LABOR & EMPLOYMENT

Arbitration Decisions ☆ Favorite

Labor Arbitration Decision, City of Columbus, 2020 BL 191193, 2020 BNA LA 1080

Pagination
* BNA LA 1080 p

Decision of Arbitrator

In the Matter of: **CITY OF COLUMBUS**, DEPARTMENT OF PUBLIC SAFETY, Employer, and INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL #67, Union.

April 13, 2020

Hide Summary ^

Case Summary

LABOR ARBITRATION

SUMMARY

[1] Discipline - Neglect of duty ►100.552535 ►100.15 ►100.5507 ►100.559565 ►100.559505 [Show Topic Path]
The **City of Columbus**' 72-hour suspension of a firefighter EMS medic for "performing job assignments carelessly or negligently" by failing five times to obtain the signature of either the patient he delivered to the hospital or a hospital representative, as required by EMS policy, is reduced to a 24-hour suspension, Arbitrator Lee Hornberger ruled. Only two violations were proven by the grievant's admission that two signatures were signed by him and not by the hospital, the grievant is a 24-year employee with no previous discipline, and a 72-hour suspension costing him $2,853.30 in base wages alone is not reasonably related to the seriousness of the offense and the employee's record of service. The city must reimburse the grievant for the loss of his in-charge medic stipend and overtime from the day after his 24-hour suspension would have been served until these opportunities were restored, in addition to his contract wages.

Allison Lippman (0075554), Assistant City Attorney, 77 North Front Street, Fourth Floor, Columbus, OH 43215, for the Employer.

Thomas Wyatt Palmer (0072816), Thompson Hine LLP, 41 South High Street, Suite 1700, Columbus, OH 43215, for the Union.

LEE HORNBERGER, Arbitrator.

LABOR ARBITRATION PROCEEDING FEDERAL MEDIATION AND CONCILIATION SERVICE

DISCIPLINE OF FIREFIGHTER DORRIS E. MOORE
DECISION AND AWARD
INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between the **City of Columbus**, Department of Public Safety (Employer) and the International Association of Fire Fighters, Local #67 (Union). The Union contends that the Employer violated the CBA when it suspended Grievant. The Employer maintains that it did not violate the CBA when it suspended Grievant.

Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on February 18, **2020**, in Columbus, Ohio. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of relevant exhibits. The dispute was deemed submitted on **April** 1, **2020**, the date the last post-hearing submission was received.

The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

Both advocates did an excellent job in representing their clients. All involved in the arbitration were courteous and professional. The post-hearing submissions were very helpful.

ISSUES

The Employer frames the issues as follows.

Did the Employer have just cause to discipline Grievant and if not what shall the appropriate remedy be?

The Union frames the issue as follows.

Has the Employer established "just cause" to suspend Grievant for seventy-two hours, as required by CBA, Art. 10, Sec. 10.1? If not, what is the remedy?

Based on the stipulation at the arbitration hearing, I frame the issue as follows.

Was there just cause for the discipline, and, if not, what is the remedy?

RELEVANT CHARTER, CONTRACTUAL AND OTHER LANGUAGE

Section 108, Columbus City Charter

> The chiefs of the divisions of police and fire shall have the exclusive right to suspend any of the officers or employees in their respective divisions, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given by the proper authority, of for any other just and reasonable cause. If any officer or employee be suspended, as herein provided, the chief of the division concerned shall forthwith in writing certify the fact, together with the cause for the suspension, to the director of public safety, who, within five (5) days from the receipt thereof shall proceed to inquire into the cause of such suspension and render judgment thereon, which judgment, if the charge be sustained, may be suspension, reduction in rank or dismissal, and such judgment in **[*2]** the matter shall be final, except as otherwise hereinafter provided. The director of public safety, in any such investigation, shall have the same power to administer oaths and secure the attendance of witnesses in the production of books and papers, as is conferred upon the council.

Collective Bargaining Agreement

Article 7 - Management Rights
Section 7.1(D)

The City retains the right to suspend, discipline, or discharge employees for just cause (probationary employees without cause).

Section 9.2. Grievance Procedure

It is the Division of Fire's well-established policy that any discharge, demotion, suspension, removal or other disciplinary measure shall only be for just cause.

***Section 10.1 Just Cause*.**

Any discharge, demotion, suspension, removal, or other disciplinary measure shall be only for just cause.

Work Rules

RULE 7. NEGLECT OF DUTY.

