

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 15-02-090603-072-01-09

OHIO CIVIL SERVICE EMPLOYEE'S ASSOCIATION

GRIEVANT: Christy Backus nka Richardson

AND

THE STATE OF OHIO

OHIO DEPARTMENT OF PUBLIC SAFETY

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: April 24, 2010

APPEARANCES FOR THE PARTIES

Employer:

Kathy Gulla, Ohio Department of Public Safety

Employer Advocate

Marissa Hartley, Office of Collective Bargaining

Samantha Genders, Employer Representative

UNION:

William A. Anthony, Jr. OCSEA Union Advocate

Richelle Davis, Second Chair

Pam Caldwell, Staff Representative

Grievant: Christy Backus nka Richardson

PROCEDURAL HISTORY

Ohio Department of Public Safety is hereinafter referred to as "Employer". Ohio Civil Services Employees Association is hereinafter referred to as "Union". Christy Backus nka Richardson is hereinafter referred to as "Grievant".

Grievance No. 15-02-090603-072-01-09 was submitted by the Union to Employer in writing on June 3, 2009 pursuant to Article 24 of the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance, it was referred to arbitration in accordance with Article 25, Section 25.02(3) of the 2006-2009 Collective Bargaining Agreement.

Pursuant to the collective bargaining agreement between the Union and Employer, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on January 28, 2010 at the Ohio Civil Service Employees Association, Columbus, Ohio. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witness, and oral argument. Witnesses were sequestered during the hearing. The parties elected to file post-hearing briefs. The Arbitrator received closing briefs from both parties. The Arbitrator received the last brief on March 8, 2010.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator, and submitted joint stipulations of fact.

The parties stipulated that the issues to be resolved in the instant arbitration to be: Was the removal of Christy Backus for just cause? If not, what shall the remedy be?

PERTINENT PROVISIONS OF THE 2006-2009 AGREEMENT

Article 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action...

Article 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- a. One or more oral reprimand(s) (with appropriate notation in employee's file);
- b. One or more written reprimand(s);
- c. Working suspension;
- d. One or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB. Agencies shall forward a copy of any fine issued to employees, to OCB. Should a grievance be filed over the issuance of a fine and the grievance is settled prior to Step 4, the Agency shall forward a copy of the settlement to OCB. OCB shall maintain a database involving fines and share this information with the Union no less than quarterly.
- e. One or more day(s) suspension(s);
- f. Reduction of one (1) step; This shall not interfere with the employee's normal step anniversary. Solely at the Employer's discretion, this action shall only be used as an alternative to termination.
- g. Termination.

Article 28.03 Vacation Procedure

Vacation leave shall be taken only at times mutually agreed to by the Agency and the employee and shall be used and charged in units of one tenth (1/10) hour. The Agency may establish minimum staffing levels for a facility which could restrict the number of concurrent vacation leave requests which may be granted....

Employees in other than seven (7) day operations shall request vacation according to agency policy (work rules) unless the Employer and the Union mutually agree otherwise. In those operations, the Employer shall not deny a vacation request unless the vacation would work a hardship on other employees or the Agency. The Employer shall promptly notify employees of the disposition of their vacation requests. Unless the Employer agrees otherwise, an employee's vacation will not exceed one (1) year's accrual.

BACKGROUND

Set forth in this Background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the Discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

Grievant had been employed by the State of Ohio since September 11, 1991; she had nearly 18 years of service at the time of her removal. Grievant was an Account Examiner 2 for the Ohio Department of Public Safety in the Revenue Management Department. Seventy percent (70%) of her time is allocated for assistance in reviewing and taking appropriate action to correct problems with various transactions for various accounts to ensure their accuracy, completeness and compliance with rules and regulations. Twenty percent (20%) of her time is allocated to provide guidance to all sections and agency rules and procedures related to sales, revenue, depositing and refunding, review and audit daily transactions for compliance with the above, and so forth. Five percent (5%) of her time is allocated to cross train others, write and maintain desktop procedures for processes and serve as back-up for various duties for the unit. The remaining five percent (5%) of her time is allocated to perform other related duties as requested (e.g. filing, typing correspondence, answering phones, etc.) The scheduled work shift of Grievant starts at 7:00 a.m., and has been adjusted by FMLA for a maximum of two (2) hours at the start of shift, and her lunch period (originally 45minutes then changed to an hour), if applicable.

