

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration :
 :
 between : AAA Case No.
 : 01-19-0001-9041
 :
 CITY OF PHILADELPHIA, : Opinion & Award
 :
 “City” : Re: Discharge of
 : Michael Martinez
 - and - :
 : Hearing: June 9, 2020
 :
 AFSCME, DISTRICT COUNCIL 47, :
 :
 “Union” :
 :
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APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Benjamin Patchen, Esq., Assistant City Solicitor

For the Union

WILLIG, WILLIAMS & DAVIDSON
Jessica R. Brown, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Michael Martinez, effective April 22, 2019. It took this action upon finding that he had falsified his time records on multiple dates in [REDACTED] and [REDACTED].

The Union contends the City lacked just cause to discharge Martinez. It asks that he be reinstated to his former position with the City and be made whole for all pay and benefits lost as a consequence of his discharge.

The relevant facts of this case, including the areas of dispute, may be set forth succinctly.

Martinez's Employment History

At the time of his discharge, Martinez had been employed by the City as a contract auditor for approximately five years. (Tr. 189.)¹ His performance records reflect annual overall ratings of satisfactory or superior for each year. (Union Exhibit 3.) He has no record of prior discipline. (Tr. 111.)

Throughout his tenure with City, Martinez was assigned to the City's Division of Housing and Community Development ("DHCD") within its Department of Planning and Development. (Tr. 97-98.) His duties there included auditing the records of community organizations receiving monies from the City funded by federal grants. (Tr. 21-22.) His scheduled working hours were 8:00 a.m. to 4:30 p.m., Monday through Friday. (Tr. 34-35.)

¹ References to the transcript of the June 9, 2020 hearing in this case will be identified as "Tr." followed by the applicable page number(s).

Timekeeping System

As of [REDACTED], DHCD employees, including Martinez, recorded their work time by using a computer-based program, known as the Oracle system. This system required employees to enter their arrival and departure time each workday, as well as the time at which they began and concluded their lunch break. (Tr. 102 & City Exhibit 1.)²

This system, which the City introduced in or about September 2018, replaced the manual process then in effect within DHCD. (Tr. 67-68.) Under that prior method, employees used hard copy time sheets to record their working time. (Tr. 68-69.)

1234 Market Street – SEPTA Building

As of [REDACTED], DHCD's offices were located on the seventeenth floor at 1234 Market Street in Philadelphia, a building owned and operated by Southeastern Pennsylvania Transportation Authority ("SEPTA"). (Tr. 47-48.) The building has two street entrances, which are located in the front and rear of the property. It also can be accessed by a stairway that connects to an adjacent SEPTA subway station. (Tr. 47-48 & 166-167.)

Visitors seeking to enter the building must sign-in and present identification to one of the guards stationed at the security desk in the building lobby. Once registered, the visitor receives a pass from the guard and may proceed to the lobby elevator banks in order to gain access to the floor that he/she is visiting. (Tr. 47.)

Employees working in the building may proceed directly to the lobby elevator banks by swiping their building identification card at one of the turnstiles that controls

² W [REDACTED] S [REDACTED], Audit Director for DHCD confirmed that with the introduction of the Oracle system, all DHCD employees, including Martinez, received training in its use. (Tr. 102-103.) In his testimony, Martinez acknowledged being provided such training. (Tr. 195.)

access to that area.³ (Tr. 47-48.) The building also has a handicap entrance through which employees can gain entrance to the elevators. This entrance consists of a stall with a set of plexiglass panels that retract when an employee swipes his/her building identification card. Once the employee passes through the stall, the panels close automatically to restrict further access. (City Exhibit 8.)⁴

Investigation of Martinez's Time Records

Martinez's supervisor, B■■■■ C■■■■ testified that in ■■■■■, he became concerned that Martinez might be falsifying his time records.⁵ This suspicion, he related, was first triggered on ■■■■■. (Tr. 25-26.) On that morning, he recounted visiting Martinez's workstation three times, beginning at approximately 8:30 a.m., in order to provide him with his pay stub. On each occasion, he stated, Martinez was not there, although the third time, he observed Martinez's coat lying on his chair. (Tr. 26-27.)

