

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration :
 :
 between : AAA Case No.
 : 01-18-0003-8008
 :
 AFSCME, DISTRICT COUNCIL 47, LOCAL 2187, : Opinion & Award
 :
 “Union” : Re: Discharge of
 : Dickson Nyesuah
 - and - :
 : Hearings: March 2, 2020
 CITY OF PHILADELPHIA, : December 14, 2020
 : December 28, 2020
 “City” :
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APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Erica E. Kane, Esq., Assistant City Solicitor

For the Union

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

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Dickson Nyesuah, effective April 4, 2018. It took this action upon finding that he had falsified reports of home visits and related claims for overtime compensation and had neglected to perform required recordkeeping.

The Union contends the City lacked just cause to discharge Nyesuah. 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.

Department of Human Services

The City's Department of Human Services ("DHS") has responsibility for providing and promoting safety, permanency and well being for children at risk of abuse and neglect. (Tr. I-17.)¹ As organized, DHS includes an Intake Unit, which is staffed by social workers charged with performing the initial investigation of child abuse and neglect reports received by the agency. (Tr. I-57.)

Upon being assigned a report of abuse or neglect, Intake Unit social workers must conduct a home visit and physically observe the subject child. Such visits must be conducted within twenty-four hours to three days, depending on the priority of the report. (Tr. I-129.)

Three days per month, Intake Unit social workers are assigned "E-days" or emergency days. Their assignments on those days carry a priority requiring an immediate or twenty-four hour response. (Tr. I-29-30, 58.) As a consequence of these

¹ References to the transcript of the hearing in this case will be identified as "Tr." followed by the applicable volume and page number(s). For example, a reference to page 17 of the transcript of the March 2, 2020 hearing (i.e., Volume I) would be cited as "Tr. I-17."

time requirements, Intake Unit social workers often must work overtime on their assigned E-days. (Tr. I-58.)²

This obligation to work extended hours also applies with some frequency to their other scheduled days (i.e., Non-E days). G■■ M■■■■■■, Director Intake Investigations, conveyed this expectation in an October 5, 2017 email to the Intake Team with the subject line “Intake is NOT a 9 to 5 Job.” She stated there, “[Intake] takes a special person to do this work and keeping up with it is extremely challenging In order to do so, staff are often asked to visit families, secure placements and complete some of their case documentation after hours.” (Union Exhibit 18.)

DHS’s Recordkeeping System

DHS maintains an electronic case management system (“ECMS”). All Intake Unit social workers are expected to use ECMS to memorialize all family home visits and record their progress notes. (Tr. I-99.)

Gary Williams, the City’s Deputy Commissioner for Policy and Development and System Enhancements, testified that all DHS social workers receive approximately 120 hours of training upon hire. (Tr. I-115.) This instruction, he said, emphasizes the importance of timely documentation of all relevant events, including home visits. (Tr. I-116-117.) According to Williams, social workers are informed that progress notes should be entered within six business days of the point of contact, and safety assessments must be entered within three business days. (Tr. I-117.)

² DHS’s Overtime Policy and Procedure Guide specifies that overtime work must be approved in advance by management, except in case of emergency or in the interests of public health and safety. It states further, “overtime abuses and failures to comply with policies and procedures will be subject to discipline.” (City Exhibit 7.)

He also averred that the training addresses the gravity of falsifying records. The social workers, he related, are advised as to the consequences of perjury and warned that false reporting compromises child safety. (Tr. I-118.)

He attested that accurate recordkeeping also bears on the funding that DHS receives, as well as its continued licensure by the Commonwealth. DHS, he explained, is reviewed periodically by the Federal, Commonwealth and City governments, each of which provides a portion of the agency's funding. (Tr. I-121.) In the case of the Commonwealth, he said, its review closely assesses progress notes, case plans and other records as to accuracy and proper safety/risk assessment. Deficiencies in those areas can result in the agency receiving a provisional license with increased scrutiny going forward, as well as the possibility of a takeover by the Commonwealth. (Tr. I-121-124.)

Nyesuah's Employment History

Nyesuah's employment with DHS dates to August 2006, with his hire as a social worker trainee. (Tr. II-81.) Subsequently, he received promotions, progressing first to social worker 1 and later to social worker 2, the position that he held as of his discharge. (Tr. II-82.)

During his tenure, he received positive annual performance evaluations. (Union Exhibit 12.) After completing his initial probationary period in 2007, his supervisors rated his overall performance as superior or outstanding each year. (Union Exhibit 12.)

