FEDERAL MEDIATION AND CONCILIATION SERVICE
IN THE MATTER OF THE ARBITRATION BETWEEN

International Association of Firefighters, Local 49,	**:**	**Case No.: 17-55299**
	:	**Grievance: Suspension**
Union,	**:**	
	:	**Grievant: Jon Caponi**
and	**:**	
	:	**Arbitrator's File No.: 17032**
City of Bloomington,	**:**	
	:	**January 19, 2018**
Employer,	**:**	

APPEARANCES

For the Union:

Shane Voyles, Attorney
Jon Caponi, Grievant
Eric Poertner, Chief Labor Representative, Police Benevolent Labor Committee

For the Employer:

Gabriel H. Neibergall, Attorney
Angie Brown
Brian Mohr, Fire Chief
Eric Vaughn, Deputy Chief
Jeff Flairty, Battalion Chief
Shanda Harms, Witness
Jesse Munk, Firefighter/Paramedic
Curtis Squires, Police Officer

Daniel G. Zeiser
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Cleveland, Ohio 44143-0280
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I. BACKGROUND

The grievance giving rise to this arbitration was submitted to the Employer in writing on March 3, 2017 and received by the Employer on March 10, 2017. It was processed in accordance with Article 14 of the Agreement between City of Bloomington, Illinois (Employer or City) and International Association of Firefighters Local 49, AFL-CIO (Union or Firefighters), May 1, 2012 - April 30, 2015 (Agreement). After unsuccessful attempts to resolve the grievance, it was submitted to arbitration pursuant to Section 14.2 of the Agreement. Using the services of the Federal Mediation and Conciliation Service, this Arbitrator was selected.

The arbitration hearing took place on November 1, 2017 at the City of Bloomington's Legal Office, 109 E. Olive St., Bloomington, Illinois. During the hearing, the parties had the full opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue their positions. Witnesses were sworn and separated. The parties stipulated that the matter was properly before the Arbitrator and ready for final and binding arbitration. They timely submitted briefs to the Arbitrator no later than December 29, 2017 and the matter was submitted.

II. ISSUE

The parties stipulated that the issue in this matter was:

> Was there just cause for Jonathan Caponi's 10 24-hour shift suspension imposed on February 28, 2017? If not, what is the remedy?

III. RELEVANT PROVISIONS OF THE AGREEMENT EMPLOYER POLICY AND ILLINOIS LAW

ARTICLE 5 ABSENCE DUE TO INJURY AND ILLNESS

Section 5.1. Sick Leave.

Any employee absent from duty because of sickness of the employee or the employee's spouse and/or dependent, shall be entitled to sick leave as provided herein, provided that the employee would have otherwise been scheduled to work but for their sickness. In cases where there is a serious illness or injury of the employee's dependent, the employee shall be released from duty and such leave time shall be charged to his sick leave bank.

…

ARTICLE 12 DUTIES, SECURITY AND WORK RULES

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Section 12.8. Computer and Internet Use.

Computers and the internet shall not be used during scheduled or unscheduled department activities for other than City business. Employees shall comply with all rules and/or regulations enacted by the City on computer and/or internet use.

ARTICLE 14 GRIEVANCE PROCEDURE

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Section 14.3. Authority of Arbitrator.

The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. The arbitrator shall consider and decide only the specific issue submitted to them in writing by the City and the Union, and shall have no authority to make a decision on any other issue not so submitted to them. The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way superseding State or Federal laws. The arbitrator shall submit it in writing their decision within sixty (60) days following close of the hearing, unless the parties agree to an extension thereof. Be decision of The arbitrator shall be final and binding.

Section 14.6. Code of Conduct and Disciplinary Actions.

The written Code of Conduct, adopted September 1, 2004 will be observed by the employees covered by this Agreement. If said Code of Conduct is changed, modified, or revised, the City will give the Union and the employees covered by this Agreement notification in advance of the effective date of any such proposed modifications. All disciplinary actions, to include suspensions and dismissal, may be grieved in accordance with the grievance and arbitration provisions of this Agreement. Grievances involving disciplinary suspensions may be filed at Step 1.

Further, is agreed that the grievance provisions of Article 14 and the Board of Fire and Police Commissioners appeals procedure are mutually exclusive and that no relief shall be available under Article 14 with respect to any matter which, at the employee's option, is appealed to the Board of Fire and Police Commissioners; and no

relief shall be available under the Board of Fire and Police Commissioners appeals process to any matter which, at the employee's option, is appealed to the grievance arbitration procedures of Article 14 of this Agreement. Disciplinary actions involving the interpretation or application of the written Code of Conduct are subject to the grievance and arbitration procedure set forth in this Agreement.

Differences of opinion concerning the interpretation or application of the Code of Conduct or the City of Bloomington Employee Handbook which directly affect the working conditions of employees covered by this Agreement may be processed as grievances under the grievance procedure set forth herein.

ARTICLE 16 MANAGEMENT RIGHTS

It is recognized that the City has and will continue to retain the rights and responsibilities to directly affairs of the Fire Department in all of its various aspects. Among the rights retained by the City are the City's right to direct the working forces; to plan, direct and control all the operations and services of the Fire Department; to determine the methods, means, organization, and number of personnel by which such operations and services are to be conducted; to determine whether goods or services shall be made or purchased; to make and enforce reasonable rules and regulations, provided that the exercise of discipline to enforce such rules and regulations shall be for just caught; to change or eliminate existing methods, equipment or facilities; provided, however, that the exercise of any of the above rights shall not conflict with any of the express written provision of this Agreement.

