoring.

Grievant's Supervisory History

According to Grievant's position description, she reports to the Associate Deputy Director. Veronica Resa ("Resa") was the Associate Deputy Director of Communications from December 2013 until she became the Deputy Director of Communications in December 2015, replacing Karen Hawkins ("Hawkins"). Resa reported that Grievant declared upon Resa's appointment to Associate Deputy Director that she (Resa) was not her boss and she would not report to her. Resa advised Hawkins that Grievant came to work late every day and she would not sign her time sheets. Apparently, Hawkins interceded and took on the supervisory tasks of managing Grievant as evidenced by the fact that she signed her time sheets and completed her 2014 evaluation. Hawkins' provided a glowing review of Grievant's performance in stark contrast to Resa's evaluation for 2015 (issued almost a year after the relevant review period on November 17, 2016) reflecting severely poor performance.

Grievant confirmed during her testimony at the arbitration hearing that she believed that Resa was not her supervisor until March 2016. She explained that Andrew Flach ("Flach") was her supervisor during January and February of 2016 and that she did not respond to the inquiry from Resa about her attendance during those months because it was her view that it was not proper for Resa to question her since Flach signed off on her attendance records. Based on the

testimony from Resa and Grievant, it is clear that they did not have a congenial working relationship.

The Events Triggering the Investigation

Resa is no longer an employee of the State of Illinois. She is currently employed as the Director of Communications for a national non-profit organization. She testified that while employed as the Deputy Director of Communications with the Department, about 80% of her job was crisis management. Resa testified that when she began supervising the Communications team at DCFS, she provided instruction on how to complete a timesheet. Resa explained that she had refused to sign Grievant's timesheets because she thought they were false. She recalled that in January 2016, she held a meeting with staff requesting transparency on time reporting. She stated that she was adamant that staff should be working the times stated on their timesheets.

Resa testified that sometime in the Summer of 2016, she became very concerned with Grievant's pattern of calling in from her cell phone when she should have been at her DCFS office. Resa stated that she was often not able to reach Grievant at the office and had to access her Outlook calendar to find out where she was supposed to be. Resa explained that this was a consistent issue. When required to attend weekly meetings at the JTRC, Grievant would call in from her cell phone or arrive in person late. Additionally, Grievant was not responsive to emails in a timely manner. Consequently, she contacted Labor Relations Administrator Justin Hegy ("Hegy") about how to go about "correcting" this behavior. In an email dated September 27, 2016, to Hegy, Resa wrote, in part:

> This all came about because I would call her desk at off lunch hours and she would never answer. We had communications meetings at 10:00 a.m. on Wednesday and it sounded like she was calling from her cell phone and sometimes her car. I would leave her voicemail messages to call me back and she would never respond with a

> call or email. One recent example, I left a message for her on September 2 and asked her to TWEET and call me. She never did either. I asked her in a meeting if (sic) received my voicemail and she said no.[2]

Hegy testified that he recommended moving Grievant back to the JTRC Building, and subsequently started the investigation process.

The Investigation Process

Hegy testified that as part of his investigation, he examined Grievant's key code data, computer login data, timekeeping sheets and Outlook calendar. Based on this information, he concluded that discipline was appropriate. He compiled the information and prepared the report used to support the pre-disciplinary notice, explaining that he could not make sense of the data and reconcile that she was at work. Thereafter, an investigatory interview was conducted by Resa and Senior Deputy Director for Strategy and Performance Neil Skene ("Skene")[3] with Grievant and her Union representative, Jennifer Howard on September 9, 2016.

Grievant provided a written response on September 16, 2016, to the allegations that she had been paid for time when she was not at work. In her response, she provided explanations for some of the cited occurrences between March 1, 2016 and July 18, 2016 and stated "I don't recall" for a significant number of the occurrences. She responded to forty-one occurrences in total but did not address the twenty-five other occurrences in question taking place between January 6, 2016 through February 24, 2016. In her response, she explained that it was her understanding (based on casual conversations with Michelle Jackson of DCFS Legal) that she did not need to respond to Resa about the January and February dates because Flach was her supervisor and signed her timesheets during those months. Michelle Jackson ("Jackson")

[2] Joint Exhibit 3 at 75.
[3] Mr. Skene also held the title of Deputy Chief of Staff at some point during this process.

testified and acknowledged having conversations with Grievant over a 10-year period. She stated that they had conversations about Grievant's office location and how Grievant's role was changing. Jackson recalled that Grievant did not get along with Resa. She also recalled that Grievant was unhappy about a change that was taking place, though she was not sure about the specifics of the change. Jackson denied advising Grievant that she did not need to explain the alleged absences to Resa.