As a consequence, he reported sending Martinez a text message at 10:01 a.m. that morning, which read: "Mike did you come in today?" At 11:21 a.m., Martinez replied, "Just saw your text . . . been here . . . we getting out early?" (Tr. 27 & Union Exhibit 8.)

C■■■■ continued that his suspicion that Martinez was falsifying his time records grew with the events on ensuing days. (Tr. 37.) According to C■■■■, at approximately 8:45 a.m. on ■■■■■, he observed an audit report on Martinez's desk chair,

³ Employees reporting for work without their building identification card may gain access to the building by following the same process applicable to visitors; namely presenting identification at the security desk, signing in and obtaining a pass from one of the guards. (Tr. 130-131.)

⁴ When exiting the building through one of the employee turnstiles or the handicap entrance, employees must again swipe their building identification card.

⁵ C■■■■ became Martinez's supervisor in October 2018, succeeding P■■■■ W■■■■ upon her retirement from that position. (Tr. 66.) In taking on this new role, he reported receiving limited supervisory training, which did not address the subject of progressive discipline. (Tr. 66-67.)

which he had placed there before leaving work on [REDACTED]. (Tr. 37-39.) He related making a similar observation at approximately 8:45 a.m. on [REDACTED], as to an audit report that he had left for Martinez at the end of the prior day. (Tr. 39-40.) With these reports appearing to have been untouched by Martinez as of 8:45 a.m. on these days, despite his 8:00 a.m. starting time, C [REDACTED] averred concluding that Martinez was not reporting for work on time. (Tr. 40.)

In response, with authorization from his manager W [REDACTED] S [REDACTED], he commenced an investigation of Martinez's time records in early [REDACTED]. (Tr. 41.) The investigation, he said, began with obtaining door access reports from SEPTA, reflecting each time Martinez used his building identification card to enter or exit the building through one of the employee turnstiles. (City Exhibits 2 – 3.)

In comparing the data in these reports with Martinez's entries in the Oracle timekeeping system, he discovered numerous discrepancies. (City Exhibits 1 -3.) In particular, during the period from [REDACTED] through [REDACTED], he identified fifteen days on which Martinez's recorded starting time in Oracle varied from the time of his corresponding first inbound building identification card swipe, as reflected in the SEPTA door access report. These variances ranged from fourteen minutes to two hours and twenty-one minutes. For example, on [REDACTED], Martinez recorded his starting time as 8:00 a.m.; yet, the door access report reflects that his first inbound building identification card swipe occurred thirty-two minutes later at 8:32 a.m. (City Exhibit 4.)

C [REDACTED]'s review for this same period also revealed variances on eleven days between Martinez's recorded ending time in Oracle and the time of his corresponding

final outbound building identification card swipe per the SEPTA report. These variances ranged from one to twelve minutes. For example, on [REDACTED], Martinez recorded his ending time as 4:30 p.m.; yet, the door access report lists his final outbound building identification card swipe as having been recorded two minutes earlier at 4:28 p.m. (City Exhibit 4.)

C [REDACTED] related that a subsequent review of Martinez's time records against the SEPTA door access report for the period [REDACTED], revealed additional, similar discrepancies. These concerned eight days as to which a comparison of the two reports showed variances of seven minutes to one hour and forty-five minutes between Martinez's recorded starting time and his corresponding first inbound building identification card swipe. (City Exhibit 4.)

Based upon these variances, C [REDACTED] averred concluding that Martinez had falsified his time records. For this offense, he confirmed recommending that the City terminate Martinez's employment. (Tr. 62.)

Martinez's Testimony Regarding His Time Records and Building Access Practice

In his testimony, Martinez denied ever falsely recording his work time in the City's timekeeping system. (Tr. 199.)