Employer conducted an investigation into the attendance of Grievant due to the suspicion of a supervisor that Grievant was falsifying time sheets. The investigation of Employer included a review of phone records, computer data files, security desk files, video recordings, HMS reports, sign-in sheets, and swipe card records. The administrative investigator analyzed ninety-seven (97) working days. The administrative investigation indicated that of the ninety-seven (97) days in question, there were sixty-one (61) days where there were no identified timekeeping issues. There were four (4) days where Grievant was alleged to have falsified her start time but received no gain. There were four (4) days where Grievant failed to obtain a temporary identification card as required by policy. There were six (6) days where there was insufficient evidence to support a finding. There were twenty-two (22) days where Grievant is alleged to have falsified her time and received a monetary or other gain. Of the aforementioned twenty

two (22) days, seventeen (17) days involved a gain of less than five (5) minutes. The remaining five (5) days indicate time discrepancies ranging from twenty-eight (28) minutes through fifty-nine (59) minutes. Grievant was paid for time represented by the discrepancies as noted in the investigation. The investigator was unable to track the duties of Grievant related to her responsibility to forward a daily report to the bank which is time sensitive at the start of her shift. The investigation tracks the attendance of Grievant by sign-sheets, identification card swipe records, temporary employee identification card records, and use of her computer. However, her computer is not utilized to perform the daily report to the bank. No policy existed at the time of investigation requiring Grievant to log on to her computer at the start of her shift.

On March 24, 2009, Grievant was approved for leave due to FMLA until 10:00 a.m. Grievant called into management prior to 10:00 a.m. to request additional leave from 10:00 a.m. to 1:00 p.m. because her car window had been busted, and car vandalized. Her immediate supervisor submitted the request for leave at 08:00:23 a.m. At 08:29:14 a.m. the request was "approved due to mitigating circumstances per Kenneth Higgins." At 09:53:50 a.m. the notation states "approved pending documentation of mitigating circumstances." At 09:57:27 a.m. the notations state administrative investigation" pending due to leave without pay status without the benefit of FMLA." Grievant arrived at 12:04 p.m., and provided a copy of the police report. It is disputed whether Grievant had permissive leave available to cover her absence from 10:00 a.m. to 12:04 p.m. Since the absence was not due to FMLA, Employer entered her into a leave without pay status without the benefit of FMLA for a total of two (2) hours and four (4) minutes for the leave from 10:00 a.m. to 12:04 p.m. on March 24, 2009.

Grievant was terminated on May 29, 2009 for violation of Ohio Department of Public Safety's work rules 501.01(C)Leave Without Pay and 501(C)(10)(c)Dishonesty. Specifically, it is charged that from November 3, 2008 through March 27, 2009 Grievant falsified sign-in time sheets on numerous occasions when she was not actually at work. In addition, on March 24, 2009, Grievant went into a leave without pay status with no FMLA coverage for her absence.

Her department record is as follows: A three day working suspension for leave without pay status was issued on April 22, 2009 when Grievant went into leave without pay status for twelve (12) minutes. A three (3) day fine issued on December 21, 2008

for negligence when Grievant abused FMLA leave time by exceeding the approved amount of time. A verbal reprimand for tardiness on March 19, 2008 when Grievant was five minutes late because she lost her ID badge somewhere in the parking lot. A one day fine issued on January 20, 2008 for noncompliance to policy/procedure and leaves without pay status, when Grievant submitted request for leave but failed to seek approval prior to the actual leave. A written reprimand for leave without pay status on June 26, 2007 where Grievant was scheduled to work from 0815 -1700 hours, granted personal leave from 0815-0933 hours, failed to report for work at 0933 hours, and was entered leave without pay status from 0933-1315 hours. A written reprimand for noncompliance to policy/procedure was issued on June 26, 2007 when Grievant used a handicapped placard that was issued to another individual which enabled her to park in a designated handicapped parking space in the Employer parking lot. A verbal reprimand for leave without pay status was issued on August 10, 2006 when Grievant took off time to provide child care assistance for her sister and had insufficient leave to cover her absence and went into leave without pay status. A verbal reprimand for noncompliance to policy/procedure was issued on July 26, 2006 when Grievant parked her vehicle in the "visitor parking" area in violation of the parking policy.