At the arbitration hearing, Grievant denied falsification, misusing time or being absent without authorization. In her defense, she explained that she would often enter the building tailgating another employee on the elevator and up to the 7th floor suite of offices where she worked. She stated that she did not mention in her rebuttal her practice of using the stairs to move throughout the building because it is something she has been doing since 1994 and did not think it would ever need to be explained. Further, she stated that the garage entry gate was broken for a period of time. On rebuttal, Towers testified that he could not recall an extended time when the gate did not work. He noted that sometimes a key pad will go out but it is usually repaired within 2-3 days.

The Disciplinary and Grievance Processes

By memorandum dated November 4, 2016, Grievant was served with a notice that a pre-disciplinary meeting would be held that same day to address allegations of misconduct as contained in the documents attached to the memorandum. Present at the meeting were Resa, Skene, Grievant and Lead Union Steward Washington-Cargle. On November 22, 2016, Washington-Cargle presented a written rebuttal on Grievant's behalf which, in essence, denied the charges and provided more specific responses about individual days and time periods when

Grievant was allegedly not present at work. After review of Grievant's rebuttal, Resa recommended that Grievant be discharged from employment. Skene was the decision maker subject to the Director's approval. Skene testified that he reviewed the Union's rebuttal prior to giving input on final discipline. He testified that he also took her 2013-2014 performance evaluation into consideration though, in his view, it was more remote in time as compared to the data evidence collected during the investigation. And finally, he considered the positive email concerning Grievant that was sent from Kara Teeple at Lawrence Hall. Skene explained that the prior unauthorized absences reflected in her record carried no weight as a factor. He stated that he did not move forward with discharge as recommended by Resa because did not think it was sustainable.

Chief Labor Relations Administrator Pete Wessel testified that he had signature authority for the DCFS Director. Wessel heard the Step 3 grievance appeal. He explained that this case involved a high number of occurrences not seen before and it is the practice of the Department to give at least one discipline before discharge. This was the case even though Grievant's occurrences exceeded twelve as referenced in the Affirmative Attendance Policy. Wessel also testified that the Employer has a practice of both docking and imposing discipline under Article XII and there has been no "push back" from the Union.

On January 4, 2017, the Department issued a 10-day actual suspension for Falsification of Records (62 instances) and Misuse of Time (43 instances). The Department also issued a 20-day suspension (5 actual, 15 paper) for 17 unauthorized absences. The notice stated that Grievant's actions demonstrated a violation of DCFS Employee Handbook Sections 2.1 (Daily Time); 3.1 (Professional Conduct); 3.4 (Daily Attendance, including the Affirmative Attendance Policy); 3.10 (Code of ethics); and Article XII of the Collective Bargaining Agreement (Hours of

Work and Overtime). Grievant's pay was also docked in the amount of $9,571.65. Notice was provided that recoupment would occur over a period of time. The Union filed a grievance the same day that notice of disciplinary action was received. Local 2081 President Mittons testified that the Union's position is that docking pay and disciplining an employee is double jeopardy. The grievance was not resolved through the grievance process with the official denial issued by Skene on February 16, 2017. The matter is now before the undersigned for final and binding resolution.

POSITION OF THE PARTIES

The Employer argues:

- The Department has provided clear, compelling and uncontroverted evidence that Grievant operated as a ghost employee by claiming to be working when she was not. The suspensions were warranted and arguably lenient. Grievant is a long-time employee who was aware of the applicable policies.

- Management was reasonable in its initiation of the investigation. Resa testified credibly that Grievant's failure to be responsive during the workday triggered the investigation. All absences were discovered at one time. The Employer had no prior knowledge that Grievant was misusing time. The investigation ultimately revealed that she abused the privilege of being allowed to work from a remote location. Her extreme reaction of emailing the first lady of the State of Illinois when directed to report to the JRTC for duty supports this conclusion.

- Grievant was provided with due process in this case. Although she was given the opportunity to respond to the investigative report concerning her absences, she failed to address dates during January and February 2016 when some of the most egregious absences occurred. Grievant's explanation concerning the remaining days were not corroborated by the evidence. In sum, her explanations are not credible and are illogical.