BLOOMINGTON FIRE DEPARTMENT
STANDARD OPERATING PROCEDURE

Disciplinary Actions **SOP 100.05**

I. PURPOSE

Disciplinary action is a tool to allow supervisors to deal effectively with members whose performance or conduct is unacceptable.

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III. VIOLATIONS

A member shall be subject to discipline, including suspension, demotion, or discharge on any of the following grounds:

…

B. Any act or omission which violates the Code of Conduct of the City of Bloomington.

…

E. Any unreasonable act or omission, the effect of which my:
   1. Hamper the functioning of the Bloomington Fire Department; or

   2. Cause embarrassment of the department of [sic] any member of the department before one or more citizens; or

   3. Reflect adversely upon the accused member, the Bloomington Fire Department, or any officer of the Bloomington Fire Department.

…

IV. PROCEDURES

…

D. Written disciplinary action shall specify the department policy, rule, and/or regulation that have been violated. A copy of such discipline shall be served upon the member not less than twenty-four (24) hours before any disciplinary action is taken.

E. Any member committing an infraction contained herein may be subject to the following actions:

   1. Coaching Session

   2. Written reprimand which is inserted in the member's personnel file.

   3. Suspension from one (1) to five (5) days without pay.
      a. Personnel placed on suspension will also be removed from the both the long and short overtime list for a period of not less than 30 days.

   4. Members subject to suspension for more than five (5) days, demotion, and/or discharge shall be referred to the Board of Fire and Police Commissioners.

Code of Conduct **SOP 102.01**

I. PURPOSE

This standard is written to give our members a general set of expectations for as long as they are employed by the Bloomington Fire Department.

II. GENERAL

All employees have an obligation to conduct their official duties in a manner that serves the public interest, upholds the public trust, and protects the department's

resources. All members of the department are expected to operate in a highly self-disciplined manner and are responsible for regulating their conduct in a positive, productive, and mature manner. Failure to do so may result in disciplinary action. All employees are expected to:

…

D. Ensure that all department resources, including funds, equipment, vehicles, and other property, are used in strict compliance with department policies.

E. Conduct all dealings with the public, city employees, an [sic] other organizations in a manner that presents a courteous, professional, and service-oriented image of the department.

…

G. Avoid any behavior that could fall under the definition of misconduct in the disciplinary section of the City of Bloomington Employee Handbook; and

H. Report for duty at the appointed time and place fully equipped, fit, and able to perform assignments.

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Professional Standards **SOP 102.03**

I. SCOPE

This SOP will over the Fire Department's expectations regarding the professional standards and conduct of its members.

II. STANDARDS

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F. Employees shall exhibit courtesy and respect to members of the public and other city employees.

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Social Media/Networks **SOP 103.03**

I. PURPOSE

This policy establishes this department's position on the utility and management of social media and provides guidance on its management, administration, and oversight. This policy is not meant to address one particular form of social media;

rather social media in general, as advances in technology will occur and new tools will emerge.

Social media provides a new and potentially valuable means of assisting the department and its personnel in meeting community outreach, problem-solving, investigative and related objectives. This policy identifies potential uses that may be explored or expanded upon as deemed reasonable by administrative and supervisory personnel.

The department endorses the secure use of social media to enhance communication, collaboration, and information exchange; streamline processes; and foster productivity.

…

VI. PERSONAL USE

Precautions and prohibitions — Barring any state statute to the contrary, department personnel shall abide by the following when using social media.

1. Department personnel are free to express themselves as private citizens on social media sites to the degree that their speech does not impair working relationships of this department for which loyalty and confidentiality are important, impede the performance of duties, impair discipline and harmony among coworkers, or negatively affect the public perception of the department…

…

3. Department personnel shall not post, transmit, or otherwise disseminate any information to which they have access as result of their employment without written permission from the Chief of Fire or his or her designee…

7. Department personnel may not divulge information gained by reason of their authority…

City of Bloomington
Employee Handbook
Effective October 1, 2002

CODE OF CONDUCT

…

Confidentiality

Employees hold positions of public trust. All employees must respect me sometimes private and sensitive nature of information which they are privy, or to which they may

have access. To ensure confidentiality of information, employees may not disclose, use, remove, Record or copy confidential information unless required to do so in the course of city business or bylaw.

Employees may not use information obtained through their employment with the city for their personal gain or profit, or for the profit of others, during or after their employment with the city. Employees must avoid situations that create the appearance of misuse of information for personal profit or game.

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Employee Privacy and Personal Use of City Property and Facilities

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Other Equipment: Employees are expected to safeguard the equipment issued to them to avoid damaging it and to extend its useful life. Employees must follow all operating instructions, safety standards and guidelines. The City may have specific practices concerning the use of certain equipment. Employees must follow any such practices.

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City equipment may not be used for purposes unrelated to City business, unless otherwise provided by the City or Department.

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Sick Leave

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Permissible Use of Sick Leave: Employees may use their sick leave when they are injured or ill as well as when they must care for a spouse, child or parent who is ill or injured. Employees may use their sick leave for routine dental, optical and medical appointments for themselves, or when they must accompany a spouse, child or parent to such appointments. Sick time will be recorded in fifteen (15) minute increments.