All employees are expected to perform their work duties during their work hours, to do a competent job in performing those duties and to work except when they are at lunch or on a rest period as authorized by contract or City policy. Employees shall not neglect their duties, that is, fail to perform their duties, or perform them in an unacceptable manner during their work hours, including any overtime hours. The following acts or omission are specifically prohibited:

(A) Performing job assignments carelessly or negligently. ... Emphasis in the original.

FACTUAL OUTLINE
Précis

Grievant is a Firefighter EMS medic. His job duties include helping to deliver patients to hospitals. Under certain circumstances, he must obtain a signature from the receiving hospital. This case involves five of those signatures. These are 159/595 on September 30, 2017; 691 on October 3, 2017; 139 on October 23, 2017; 835 on November 26, 2017; and 238 on January 6, 2018. This case involves whether the signatures entered in the EMS system for the hospitals in the above five instances complied with Employer rules or not. The Employer says the signatures did not comply. The Union says the signatures did comply.

Introduction

Grievant has worked for the Employer as a Firefighter paramedic for twenty-four years. When paramedics take a patient to a hospital, they must get the patient's signature. If the patient is not able to sign, the paramedic must obtain a signature from a hospital representative. Paramedics are trained on this requirement every three years. This requirement is stated in the Protocols that Grievant follows as a paramedic.

July 1, 2016, Required Documentation for EMS Runs

There are Division bulletins via the Employer's on-line training system. Exh. 5. On October 31, 2016. Grievant electronically acknowledged receiving Required Documentation for EMS Runs document. In 2016, Grievant received a bulletin through CDF's electronic training software titled Emergency Medical Services Documentation. This memorandum states that when "a patient **[*3]** representative is not present and the patient is unable to sign, [s]ign the contemporaneous statement built into SafetyPad. Make sure you get a signature from the hospital representative and that it is legible or their name is printed above the signature." This bulletin also states that "[i]f the signatures are not legible, print the name of the person signing." Grievant acknowledged receiving and reading this bulletin. Exh. 9.

The January 1, 2017, EMS Protocol states: "In the event that the patient is transported to the hospital and patient is unable to sign and the authorized representative is unable to sign, then a receiving facility representative signature must be captured at the time of transport." Exh. 11.

The July 1, 2017, Administrative Protocol provides that:

> The patient needs to sign the report, whether they were transported or refused. Include the name and relationship to the patient in the report. In the event that the patient is actually physically unable or mentally incapable of signing, a signature *must* be captured from an authorized representative of the patient. An authorized representative includes *only* the following individuals:
>
> a) Patient's legal guardian
>
> b) Patient's healthcare power of attorney
>
> c) Relative or other person who receives government benefits on behalf of the patient
>
> d) Relative or other person who arranges treatment or handles the patient's affairs
>
> e) Representative of an agency or institution that furnishes care, services or assistance to the patient. Italics in original. Exh. 10.

The five signatures in question

There was Run 595/159 on September 30, 2017. Exh. **13**. At the investigatory meeting, Grievant said this [the receiving hospital signature] was "close to my signature." At the arbitration hearing, Grievant said this was his handwriting.

There was Run 691 on October 3, 2017. Exh. 14. At the investigatory meeting, Grievant said he was "uncertain" whether this was his signature. At the arbitration hearing, Grievant said this was not his signature.

There was Run 139 on October 23, 2017. At the investigatory meeting, Grievant said he was "uncertain" whether this was his signature. At the arbitration hearing Grievant said this was not his signature.

There was Run 835 on November 26, 2017. At the investigatory meeting, Grievant said this was close to his signature. At the arbitration hearing, Grievant said this was his signature and he had hospital authority to sign for the hospital..

There was Run 238 on January 6, 2018. Grievant says the system recorded the incorrect time. At the arbitration hearing Grievant said this was not his handwriting.

March 16, 2018, interview

In order for the Employer to submit a claim to Medicare for providing transportation to the hospital, the EMS report must have the signature of either the patient or the hospital representative. During early 2018, the Employer became aware that it **[*4]** may have submitted claims to Medicare for hospital run reports that allegedly did not contain valid signatures from hospitals. After the Employer obtains this information, Medicare regulations apparently require the Employer to complete an investigation on whether claims submitted in the past six years to Medicare are accurate. The Employer has six months to complete this investigation. If the Employer does not comply, the City apparently faces additional sanctions under Medicare fraud provisions. This investigation is completed through the Continuous Quality Improvement (CQI) office of CDF.