- Any discrepancy concerning the reported vacation day of July 1, 2016 does not change the conclusion. Grievant's current offenses support the discipline despite any issues concerning prior discipline. The only reason that the reprimand for two (2) prior unauthorized absences remained in her file was because Grievant failed to request the removal until after the notice of discipline was issued.

- The Union's view that sixty-one instances was one occurrence is based on the outdated 1995 Affirmative Attendance MOU which was in effect until 2009. The matter was cleared up in the new 2009 MOU where it specifically states that each occurrence is a

separate offense. The Employer made sure Grievant was provided with a warning or last chance and given a suspension instead of termination consistent with the *Johnson* award.[4]

- The Employer has consistently addressed unauthorized absences as separate occurrences and the Union has not objected in the last nine (9) years.

- The Employer has the right under Article XII to dock pay and discipline an employee. Any reliance on the *Stimson* award[5] by the Union is misplaced since it made no reference to Article XII. It has been the Employer's practice to reference Article XII in charges where pay is docked, and discipline imposed for the last five (5) years without objection from the Union.

- The discipline was fair and progressive and allowed her the opportunity to correct. Send a clear message that it is not proper to abuse the trust of the employer and the tax payers by being paid for work not done.

The Union argues:

- This case is not based on direct evidence. The Affirmative Attendance Policy is no fault, progressive and corrective. The Employer agreed in paragraph two of the Affirmative Attendance MOU that unauthorized absences less than ½ day are not subject to the progressive discipline track requiring termination after twelve unauthorized absences. Thus, the parties have agreed that each unauthorized absence less than ½ day is a separate occurrence requiring a separate pre-disciplinary process for each occurrence which begins with counseling as set forth in the negotiated disciplinary process.

- The Employer cannot substantiate the charge of falsification. It must prove that the act was deliberately deceitful and not a mistake. The evidence shows that Grievant made mistakes when reconstructing her time records. There is no direct evidence of falsification, only presumptions as reflected in the supporting documents.

- It is the Employer's burden to prove this case, not Grievant's burden to disprove it. Grievant provided thirty-six explanations about individual dates but the Employer did not address them. Her lack of response regarding certain dates was based on advice she believed she received from a reliable source.

- The evidence establishes that people piggyback the entry areas at various points and its possible to not leave a digital footprint. Arbitrators have ruled that keypad entry data is not sufficient evidence of falsification. A keypad is not appropriate for time records and a computer login is not an official time record. There is no rule about how to use login information.

[4] *AFSCME Council 31 and State of Illinois DCFS*, Case No. 4421, (Grievance of Bertha Johnson)(Arb. Benn, 2003).
[5] *State of Illinois DCFS and AFSCME Council 31, Local 2081*, CMS No. 6619 and AFSCME Arb. No. 13-77 (Grievance of Charles Stimpson)(Arb. Bierig, 2013).

- The arbitrator should consider that the case is based on hyperbole, not facts. Even when the Union pointed out that the July 1, 2016 date was not an unauthorized absence but instead an approved vacation day, the Employer let it remain in the charges.

- The MOU does not contemplate a forensic audit. It would make no sense given the MOU language that permits termination after twelve unauthorized absences. The *Johnson* arbitration case supports this argument. It signified that counseling must occur before taking disciplinary action for just cause.

- The Union disagrees that the Article 12, Section 6 F language concerning docking pay applies where the employee is also disciplined. To do so is double-jeopardy. It is the Employer's burden to prove a meeting of the minds regarding their interpretation of the docking provision. There is no meeting of minds here that the Employer can dock pay and discipline simultaneously.

FINDINGS AND OPINION

The Employer has the burden of proving by a preponderance of the evidence that discipline of Grievant was for just cause. In order to sustain the disciplinary action, the undersigned arbitrator must first find the existence of sufficient proof that Grievant engaged in the conduct for which she was disciplined. If the offenses are proven, it must then be determined whether the level of discipline was appropriate under the circumstances. After a thorough review of the detailed record evidence and full consideration of the testimony and arguments of the parties, for the reasons set forth below, it is concluded that the 10-day and 20-day suspensions were not for just cause. In addition, it is concluded that the Employer has the right to dock pay and impose discipline under the circumstances explained below.