Addressing the identified discrepancies between his recorded starting time in the Oracle system and his initial inbound building identification card swipe per the SEPTA door access reports on the dates at issue, he reported frequently not swiping in when entering the building at the start of his workday. Describing his typical manner of entering the building upon arriving for work, he stated:

“It all depended on where I was coming. Sometimes through the back, sometimes through the front door. If my arms were filled,

sometimes I would go through the guards' desk, just wave. Other times, if someone was in front of me and they went through the handicap [entrance], I could just walk right in behind them.”

(Tr. 190.)

In confirming the reason for his frequent failure to swipe in when reporting for work in the morning, he said, “because I had things in my hands, coffee, bag Also, there were more people there. . . . You could just walk in with the crowd.” (Tr. 192.) He explained that in such circumstances, it was inconvenient for him to use his identification card to access the building

On cross-examination, after reaffirming these alternate routes by which he entered the building at the start of the workday without swiping his building identification card, he subsequently added another. (Tr. 209-211.) Specifically, he reported entering the building on occasion through the garage loading dock, which allowed him to bypass the employee turnstile and proceed directly to the elevators. (Tr. 214-215.)

Disciplinary Hearing

On January 18, 2019, C [REDACTED] notified Martinez of the findings of his investigation. At that time, he also informed Martinez of the recommendation to terminate his employment for theft of time. As a consequence, he placed Martinez on paid administrative leave, pending a disciplinary hearing. (Joint Exhibit 2.)

On February 22, 2019, the City conducted a disciplinary hearing attended by C [REDACTED], Martinez and Local Union President Cathy Scott, as well as Karla Hill, Deputy Director Human Resources and Administration, who served as the hearing officer.

In her testimony, Hill explained that her role in in this process was to ensure that Martinez and his Union representative had an opportunity to be heard on the charges

against him and identify any reasons that the recommended action should not be taken. She noted that she was not the final decision maker, but acted to confirm that the disciplinary process was being handled appropriately. (Tr. 111-113.)

As to the substance of the hearing, she reported that Martinez challenged the propriety of the City using the door access report to confirm his reporting times. She did not recall Martinez or Scott denying the charge of stealing time. (Tr. 112.)

In testifying regarding this hearing, Scott recalled objecting to Hill serving as the hearing officer. She explained doing so because Hill, in her role as a human resource representative, had advised C [REDACTED] concerning his investigation of Martinez and the recommendation to discharge him. (Tr. 173.) Such prior involvement, she said, prevented Hill from being a fair hearing officer. (Tr. 173.)⁶

Martinez, on cross-examination, confirmed that he had an opportunity at this hearing to address the charge of falsifying time records. (Tr. 219.) He recounted explaining that the discrepancies between his time records and the door access reports reflected that in entering the building at the start of the workday, he often did so without swiping his building identification card. Referencing the handicap entrance, he related stating, "I just walked in behind somebody. You don't even need to swipe your card." (Tr. 220.) He could not recall, however, informing Hill that on other occasions, he avoided swiping his identification card by entering the building through the loading dock. (Tr. 221.)

⁶ Scott also testified that in entering the SEPTA building to attend this meeting, she was accompanied by Martinez. While confirming that she followed the visitor's procedure for entering the building (i.e., presenting identification and signing in at the security desk), she reported observing Martinez walk around the security desk and proceed to the elevators. (Tr. 167.) She recalled that in doing so, Martinez stated he wanted to speak with a guard that he knew.

Grievance Procedure

By letter dated March 19, 2019, Hill notified Martinez that his suspension with intent to dismiss for falsifying time records was upheld. (City Exhibit 5.) As a result, the City removed Martinez from payroll, effective March 22, 2019.

In response, the Union filed the instant grievance, dated March 28, 2019. (Joint Exhibit 3.)