DHS also awarded him commendations in 2016 and 2017, honoring his performance. (Union Exhibit 15A & 22.) In addition, in 2011, a City attorney issued him a recognition letter for his work and testimony in a child abuse proceeding. (Union Exhibit 16.)

He has no record of prior discipline. The only criticism identified as to his work performance concerned the timeliness with which he completed cases. (Tr. II-48, 88; Union Exhibit 12.)³

Within DHS, Nyesuah worked in the Intake Unit for his entire period of employment. (Tr. II-82.) In 2016, his group assignment within the Unit was changed, which placed him under the immediate supervision of O■■ O■■. (Tr. II-86.)⁴

In early 2017, O■■'s group, which had five social workers, became understaffed when two members took leaves of absence (i.e., R■■ K■■■■■■ and O■■ E■■). (Tr. I-61; II-41.) O■■ testified that M■■ and her immediate supervisor L■■ W■■ denied her request to reassign the cases of these two social workers to other groups within Intake. (Tr. II-43-44; Union Exhibit 2.) Instead, per their direction and approval of overtime, she reported having Nyesuah and C■■ C■■, another social workers in her group, assume responsibility for this work. (Tr. II-42.)

M■■'s September 2017 Audit

M■■ testified that in connection with O■■'s September 2017 request for a transfer to a different administrator, she performed a caseload audit of both O■■'s current group and the group to which she would be moving. According to M■■, the audit covered the period May – September 2017. (Tr. I-18-21.) She explained that it is

³ Intake Unit supervisor O■■ O■■, to whom Nyesuah reported from 2016-2017, testified, "It takes him quite a while to finish a case. But when he finishes the case, there's nothing to correct. . . . He is very meticulous." (Tr. II-48.)

⁴ O■■ testified that M■■ made this assignment change. She averred that at or about that time, M■■ also transferred other social workers into her group. They included R■■ K■■■■■■ and C■■ C■■, both of whom, like O■■ and Nyesuah, are of African descent. (Tr. II-47.) On cross-examination, O■■ confirmed subsequently filing a federal lawsuit against the City, alleging national origin discrimination based, in part, on these transfers. The suit, she said, was later settled, pursuant to which she received monetary compensation. (Tr. II-56.)

routine practice within DHS to conduct such an audit whenever there is a change in supervision. (Tr. I-20-21.)

According to M [REDACTED], this audit, which involved reviewing all case data entered into ECMS for the relevant time period, revealed numerous overtime discrepancies relating to Nyesuah. (City Exhibit 9.)⁵ She related identifying the following types of irregularities based upon his ECMS entries: (1) overtime requests for closed cases on dates he did not record any supporting case note entries; (2) overtime requests on dates he did record supporting notes, but for times that overlapped between cases; (3) overtime requests for open cases on dates he did not record any supporting case note entries; and (4) questionable assignments (e.g., case closed prior to his reported visit; reported visit conducted before case assigned to him). (Tr. I-25-28; City Exhibit 1.)⁶ In total, she reported finding eighty-eight instances in which the ECMS data did not support Nyesuah's corresponding overtime requests. (Tr. I-34.)

In testifying, M [REDACTED] reviewed Time Reports and Overtime Slips submitted by Nyesuah for six dates flagged by her audit. These include: [REDACTED] and [REDACTED] and [REDACTED]. (City Exhibits 2 – 5.)

Addressing the documents for [REDACTED], she related that they represent an example of an overtime request by Nyesuah, where his corresponding case notes reflect overlapping family visit times. (Tr. I-34; City Exhibit 2.) She highlighted in this regard

⁵ On cross-examination, M [REDACTED] confirmed that in performing her audit, she did not review any documents outside of ECMS, except for daily time reports and overtime authorization forms. (City Exhibit 10.) Also, according to M [REDACTED], her audit did not involve questioning Nyesuah or any other DHS employees or contacting any of the families as to which the suspect overtime hours related. (Tr. I-65-67, 71.) In addition, she averred that her audit identified overtime discrepancies relating to other DHS employees, including O [REDACTED]. (Tr. I-65.)