The Charges

Falsification of Records

I find insufficient evidence to support the charge of falsification. Grievant was charged with falsification of her timesheets on sixty-two separate instances from January 6, 2016 through

July 18, 2016. In order to sustain the charge of falsification, in accordance with its own Code of Personal Conduct, the Employer must prove that Grievant "knowingly" and deliberately made a misrepresentation on an official document. Likewise, in public sector labor relations, in order to prove an employee falsified information, the Employer "must prove by a preponderance of the evidence that the employee *knowingly* supplied wrong information, and that [she] did so with the *intention* of defrauding the agency." (Emphasis added).[6]

In this case, Grievant testified that she completed her time sheets just before they were due to be submitted to the timekeeper. Therefore, she was required to recall her time each day for approximately fourteen days since the attendance records were submitted every two (2) weeks. While this practice might be inconsistent with the procedural requirement to sign her timesheet every day, it does not establish a willful intent to deceive the Employer. It only proves that she had the inability to recall accurately her arrival and departure times each day. Where adequate evidence is not present to establish intent, the benefit of the doubt must fall to the accused.

Misuse of Time

I find that the Employer failed to prove the charge of misuse of time. The Employer charged Grievant with misuse of time on forty-three occasions from January 7, 2016 through July 18, 2016. Under the Affirmative Attendance Policy ("the policy"), misuse of time is defined as an unauthorized absence that is greater than an hour after starting time up to ½ day of an employee's work day. The policy specifically states that "misuse of time inclusive of all other time related infractions (including late arrival, extended breaks and lunch hours, leaving work without authorization, etc.)" will be treated "as one progressive and corrective disciplinary track"

[6] *Naekel v. Dep't of Transportation*, 782 F.2d 975 (Fed. Cir. 1986).

under the Article IX Discipline provision of the CBA. Assessment of discipline for these types of cases is explicitly excluded from the "corrective and progressive disciplinary action" listed in Paragraph 8A. of the policy which results in discharge after the 12th occurrence. The policy states, "[Misuse of time] absences shall not be subject to #8 of this agreement." Therefore, those occurrences reflecting a misuse of time must be evaluated under standard notions of corrective and progressive discipline for just cause as incorporated in Article IX of the CBA.

In order to substantiate the charge of misuse of time, the Employer has the burden of proving that Grievant was not present or otherwise performing work-related tasks during the times in question. The Employer must also establish that the employee was on notice of how the attendance is recorded for purposes of imposing discipline, for to do otherwise would surely undermine the basic premise of fairness required to hold employees accountable for their actions.

Such proof is typically not an issue because, traditionally, an employee reports to a worksite where the supervisor can observe when an employee is present, or time and attendance is officially recorded by means of an electronic clock that the employee activates with the use of a device or code. With both methods, the employee has clear and unambiguous notice of how their time is being verified for attendance reporting purposes. Under these circumstances, the employee can appropriately be held accountable for violations of an attendance policy when the reported attendance times are confirmed using the disclosed methods for verifying such information.

The Grievant did not have a traditional workplace arrangement. During the time in question, she worked at a location different from her supervisor, therefore, her supervisor could not observe Grievant's attendance. Similarly, there was no official recording device used to capture arrival and departure times at Grievant's worksite. According to the Employee

Handbook, "Attendance for employees is maintained by the use of two (2) forms, the Daily Staff Attendance Report (CFS 725A)…and the Employee Request Form For Use of Benefit Time (CFS-728)….The Daily Staff Attendance Report is used by employees to note their arrival/departure times on a daily basis."[7] The Handbook makes no reference to the fact that key code entries, computer logins and/or calendar entries will be used to confirm entries on the attendance report. Nor is there any other evidence in the record that Grievant was on notice that any method other than the attendance report would be used to track her time and attendance. Hence, she only had clear and unambiguous notice that her time was recorded by the use of the Daily Staff Attendance Report.

While the Handbook and policies do not reflect that methods other than the attendance record may be used for official time keeping purposes, that is not to say that such tools may not be used by the Employer to investigate matters of time and attendance. Here, the Employer used Grievant's key code entry data; computer login data; and calendar information to evaluate whether she was reporting to work on time or at all. In Grievant's case, the investigation revealed patterns of her appearing to arrive up to an hour late on some days. On other days, it appeared that she arrived more than an hour late. Notwithstanding the employee notice issue, the problem with using this data as proof that the Grievant was absent is the extensive testimony that employees can enter the building at various points without leaving a digital footprint.