The Union filed its grievance on June 3, 2009 alleging a violation of Article 24 Standard. The grievance was not resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration.

POSITIONS OF THE PARTIES

EMPLOYER

Employer contends that Grievant was terminated for just cause. The department conducted a thorough investigation of the irregular attendance and time keeping practices of Grievant. The administrative investigative findings demonstrate that Grievant was compensated for time she did not work on twenty-two (22) separate occasions. The record amply demonstrates through the investigator, supervisor, and the investigative findings "a regular pattern of dishonesty" with respect to the time keeping of the Grievant. Grievant stole time from the State in a premeditated manner; the findings demonstrate that the larger discrepancies in time occurred when her immediate supervisor was scheduled off from work. Grievant engaged in a pattern of falsifying her sign-in time sheets to avoid using permissive leave or FMLA leave and

received a monetary gain. The actions of Grievant violated the trust of her Employer and the State of Ohio. Said actions constitute a violation of DPS Rule 501(C)(10)(c) Dishonesty.

Employer contends that Grievant went into leave without pay status without FMLA coverage for her absence on March 24, 2009. An emergency did exist, and Grievant provided verification of the emergency. Grievant who is responsible for knowing her actual balances, did not have sufficient leave available to cover the request. Said action constitutes a violation of DPS Rule 501.01(C)(3) Leave Without Pay.

Employer contends that Grievant is not credible a witness and her testimony should not being given any credence when weighed against the testimony of the investigator, immediate supervisor and documentary evidence. Employer argues that the material allegations of supervisory intimidation in the testimony of Grievant were not corroborated. There were numerous discrepancies in the testimony of Grievant which further demonstrate her dishonesty throughout the grievance process. The discrepancies in her testimony demonstrate an attempt by Grievant to reconcile the evidence in a light most favorable to Grievant.

Employer contends that Grievant has been officially counseled, warned and disciplined about inappropriate behavior on eight (8) different occasions. Despite her long term service with the Employer, Grievant continued to ignore policy and failed to correct her behavior.

Employer requests that Grievance No. 15-02-090603072-01-09 be denied.

UNION

Union contends that there was no violation of DPS Rule 501(C)(3) Leave Without Pay. On March 24, 2009 Grievant had her car window broken and car vandalized. She contacted her employer because she wanted to seek approval to use vacation time due to the emergency circumstances to have her car window repaired prior to coming to work due to her FMLA condition. Her immediate supervisor informed her that the circumstances qualified for the use of vacation leave. The vacation leave was available. The vacation leave which should have been approved for these exigent circumstances was denied, placing Grievant in leave without pay status.

Union contends that the evidence does not demonstrate a violation of the work rule 501(C)(10)(c) Dishonesty. Grievant did not falsify her time-sheets. Grievant did not

engage in a pattern of deception for monetary gain. The Union argues that the disciplinary action given the eighteen-year tenure of Grievant and admission of the one mistake in the recording of her time, the termination was made without just cause.

Union contends that termination was too severe a punishment. Termination was not progressive but rather punitive in nature and did not afford Grievant the opportunity for correction.

Union contends that the combined exploratory investigation of the department chief and the administrative investigation of Employer expanded from September 1, 2008 through March 27, 2009. Grievant however was disciplined separately on April 7, 2009 for an occurrence of similar nature which arose during the same time period of the administrative investigation. Union argues that Employer has engaged in the stacking of charges against Grievant to support a removal.

Union contends that the investigation is flawed because the Employer ignored the fact that Grievant performed duties at the start of her work day that were not connected to her computer, and because the Employer could not track the time the work was done, they simply chose to ignore that Grievant was at work even though the work was completed.

Union contends that the experiences of Grievant of hostility, intimidation and harassment in the workplace were numerous. When her department chief's directives were overturned by other departmental heads, he singled out Grievant for work rule violations and discipline to progress her for removal.