⁶ In testifying on rebuttal, M [REDACTED] stated, “[A] closed case would be one that’s been prepared and submitted for filing in our file room or transferred for scanning for follow up.” (Tr. III-282.) A social worker, she related, would cease working on a case once it is formally closed following the completion of the investigation with a stated outcome. (Tr. III-286.)

that he reported visiting one family from 6:30 – 7:30 p.m., a second from 7:00 – 8:00 p.m. and a third from 7:00 – 7:30 p.m. (Tr. I-35; City Exhibit 2.) Since he could not have been in these three locations simultaneously, she reported concluding that the documentation did not support his overtime request, which covered the period from 5:30 p.m. – 11:30 p.m. (Tr. I-36-37; City Exhibit 2.)

Reviewing the Time Reports/Overtime Slips submitted by Nyesuah for the other dates, she identified the type of overtime irregularity that each concerned. These are: (1) ██████████ – closed case and no supporting ECMS case notes recorded for that date; (2) ██████████ – case closed prior to reported visits on the listed dates; (3) ██████████ – case not yet assigned to Nyesuah as of the date of his overtime request and no ECMS case note entry documenting a home visit on that date. (Tr. I-38-51; City Exhibits 3-5.)

On the basis of this audit, M████████ averred concluding that Nyesuah had violated various DHS policies by submitting fraudulent overtime requests and falsifying reports of home visits. (Tr. I-55.) She confirmed recording these findings in an Employee Violation Report, dated October 24, 2017. (Tr. I-55-56; City Exhibit 6.)⁷

January 24, 2018 Disciplinary Hearing

In response to this Report, the City, on January 24, 2018, conducted a disciplinary hearing before a four-member panel. (Union Exhibit 17.)

M████████, who presented the City's case, recounted her September 2017 audit, as detailed above, and reviewed the policies with which Nyesuah was charged with violating. (Union Exhibit 17, pp. 9-16.)

⁷ The Employee Violation Report also charges Nyesuah with poor work performance. (City Exhibit 6.)

The Union, which represented Nyesuah at the hearing, presented documents that reportedly confirmed his making a home visit to the relevant family(ies) on each of the dates that M [REDACTED] identified as an instance of a falsified visit or fraudulent overtime request. (Union Exhibit 17, pp. 70-71.) In addition, in response to the charges, Nyesuah testified that in each listed case, he visited the family on the date at issue.

For example, addressing the K [REDACTED] case, which was assigned to him on [REDACTED] [REDACTED] he recalled needing to make multiple home visits because the victim child and siblings did not all reside at the same address. Also, at his supervisor's direction, he reported performing a safety visit at the father's home after the case had been closed. (Union Exhibit 17, pp. 80-85.)

As to the R [REDACTED] case, for which he submitted overtime requests on [REDACTED] [REDACTED] despite a [REDACTED] closure date, he noted that the case had been assigned to social worker K [REDACTED]. Explaining his work on the dates at issue, he recalled being directed by his supervisor to assist K [REDACTED] with kinship placement. (Union Exhibit 17, pp. 86-87).

His [REDACTED] overtime request for the P [REDACTED] case, he said stemmed from a telephone conversation that day with his supervisor. Although the case was not formally assigned to him until the following day, he recalled that his supervisor directed him to make an immediate visit to the family's home, as part of his [REDACTED] E-day assignments. (Union Exhibit 17, pp. 89-90.)

Responding to discrepancies between the end-time listed on his overtime request form and the times recorded for his home visits, he acknowledged possible "sloppy work" in recording the visit times. He maintained that on each date at issue, the listed

end-time corresponded to the time at which he concluded his home visits for that evening. (Union Exhibit 17, pp. 97-98, 161.)

In his testimony here, he reviewed his cases notes for twelve families, which were among the cases audited by M [REDACTED]. Referencing these documents, he explained that his practice at the initial home visit was to obtain a release from the parents/guardians, allowing DHS to obtain all necessary medical records for the subject child(ren). (Tr. II-93; Union Exhibits 1, 3-10 & 13-15.) Further, he highlighted that his handwritten notes confirmed his interviews with the respective families on the dates at issue. (Tr. II-94, 98-108.)⁸

Addressing the charges here, he denied ever having failed to perform a required home visit. (Tr. II-109.) Likewise, he confirmed never having falsely reported performing a home visit or falsely claiming overtime compensation to which he was not entitled to receive. (Tr. II-110.) According to Nyesuah, his only mistake was not timely recording his notes in ECMS, which he attributed to his overwhelming caseload at the time. (Tr. II-110.)