By way of example, Grievant's key code entries (as found on the Transaction Report) for March 18, 2016, shows that Grievant's first code entry was at 11:11 a.m. on the 10th floor lobby. Grievant was charged with misuse of time from 9:30 a.m. to 11:10 a.m. This begs the question of how the Employer can prove that Grievant was not present between 9:30 and 11:10 when the

[7] Joint Exhibit 7.

first recorded entry is on the 10th floor. Grievant had to enter the building either through the garage or through the lobby. Since her key code was not recorded at the garage gate, she could not have come through the garage since no piggybacking is possible through the garage gate. That means she had to piggyback along with another employee up the elevator and through the 7th floor entry where she worked, which was feasible based on competent testimony at the hearing. A first code entry for the day on the 10th floor at 11:11 in the morning when employee traffic was light and the likelihood that she could piggyback was slim, makes it logical to conclude that she was already in the building when she accessed the 10th floor at 11:11am. It is this type of scenario that makes reliance on the key code information flawed for purposes of imposing serious discipline. Thus, reliance on key code transactions may be suggestive of an employee's whereabouts. However, in this case, it is insufficient evidence of misuse of time.

Additionally, Grievant's job was of a nature that she could perform work-related tasks without being in the office or logging onto her computer. While at first glance, the long list of occurrences seems abysmal. Upon closer examination, the Employer has not been able to prove that Grievant was not engaged in some work-related activity especially in those instances where it appears that she arrived at least an hour after her start time. A review of the key code entry report shows that Grievant routinely entered her code 20-40 minutes after her starting time. In these instances, I am persuaded that it was more likely than not that Grievant arrived late and was not engaged in work-related activities due to the short window of time between her arrival and start time, in conjunction with the fact that these were garage gate and first floor elevator entries which logically reflect her actual arrival at the 1911 building. On the dates where there was no key code or gate entry recorded until more than an hour after her start time, the evidence of a policy violation is less convincing.

The Employer conducted a 6-month review of Grievant's attendance and building entry data. The problem with taking a look backwards in time is that it is difficult to recall or establish what was happening on a particular day. Grievant's work involved connecting with the community and working outside of the office meaning that any number of tasks could have occurred like phone calls, meeting preparation, in-person conversation, etc. Grievant also testified that she did not always log into her computer when arriving at the office. Sometimes she engaged in conversations or checked mail. While it is possible that she was not at the office or engaged in work-related activities, it is also just as possible that she was engaged in work-related activities. These even-handed possibilities fail to tip the scale in favor of the Employer's position.

The most appropriate use of the circumstantial evidence that the Employer gathered during its investigation would have been to use it to counsel Grievant that there was a concern that she was not reporting to work in a timely manner and put her on notice that her key code logs and computer login times in conjunction with her calendar would be used to determine her timeliness, thereby, making it clear to Grievant that future demonstration of irregular patterns could lead to discipline. Likewise, the results of the investigation could appropriately be used by the Employer to exercise its discretion to place her back in line-of-sight supervision at the Communications Division's headquarter office. This was, in fact, done in this case and was proper.

In sum, the Employer has not provided sufficient evidence that Grievant misused her time on the dates cited due to the unreliability of the methodology used given the nature of Grievant's work; her lack of notice that such tools would be used to track her time; and the amount of time

that passed before being asked to account for the discrepancies. Under these circumstances, it would be patently unfair to hold Grievant accountable for such a serious offense and penalty.

Unauthorized Absences

I find that there is insufficient evidence to prove Grievant was absent without authorization. Unauthorized absences in excess of a ½ work day are subject to the progressive discipline process set forth in Paragraph 8A. of the Affirmative Attendance Policy. The Union argues that this provision is not applicable to a situation where the Employer has conducted a forensic audit of an employee's time records. It argues that Grievant's situation falls outside of this provision since any corrective action associated with an audit of time should account for only one (1) occurrence regardless of the number of days involved. The Union urges that this should be the case because Grievant was not aware that she was being assessed with an attendance occurrence until presented with the investigatory report. Therefore, where the Employer chooses to conduct a forensic audit of time and attendance, any discrepancies should be analyzed under the disciplinary procedure in Article IX. To the contrary, the Employer contends that Paragraph 8A. does apply to the forensic audit scenario, and that it was being lenient by not terminating Grievant's employment since she had in excess of twelve unauthorized absences.