…

DISCIPLINE

Employees who violate any City or department policy, or who otherwise fail to meet the expectations of the City, their department or their supervisor may be subject to discipline. While this will most often involve some form of progressive discipline (for example, a verbal warning, followed by a written warning, followed by suspension or

termination), the City will take whatever disciplinary measures it deems appropriate to deal with a particular situation.

Employees who feel that they have been disciplined unfairly are encouraged to first discuss the matter with their supervisor or department head. If this does not result in a satisfactory resolution, employees may discuss the matter with Human Resources.

City of Bloomington
Communication Manual
Effective March 1, 2005

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This Policy is intended to assist and protect the City and its employees in the course of their work. All employees are required to comply with this Policy. Use of any City Communication Systems shall constitute the employee's consent to this Policy.

1. All Communications Systems are the property of the City of Bloomington and I provided to support City business. All use of City Communications Systems must comply with all Federal and State laws, where applicable. Penalties for violations may include discipline, termination and/or civil criminal [sic] prosecution.

…

5. Voice mail, e-mail, electronic files and Internet messages should be treated with the same concern for security and confidentiality has written documents for oral statements. Accordingly, confidential documents that are to be e-mailed or sent by fax transmission should be protected as if receipt by a third party would result in a breach of confidentiality. Similarly, voice mail messages that contain confidential information should be communicated only to employees with a "need to know."

…

8. …Unless authorized to do so by the appropriate supervisory personnel, employees may not: access any computer or network; delete, examine, copy or modify any software, files or data; prevent or impede others from making authorized use of any computer, network, software, file or data; or attempt any of these acts.

ILLINOIS LAW

Board of Fire and Police Commissioners Act

Removal or discharge; investigation of charges; retirement. 65 ILCS 5/10-2.1-17

Except as hereinafter provided, no officer or member of the fire or police department of any municipality subject to this Division 2.1 shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. The hearing shall be as hereinafter provided, unless the employer and the labor organization representing the person have negotiated an alternative or supplemental form of due process based upon impartial arbitration as a term of a collective bargaining agreement. Such bargaining shall be mandatory unless the parties mutually agree otherwise. Any such alternative agreement shall be permissive.

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The board of fire and police commissioners shall conduct a fair and impartial hearing of the charges, to be commenced within 30 days of the filing thereof, which hearing may be continued from time to time. In case an officer or member is found guilty, the board may discharge him, or may suspend him not exceeding 30 days without pay. The board may suspend any officer or member pending the hearing with or without pay, but not to exceed 30 days. If the Board of Fire and Police Commissioners determines that the charges are not sustained, the officer or member shall be reimbursed for all wages withheld, if any. In the conduct of this hearing, each member of the board shall have power to administer oaths and affirmations, and the board shall have power to secure by its subpoena both the attendance and testimony of witnesses and the production of books and papers relevant to the hearing.

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Nothing in this Section shall be construed to prevent the chief of the fire department or the chief of the police department from suspending without pay a member of his department for a period of not more than 5 calendar days, but he shall notify the board in writing of such suspension. The hearing shall be as hereinafter provided, unless the employer and the labor organization representing the person have negotiated an alternative or supplemental form of due process based upon impartial arbitration as a term of a collective bargaining agreement. Such bargaining shall be mandatory unless the parties mutually agree otherwise. Any such alternative agreement shall be permissive.

Any policeman or fireman so suspended may appeal to the board of fire and police commissioners for a review of the suspension within 5 calendar days after such suspension, and upon such appeal, the board may sustain the action of the chief of the department, may reverse it with instructions that the man receive his pay for the period involved, or may suspend the officer for an additional period of not more than 30 days or discharge him, depending upon the facts presented.

IV. FACTS

The City is a municipality in north central Illinois. It operates its own Fire Department. The Union represents Fire Department employees including Probationary

Firefighters, Firefighters, Paramedics, Engineers, Captains, Fire Investigators, and the Public Education Officer. (CX A). The parties have had a collective bargaining relationship for years. The Grievant is a Firefighter/Paramedic with the City. The Fire Department does ongoing training, which has included HIPAA training. The Grievant received HIPAA training most recently on July 7, 2016. (CX H-8, 9, and 10). On February 28, 2017, the Grievant was suspended for sustained findings of official misconduct, abuse of position, bringing the Fire Department in public disrepute, breach of the public trust for disclosing confidential information, and violation of the attendance policy. (CX D).

The Grievant was off duty on November 9, 2016. At the time, he was living with Krystina Bratcher at 716 West Mulberry Street in Bloomington. The Grievant and Bratcher had experienced domestic disputes before November 2016. The Grievant testified that Bratcher had called the police several times before November 2016 and claimed to be injured. During the evening of November 9th, the Grievant and Bratcher got into a fight. The Grievant locked Bratcher out of the house and Bratcher texted that she was going to the hospital. The Grievant learned that Bratcher was going to Advocate BroMenn Hospital in Normal and drove there about 9:15 p.m. Upon arriving, he saw a police car near the Emergency Room entrance. As a Firefighter/Paramedic, the Grievant knew many of the hospital personnel. He called the hospital, identified himself, spoke to the charge nurse, and asked to be connected to Bratcher's room. He spoke to Bratcher for about two minutes.