On cross-examination, he addressed the various instances as to which he is charged with failing to make required entries in ECMS and/or falsifying home visits and claims for overtime compensation. Responding to the occasions on which he submitted an overtime claim, but failed to record a corresponding entry in ECMS, he offered various explanations. For example, he suggested that such failure for the [REDACTED]

⁸ Addressing his handwritten notes on these documents, he averred, “And so this is the interview that I have with the family, I jot it down to make sure I have all the necessary information that I need from the family before I leave the house. . . . So it will guide me, when the time comes, to transcribe these handwritten notes into the system, to make sure that I get the correct information to put into the system.” (Tr. II-94.)

home visit to the P [REDACTED] family might have resulted from a lack of time to record his notes in ECMS. (Tr. II-137-138, 144; City Exhibit 9.)

He related further that once a case is closed, ECMS does not permit him to record entries for work previously performed. (Tr. II-152-154 & 161, III-208-210, 236-238, 240-241.) There were also instances, he said, when he could not make entries due to a lack of ECMS access stemming from other reasons, such as cases that were transferred for placement or cases that were informally re-assigned to him from another social worker without ECMS authorization, such as occurred when K [REDACTED] was on leave. (Tr. III-186-190, 194-195, 202-203, 231-232, 242-243.)⁹ When such entries could not be made, he reported submitting his notes to the record room. (Tr. III-190-192, 195, 203-205, 215, 236, 241, 243.)¹⁰

In addition, he recounted instances in which entries recorded in ECMS were lost due to technical or “IT” issues. (Tr. III-179-180.)

As for occasions when he recorded overlapping times for two or more home visits, he cited the need to go back and forth between homes in an evening due to a family not being present on his initial visit. (Tr. II-140-141 & 158, III-197-198, 225.) Such recording of overlapping times, he said, was not intentional and the recorded times may not have been exact. (Tr. II-141, III-198.)

⁹ Deputy DHS Commissioner Vongvilay Mounelasy confirmed that upon a case re-assignment, a social worker would not have ECMS access to record entries for the case unless his/her supervisor granted him/her such authority within the system. (Tr. III-277.)

¹⁰ In testifying on rebuttal, Mounelasy confirmed the existence of the record room, noting it is staffed by clerical employees, who store and/or upload documents into ECMS. These employees, she said, are not trained in social work and are not part of the social work case management team. (Tr. III-268.) According to Mounelasy, per the governing policy, all notes of home visits must be entered into ECMS by the social worker conducting the visit. (Tr. III-272.) Submission of such notes to the record room, she said, does not constitute entry into ECMS, as the record room employees do not upload them into that system. (Tr. III-273-274.) She averred that the record room employees would simply file the hard-copy version of the notes received by them. (Tr. III-275.)

He also explained his work on cases after their closing or disposition dates. Such additional follow-up visits, he said, can arise when the family subsequently reports an urgent situation, such as a lack of food or other essentials. (Tr. II-149-150, III-228-229.)

Discharge of Dickson Nyesuah

After deliberating, the disciplinary hearing panel upheld the charges of “poor work performance” and “falsification.” On the basis of these findings, the panel recommended issuing Nyesuah a fifteen-day disciplinary suspension. (Union Exhibit 17, pg. 162.)

Deputy Mayor Cynthia Figueroa, who was DHS Commissioner in 2018, testified to her disagreement with this recommendation. The proposed discipline, she said, was inconsistent with the level of misconduct found. In this regard, she cited both the repetitive nature and severity of Nyesuah’s infractions. As to the latter, she noted that the falsification of visits is one of the most egregious offenses that a social worker can commit. She emphasized that such misconduct jeopardizes the safety of children and places DHS’s license at risk. (Tr. II-8-12.)

For these reasons, she averred concluding that discharge was the appropriate level of discipline.¹¹ (Tr. II-8-12.) Therefore, at her direction, the City issued Nyesuah a Notice of Intention to Dismiss, dated March 23, 2018, followed by a Notice of Dismissal, effective April 4, 2018. (Tr. II-7; City Exhibit 8, Union Exhibit 11.)¹²

¹¹ Deputy Commissioner Mounelasy testified to consulting with Figueroa regarding the decision to discharge Nyesuah. Similar to Figueroa’s account, she recalled concurring that the scope and gravity of Nyesuah’s misconduct warranted more severe discipline than that recommended by the Disciplinary Hearing Panel; namely, dismissal. (Tr. I-133-134.) She noted further that DHS has been consistent in discharging employees found to have falsified records. (Tr. I-134.)