Union requests that Grievance No. 15-02-060427-0093-01-09 be sustained, and that Grievant be reinstated to her position, with full back pay and benefits. In the alternative, if the infractions are upheld, Grievant should be reinstated with a lesser discipline imposed.

DISCUSSION

Article 24.01 of the collective bargaining agreement provides that disciplinary action shall not be imposed upon an employee except for just cause. The just cause standard is founded upon the principles of due process and fairness in the administration of discipline. Briefly, the elements of just cause include reasonable work rules, sufficient proof of misconduct or misbehavior, a fair and objective investigation, notice that the misconduct or behavior can result in disciplinary action, and that the penalty must be proportional to the behavior with no disparate treatment. With the

exception of serious or egregious offenses, the just cause standard and the collective bargaining agreement contemplate that the discipline must be progressive or corrective in its application. The employee is noticed that the infraction or misconduct is unacceptable and, if repeated, discipline is progressively applied with increasing severity up to and including termination. The Employer has the burden of proof to establish just cause for any disciplinary action; recognition of this burden is incorporated in the collective bargaining agreement. For a removal case the evidentiary burden is proof by clear and convincing evidence.

In the instant case, Employer issued the notice of termination on May 29, 2009. The notice states:

“You are hereby advised you are being terminated from your Employment with the Department of Public Safety, effective Immediately May 29, 2009, for violation of the Ohio Department of Public Safety Work Rules 501.01 (C)(3), leave without Pay and 501.01(C)(10)(c), Dishonesty.

Specifically it is charged that from November 3, 2008 through March 27, 2009 you falsified sign-in times on numerous occasions that you were not actually at work. In addition, on March 24, 2009 you went into a leave without pay status with no FMLA coverage for your absence.”

Under the just cause standard, Employer must first establish that the reasonable work rules exist, and communicated to Grievant. Employer has established work rules for non-sworn bargaining unit personnel. It is not disputed that the work rules are reasonable. Grievant signed and acknowledge that she had read said Work Rules. DPS Rule 501.01 (10) (e) notices Grievant that she may be disciplined for failure to follow guidelines contained in the work rules, which result from failure to follow applicable policy and procedure of the Department of Public Safety.

Grievant is charged with violation of DPS Rule 501.01(C)(3) Leave Without Pay. DPS Rule 501.01(C)(3) states that any employee who is absent without approved leave is in leave without pay status and subject to discipline. DPS Rule 501.16(B)(1) states that “leave shall be taken only at times mutually agreed to by the employer and the employee,” and DPS-501.16(B)(5) states that “vacation and compensatory time leave requests will be granted or denied in accordance with the applicable labor agreement.” Article 28.03 paragraph (1) of the 2006-2009 Collective Bargaining Agreement provides

in pertinent part "vacation leave shall be taken only at times mutually agreed to by the Agency and the employee..." Article 28.03 paragraph (4) of the labor agreement further provides "... the Employer shall not deny a vacation request unless the vacation would work a hardship on the other employees or the Agency. DPS-501.16(C)(6)(e) "there may be times when an employee is late for work for a legitimate reason in which disciplinary action is not in order. Supervisors should consider mitigating circumstances prior to implementing discipline, under the direction of Human Resources. In the case of an unforeseen emergency, personal leave, vacation or other permissive leave may be approved by a supervisor." An emergency existed, and Grievant brought verification of the emergency, the police report, into the department when she returned to work.