After speaking with Bratcher, the Grievant drove to Bloomington Fire Department headquarters at 310 North Lee. He went into the watch booth where he briefly spoke

with Battalion Chief Jeff Flairty. Flairty testified that he thought nothing of it because it is common for firefighters to be in the watch booth while off duty. While there, the Grievant accessed the Computer Aided Dispatch (CAD) system to confirm that the police were present at the hospital to speak with Bratcher. Using his cellphone, he took a photo of the computer screen showing the police dispatch call regarding Bratcher. The record identified Bratcher as a battery victim in Room 11 at Advocate Hospital and listed her date of birth and address. (CX F-2). The Grievant then went home and waited for the police to arrive.

Sometime between 10:45 and 11:00 p.m., Bloomington Police Officers Curtis Squires and Steven Statz arrived at his house. The Grievant allowed them access to the house and permitted Squires to look at his cell phone. There is no dispute that Squires looked at certain content on the cell phone, but Squires and the Grievant differed as to the extent of what was reviewed. The Grievant testified that he asked Squires repeatedly whether he was going to jail, that Squires would not answer, and that he took the phone away from Squires saying "Fuck you, I'm not giving you anything unless you tell me if I'm going to jail." Squires testified that the Grievant did not take the phone away from him. Rather, he set it down. Squires then told the Grievant he was being arrested and told him to stand up and put his hands behind his back. The Grievant testified that he responded "Really? You know I'm a fireman. You're going to fuck my career like this?" The Grievant further testified that he asked Statz "Are you going to let him do this to me?" Squires testified that he thought the Grievant was trying to play the firefighter card to avoid being arrested. Squires also testified that, before November 9th, he was familiar with the Grievant's address and knew the Grievant was a firefighter.

During their encounter, the Grievant mentioned that he had checked the CAD at the station and knew the police would be coming. Squires testified that he did not know the Fire Department could access police dispatch calls and this was a safety concern. Squires further testified that being cussed at was ordinary and routine for a second shift Patrol Officer.

After being arrested, the Grievant was taken to and booked into the McLean County Jail. He was scheduled to work the next day, so he called the Department from jail and spoke to Acting Captain Cory Matheny. The Grievant testified that he asked Matheny to use vacation or PC time, but Matheny said there was none available. He then said he needed to use sick time, though he was not and did not claim to be sick. The Grievant testified that he told Matheny that Bratcher "went and got me hooked up." According to the Grievant, this meant he was arrested, but Methany did not ask what it meant. In his statement, Matheny said that the Grievant told him that Bratcher had got him hooked up that night, and he needed to use sick leave because he could not make it to work in the morning. Matheny could not recall "exactly" whether the Grievant asked to use other time, but specifically recalled him asking to use sick time. Matheny also did not remember checking whether other time were available. (CX C-3). Sometime later, Matheny told Flairty that the Grievant needed to use 24-hour sick leave. Flairty is in charge of entering sick leave and did so for the Grievant for November 10th. The morning of November 10th, Flairty learned the Grievant had been arrested and called Deputy Chief Eric Vaughn to advise him. Flairty also told Vaughn that Methany had informed him (Flairty) that the Grievant had called to request sick leave. Vaughn told Flairty that this was a possible sick leave violation. Vaughn then informed Fire Chief

Brian Mohr of the situation. The Grievant was released from jail during the afternoon of November 10th.

On November 11, 2016, the Grievant engaged in a Facebook Messenger conversation with Shanda Harms, a nurse at Advocate Hospital. Harms testified that she and the Grievant have known each other through work for years and have a casual friendship. During their conversation, the Grievant sent Harms the photograph of the CAD police dispatch call regarding Bratcher and asked her if she could find out the injuries Bratcher claimed to have suffered. Harms declined, telling the Grievant she could lose her job. (CX F-1). Several days later, Harms mentioned this to Samantha Munk, another nurse at Advocate, who is married to Bloomington Firefighter Jesse Munk. Jesse Munk was at Advocate getting medication replacement following a call. Samantha Munk mentioned the incident to him and that the Grievant had sent a text to Harms. Jesse Munk then asked Harms about it and Harms showed him the text from the Grievant with the photo, which Munk recognized as the CAD from the Department. He then contacted Chief Mohr to inform him. Jesse Munk testified that he did not recall seeing any protected information in the photo.

Chief Mohr testified that Vaughn informed him on November 10th that the Grievant had called in sick. Later the same day, the Grievant called him at home to ask where he stood. According to Mohr, he told the Grievant that he had limited information, knew about him calling in sick, and that there was only a sick leave violation. Mohr testified that the Grievant responded it was his sick leave and he could use it as he wanted, or words to that effect. Mohr disagreed and told the Grievant he could have used vacation, but not sick, time. Mohr also testified that using any other form of paid

benefit leave time would not have been viewed as misconduct. On Monday, November 14th, Vaughn told Mohr that the Police Department emailed him with a concern about police records being looked at by Fire Department personnel. Vaughn testified that Firefighters should not be able to see police calls on the CAD system, that the system was somehow set up that way, and that the Fire Department was not aware it could access police calls.