As a result of this investigation, the Employer apparently had to reimburse Medicare for run reports from three of its paramedics. Grievant was allegedly one of the three medics. According to the Employer, the Employer repaid Medicare over $40,000 for EMS run reports created by Grievant. The accuracy of hospital signatures on Grievant's reports was forwarded to CDF's Administrative Investigative Unit ("AIU") for additional investigation. Exh. 7.

Battalion Chief Secrist assisted with the AIU investigation. During the investigation, Chief Secrist visually examined signatures listed as hospital representatives from Grievant's runs. Exh. 15. Chief Secrist interviewed Grievant on March 16, 2018, and October 12, 2018. Exh. 12. Chief Secrist compared tracking data to the time stamp on some of Grievant's runs. Exh. 16. During both interviews, Grievant had an opportunity to review the information that AIU had gathered. Grievant came to the AIU office on September 28, 2018, and examined AIU's reports. Exh. 8. The summary of the AIU investigation was that Grievant did not demonstrate he was adept "with signature compliance standards set forth in the Documentation Guidelines in the Administrative Protocol."

In August 2018, after Grievant's first interview, this matter was scheduled for a hearing in front of Chief O'Connor. Initially, Chief O'Connor recommended Grievant's termination. A second hearing was held in front of Chief O'Connor on January 10, 2019. Chief O'Connor recommended termination noting that Grievant "acknowledged being aware of the policies and procedures on the collection of signatures. Evidence indicated that in many occurrences [Grievant] willfully failed to follow these procedures." Exh. 1.

April 4, 2019, Director's Hearing

Pursuant to the Columbus City Charter this matter was scheduled for a hearing in front of the Director of the Department of Public Safety. This hearing was held on **April** 4, 2019. The Union attorney was at this hearing. Following this hearing, Director Pettus sustained the charge for violating Rule 7 but modified the discipline to a suspension of seventy-two work hours.

On August 2, 2019, the Union requested arbitration. Exh. 1.

CONTENTIONS OF THE PARTIES

a. *For the Employer*

Grievant, by his own admission violated the Employer's **[*5]** procedures for obtaining signatures from hospital representatives. As a result of this violation, the Employer had to pay tens of thousands of dollars back to Medicare. Grievant's conduct is a clear violation of Rule 7. In light of the Employer's resources spent to address Grievant's negligence, a seventy-two hour suspension is appropriate.

The Employer has a clear policy that paramedics should obtain a legible signature of a hospital representative if the patient is unable to sign. This is stated in the administrative protocol, the EMS protocol, and a separate training bulletin on this issue was sent in 2016. Grievant knowingly disregarded this policy. Grievant acknowledges violating this policy. Grievant seems to suggest that getting back into service is more important than complying with paperwork. Grievant also suggests that because a nurse gave him verbal authorization to sign a report, he was complying with CDF procedure. The written policy is clear that a representative from the hospital must sign. No policy indicates that this may be accomplished by the hospital giving verbal authorization.

In addition to Grievant's admissions, a visual examination of the signatures that Grievant obtained illustrates he did not comply with CDF policy.

Instead of addressing the physical evidence-the actual signatures in the runs Grievant authored-the Union's presentation provides red herrings on the procedure. How and when a time stamp is created on a report does not change the fact that many of the signatures look the same. As the signatures themselves are undisputedly not legible, there would be no realistic way to confirm that they were from a hospital representative. The Employer has the right to trust its paramedics. As Chief O'Connor stated, Grievant was disciplined because his behavior demonstrates he cannot be trusted to complete accurate reports. By violating clear policy and instead taking short cuts to complete his reports-conduct that he admits-Grievant violated Rule 7. The seventy-two hour suspension is appropriate discipline for this conduct. The grievance should be denied.

b. ***For the Union***

According to the Union, the Employer's patient reporting software, SafetyPad, time-stamps the signature of a receiving hospital when the signature box is opened in SafetyPad-not when a signature is written. As a result, the indicated time of signature is meaningless for determining whether a signature was obtained before or after an ambulance arrived at the hospital, and likewise is meaningless to conclude that Grievant falsified signatures. The data that the Employer relied upon to investigate, to charge, and to discipline Grievant is unreliable and cannot support a finding of just cause.

The Employer did not know how SafetyPad records signatures until, facing scrutiny over Medicare reimbursements, it investigated what appeared on the surface to be a problematic situation **[*6]** where the signature of a receiving facility seems to precede the time when an ambulance arrives at the hospital. But upon learning how SafetyPad actually works, the Employer did not take responsibility for its Medicare reimbursement issues caused by its misunderstanding of its software program. Instead it blames Grievant to save face.