In April 2019, Catherine Califano, the City's First Deputy for the Office of Planning and Development, conducted a third step grievance meeting on the matter. (Tr. 125.) In attendance at this meeting were Martinez and Scott. (Tr. 125-126.) No other representative for the City was present. (Tr. 175-176.)⁷

Califano testified that at this meeting, Martinez explained the discrepancy between his time records and his building identification card swipes per the door access report stemmed from his entering the building at the start of the workday on the dates at issue without swiping his card. She recalled him stating that he would do so by either "sneaking" behind someone using the handicap entrance or walking around the security desk without signing in. (Tr. 128-129.)

According to Califano, she did not consider either explanation to be credible. (Tr. 129.)

In response to the first, she explained that the manner in which the handicap entrance operates would not permit the method of entry that Martinez described. The retractable plexiglass panels at the handicap entrance, she said, close automatically once the person who has swiped his/her building identification passes through the stall. The

⁷ Union President Scott testified that per the parties' Agreement, a representative of the Department should have attended this meeting in order to present the basis for the disciplinary action being taken against Martinez. (Tr. 175.)

speed with which those panels close, she explained, do not allow a second person to sneak in behind the first. (Tr. 130-131.)⁸

Addressing Martinez's second explanation, she averred that her prior experience in using the visitor's process to enter the building confirmed that the security guards would not allow persons to walk past the desk without presenting identification and signing in. (Tr. 130.)

Following this meeting, by letter dated April 12, 2019, Califano issued the City's Step 3 Answer to the grievance, which affirmed the decision to discharge Martinez. (Tr. 132-133; City Exhibit 6.)

Having been unable to resolve the matter of Martinez's discharge through the grievance process, the Union demanded arbitration. Pursuant to the procedures of their collective bargaining agreement, the parties selected me to hear and decide this case. (Joint Exhibit 1.)

I held a hearing in this matter on June 9, 2020, at the offices of American Arbitration Association in Philadelphia, Pennsylvania. At that time, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon my receipt on June 24, 2020 of the stenographic transcript of the hearing, I declared the record closed as of that date.

⁸ A video that Califano recorded of the operation of the handicap entrance depicts a person swiping his building identification card and then walking through the stall. In the video, the plexiglass panels controlling access at this entrance retract upon the badge swipe and then close within two seconds after the person has passed through the stall. (City Exhibit 8.) However, according to Martinez, placing a hand or other object in between the plexiglass panels before they have fully closed will trigger a sensor and cause them to retract again. Doing so, he said, would allow a second person to pass through the handicap entrance without that individual needing to swipe his/her building identification card. (Tr. 211-212.)

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Michael Martinez, effective March 22, 2020?⁹
2. If not, what shall be the remedy?

Positions of the Parties

The City contends that its discharge of Martinez was for just cause. It maintains that the evidence presented substantiates that Martinez falsified his time records, as charged. Under the circumstance of this case, it avers, termination is the appropriate penalty for this offense.

It argues further that the Union has not presented any reasonable alternate explanation of the evidence that would support a different finding. In particular, it maintains that Martinez's account of entering the building at the start of his workday on the dates in question without swiping his building identification card is not credible.

The video presented, it submits, refutes his claim of being able to gain such access through the employee handicap entrance. It asserts that given the speed with which that entrance's plexiglass panels close, it would have been impossible for him to enter there without using his identification card by sneaking in behind another employee.

In further challenging the credibility of Martinez's account, it highlights that his reported methods for entering the building without swiping his building identification have evolved over time. In particular, it points out that on cross-examination, Martinez

⁹ Although Martinez's discharge was effective April 22, 2019, the parties have agreed to identify the date as March 22, 2019 for purpose of the issue to be decided here given that his unpaid suspension with intent to dismiss was effective as of that earlier date. (Tr. 9.)

claimed for the first time to have also done so on occasion by entering through the loading dock, which allowed him to bypass the employee turnstile.