On November 15th, the Grievant was placed on paid administrative leave and a formal investigation ordered. The City used an attorney, Christina Self, to investigate. She interviewed the Grievant on December 8, 2016, and also interviewed Harms, Matheny, Flairty, and Jesse Munk. (CX 2). Vaughn assisted Self during the investigation and was present during the interviews. Self summarized the interviews and prepared a final report. Mohr testified that he reviewed the final report, but did not read the interview transcripts. He further testified that he was concerned with three main areas: the use of sick leave; the CAD — both accessing it and disclosing the information; and the abuse of his position in trying to get out of being arrested and get information from Harms. Mohr was concerned with the negative impact of the Grievant's conduct, though he testified that he had no evidence of such impact or any refusal by a City of Bloomington employee to work with the Grievant, nor any evidence the Grievant used his position to get information from Harms.

On February 28, 2017, Mohr suspended the Grievant for 10 working days, that is, ten 24-hour shifts beginning March 1 and ending March 28, 2017. The Grievant also received a mandatory EAP referral and was required to follow any course of action recommended by the EAP. If this included further treatment, such treatment would be

paid for by the Grievant. (CX D). Additionally, the City denied the Grievant's use of sick leave for November 10th, but did not substitute other leave. The Record of Disciplinary Action reads:

> On December 6th, 2016, FF Caponi was noticed that an investigation would be conducted due to allegations of official misconduct, abuse of his position; criminal conduct; public disrepute; violation of the attendance policy and breaching the public trust. These allegations involve violation(s) of the City of Bloomington Employee Handbook, Collective Bargaining Agreement between IAFF Local 49 and the City of Bloomington, Bloomington Fire Department Standard Operating Procedures, and the City of Bloomington Communication Manual. The results of said investigation resulted in a sustained finding of the following: official misconduct, abuse of his position, bringing the Fire Department in public disrepute, breach of the public trust by disclosing confidential information to a third party entity, and violation of the attendance policy
>
> …
>
> FF Caponi will receive a mandatory EAP referral and must schedule an appointment within 24-hours. He must follow any recommended course of action from the EAP Counselor. The City will not be responsible for any and all counseling recommended or any travel to and from the treatment recommended by the EAP Counselor. FF Caponi must adhere to the Bloomington Fire Department Standard Operating Policy and Procedures, City of Bloomington Employee Handbook and Communication Manual, the Local 49 Collective Bargaining Agreement, City ordinances, state and federal laws. FF Caponi's actions both on and off duty reflect not only on himself, but the department as a whole. FF Caponi must act in accordance with the above mentioned items and any further violations will not be condoned or tolerated and will lead to termination.

(CX D). The Grievant testified that the attendance policy violation was self-explanatory, but the City did not explain how he committed the other violations. Chief Mohr told him that he brought the Fire Department into public disrepute, but did not provide any details. He assumed it was because his arrest hit the newspaper. The Grievant further testified that he was not told why he had to contact the EAP. This grievance followed. (CX E-1).

The Grievant was charged with misdemeanor domestic battery, but the charge was dismissed on February 28, 2017. (UX 5). Eric Poertner, Chief Labor Representative for the Union, testified regarding several prior incidents of discourtesy by Bloomington firefighters. In March 2004, Captain JT was counseled in writing for saying "bullshit" in a coughing voice to the Department's training officer to indicate the training officer was lying. In October 2004, Captain DB was issued a written reprimand for actions and comments made to the instructor during a training session. The reprimand was grieved and overturned by an arbitrator for failing to conduct a fair and reasonable investigation. In 2016, the Department investigated allegations of bullying that resulted in coaching. Also in 2016, a firefighter swore at another firefighter and used politically incorrect language, resulting in a coaching and referral to the EAP. (UX 1-4). No evidence of prior incidents of sick leave abuse by firefighters was introduced.

V. POSITION OF THE EMPLOYER

The grievance should be denied. The Employer had just cause to discipline the Grievant. The Employer proved the Grievant engaged in the charged misconduct and the ten shift suspension was appropriate.

There is no dispute that the Grievant violated the sick leave provisions of the Agreement, SOP Section 102.01.II.G, and the Employee Handbook. Both he and the Union admitted he should not have called in sick. Both also admitted the Grievant improperly accessed the police CAD system for personal reasons, which also violated the Agreement, SOP Sections 102.01.II.D and G, the Handbook, and the Communication Manual. Even though the Grievant admitted he sent the photo of the CAD screen, the Union disputed that it was a violation because it was a public record

and did not contain confidential information. However, the photo of the CAD screen is exempt from disclosure as a public record because it would interfere with or obstruct an ongoing criminal investigation. And the photo contained HIPAA information because it disclosed information that would identify Bratcher. Further, the Grievant's disclosure was not related to Bratcher's treatment, payment, or health care and was without her consent. The evidence established that the information, and thus the photo, was confidential. It should not have been disclosed and doing so violated the Agreement, SOP, Handbook, and Communication Manual. Section 12.8 of the Agreement requires employees to comply with Employer rules on computer and internet use, while SOP 102.05.III.E prohibits disclosure that would cause embarrassment to the Department. SOP 103.03.VI.3 prohibits dissemination of information to which employees have access because of their employment. The Handbook's Confidentiality section does not allow disclosure unless it is required by City business or by law, and the Communication Manual provides for confidentiality as well.