That is why the Employer presented a new case before the Arbitrator. The Employer charged Grievant with forging signatures solely based upon the time of the hospital's signature supposedly preceding the time that the ambulance arrived, rushing to the wrong judgment that those earlier-in-time signatures cannot be genuine. Then after realizing the deficiencies of its case as charged, the Employer presented new "evidence" outside the scope of the charge; presented new "evidence" that the parties' CBA expressly prohibits; urges the Arbitrator to uphold discipline based upon policies that the Employer did not charge Grievant with violating; and asks the Arbitrator to endorse the Employer violating Grievant's due process rights as a classified employee.

Those flaws defeat a showing of just cause discipline. The Grievance should be granted.

DISCUSSION AND DECISION

Introduction

The CBA provides that an employee cannot be disciplined without just cause. It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that such action be for just cause, the employer has the burden of proving that the discipline was for just cause. "Just cause" is a term of art in CBAs. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined. Other elements include a requirement that an employee know or could reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline; the existence of a reasonable relationship between an employee's misconduct and the punishment imposed; and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude, in part, that the seventy-two hour suspension should be reduced to a twenty-four hour suspension.

The CBA provides:

Section 9.2. Grievance Procedure

> It is the Division of Fire's well-established policy that any discharge, demotion, suspension, removal or other disciplinary measure shall only be for just cause.

Section 10.1 Just Cause.

> Any discharge, demotion, suspension, removal, or other disciplinary measure shall be only for just cause.

Discipline

Grievant was disciplined for:

RULE 7. NEGLECT OF DUTY.

> All employees are expected to perform their work duties during their work hours, to do a competent **[*7]** job in performing those duties and to work except when they are at lunch or on a rest period as authorized by contract or City policy. Employees shall not neglect their duties, that is, fail to perform their duties, or perform them in an unacceptable manner during their work hours, including any overtime hours. The following acts or omissions are specifically prohibited:
>
> (A) Performing job assignment carelessly or negligently.

Specification 1.

> Between the years 2012-2017, FF Moore has demonstrated a pattern of falsifying the signature of the hospital receiver when required, following transport from an EMS incident. This was evidenced by the receiver signature being obtained prior to the time of arrival at the hospital, as shown on the patient ePCR and GPS tracking data.

Grievant's job duties include delivering patients to hospitals. Under certain circumstances, he must obtain a signature from the hospital. This case involves five of those signatures: 159/595 on September 30, 2017; 1691 on October 3, 2017; 3139 on October 23, 2017; 0835 on November 26, 2017; and 3238 on January 6, 2018. The factual issue is whether the signatures for the hospitals in these five instances complied with the Employer rules. The Employer says the signatures did not comply. The Union says the signatures did comply.

Run 595/159 on September 30, 2017.

Exh. **13**. At the investigatory meeting, Grievant said this was "close to my signature." At the arbitration hearing, Grievant said this was his handwriting.

Run 691 on October 3, 2017.

Exh. 14. At the investigatory meeting, Grievant said he was "uncertain" whether this was his signature. At the arbitration hearing Grievant said this was not his signature.

Run 139 on October 23, 2017.

At the investigatory meeting, Grievant said he was "uncertain" whether this was his signature. At the arbitration hearing, Grievant said this was not his signature.

Run 835 on November 26, 2017.

At the investigatory meeting, Grievant said this was close to his signature. At the arbitration hearing, Grievant said this was his signature and he had hospital authority to sign for the hospital.

Run 238 on January 6, 2018.

At the arbitration hearing, Grievant said this was not his handwriting.

In short, Grievant admits that 595/159 (September 30, 2017) and 835 (October 23, 2017) were signed by him and not by the hospital.

Burden of proof

The Employer has the burden of proof in a discipline case. Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209; Cornerstone Chemical Co. **136 LA 7** , 18 (Jennings, 2015).

Witness credibility

One of my duties is to decide how credible each witness was. It is up to me to decide if a witness's testimony was believable, and how much weight I think it deserves.

I started my credibility analysis with the viewpoint that all witnesses are equal and deserving of equal deference concerning their recollections. At the **[*8]** onset, neither Employer nor Union witnesses should be given higher deference. "[S]upervisors should not necessarily be given greater credibility. ... [It has been suggested that] neither the discharged employee, the steward, nor the supervisor who made the [discipline] decision [is] inherently more credible. ..." Elkouri & Elkouri, p. 8-97.