It also contends that the door access reports undercut Martinez's claim that on each date at issue, he entered the building at the start of the workday by a route that avoided the need to swipe his building identification card. In this regard, it notes that during the period from [REDACTED] – [REDACTED], the door access reports reflect, with one exception, a corresponding inbound and outbound card swipe for each time Martinez entered and exited the building during the course of each work day. This record of activity, it reasons, renders unreasonable Martinez's defense. It explains that if Martinez actually used these purported alternate routes to enter the building as he claims, the door reports would also reflect instances of him doing so on dates and times other than those to which the charge of falsifying time records relate.

It argues further that Martinez's testimony should be rejected as inherently unreliable given obvious inconsistencies in his account of events. For example, it points out, on cross-examination, he initially stated that he commuted to work by either subway or car. However, later in his testimony, he reported traveling by PATCO when commuting from his girlfriend's home in New Jersey. This last minute addition, it submits, represents a convenient effort by Martinez to explain his approaching the building from the direction that would support entering through the loading dock on occasion, as he claimed.

Anticipating the Union's defense, it submits that Martinez received due process in connection with his termination. In particular, it cites that at both the disciplinary hearing

and Step 3 grievance meeting, he had Union representation and was afforded an opportunity to be heard on the charge of falsifying his time records.

Finally, it asserts that progressive discipline does not apply here. The governing provision of the parties' Agreement does not mandate that it be followed in all cases, but only where appropriate. It reasons that a theft of time is an offense of such gravity that it warrants discharge without prior progressive discipline. This principle, it states, applies with particular force here given Martinez's position as a contract auditor, which carries a high expectation for honesty and integrity.

Accordingly, for all these reasons, it concludes that Martinez's discharge should be sustained and the Union's grievance should be denied.

The Union, on the other hand, maintains that the City lacked just cause to discharge Martinez for the alleged falsification of time records. It submits that the City has failed to meet its burden of proof in this regard.

It reasons that the City's case, as presented here, seeks to reverse this burden. The City, it explains, attempts to do so by citing Martinez's failure to provide a credible explanation for the discrepancies between his time records and the door access report as proof of the alleged theft of time. It concludes that the City should not be permitted to side step in this fashion its obligation to demonstrate just cause for Martinez's discharge.

It also contends that in discharging Martinez, the City violated established rules and deprived him of fundamental fairness, thereby undercutting any claim of just cause.

In this regard, it cites the City's disregard of the progressive discipline standard set forth in the parties' Agreement despite Martinez's record of exemplary service and

lack of prior discipline. It also points to the City's failure to train supervisor C [REDACTED] as to just cause and the disciplinary process.¹⁰

Such deprivation of basic fairness, it argues, continued with the disciplinary hearing at which Hill refused to recuse herself as the hearing officer notwithstanding her prior involvement in advising C [REDACTED] as to his investigation of this matter. Likewise, it highlights, in conducting the Step 3 grievance meeting, the City ignored the contractual requirement to have an agency representative in attendance to present the case against Martinez. Instead, it stresses, the City proceeded on the basis that Martinez was somehow obligated to disprove the charges against him.

It concludes that such disregard by the City of the governing rules and standards of fairness necessarily renders suspect the conclusions underlying its decision to discharge Martinez.

Moving from the procedural to the substantive, it maintains that the record lacks the proof necessary to find Martinez committed a theft of time. To the contrary, it avers, Martinez's testimony demonstrates that the discrepancies between his time records and the door access reports, on which the City's case rests, do not support such a conclusion.

Rather, as he explained, these discrepancies reflect that he frequently did not swipe his building identification card when entering the building at the start of each workday. Instead, for reasons of convenience, he often avoided the employee turnstile entrance and used alternate entry points, such as the handicap entrance or walking around the security desk, which did not require him to swipe his card. It contends that his inability to recall the specific entry point that he used on any particular day is entirely

¹⁰ Scott testified that the collective bargaining agreement governing C [REDACTED]'s employment mandates that as a supervisor, he receive certain basic training, which includes the subjects of just cause and progressive discipline. (Tr. 170-171.)

understandable given that more than a year had elapsed from those dates to when he testified here.