It is not disputed that on March 24, 2009, Grievant was approved for leave due to FMLA until 10:00 a.m. Grievant called into management prior to 10:00 a.m to request additional leave from 10:00 a.m. to 1:00 p.m. because her car window was busted and car vandalized. Her supervisor testified that the leave was approved for exigent circumstances but Grievant did not have leave available. When the supervisor was questioned regarding the non-approval of vacation leave to validate the request, there was uncertainty in his responses regarding the leave balances. According to the Request for Leave and Adjustment Detail, Grievant had an available balance of 0:05 hours in personal time, 05:49 hours in sick time and 12.50 hours in vacation time as of 03/14/2009, with usage of 4:36 in sick time and 6:48 in vacation for the pay period ending 03/28/2009 on that date. Her supervisor testified that the document was printed off on March 30, 2009, and additional leave may have been added, but he was unsure. Grievant was of the opinion that vacation leave was available at the time of the request based upon her conversation with her supervisor. It was her understanding that he checked her balances during their conversation; Grievant was at the hospital when the telephone call was placed to her immediate supervisor for treatment of her FMLA condition. The administrative investigation questions and responses provide little clarification. The third question asked was "When you requested additional leave on March 24, 2009, were you aware that you did not have permissive leave available to cover this request." Her response was "No." The response only indicates that she was not aware that she did not have sufficient leave available. There was no specific question posed on actual balances on March 24, 2009 at the investigatory interview. At the hearing Grievant testified that she believed that she had vacation time available.

Thus, there was insufficient evidence on a material fact, the actual permissive leave available to Grievant on March 24, 2009.

The arbitrator therefore concludes that there was no just cause to discipline Grievant for violation of DPS Rule 501.01(C)(3) Leave Without Pay.

Grievant is charged with violation of DPS Rule 501(C)(10)(c) Dishonesty. DPS Rule 501.01(C)(10)(c) states "Employment-related dishonesty, falsifying and/or altering employment applications or any other job related documents, records or statements.

Due to suspicion that Grievant was compensated for time when she was not at work, the department chief initiated an exploratory investigation into her attendance, timekeeping, and payroll. The department chief reviewed sign-in sheets, identification card swipe records, temporary employee identification card records, and copies of payroll for Grievant from September 1, 2008 through January 22, 2009. In reviewing Exhibit A, the department chief specifically identifies two concerns arising in September of 2008. The first concern arose on September 2, 2008, wherein the department chief highlights that Grievant "did not have her badge, temporary employee identification card requested, but card swiped during the day". The second highlighted concern is a more general comment that Grievant has not requested a replacement identification card since September 1, 2008. His exploratory findings resulted in a formal request for an administrative investigation. Notwithstanding the exploratory investigation from September 1, 2008 through January 22, 2009, the formal investigation is conducted from November 3, 2008 through March 27, 2009, resulting in an increase of the percentages of discrepancies since only two discrepancies are noted from September through October 2008.

The administrative investigator conducted several tests to determine if time discrepancies existed between the Hours Management System (HMS) and the time clock by the Revenue Management sign-in sheet. A test was conducted on February 4, 2009 and determined that both HMS and the clock on the sign in sheets were within seconds of each other at the time the test was conducted. A test was conducted on April 12, 2009 to determine if there was any time discrepancy between the HMS clock and the time report generated (Event Log Report) when an employee uses her access card at the Employee Entrance and Revenue Management Entrance. This test result indicated no discrepancy between the two systems. The supervisor in his email of April 29, 2009 stated that he recompared the sign-in clock with HMS in terms of how

synchronized they were, and found them to be seconds apart. The supervisor testified that he had no understanding of how the timekeeping systems operated or how the clocks work. He did not know if they were battery operated and if they were, when the last time the batteries were changed. On the date that he conducted the test, the systems were within seconds.

Surveillance video for certain dates had been destroyed prior to the investigation. Through the course of the administration investigation, it was determined that Grievant installed an internet program for screensavers known as Webshots. Webshots initiated within minutes of the computer being activated. The investigator established Webshots as a control group to track the attendance of Grievant.

The investigator makes an erroneous assumption throughout the investigation. Namely, each day that Grievant immediately enters her work station the first thing she does is to turn on her computer. Grievant is responsible for running reports in the Automated Titling Processing System (ATPS), and transmitting the same to the bank. The supervisor testified that the process generally takes ten to fifteen minutes but if there is equipment failure, it will take longer. The supervisor estimated that the equipment fails three (3) to four (4) times per month. These reports are due between 9:00 a.m. and 10:00 a.m. Both Grievant and her supervisor agree that she completes the reports first thing in the morning, and the investigator was aware of this task. In the course of the investigation, the investigator contacted several personnel to obtain verification of these duties of Grievant. The investigator was informed that there was no way in the current ATPS system to track when an employee logged on to the system or ran certain reports.