I agree with the Union's position on this point. As interpreted by the undersigned, an absence in excess of a ½ day is, in the typical sense, a no-show situation. For example, Employee A is expected to report to the customer service desk (or any desk) by 9:00 a.m. He does not report to work. In this situation, it is obvious that Employee A is not present which creates an immediate impact to the workplace in that he is not available to service customers or perform

other duties. Thus, it makes sense to apply the Paragraph 8A. progressive discipline scheme of the 12th such occurrence resulting in discharge to send the message that failure to show up to work without authorization will ultimately lead to termination. Under this scenario, Employee A receives a write-up for missing work and is on notice that he has obtained his first occurrence on the progression. The resulting consequence is a record of counseling. The next occurrence will lead to an oral reprimand and so on. The same analysis would apply if an employee left early and failed to work at least ½ the workday.

A retroactive review in an effort to audit an employee's attendance for purposes of disciplinary action appears to be outside of what the parties may have contemplated at bargaining. For certain, the plain language of the CBA along with the fact that the record is devoid of any bargaining history that would suggest otherwise, leads this arbitrator to the conclusion that Paragraph 8A. is inapplicable to a time and attendance audit. Further, if it were used where an audit is conducted, it would effectively serve as a "gotcha" method for walking employees out the door if the Employer could audit anytime and apply what appears to have been intended as a progressive process of individual occurrences.

The Affirmative Attendance Policy is lengthy and comprehensive. If the parties had intended for it to operate in the manner used in this case, it is clear that the parties are of a level of sophistication that they would have included such language. Finding no such language, it is concluded that Paragraph 8A. does not apply to the circumstances of this case. In other words, the Employer's attempt to consolidate all of the alleged unauthorized absences into one disciplinary action in order to advance Grievant to the end of the progressive discipline table in Paragraph 8A. is inconsistent with the Affirmative Attendance Policy even with stopping just shy of termination.

That said, Grievant was charged with unauthorized absences on seventeen days. The Employer took a 6-month review of Grievant's key code entries, computer logins and calendar entries. As discussed above, it is not clear that Grievant was absent for more than half her work day on each date cited instead of simply failing to adequately document her calendar. While she is expected to report on time for work and be ready to perform her duties, her unrebutted testimony is that 50% of her time is spent doing work away from the office. In this situation, it is not so clear that she was not working at all on the days in question. And because so much time had passed when questioned about it, the Employer cannot prove that Grievant was not performing any work-related tasks on the dates in question simply because she could not recall what she was doing. Accordingly, it is concluded that there is insufficient evidence to support the charge of unauthorized absence.

Grievant's Daily Attendance Pattern

As mentioned above, the evidence shows that Grievant demonstrated a pattern of excessive late arrivals or tardiness. And although she was not charged with this specific offense, such conduct is incorporated in the policy violation of Section 2.1 (Daily Time) of the Employee Handbook relied upon in the charging document. Additionally, the Affirmative Attendance Policy specifically states that "Although tardiness is not considered an unauthorized absence under this agreement, employees are expected to report to work on time each day as scheduled."[8] While discipline for an occasional late arrival in Grievant's case would be unreasonable, the record reflects a significant pattern of tardiness that warrants corrective action. There can be no dispute that Grievant was aware of the requirement to be on time for work. No specific notice is

[8] Joint Exhibit 1 at 210 (Affirmative Attendance Policy), Paragraph 2.

necessary for such a rudimentary work rule. The investigative records support the conclusion that no work-related activities were likely performed where Grievant's key code was captured at the building entry points within an hour of her start time. The question is whether the conduct warrants the serious level of discipline imposed by the Employer.

Resa testified that she had concerns about Grievant's timeliness long before this disciplinary action took place. It is upon her initial concern that action should have been taken if, in fact, the idea was to correct Grievant's conduct. It is improper to save up would-be violations and then impose the most severe level of discipline in order to purportedly correct the behavior. Operating in this manner leads one to conclude that the discipline was punitive instead of corrective in nature which is contrary to the principles of just cause. Taking into consideration Grievant's lengthy tenure, prior 3-day suspension, and the consistent pattern of lateness during the period of review, it is determined that a 5-day suspension is an appropriate level of discipline to impose. This should send the message to Grievant that she must report to work on time; be mindful of her overall accountability for her time; and that such continued pattern could lead to more severe discipline including termination.