Here are some things I consider in evaluating witness testimony. (A) Was the witness able to clearly see or hear the events in question? Sometimes even an honest witness may not have been able to see or hear what was happening and may have an incorrect recollection. (B) How good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened? (C) Was there anything else that may have interfered with the witness's ability to perceive or remember the events? (D) How did the witness act while testifying? Did the witness appear honest? Or did the witness appear to be mistaken? (E) Did the witness have any relationship with any party, or anything to gain or lose from the case that might influence the witness's testimony? Did the witness have any bias, prejudice, or reason for testifying that might cause the witness to testify incorrectly or to slant the testimony in favor of one side or the other? (F) Did the witness testify inconsistently while on the witness stand, or did the witness say or do something or fail to say or do something at any other time that is inconsistent with what the witness said while testifying? If I believe the witness was inconsistent, I ask myself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. I consider whether the inconsistency was about something important, or about some unimportant detail. I ask myself if it seemed like an innocent mistake or if it seemed deliberate. (G) How believable was the witness's testimony in light of the other evidence? Was the witness's testimony supported or contradicted by other evidence that I found believable? If I believe a witness's testimony was contradicted by other evidence, I realize people sometimes forget things, and even two honest people who witness the same event may not describe it exactly the same way.

These are some of the things I consider in deciding how believable each witness was. I consider other things that I think shed light on the witness's believability. I use my common sense and my everyday experience in dealing with other people. Then I decide what testimony I believe and how much weight I think it deserves. See generally WD Mi Civ JI 2.07. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-93 to 8-98.

I have considered all the circumstances of all the witnesses when assessing which testimony is the most credible. I have considered the totality of the circumstances.

"[T]he employee has the burden of proving the validity of the defense or excuse that the employee asserts in justification for his ... conduct." *Id.* at 15-25 fn 118.

Grievant knew of the hospital [*9] signature policy

The July 1, 2016, memo, p. 3, Exh. 5; July 1, 2017, Updated Protocol, p. 22, Exh. 10; and July 1, 2017, Updated EMS Protocol, p. 218, Exh. 11, all provide for hospital signatures.

Grievant was aware of the Employer's hospital signature policy. Grievant knew or could reasonably be expected to know that the hospital had to sign for the hospital.

The hospital signature policy was a reasonable work rule

Management has the right to establish reasonable work place rules not inconsistent with the CBA. Elkouri & Elkouri, pp. **13**-144 to **13**-145. Assuming there is a proven violation and the other requirements of just cause, the Employer's signature policy is reasonable. See generally, Abrams, p. 261.

There was a fair and objective investigation

There was an appropriate investigation.

"Industrial due process ... requires management to conduct a reasonable inquiry or investigation before assessing punishment." Elkouri & Elkouri, p. 15-49. It is a fundamental principle of employment law that the issue of due process and following correct procedures can impact on the issue of just cause and the amount of discipline, if any, that should be approved or imposed. *Id.* at 15-47 to 15-50. Federated Dep't Stores v. Food & Commercial Workers Local 1442, **901 F.2d 1494** (9th Cir. 1990) (arbitrator appropriately determined due process to be component of good cause for discharge); Teamsters Local 878 v. Coca-Cola Bottling Co., **613 F.2d 716** , 718 (8th Cir.), cert. denied, **446 U.S. 988** (1980) (appropriate for arbitrator to interpret just cause as including requirement of procedural fairness).

Abrams, p. 211, states:

> ... [T]he concept of "due process" is inherent in the just cause provision.
>
> ... [a]rbitrators prefer seeing evidence that management ... offered the accused employee the opportunity to contribute before the investigation hardened into a decision. A discharge followed by an investigation obviously puts the cart before the horse. An employer need not keep an employee at work, but there is no obvious reason why it cannot suspend the employee pending investigation.

Arbitrators "often overturn otherwise valid discharges where the employer has denied the employee those [due process] protections." Nolan, *Labor and Employment Arbitration* (1999), pp. 205 to 206.

Arbitrator Goldstein indicated at State of Illinois, **136 LA 122** , 129-130 (2015), that:

> [A]n employer's obligation to a predisciplinary investigation is determined by context. ... [T]he level of discipline involved is an important consideration ... in determining whether the underlying investigation by the employer was fair and reasonable.

Grievant was given a meaningful opportunity to tell her side of the story before discipline was imposed. There was an adequate check against the possibility of an incorrect decision.

The hospital signature rule was applied evenly and without discrimination

There is no evidence that other employees have violated the hospital signature policy and not been disciplined.