During the interaction between the Grievant and Squires, the Grievant testified that he made it known to Squires he was a firefighter and arresting him would "fuck" his career, and asked Statz if he were going to let Squires arrest him. Squires testified the Grievant mentioned he was a firefighter several times, so much so that Squires concluded the Grievant was playing the firefighter card. The Grievant did not dispute this. Thus, he abused his position, in violation of SOP Section 100.05.III.E.3, SOP Section 102.01.III.E, SOP Section 102.03.II.F, and the Handbook's Discipline section. Simply put, the Employer proved the charge of official misconduct, abuse of position.

The next step is to demonstrate that the penalty, here the ten 24-hour shift suspension, was appropriate. The Grievant's conduct was unprecedented. Chief Mohr testified there were multiple violations involving sick time, accessing and disclosing the CAD information, and abuse of position, all of which had a negative impact on the Fire Department. There were no prior incidents remotely alike the Grievant's conduct. The Union attempted to prove there were similar situations, but none of the incidents it introduced involved a firefighter's abuse or attempted abuse of his status as a firefighter, not to mention accessing the CAD for personal reasons or disseminating the information. The Union introduced testimony about a prior sick leave violation, but this was 20 years ago and related to the Police Department. Furthermore, the Union argued that the Employer did not explain the misconduct to the Grievant, as if this somehow absolved him of responsibility. However, Attorney Self offered the SOPs, the Handbook, and the Communication Manual at the Grievant's December 8, 2016 interview, but the Union declined. The Employer also explained the violations in its April 7, 2017 letter. The Union's argument that the Employer failed to explain the violations fails. Given the Grievant's conduct and the public trust a firefighter carries, the suspension was warranted.

VI. POSITION OF THE UNION

The Arbitrator should uphold the grievance. The City suspended the Grievant for five reasons, but did not prove all the allegations against him. Some were not proved, some only partially, and it provided no explanation for one of the allegations. Even if all the allegations had been proved, a ten shift suspension was unreasonable. The criminal charge against the Grievant was dismissed, and all that remains is a month's

suspension for allegations that were not proved. Simply put, the Employer did not have just cause to suspend the Grievant for a month.

The City gave five reasons for suspending the Grievant. To prove just cause, it must prove all the allegations. Five reasons were given in the Record of Disciplinary Action, but only four in the City's grievance response. It failed to explain and prove these generalized allegations. The first reason is "official misconduct," but nowhere is that term defined, nor is it mentioned in any rule, regulation, policy, procedure, or contract. SOP 100.05.IV.D provides that written discipline shall specify the policy, rule, or regulation violated, but the City did not follow its own rules. Nor did it explain to the Grievant what he did that was "official misconduct." Leaving the Grievant and the Arbitrator to guess fails to meet the just cause standard. Employers must effectively communicate any rules so that employees know what is expected of them and the discipline that could result from a violation. Additionally, discipline should be corrective, not punitive, so that employees are put on notice and can correct their behavior. Here, the Employer did not explain its decision and appears to have created the "official misconduct" rule. Just cause requires more.

"Official misconduct" is defined by Illinois law, 720 ILCS 5/33-3. If the City used this definition, it did not specify so in the Record of Disciplinary Action, nor is it included in the Agreement or any SOP or rule cited. If the City did rely on it, it failed to prove a violation because the Grievant was not charged with this crime by the prosecutor. Further, the charge of domestic battery was dismissed. It appears the City is asking the Arbitrator to find the Grievant guilty of an offense the prosecutor did not charge or pursue. Finally, since "official misconduct" is not included in the City's grievance

response, so it is possible the City abandoned this charge. Simply put, whatever role "official misconduct" played in the Grievant's suspension should be overturned.

The Employer also failed to prove the Grievant abused his position. The Record of Disciplinary Action lists violations of the Agreement, Handbook, and SOPs, but does not specify the particular rules violated or explain how the Grievant abused his position. None of the documents listed defines "abuse of position." Again, how is the Grievant expected to correct his behavior if he does not know what behavior constituted abuse of position? While it was apparent at the arbitration hearing that the Employer believed the Grievant abused his position during his interactions with Squires and Harms, it failed to prove a violation. The Grievant did not ask Squires for special treatment and Squires already knew the Grievant was a firefighter. Abuse of position occurs when someone obtains a personal advantage not available to the public, but there is no dispute the Grievant gained nothing. Merely stating a fact already known is not an abuse of position. The Handbook does include that City employees should behave lawfully and respectfully, and cannot speak or act on behalf of the City unless authorized, but that is not the case here. Nor is the three-part nexus test set forth in W.E. Caldwell met. The Grievant's statements that he is a firefighter and speculation about damaging his career have not diminished his effectiveness or affected his performance as an employee. It appears the Employer has not explained this allegation because it cannot.

The Grievant did not abuse his position. Generally, an employer cannot discipline an employee for off-duty conduct unless there is a nexus between the off-duty conduct and an injurious effect on the business. The employer must prove the conduct harmed the business, adversely affected the employee's ability to do the job, or led other

employees to refuse to work with the employee. The Grievant's statements to Squires did not harm the City, did not affect the Grievant's ability to do his job, and did not lead any employees to refuse to work with him. Chief Mohr had no evidence that the Grievant damaged the public trust, only speculation, which is insufficient to prove nexus. Certain situations, such as police officers being free of criminal taint and firemen of the tinge of pyromania, obviate the need for proof of harm, but this is not one.