It also points out that Scott's testimony corroborates Martinez's use of such an alternate entry point to access the building. Namely, testifying without contradiction regarding her entry into the building to attend the February 22, 2019 disciplinary meeting, she reported observing Martinez proceed to the elevators by walking around the security desk without presenting identification or signing in.

In sum, it submits that the record here reflects a rush to judgment by a new supervisor who had not been trained regarding the disciplinary process and the just cause standard. Not surprisingly then, it maintains, he relied upon unsubstantiated conclusions to find erroneously that Martinez had committed a theft of time. Accordingly, for these reasons, the Union asserts that its grievance should be granted and the requested relief awarded.

Opinion

Certain introductory comments are appropriate here. As a basic condition of employment, employees owe certain fundamental duties to their employer. These include conducting themselves honestly in all aspects of their employment and fully and faithfully performing their assigned job duties. When an employee breaches such an essential obligation, he/she is subject to discipline in accordance with the principles of just cause.

The employer, of course, carries the burden of proof in connection with such discipline. It must establish that the employee committed the alleged misconduct by the weight of the credible evidence. It must also prove that the level of discipline imposed is

appropriate in light of all of the relevant circumstances. The Union, on the other hand, has no corresponding burden. It need not disprove the charges lodged against the employee. Indeed, the employee is entitled to the presumption of innocence.

With these principles in mind, I turn to the issue presented here; namely, whether the City had just cause to discharge Martinez.

As a preliminary matter, my review of the record confirms the absence of any direct evidence establishing that Martinez committed the charged misconduct. More specifically, the City did not present any eyewitness testimony that Martinez reported for work after his 8:00 a.m. starting time on any of the dates at issue, thereby substantiating his false reporting of time. Nor is there any evidence that Martinez admitted to this offense. In sum, the case rests on circumstantial evidence.

This fact, however, does not compel a finding for the Union. Indeed, in disciplinary cases, it is not uncommon for Arbitrators to be faced with deciding whether a grievant committed the charged misconduct when nothing more than circumstantial evidence exists. In such cases, the determination to be made is whether through close reasoning by inference, the circumstantial evidence weaves a sufficiently tight factual web to substantiate the grievant's guilt of the charged misconduct.

The question then is whether the totality of the evidence is strong enough to compel the conclusion that Martinez falsified his time records, as charged. After carefully reviewing the record and thoroughly considering the parties arguments, I am persuaded that the evidence is sufficient to support that finding. My reasons follow.

To begin with, the documentary evidence confirms a discrepancy on each of the dates at issue between Martinez's recorded starting time in the Oracle system and his

initial building identification card swipe for such day, as reflected in door access report. In view of the evidence presented regarding the building's access controls, including the employee turnstile for which a building identification card swipe is required to pass through, it is reasonable to conclude, absent other context, that Martinez's initial building identification card swipe each day represented his actual arrival or starting time. Therefore, to the extent such swipe time is later than Martinez's recorded starting time in Oracle, it supports a finding that the latter entry is false, and, in turn, represents a theft of time.

That said, in testifying here, Martinez denied falsely recording his starting time on the dates at issue and provided an explanation for the discrepancies on those dates between his reported starting time in Oracle and his first building identification card swipe card per the door access reports. More specifically, he averred that upon arriving at the building on these dates, he entered without swiping his building identification card by using an entry point other than the employee turnstile. These included following another employee through handicap entrance, walking around the security desk without signing in and entering through the loading dock.

Martinez is, to be sure, entitled to the presumption of innocence. However, the presumption does not mean that I must accept his explanation at face value, especially when it collapses under closer review.