The Union makes serious arguments. [*10] I have seriously considered all of them

The Union argues that the Employer failed to establish that a work rule prohibited the conduct for which Grievant was disciplined. This argument does not control. Grievant was disciplined for not obtaining a signature from the receiving hospital. Employer rules required that Grievant receive a signature from the hospital.

The Union argues that the Employer's "impromptu" charges do not establish just cause. This argument does not control. My decision in this case is not based on "impromptu" charges. My decision is based on the specific five signature allegations that have been on the table since the beginning of the disciplinary process.

The Union argues that the Employer must notify Grievant of the possible or probable disciplinary consequences of his conduct and that no work rule, standard operating procedure, or systems manual provision prohibited an employee from signing on behalf of a receiving facility when so authorized. This argument does not control. The Employer had several rules requiring Grievant to get a signature from the hospital. No work rule authorized Grievant to make a decision not to get such a signature. He did not have the option of not getting a signature from the hospital. The hospital could not remove that obligation from Grievant or delegate it back to him.

The Union argues that the Employer's investigation of Grievant must be fair and objective, but once the Employer became aware that the SafetyPad records the receiving hospital's signature at the time the signature box is opened, the Employer sought out no witnesses to confirm when Grievant arrived at the hospital, to authenticate the receiving hospital representative's signature, or to confirm whether Grievant had been given authority to sign. This argument does not control. This is a who-signed-what case. This is not a SafetyPad case. The SafetyPad time recording situation may have led to the discovery of the signature allegations. The ultimate factual issue in this case concerns wrote the signature, not the timing of the signature. Grievant admits that several of the signatures in question were done by him and not by the hospital. There is a violation of the Employer's signature requirement even if the hospital asked Grievant to sign for it. The July 1, 2016, memo, p. 3, Exh. 5; July 1, 2017, Protocol, p. 22, Exh. 10; and July 1, 2017, EMS Protocol, p. 218, Exh. 11, all provide for hospital signatures. They do not provide for Grievant signatures on behalf of the hospital.

The Union argues that the Employer relies upon defective information, much of which falls outside the scope of the Charge or is prohibited by a Memorandum of Understanding, and the Employer breached its promise not to use GPS data that precedes March 31, 2017, for purposes of discipline. This argument does not control. This case involves five signatures, the first of which was September 30, 2017. This is after the time period covered by the Memorandum of Understanding.

The Union argues Grievant's **[*11]** discipline must be reasonably related to both the seriousness of the proven offense and Grievant's exemplary service record. As indicated elsewhere in this Decision, I agree.

The Employer makes serious arguments. I have seriously considered all of them.

The Employer argues that Grievant acknowledges violating the signature policy and Grievant seems to suggest that getting back into service is more important than complying with paperwork requirements. I agree that Grievant testified that he signed for a hospital at least twice. I am approving the imposition of a twenty-four hour suspension on Grievant for these two signatures.

The Employer argues that Grievant suggests that because a nurse gave him oral authorization to sign the hospital, he was complying with CDF procedure, the written policy is clear that a representative from the hospital must sign, and no policy indicates that this may be accomplished by the hospital giving authorization otherwise. I agree with the Employer that the hospital has to sign for itself. Grievant does not have the authority to deviate from this even with purported authority from the hospital.

The Employer argues that how and when a time stamp is created on a report does not change the fact that some of the signatures look the same, and as the signatures themselves are not legible, there is no realistic way to confirm that they were from a hospital representative. I agree with this argument. This is not a time stamp case. This is a signature case. At the arbitration hearing, Grievant admitted that at least two of the signatures are not the hospital's. The hospital signatures in question can be described as tildes ~~.

The Employer argues that the Employer has the right to trust its paramedics, Grievant was disciplined because his behavior demonstrates he cannot be trusted to complete accurate reports, by admittedly violating policy and taking short cuts to complete his report, Grievant violated Rule 7, and the seventy-two hour suspension is appropriate discipline for this conduct. This argument does not control. In light of the totality of the circumstances, including Grievant's years of good service, a twenty-four hour suspension is consistent with the CBA requirement of just cause. A seventy-two hour suspension is not consistent with just cause.