¹² As a consequence of M█████’s September 2017 audit, the City also took disciplinary action against other DHS employees, including supervisor O█████ and her immediate superior, Intake Administrator L█████ W█████. More specifically, it discharged O█████ and issued W█████ a written warning for poor work performance and violating DHS’s overtime and timekeeping policy. (Union Exhibit 19.) The Union

Procedural History

In response to this action, the Union filed the instant grievance, dated March 27, 2018. (Joint Exhibit 3.) When the parties were unable to resolve this matter at the lower stages of the grievance procedure, the Union demanded arbitration. (Joint Exhibit 2.) Pursuant to the procedures of their governing collective bargaining agreement, the parties selected me to hear and decide the case. (Joint Exhibit 1.)

In response, I held a hearing that commenced on March 2, 2020 at the offices of American Arbitration Association in Philadelphia, PA, and with the parties' consent, continued by videoconference on December 14 and December 20, 2020. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the December 20, 2020 hearing day, the parties elected to submit post-hearing briefs. With the receipt of those briefs on February 26, 2021, I declared the hearing record closed as of that date.

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, Dickson Nyesuah, effective April 4, 2018?
2. If not, what shall be the remedy?

contested O■■■■'s discharge through the applicable grievance and arbitration procedure. Following a hearing, Arbitrator Lawrence Coburn ruled that the City had substantiated that O■■■■ was negligent in approving overtime for her direct reports on numerous occasions during the audited period; however, it failed to meet its burden of proof that she had engaged in deliberate falsification and misrepresentation of overtime hours and client visits. On the basis of the substantiated infractions, he concluded that the City lacked just cause to discharge her, finding instead that the appropriate penalty was a one-week disciplinary suspension. (Union Exhibit 20.)

Positions of the Parties

Both parties filed post-hearing briefs, which are summarized here.

The City contends that its discharge of Nyesuah was for just cause. It maintains that the evidence presented substantiates that he falsified reports of overtime work, including home visits, and thereby committed theft of time and placed children under DHS supervision at risk of harm. In view of these circumstances, it avers, termination is the appropriate penalty for his transgressions.

It argues that Nyesuah was well aware of his recordkeeping responsibilities, including the critical importance to DHS's mission of performing that function timely and accurately. These facts, it maintains, were made known to him in the training he received regarding DHS policies and procedures. Citing Williams's testimony, it points out that such training includes specific instructions to document all home visits and progress notes in ECMS within six days of the relevant event.

Further, it asserts, his regular and routine use of ECMS demonstrates his familiarity with the system and his responsibilities in this regard.

As such, it concludes, he knew what data to enter into ECMS and how and when to do so.

In view of this knowledge, it argues, M [REDACTED]'s audit substantiates that he either deliberately submitted false data into ECMS or knowingly failed to correct timekeeping errors of which he was aware. It highlights in this regard that M [REDACTED] confirmed three categories of theft of time committed by him repeatedly throughout the four-month period of her audit. (i.e., work on closed cases; work for which notes were not entered in ECMS; and home visits with overlapping times).

It maintains that the evidence shows that on seventy-one occasions, Nyesuah submitted a request for overtime compensation, yet ECMS contains no evidence of any work performed by him on that date. When questioned on cross-examination, it avers, he failed to provide an acceptable explanation for any of these discrepancies.

It contends that his claim of insufficient time to make the required entries in ECMS due to his overwhelming caseload does not withstand scrutiny. It notes in this regard that on the occasion of each discrepancy identified in M [REDACTED]'s audit, he was able to complete and submit an overtime request slip. Therefore, it concludes, he surely also had the time to make the requisite entries in ECMS.

A review of his testimony, it submits, makes clear the deficiencies in all of the explanations that he proffered for this failure. (*City's Post-Hearing Brief* at pp. 7-8.)

In addition, it maintains that the evidence confirms that on seventeen occasions during the four-month period audited by M [REDACTED], he reported conducting multiple home visits at the same time. Here again, it asserts, he failed to present any credible explanation for the overlapping visits identified by M [REDACTED]. (*City's Post-Hearing Brief* at 8-9.)

In sum, it reasons that his repeated failure to document work for which he claimed overtime compensation, as well as obvious discrepancies in his reporting of such work in other instances (i.e., overlapping home visits) confirms his theft of time. His failure to credibly explain these recordkeeping deficiencies, it avers, compels the conclusion that he made deliberate misrepresentations to fraudulently obtain overtime compensation.