Further, in reviewing the dates when there were no identified timekeeping issues, a comparison of the swipe card times, sign-in time sheets and Webshots.com Run Time supports the testimony of Grievant. On November 3, 2008 a temporary ID badge is issued at 10:13 a.m, the sign-in time is 10:15 a.m but Webshots.com does not initiate until 10:29:14 a.m., 0:14:14 minutes later. On November 4, 2008 the Employee entrance swipe time is 12:04:53 p.m., the sign-in time is 12:06 p.m., but Webshots.com does not initiate until 12:24:27 p.m., 0:18:27 minutes later. On November 6, 2008 the Employee entrance swipe time is 8:37:21a.m., the sign-in time is 8:38 a.m., but Webshots.com does not initiate until 8:44:02 a.m., 6:02 minutes later. On November 10, 2008 the Employee entrance swipe time is 7:03:44 a.m, the sign-in time is 7:06 a.m.,

but Webshots.com does not initiate at all. On December 1, 2008 the employee entrance swipe time is 6:56:55 a.m., the sign-in time is 6:57a.m., but Webshots.com does not initiate until 7:45:03a.m., 0:48:03 minutes later. The argument of the Employer tying her attendance to Webshots.com is without merit. Additionally, on January 5, 2009, an insufficient finding date, a temporary badge is issued at 10:42 p.m., the sign-in time is 10:42 a.m., but Webshots.com does not initiate until 11:43:15 a.m., 01:01:15 hour later. The investigator draws a negative inference and comments "there is almost an hour that passes between when Grievant allegedly obtained her temporary ID and when Webshots initiated, creating questions about what time she arrived at work or turned on the computer." The inference should be that she was at work, and raise questions as to her productivity rather than theft of time. Unfortunately, this type of rational permeates throughout the investigation, and arguments of Employer. These conclusions are not only wrong they are unfair and a violation of the just cause provision in the Collective Bargaining Agreement. Actual surveillance would have accomplished the objectives of Employer, and support the element of a fair investigation.

At the arbitration hearing, Employer prepared a color coded tabbing process to identify the discrepancies. The seventeen (17) yellow tabs indicated findings of less than five minutes. The six (6) green tabs indicated there were no substantial findings and/or insufficient evidence. The five (5) blue tabs indicated discrepancies ranging from twenty-eight (28) through fifty-nine (59) minutes.

Union argues that the six dates identified by the green tabs should be disregarded because there were no substantial findings and/or insufficient evidence. The Arbitrator agrees due to the quantum of proof necessary for the removal.

Union further argues that the seventeen occurrences where finding are less than five minutes should be given no weight. It is not disputed that the investigator stated that the department was not concerned about small time discrepancies of two (2) to three (3) minutes because the clocks could be off by these amounts. There is only one occurrence of four (4) minutes, the remainder range from one (1) to three (3) increments of time. The underlying principles of the just cause standard is due process and notice. If two (2) to three (3) minutes are at issue then make it an issue, and allow the adverse party the right to defend. Grievant testified that she wrote the time from the clock at the sign-in station. The supervisor had no idea how the clocks operated, but on the dates

tested the clock and HMS system were synchronized. Her coworker who is stationed on the second floor testified that it was not uncommon for employees in the Grievant's division to be leaving while employees on her floor were waiting for the supervisor to release them. Their work day ended at the same time. The discrepancies in this category total forty (40) minutes.

The remaining five (5) days have discrepancies ranging from twenty-eight (28) through fifty-nine (59) minutes. The first date in question is December 9, 2008; the findings were as follows:

Employee Entrance swipe	Revenue Management Swipe	Temporary ID Badge Requested	Sign-In Sheet Time	HMS Start Time	Webshots.com Run Time
11:00:02	11:01:14	N/A	9:30	9:45	10:13:24

The investigator stated that it is impossible to prove Grievant was or was not at work during the time frame claimed. All surveillance video from this date was destroyed prior to the investigation being initiated. Employer argues there is approximately 28 minutes (0945 HMS start time to 1013 Webshots initiated) where Grievant was compensated and does not appear to have been in the building. Again, this represents the flaw in the investigation; the duties and responsibilities of Grievant are not tied to her computer.