Penalty

It has been indicated that the remedy to be fashioned will be fact-specific. An arbitrator can consider mitigating circumstances. Arbitrators may reduce the penalty if, given the facts of the case, it is clearly out of line with generally accepted industrial standards of discipline. Elkouri & Elkouri, pp. 18-46 to 18-49; and Elkouri & Elkouri, *How Arbitration Works* (8th ed.) (2018 Cum. Supp.), pp. 18-6 to 18-7. See generally ConAgra Foods, Inc., **137 LA 169** , 178-180 (Ross, 2017). "Absent a specific provision establishing that violation of a provision [of the CBA] results in [a certain level of discipline], the arbitrator has broad leeway to **[*12]** determine whether the discipline imposed fits the charge of misconduct." Farrell, "Due Process/Just Cause Issues," *References for Labor Arbitrators* (American Arbitration Association, 2005), p. 32. "Court decisions recognize broad arbitral discretion to review the reasonableness of the penalty imposed by the employer in relation to the employee's wrongful conduct." Elkouri & Elkouri, p. 15-32. Paperworkers v. Misco, Inc., **484 U.S. 29** (1987). Miami Twp. Bd. of Trustees v. Fraternal Order of Police, Ohio Labor Council, Inc., **81 Ohio St. 3d 269** (1998) (arbitrator has the authority to review the appropriateness of the discipline imposed.)

Grievant had not been disciplined before. The Employer awarded the Bronze Maltese Award to him for exhibiting courage in the performance of his duties. Exh. 19. The Columbus City Council had honored and recognized his performance and service. This was for saving a four year old girl from a German Shepherd dog. Exh. 20. Grievant has served 24 years with the Employer as a Firefighter.

"[T]he employee's past record often is a major factor in the determination of the proper penalty for the offense." Elkouri & Elkouri, p. 15-69. Length of service with the Employer, especially an unblemished record, is a definite factor in favor of an employee. *Id.* at 15-74. Windstream Nebraska, Inc., **136 LA 1354** , 1358 (Fitzsimmons, 2016).

Even though Grievant impermissibly signed at least two times for a receiving hospital in violation of a work rule, a seventy-two hour suspension costing Grievant $2,853.36 in base wages alone was unreasonable. Discipline should be reasonably related to the seriousness of the proven offense and the employee's record of service.

The Employer did not follow its policy of progressive discipline. “Except for serious infractions of the rules, the City will follow a policy of progressive disciplinary action. …” Exh. 3 at p. 1.

The Record does not reflect what the cost was related to the times that Grievant impermissibly signed for the hospital. Assuming those patients were covered by Medicare and that the Employer did refund the amounts that it collected for providing care, the Employer did not establish the amount of those refunds

The Employer and Union are jointly responsible for paying the arbitrator’s fees and costs

CBA Art. 9.2, Step 3(5) obligates the losing party to pay “[t]he compensation and expenses of the arbitrator.” The Employer has prevailed on the issue of having a twenty-four hour suspension. The Employer has prevailed on having its signature by the hospital policy being enforced. The Union has prevailed on the issue of the issue of not having a seventy-two hour suspension. The Union has prevailed on the issue of the period of time for the stipend and overtime adverse impact to be reduced.

This is a split decision. I identify both parties as equal winners and losers in this case. The compensation and expenses of the arbitrator shall be split and paid fifty-*fifty* between the parties. Elkouri & Elkouri, pp. 18-36 **[*13]** to 18-37. Fawcett Mem’l Hosp. **136 LA 1727** , 1735 (Goldberg, 2016).

The alleged lost overtime and stipend situation

The Union argues that Grievant lost $3,538.47 in lost wages from being unable to work as the In-Charge Medic. According to the Union, MOU #2016-01 provides that In-Charge paramedics receive a stipend of 3.5% of his/her hourly rate. Exh. 2 at p. 127. When the Employer investigated Grievant beginning in very early 2018, it prohibited him from working as the In-Charge Medic. Before then, Grievant worked as the In-Charge one-half of his shifts. According to the Union, Grievant works on average nine, twenty-four hour shifts per month, and the Employer deprived Mr. Moore of $1,740.92 [$38.38 per hour × 3.5% = $1.3433 per hour × 4.5 In-Charge shifts per month × 24 hours per shift × 12 months = $1,740.92. (CBA, Sec. 12.1(A)(1) Class E/5.)] in 2018 and $1,797.55 [$39.63 per hour × 3.5% = $1.387 per hour × 4.5 In-Charge shifts per month × 24 hours per shift × 12 months = $1,797.55] in 2019, respectively.