For these offenses, it submits, discharge was the fair and proportional response. In support, it cites: (1) the magnitude of his false reporting; (2) the risks that such

falsification posed as to DHS's certification; (3) the payment of such fraudulent overtime from public funding; and (4) the substantial safety risk posed by Nyesuah's shirking of his home visit responsibilities.

Accordingly, for all these reasons, it concludes that Nyesuah'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 Nyesuah for the charged offenses. It submits that the City has failed to meet its burden of proof in this regard.

Proof of just cause, it asserts, requires that the employer substantiate that the alleged misconduct occurred and the penalty imposed was reasonable, such that "the punishment fits the crime." *Mississippi Valley Gas Co.*, 41 LA 745, 750 (Herbert 1963).¹³ Inherent in the just cause standard, it states, are the principles of due process, fairness and equity.

The record here, it contends, lacks sufficient evidence that Nyesuah engaged in the type of misconduct that warrants discharge. Further, it states that application of the principles of progressive discipline and consideration of the mitigating circumstances present confirms the City lacked just cause to terminate his employment.

The City, it notes, has not presented any direct evidence that Nyesuah failed to conduct home visits, as it cites in justifying his discharge. Nor did the City present direct evidence that he falsified records or committed any other misconduct.

Instead, it asserts, the City relies on the absence of ECMS entries to conclude that he failed to perform visits, and, in turn, falsified claims for overtime compensation, as

¹³ The Union asserts that in determining whether the City has met its burden of proof, the clear and convincing evidence standard should apply. *Green County DHS*, 109 LA 1160 (Sergent 1997) (devastating consequences of discharge require clear and convincing proof).

charged. It points out that M [REDACTED] limited her investigation to reviewing ECMS. She did not interview Nyesuah, his superiors, any of the families he allegedly failed to visit or any DHS employees that subsequently provided services to those families. Under these circumstances, it submits, M [REDACTED] unfairly jumped to the conclusion that Nyesuah had suddenly stopped performing his duties, as opposed to falling behind on data entry.

The fatal deficiencies in M [REDACTED]'s investigation, it contends, were demonstrated during the Nyesuah's disciplinary hearing. In particular, it cites the binder of documents presented showing he made the home visits at issue. These materials, it argues, demonstrate his only offense was neglecting to keep up with his paperwork.

The City, it stresses, has not offered any evidence refuting the genuineness of these records. These documents include twelve sets of Nyesuah's notes, which reflect that he made the required visits.

As such, it maintains that Figueroa was without basis to conclude that he had falsified records or failed to make home visits for which he received overtime compensation. The absence of supporting notes in ECMS, it submits, does not support such a finding.

Instead, it avers the only infraction the City has established concern Nyesuah's recordkeeping deficiencies, including his failure to enter notes in ECMS and his block recording of overtime. In view of his twelve-year's of service without prior discipline, it asserts that these first-time administrative-type errors call for progressive discipline and not discharge. *Village of Key Biscayne*, 133 LA 176, 185 (Sergent 2014); *Kimberly-Clark Corp.*, 107 LA 554 (Byars 1996).

Accordingly, for these reasons, the Union asserts that its grievance should be granted and the requested relief awarded.

Opinion

There can be no dispute that DHS has a right and a duty to mandate that its social workers document in ECMS all family home visits, as well as their progress notes for each case. Indeed, it stands undisputed that DHS's licensure and funding are dependent on such accurate recordkeeping.

Likewise, it logically follows that DHS may properly expect that its social workers will truthfully report all such data. The same holds true for any related submissions, such as overtime compensation requests. Indeed, as a basic condition of employment, employees owe a fundamental duty to conduct themselves honestly in all aspects of their employment.

As such, employees who breach these duties can and should expect that discipline will follow. In the case of dishonesty, it should be understood that the discipline will be substantial, and may involve discharge.

The City, of course, carries the burden of proof here. 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 Nyesuah. After a careful review of the record and thorough consideration of the parties' respective arguments, I conclude that the City has not met its burden.¹⁴ My reasons for this determination follow.

At the heart of the City's decision to discharge Nyesuah lies the conclusion that over a four-month period, he repeatedly falsified reports of home visits performed for which he fraudulently submitted overtime compensation claims. Indeed, Deputy Mayor Figueroa's testimony makes clear that her decision to discharge Nyesuah was driven by these acts of dishonesty, as opposed to his poor work performance relative to deficient recordkeeping.