By the account proffered, Martinez posits that his first building identification card swipe on the dates at issue does not represent his arrival time that day, but rather the time at which he re-entered the building upon concluding a break. If true, each such entry should be preceded by an outbound building identification card swipe, recording

Martinez's departure from the building at the start of his break. However, of all the many dates at issue, in not one instance is Martinez's initial inbound card swipe for the day preceded by an outbound swipe.¹¹

In his testimony, Martinez did not offer any reason for the absence of such an outbound swipe. Nor does the record suggest any basis to infer one. To the contrary, Martinez's purported convenience explanation for not swiping his identification card upon first entering the building (e.g., carrying coffee or bags) seemingly has no application to his exiting the building for a break. Indeed, he never suggested any such circumstances existed on any of the dates at issue, indicating instead that his departures from the building were for "smoke" breaks.

Moreover, his ability to make the inbound swipe belies any basis to conclude that he had a convenience reason for not recording an outbound swipe. Further, in view of the sheer number of instances involved, it defies credulity that Martinez would not have recorded an outbound swipe on at least some of these occasions if, as he claims, his subsequent entry to the building actually represented a return from break, and not his initial entry for the day.¹²

Simply put, this glaring inconsistency in Martinez's account causes me to reject it as lacking in credibility. Consequently, I am compelled to conclude that his initial inbound card swipes on the dates at issue do, in fact, represent his arrival time on those

¹¹ The chart that C ■ prepared lists 13 days in ■ and 10 days in ■, where there is a discrepancy between Martinez's reported starting time in Oracle and his first building identification card swipe card per the door access report. (City Exhibit 4.)

¹² I note that the finding that Martinez's initial card swipes on ■ and ■ reflect his actual arrival time on those days (i.e., 10:21 a.m., 9:46 a.m. and 10:32 a.m.) is fully consistent with C ■'s account of being unable to locate Martinez in the office those mornings, as detailed above.

days. As such, it follows that the earlier starting time that he recorded in the Oracle system for each of these days was false and represents a theft of time.

In view of this finding, the question remaining is whether discharge is the appropriate measure of discipline to be imposed here. I conclude that it is.

There can be no doubt that a theft of time represents a very egregious offense. Indeed, by committing such misconduct, an employee breaches the basic trust that is fundamental and critical to the employment relationship.

For this reason, discharge is not an inappropriate penalty for such misconduct, even for a first instance. On review I conclude that it is warranted here.¹³

In reaching this decision, I am mindful of Martinez's tenure, absence of prior discipline and exemplary work performance history. However, I do not find these factors provide a sufficient basis to mitigate the penalty of discharge in this case. Martinez's actions do not amount to a mere error in judgment that occurred in the spur of the moment. Instead, on the record here, I am persuaded that he acted deliberately, willfully and repeatedly in falsifying his time records. As such, he must accept the consequences of his misconduct, namely discharge.

Finally, as to the City's procedural failings cited by the Union, I do not find they support a different outcome. These include: the failure to provide C ■■■ with contractually required supervisor training; Hill serving as the hearing officer at the disciplinary hearing despite her prior involvement in advising on C ■■■'s investigation; and the absence of a human resources or other agency representative at the Third Step

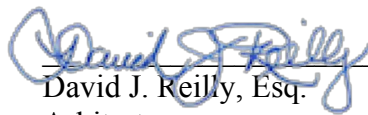
¹³ The provision of the parties' Agreement concerning progressive discipline does not cause me to find otherwise. It reads: "Disciplinary actions shall be progressive in nature where appropriate." (Joint Exhibit 1.) This language clearly reflects the parties' recognition that progressive discipline is not warranted in all cases. On the record here, I am satisfied that Martinez's theft of time falls into the category of cases for which progressive discipline is neither appropriate nor warranted.

grievance meeting. In sum, even crediting the Union's assertions as to these deficiencies, I do not find they so severely deprived Martinez of fundamental fairness or so unfairly prejudiced him so as to undermine the integrity of the decision to terminate his employment.

AWARD

1. The grievance is denied.
2. The City had just cause to discharge Michael Martinez, effective March 22, 2019.

July 24, 2020



David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

July 24, 2020



David J. Reilly, Esq.
Arbitrator