The adverse impact on stipend and/or overtime hours apparently started in January 2018 when the investigation started and apparently ended after the seventy-two hour suspension had been served. The ending date of the adverse impact period is not clear in the record. There was an interview with Captain Barnhart of the Professional Standards Unit on March 16, 2018. The March 16, 2018, hearing reflects that Grievant, as of January 2018, stated “I don’t get the paramedic, I haven’t gotten any overtime since the process started. …” Exh. 4-B, pp. 19 to 20. The Employer provided Grievant with the Chief’s hearing on January 10, 2019. This hearing resulted in the Chief recommending termination in the February 12, 2019, Hearing Results document. This led to the **April** 4, 2019, Director’s Hearing which resulted in a seventy-two hour suspension. The suspension was announced in a document dated June 18, 2019. That resulted in the later grievance and arbitration proceedings. Based on the preponderance of the evidence, if the Employer had timely provided for the serving of the twenty-four hour suspension, the suspension would have been served prior to December 1, 2018. It was inappropriate and a violation of just cause for Grievant to have been subject to the adverse stipend and/or overtime situation after November 30, 2018. The Employer will reimburse Grievant for any lost stipend and/or overtime after November 30, 2018, and the time that Grievant’s stipend and overtime opportunities were reimplemented.

The issue in this case provides that, if I do not find just cause existed for the seventy-two hour suspension, then I shall determine the appropriate remedy. “The back pay amount should make the employee whole for the loss of earnings incurred by reason of the employer’s contract violation.” Abrams, p. 175. See generally Elkouri & Elkouri, p. 15-22.

The Federal and Ohio law allegations

The Union argues that Grievant is a classified employee, and Grievant has a property interest in continued **[*14]** employment which the Employer cannot take away without affording due process. Clev. Bd. of Edn. v. Loudermill, **470 U.S. 532** , 541 (1984) ("While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."). O.R.C. 124.34(A)

I have rendered a Decision and Award concerning the CBA allegations and issues. I am not making a determination concerning the Federal and Ohio law allegations.

The National Academy of Arbitrators, American Arbitration Association, and Federal Mediation & Conciliation Service, Code of Professional Responsibility for Arbitrators of Labor Management Disputes, C(1)(a), states:

C. Awards and Opinions

> 1. The award should be definite, certain, and *as concise as possible.*
>
> a. When an opinion is required, factors to be considered by an arbitrator include: *desirability of brevity,* consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and *avoidance of gratuitous advice or discourse not essential to disposition of the issues.* Emphasis added. Abrams, pp. 297-298.

Conclusion

The crucial points in this case include:

1. The Employer has the burden of proof;

2. The Employer's published reasonable rules concerning hospital signature;

3. Grievant had knowledge of the signature requirement;

4. Grievant admitting to signing at least twice for the hospital;

5. Grievant's length of service, work history, and unblemished record;

6. The totality of the circumstances; and

7. The CBA.

This decision neither addresses nor decides issues not raised by the parties.

The Employer violated CBA, Section 10.1, by suspending Grievant for more than twenty-four hours without just cause.

The Employer shall reimburse Grievant his Contract wages that he would have earned had he not been suspended in excess of twenty-four hours.

The Employer shall make Grievant whole for any other money or benefits lost, other than during the twenty-four hour suspension, including but not limited to applying the appropriate number of hours to the accrual of Grievant's sick leave and vacation leave.

The Employer will reimburse Grievant for any lost stipend and/or overtime from December 1, 2018, until the time that Grievant's stipend and overtime opportunities were reimplemented.

This is a split decision. I identify both parties as equal winners and losers in this case. The compensation and expenses of the arbitrator shall be split and paid fifty-fifty between the parties. CBA Art, 9.2, Step 3 (5).

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials **[*15]** in this case and in light of the above discussion, I grant the grievance in part and deny the grievance in part.

The Employer violated the CBA, by suspending Grievant for more than twenty-four hours without just cause.

The Employer shall reimburse Grievant his CBA wages that he would have earned had he not been suspended in excess of twenty-four hours.

The Employer shall make Grievant whole for any other money or benefits lost, other than during the twenty-four hour suspension, including but not limited to applying the appropriate number of hours to the accrual of Grievant's sick leave and vacation leave.

The Employer will reimburse Grievant for any lost stipend and/or overtime from December 1, 2018, until the time that Grievant's stipend and overtime opportunities were reimplemented.

This is a split decision. I identify both parties as equal winners and losers in this case. The compensation and expenses of the arbitrator shall be split and paid fifty-fifty between the parties. CBA, Art, 9.2, Step 3(5).

I retain jurisdiction over this matter for sixty days from the date of this Award for the sole purpose of resolving any issue(s) pertaining to the order of rights and privileges contained in this Award.

Dated: **April 13**, **2020**.