On the evidence presented, however, I am not persuaded that the City has substantiated that Nyesuah is guilty of the charged dishonesty, which reportedly falls into three categories: (1) reported home visits/overtime claims on closed cases for which he did not enter any notes in ECMS; (2) reported home visits/overtime claims on pending cases for which he did not enter any notes in ECMS; and (3) reported home visits/overtime claims for which he reported overlapping times.

Addressing these first two categories, I note that the City's case is entirely circumstantial. It has not presented any direct proof of the alleged dishonesty, such as an admission by Nyesuah or confirming testimony from a witness with first-hand knowledge of the misconduct.

¹⁴ As noted above, the Union argues that as to the burden of proof here, the City should be held to a standard of clear and convincing evidence, as opposed to a mere preponderance of the evidence. It is unnecessary for me to address this issue, as I find the City's evidence falls short of even meeting this latter standard.

Instead, its case rests upon the absence of notes in ECMS documenting the visits at issue. Namely, it reasons that Nyesuah's failure to record such entries in ECMS substantiates he did not perform the visits, and thus, falsely reported doing so in claiming overtime compensation.

The circumstantial nature of the City's case, however, does not compel an automatic finding in the Union's favor. 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.

On the record here, I find the City's evidence lacking in this regard. Simply put, it is insufficient to foreclose alternative explanations for the absence of notes in ECMS documenting the home visits at issue that do not support a finding of fraud. These include, in particular, Nyesuah's deficient recordkeeping. Stated otherwise, I cannot reason from the lack of such notes to conclude it is more likely than not that Nyesuah did not perform the home visits at issue, and therefore, is guilty of falsifying records in reporting to have done so and claiming overtime compensation.¹⁵

In reaching this conclusion, I have assessed Nyesuah's testimony. For purpose of this review, I note that while he is entitled to the presumption of innocence, I am not

¹⁵ These first two categories of Nyesuah's alleged dishonesty differ only in that the former involves cases that were closed at the time of the alleged home visit, whereas the latter concerns cases that were pending when the alleged home visit was reportedly conducted. As explained below, this distinction does not affect my conclusion as to each that the absence of notes in ECMS is insufficient to substantiate that Nyesuah did not perform the home visits at issue, and therefore, committed fraud by claiming overtime compensation for them.

obligated to accept his account at face value. Evaluated on this basis, I find his testimony casts further doubt on the sufficiency of the City's evidence.

I note in this regard: (1) his testimony identifies specific work that he performed for twelve of the identified cases on the dates at issue, for which he offered corroborating documentary evidence; (2) his reportedly high workload, which stands undisputed, lends support for his reported inability to keep up with his ECMS recordkeeping; and (3) his unrebutted identification of other circumstances that prevented him from making ECMS entries for some of the cases at issues (e.g., closing of case; transferring of case to placement; supervisor neglecting to grant ECMS access for cases reassigned from another social worker) undercuts the City's reasoning.¹⁶

Finally, as detailed above regarding these first two categories of his alleged dishonesty, the City separates those involving closed cases from those concerning pending cases. It apparently has done so on the theory that as to the former, Nyesuah had no reason to perform any home visits, thereby bolstering the conclusion that his reported work and overtime claims for those cases was fraudulent. However, in view of Nyesuah's unrebutted testimony of being directed by his supervisor to perform work on closed cases, I cannot credit the City's claim in this regard.

Turning to third category of his alleged dishonesty (i.e., home visits/overtime claims with overlapping times), here too, I am unpersuaded that the evidence presented substantiates that he falsified his reports of such visits and related overtime claims.

¹⁶ I note in this regard that Mounelasy confirmed that upon such a case reassignment, a social worker cannot record entries in ECMS for the case until his/her supervisor grants him/her access within the system to do so. No evidence was offered that Nyesuah's supervisor granted him such ECMS access for any of the cases reassigned to him.

No doubt, Nyesuah could not be in two places at the same time. As such, his reports of overlapping times between home visits are unquestionably erroneous. It is another matter, however, to conclude that this discrepancy in his reports constitutes an intentionally false or fraudulent representation.

On review, I find that the evidence does not permit me to reach such a conclusion. In this regard, I give weight to Nyesuah's unrefuted testimony that the performance of multiple home visits on a given occasion does not always proceed in a strict linear fashion, but often involves going back and forth between homes. As he explained, the need to do so can arise when a family is not home on his initial visit, but later calls requesting him to return.