Grievant explained that she signed-in at 9:30 a.m.; the HMS start time reflects her lunch time that was added onto her FMLA. She was in the building before 11:00:02 because the Webshots.com on her computer initiated at 10:13:24 a.m. Grievant testified that she most likely forgot her badge, and the guard permitted her access into the building. The temporary ID was not requested because her badge was likely in her sweater in her office. When she did not locate her badge, she went to her car at her break, and then swiped the badge on her re-entrance into the agency. The investigation does not show any interviews with the guards regarding the entrance of Grievant with her badge or temporary identification card.

The second date in question is December 16, 2008; the findings were as follows:

Employee Entrance swipe	Revenue Management Swipe	Temporary ID Badge Requested	Sign-In Sheet Time	HMS Start Time	Webshots.com Run Time
9:26:31	9:27:48	N/A	8:52	8:52	9:32:50

Grievant explained that she did not have her badge, and the guards permitted her entrance with the instructions that she was to request a temporary ID card if she did not find her badge. Grievant would complete her reports, and then seek permission from her supervisor to return to the entrance to swipe the card, if she was not eligible for break.

The third date in question is December 26, 2008; the findings were as follows:

Employee Entrance swipe	Revenue Management Swipe	Temporary ID Badge Requested	Sign-In Sheet Time	HMS Start Time	Webshots.com Run Time
9:31:03	9:32:02	N/A	8:52:00	8:54:00	9:41:00

On that date Grievant called into the office at 7:34a.m. , and requested FMLA for 1:54 minutes. Grievant explained that she had lost her badge, and it was recovered by a coworker. Her supervisor granted her permission to leave her workstation, and when she reentered the building she swiped her card. The surveillance tapes were destroyed prior to the investigation to confirm these facts. Her department record indicates that Grievant was issued a verbal reprimand for tardiness because she lost her ID badge somewhere in the parking lot earlier that year. Grievant testified that later she discovered that a clasp was broken on the badge.

The fourth date in question is January 2, 2009; the findings were as follows:

Employee Entrance swipe	Revenue Management Swipe	Temporary ID Badge Requested	Sign-In Sheet Time	HMS Start Time	Webshots.com Run Time
9:41:57	9:43:20	N/A	8:42:00	8:42:00	9:49:17

Again, Grievant explained that she did not have her badge, and the guards permitted her entrance with the instructions that she was to request a temporary ID card if she did not find her badge. Grievant would complete her reports, and then seek permission from her supervisor to return to the entrance to swipe the card, if she was not eligible for break. This conduct was disclosed in her investigatory interview, but the investigation fails to include the interview of the guards.

The fifth date in question is March 25, 2009; the findings were as follows:

Employee Entrance swipe	Revenue Management Swipe	Temporary ID Badge Requested	Sign-In Sheet Time	HMS Start Time	Webshots.com Run Time
9:56:37	9:57:48	N/A	8:58	8:58	None

Grievant acknowledged that she recorded a false time on March 25, 2009. She explained that she forgot to sign-in, and when she remembered she inadvertently put in

the wrong time. Her memory is approximately one hour off from the revenue management swipe time.

Employer argues that these increased increments of time discrepancies are due to her immediate supervisor being scheduled off or coming late to work. To the contrary, her immediate supervisor testified that he did not believe that Grievant knew of the days when he was scheduled off for personal reasons or on the days when he was running late until she reported to work. Grievant would know about his vacations because he usually emailed staff of vacation.

The record demonstrates that Employer did not conduct a fair and an objective investigation. It is not a proper inference to conclude that Grievant was not in the building just because Webshots did not initiate or there were no phone records for that period of time. There was no evidence that her time sensitive work was not completed. The investigator did state that she had back up if she was not in the office, but the investigation does not include any interviews of those employees to determine how often they were doing her assigned work. The investigator drew an inference that Grievant did not take an early lunch on one occasion because the review of her phone records showed that she was calling different restaurants in the area. Grievant explained that she is responsible for ordering lunches in the department. The immediate supervisor admitted adjustments are made to the HMS time to accommodate their HR needs. Grievant testified that adjustments have also been made at the directions of Employer to accommodate HR needs. Her supervisor expressed that adjustments to her schedule was a daily occurrence.