There was no just cause to suspend the Grievance for discourtesy. There is no question the Grievant was discourteous in violation of several Employer policies. However, the Employer has ignored a history of colorful, if not abusive, speech by Bloomington firefighters resulting in discipline. The Union introduced evidence of several incidents where firefighters used profanity or similar language, but were not suspended. Because the Grievant was off duty on November 9th, it makes no sense to assess greater discipline than other firefighters for discourtesy.

The City suspended the Grievant for abuse of position, in part, because of his interaction with Harms. However, there is no evidence the Grievant used his position as a firefighter to get information from her. In the messages, the Grievant never mentioned working for the City or acting in his official capacity. The Grievant and Harms were friends and Harms already knew he was a firefighter. The City failed to prove nexus. Chief Mohr conceded he was speculating to establish any connection. The only hint of any nexus is the Grievant's phone showed his part of the conversation as a shield, but it is not the same shield used by the Fire Department, does not identify the Grievant as a City employee, and there is no evidence it showed on Harms's phone. Additionally, Harms testified the conversation was not work-related, but was the result of their

friendship. The City failed to prove the Grievant convinced Harms to do something because he was a firefighter and any role this unproved allegation played in his suspension violated the just cause standard.

There is no evidence that the Grievant brought the Department into public disrepute. The City did not explain how he did so when he was suspended, undermining a finding of just cause. It introduced no evidence of public sentiment or opinion, and Mohr admitted he speculated about public perception. Harms was the only witness not employed by the City and can be viewed as representative of the public, but she did not offer any opinion of the Department. The Grievant testified there was an article in the newspaper, but the content was not mentioned so one cannot draw a conclusion from this evidence. The Firefighters have maintained that the severity of the discipline resulted from the Grievant's arrest. The failure of the City to produce any evidence of public sentiment or opinion supports this conclusion. The Handbook specifies that the City will not use an arrest for discipline. If it did so, it violated its own rules.

The Employer failed to prove the Grievant disclosed confidential information to a third party. The Firefighters concede that the Grievant should not have accessed the CAD system for personal reasons and discipline is warranted for this violation. But the Employer has alleged the Grievant violated HIPAA by sending the photo of the screen to Harms. However, there was no HIPAA violation. The photograph is poor and does not identify any information about Bratcher that the Grievant and Harms did not already know. Jesse Munk testified that the photo did not reveal any protected health information. Since Munk presumably had the same HIPAA training as the Grievant, it makes sense that, if he could not identify protected information, the Grievant could not.

Furthermore, while the information in the CAD system was confidential on November 9th, it was no longer confidential on November 11th when the Grievant disclosed it because the police investigation was completed. Additionally, he had already told Harms that he had been arrested before he sent the photo. Therefore, no confidential public safety information was disclosed. The only other possible confidential information is that Bratcher was in the hospital, but Advocate had already disclosed that to the Grievant over the phone, so that information was no longer confidential. Since the Grievant did not disclose confidential information, there was no HIPAA violation and the Employer failed to prove the charge. While some discipline was appropriate for accessing and photographing the CAD screen, there was no just cause to discipline for disclosing confidential information. Moreover, the Employer shares some of the fault because the Fire Department was not supposed to be able to access police calls. Had the system worked as it should have, the Grievant would not have been able to access police data. The Employer must accept some responsibility and, where management is also at fault, arbitrators often reduce or set aside discipline.

While the Grievant may have violated the sick leave policy, he never hid that he was not sick. The Grievant informed Matheny that Bratcher had him “hooked up,” that is, that he was arrested. He testified that he asked for PC or vacation time, but was told none was available and only then requested sick time. Matheny understood the Grievant was not able to come to work and needed to use benefit time. It was only later that it was decided the request violated policy. Additionally, the City denied the use of sick leave, but did not substitute other leave available to the Grievant. This is a form of discipline, so using the violation as a basis for suspension is a form of double jeopardy.

The City has also been inconsistent. If this were simply a matter of not approving sick leave, the Grievant should have been permitted to substitute other leave. The April 7, 2017 letter to Union Counsel included that the Grievant was not docked sick time. Rather, using sick time was inappropriate for his arrest so the Grievant was recorded as absent without leave. However, if the Grievant did not use sick leave, there is no basis for disciplining him for misuse of sick leave.

The discipline imposed was too severe. This is not a case of an employee pretending to be sick when he was not, so the Grievant should not be punished as severely as such an employee, though he deserves some punishment for not reporting for his shift. Additionally, there was no evidence that calling off negatively affected operations, and it ignored past incidents before deciding what discipline to impose. While there were no previous incidents of misuse of sick leave in the Fire Department, there was one in the Police Department that resulted in a five day suspension for calling in sick to attend a concert. Here, the Grievant did not lie about being sick and would not have been a violation if he used leave other than sick time. These factors should mitigate any punishment and should result in a less than five day suspension.

As noted earlier, the Employer did not follow its own rules as to discipline. Arbitral precedent provides that any reason for discharge must be communicated to the employee. The Employer has set forth its reasons for discipline in other situations. That it was vague and unclear here and lumped together multiple rules is inconsistent with just cause. It also suggests an improper punitive motive. This is further supported by the requirement that the Grievant attend counseling. Procedural errors have been used to mitigate the penalty imposed.