Moreover, if Nyesuah's intent was to fraudulently report home visits to collect overtime improperly, as the City alleges, there would have been no logical reason for him to record overlapping times for such visits. Indeed, just the opposite, such a scheme would have been furthered by recording discrete times for each visit, which, in total, spanned the entire period for which he was claiming overtime.

Instead, reporting home visits with overlapping times is far more consistent with sloppy recordkeeping than with an intentional fraud. Therefore, in the absence of any direct evidence of fraud, and none was presented, I cannot conclude Nyesuah is guilty of false reporting and theft of overtime relative to any of the instances identified as to this third category of alleged dishonesty.

In sum, on the evidence presented, I find that the City has not substantiated that Nyesuah intentionally falsified reports of home visits and related claims for overtime compensation.

This finding, however, does not absolve Nyesuah from all fault. Quite the contrary, the evidence presented plainly shows that he repeatedly failed to satisfy his recordkeeping obligation to record home visits in ECMS. Indeed, he conceded as much in his testimony.

His neglect in this regard is no small matter. It stands undisputed that timely documentation in ECMS of all case activity, including home visits, is essential to DHS's mission and constitutes an essential duty for its social workers. Deputy Commissioner Williams's testimony, with which Nyesuah did not take issue, clearly confirms these facts.

Further, the scope of Nyesuah's deficiencies was substantial. As M [REDACTED]'s audit reflects, in seventy-one instances over a four-month period, he neglected to document home visits. Even allowing for the impact of his increased workload during this time frame and system issues that affected his ability to enter data, I am compelled to find that his performance in this respect was seriously deficient.

Consistent with his responsibilities as a DHS social worker, he had an affirmative obligation to remedy his recordkeeping backlog long before it reached the level that has been established. Yet, he failed to do so. Instead, he simply kicked the can down the road by sending his notes to the record room.

Obviously, this action was not an acceptable alternative. His testimony tacitly acknowledged as much. He expressed no belief that doing so would result in that information being entered into ECMS.

As to the matter of penalty, I am not persuaded that his failings in this regard, while considerable, warrant his discharge. Under the principle of progressive discipline

inherent in the just cause standard, some lesser level of discipline is called for here, which apprises him of his unsatisfactory performance and affords him an opportunity to remedy that deficiency.

I am satisfied that a five-day unpaid disciplinary suspension suffices for this purpose. It is proportional to the offense established. Likewise, it should serve to impress upon Nyesuah the gravity of his transgression and convey the need to achieve and sustain a satisfactorily level of performance and comply with all applicable policies and procedures.

Accordingly, for all these reasons, the Union's grievance is granted, in part, and the City is directed to promptly reinstate Nyesuah to his former position without loss of seniority. It shall adjust his personnel record to reflect that his April 4, 2018 discharge has been converted to a five-day unpaid disciplinary suspension. In addition, the City is instructed to make payment to Nyesuah for all wages and benefits lost as a consequence of his discharge for the period from April 4, 2018 through the date of his reinstatement, less the period of the five-day disciplinary suspension. This make whole obligation will extend to the period during which Nyesuah was placed on an unpaid pre-termination suspension. The City also shall make payment on Nyesuah's behalf for the costs incurred by the Union in carrying him on its health and welfare plan during this same period.

AWARD

1. The grievance is granted, in part.
2. The City did not have just cause to discharge Dickson Nyesuah, effective April 4, 2018.
3. The City will promptly reinstate Dickson Nyesuah to his former position without loss of seniority. The City will adjust Nyesuah's personnel record to reflect that his April 4, 2018 discharge has been converted to a five-day unpaid disciplinary suspension. In addition, the City will make him whole for all wages and benefits lost as a consequence of his discharge for the period from April 4, 2018 through the date of his reinstatement, excluding the period of the five-day unpaid disciplinary suspension and less all outside wages and other earnings received by him as to this entire period. This make whole obligation will extend to the period during which Nyesuah was placed on an unpaid pre-termination suspension. The City shall also make payment on Nyesuah's behalf for the costs incurred by the Union in carrying him on its health and welfare plan during this same period. I will retain jurisdiction of this matter to resolve any dispute as to the implementation of this award, including the monies to be paid to Nyesuah or on his behalf, as well as the issue of whether he has satisfied the obligation to mitigate his damages.

April 19, 2021



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.

April 19, 2021



David J. Reilly, Esq.
Arbitrator