Imposing Discipline and Docking Pay

The final inquiry is whether the Employer can both dock Grievant's pay and impose discipline. While the Union's argument that the language does not state that the Employer can dock and discipline simultaneously is evidence of double jeopardy, this view is inconsistent with the plain language of the CBA.

Article XII, Section 6 f) states, in part, "Employees who are repeatedly late may be docked until the problem has been corrected over a reasonable period. However, this *shall not*

limit the Employer's right to dock for unauthorized absence and/or resort to the disciplinary procedure of this Agreement for *excessive late arrival* and/or unauthorized absence." (Emphasis added). The first sentence that employees who are repeatedly late "may be docked" signifies that the Employer has reserved the discretion to dock Grievant's pay for, among other things, excessive late arrivals. The next sentence must be read in conjunction with the first sentence because the word "however" signals that what follows must also be taken into consideration. What follows, in relevant part, is that the docking discretion shall not limit the employer's right to "resort to the disciplinary procedure ….for excess late arrival…." Thus, the Employer has reserved the right to both dock and discipline an employee for excessive late arrivals and unauthorized absences. Having determined that there is sufficient proof of excessive late arrivals, it is concluded that based on the language in Article XII, Section 6 f), the Employer has the right to both dock Grievant and impose a 5-day suspension.

Both parties cited the *Charles Stimpson* case.[9] In that case, Arbitrator Steven M. Bierig determined that the Employer could not dock the grievant and counsel him since to do so was double jeopardy. The Employer petitioned the Circuit Court of Cook County to vacate the award as not drawing its essence from the collective bargaining agreement and contrary to public policy.[10] The Court confirmed Arbitrator Bierig's award.

The instant case is distinguishable. Arbitrator Bierig's award did not involve the interpretation of the current Article XII language because it was not referenced in the case before him. In the instant case, the Employer has strenuously advanced the position that Article XII gives it the "right to dock for unauthorized absence *and*/or resort to the disciplinary procedure of

[9] *Matter of the Arbitration Between the Illinois Department of Children and Family Services and AFSCME Local 2018*, CMS No. 6619, AFSCME Arb No. 13-77, Grievance of Charles Stimpson (Arb. Bierig, 2013).
[10] *State of Illinois, Department of Central Management Services v. AFSCME Council 31*, 14 CH-01987 (Grievant Charles Stimpson, 2014).

this Agreement for excessive late arrival and/or unauthorized absence." (Emphasis added). I interpret the relevant negotiated contract language to be consistent with the Employer's position. Accordingly, it is proper for the Employer to dock Grievant's pay and impose discipline. This being the case, the Employer may dock Grievant's pay on the dates contained on the Personnel Action Form where the records reflect that she arrived within one (1) hour of her starting time.

CONCLUSION

The record evidence is insufficient to establish that Grievant falsified records, misused time or was absent without authorization. Therefore, the 10-day and 20-day suspensions were not for just cause. There is sufficient evidence to establish that Grievant violated the Daily Time policy by engaging in an excessive pattern of late arrivals and just cause exists for imposing a 5-day suspension given the facts of this case. Finally, the Employer is entitled to both dock Grievant's pay for the late arrivals as reflected in the Personnel Action Form and impose the 5-day suspension in accordance with Article XII of the CBA.

AWARD

Based on the reasons above and which are incorporated herein:

1. The grievance is SUSTAINED, IN PART.
2. The charges for falsification, misuse of time and unauthorized absences shall be removed from Grievant's record.
3. The 10-day suspension and the 20-day suspension shall be removed from Grievant's record.
4. An actual 5-day suspension shall be imposed in connection with a violation of the DCFS Employee Handbook Section 2.1 (Daily Time) for tardiness.

5. Grievant shall be awarded backpay for any pay docked or suspension time served in connection with the 10-day and 20-day suspensions.

6. Grievant shall be awarded backpay for any pay docked for an instance greater than one (1) hour after her starting time.

7. The fees of the Arbitrator shall be shared equally between the parties in accordance with Article V, Section 2, c) of the CBA.

8. The Arbitrator retains jurisdiction for a period of 60 days regarding the implementation of this Award.

Dated: April 11, 2019

Jeanne Charles Wood, Arbitrator