Employer urges that Grievant is not credible. Her explanation of the events is only an "attempt to force a "fit" between what she actually did and what she would like the arbitrator to believe." Testimony of a discharged employee should be viewed with a degree of skepticism when measured against circumstances that brought her dismissal, where she is without a job and has much to gain from her testimony. SVC Mfg. Inc., 126 LA 12 (Arb. 2009). Notwithstanding credibility determinations are not to be influenced by titles or ranks, since not all management witnesses are truthful, and Grievant and his witnesses are not necessarily more likely to give testimony of self serving nature. Bemis Co., 127 LA 499 (Arb. 2010) Credibility determinations are not only made by testimony but demeanor, behavior and posturing in the hearing room. Sometimes it is not what is said that is important, but the manner in which it is said. Grievant at the arbitration

literally turned directly toward and faced the Employer advocate throughout her testimony, and maintained direct contact with the advocate. There was a great deal of frustration in her voice. In reviewing the testimony of Grievant it appears that the correction in her statement when noted by advocate was a result of not listening to and hearing the questions as posed. Regarding the "fantastical stories" that should make Grievant less credible, there were no witnesses to the work place situations that Grievant described with specific detail. There was corroboration of the emotional impact, and conversations on what action she should take to address the situations. The staff representative testified that it felt that she was routinely in that department to address complaints by Grievant about management, or management complaints about Grievant. There were opportunities to rebut testimony regarding the incidents at the workplace, and the complaint Grievant initially filed against the investigator who was later assigned to investigate her removal. There was no rebuttal.

When an employee intentionally falsifies company records or submits false claims, employer-employee trust is impaired. Deliberately falsifying time records to collect pay which has not been earned constitutes not only dishonesty, but theft. Theft is grounds for dismissal. Recklessly or carelessly recording false statements is also dishonesty but this type of behavior can be corrected with direct supervision and proper controls.

The chief element of the just cause standard is the existence of sufficient proof that the employee engaged in the conduct for which she was discharged or disciplined. It is well established in labor arbitration that where, as in the present case, an employer's right to discharge an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proving that the discharge of an employee was for just cause. The Arbitrator is persuaded and finds that the Employer has not satisfied its burden of proving that the Grievant engaged in intentional falsification of time sheets resulting in compensation of unearned pay. Employer has satisfied its burden that Grievant recklessly or carelessly falsified time sheets.

Just cause requires that the penalty imposed reasonably be related to the misconduct or infraction. Grievant was an eighteen (18) year employee at the time of her removal. Her department record has several minor infractions with reprimands until the three day working fine was imposed on December 21, 2008 for negligence when Grievant abused FMLA leave time by exceeding the approved amount of time. Union

argues that this is stacking, this Arbitrator disagrees. Grievant had a prior verbal and written reprimand for the violation of DPS Rule 501.01(C)(3) Leave Without Pay, and depending on the nature of the violations a three day fine may have not been excessive. Grievant violated several policies on payroll/time and attendance management, facility access badges, employee daily attendance policy, computer use and so forth but she was not charged with those violations. There was no evidence on job performance. In consideration thereof, a penalty of ten days is imposed.

In summary, the Arbitrator finds that Grievant was removed without just cause and therefore Grievance no. 15-02-090603-072-01-09 is sustained in part.

AWARD

Having heard, read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, Grievance no. 15-02-090603-072-01-09 is sustained in part. The Grievant was removed without just cause. Grievant did violate DPS Rule 501(C)(10)(c) Dishonesty. Grievant is to be reinstated forthwith to her former position of and the discipline is modified to a ten (10) day suspension.

Grievant is granted back pay from the period of the suspension to the date of her reinstatement, less any interim earnings and appropriate deductions including union dues, and benefits including but not necessarily limited to healthcare benefits and reimbursements, PERS contributions all leave balances that would have accrued from the date of the suspension.

Dated: April 24, 2010

/s/ Meeta Bass Lyons

Meeta Bass Lyons, Arbitrator
Steubenville, Ohio