SOP 100.05 provides that suspensions of more than five days shall be referred to the Board of Fire and Police Commissioners and Illinois law does not permit a working days suspension. An employer cannot suspend an employee for more than 30 days by using semantics and declining to pay the Grievant for another day. Because the ten 24-hour shift, or working days, suspension is contrary to Illinois law, it is also contrary to the Department's own procedures and is not supported by just cause.

VII. OPINION

The Employer bears the burden of proving that just cause exists for the Grievant's discipline. Just cause generally requires persuasive proof that the rules or policies cited for the discipline were violated and the discipline was proportionate to the offense. That is, the discipline imposed was reasonable under the totality of the circumstances. Usually, the just cause standard favors progressive discipline, which gives the employee an opportunity to correct behavior and provides notice that failure to do so will lead to more severe discipline. However, progressive discipline need not always follow an oral warning, written warning, suspension, and discharge in lock step order. The facts and circumstances of each particular case dictate the appropriate disciplinary level. Finally, no citation is needed for the principle that employers have the initial discretion to impose discipline for proven misconduct. Generally, arbitrators will not second guess management so long as the penalty imposed is reasonable under the facts and circumstances.

Here, the City charged the Grievant with official misconduct, abuse of position, bringing the Fire Department into public disrepute, disclosing confidential information, and violation of the attendance policy. (CX D). The charges stem from the Grievant's

conduct while off duty on November 9, 2016. Generally speaking, an employer cannot question the conduct of an employee away from work. However, misconduct that is directly related to employment can cause discipline, even if it occurs off duty. The question is: When is misconduct directly related to employment? Arbitrators have concluded that it is directly related when there is a workplace nexus, that is, there is a sufficient connection between the misconduct and the workplace. Put simply, there must be some connection between the off-duty misconduct and the employer's interests that legitimizes the decision to take disciplinary action. Typically, arbitrators will find a nexus when the employee's conduct harms the employer's business, adversely affects the employee's ability to perform his or her job, or leads other employees to refuse to work with the offender.

Official Misconduct

The charge of official misconduct was not addressed in detail in the Record of Disciplinary Action or the response to the grievance and the Employer did not argue it in its brief. (CX D and E-2). There is no "official misconduct" set forth in the SOPs and Handbook provisions cited by the Employer. (CX B1-5). There is a reference to "misconduct" in SOP 102.01, referring to the Handbook, but SOP 102.01 deals with employees performing their official duties. This is at least somewhat inconsistent in that the Grievant's conduct resulting in the charge was off duty. After reviewing the record, the Arbitrator understands this charge to be dovetailed in the other charges. That is, by abusing his position, using the CAD information for personal reasons, disclosing it to Harms, and by trying to take sick leave when he was not sick, the Grievant engaged in

misconduct in connection with his duties as a firefighter. Consequently, the Arbitrator will address this not as a separate charge, but as part of the other charges.

Abuse of Position

The City argues that the Grievant admitted telling Squires he was a firefighter, that he said arresting him would "fuck" his career, and that he asked Statz if he were going to let Squires arrest him. Squires testified that the Grievant said several times that he was a firefighter, so much so that Squires believed the Grievant was "playing the firefighter card." Based on this, it argues it proved abuse of position. The Union counters that no rule or policy defines "abuse of position," the Grievant never asked Squires for special treatment, and Squires already knew the Grievant was a firefighter, so no abuse was proved. Abuse of position is generally considered to be using one's position as a government employee for one's benefit or the benefit of someone else. The Union claims that he did not ask for special treatment, but stating he was a firefighter, that arresting him would mess up his career, and asking Statz if he were going to let Squires arrest him tends to support the conclusion that the Grievant tried to use his status to his benefit. It is of little import that the Grievant did not specifically ask. Abuse of position does not require a specific request, only that one uses the position for one's benefit.

The question is: Did the Grievant use his status as a firefighter for his benefit? It must be noted that the Grievant received no benefit from his position — Squires arrested him anyway. So, at most, the Grievant tried, but failed, to use his position to his advantage. Additionally, this is a he said, she said situation. The Grievant and Squires differed on how many times he said he was a firefighter and Statz was not called to corroborate Squires's version. Furthermore, any contention that the Grievant used his

status to get Harms to provide information is misplaced. The Grievant and Harms were friends and the Grievant used his status as a friend, not his status as a firefighter. On this record, the Arbitrator finds that the City did not demonstrate the Grievant abused his position as a firefighter.

As part of its abuse of position argument, the City submits that the Grievant was discourteous toward Squires in violation of SOP 102.01.II.E and 102.03.II.F. (CX B-2 and B-3). The Grievant does not deny that he was discourteous, only that others have been discourteous and have only received reprimands or counseling. (UX 1 3, and 4). In other words, the Union argues the Grievant was disparately treated. The Union bears the burden of proving disparate treatment. It must show that the Grievant was treated differently than similarly situated employees and that the conduct resulting in discipline was alike in all respects. Put another way, differences in discipline that are the result of differences in conduct do not support a disparate treatment argument. In this case, the evidence does not support that the Grievant was treated differently. Here, the Grievant engaged in other misconduct than simply using profanity or being discourteous. The other instances introduced by the Union are not similarly situated and do not prove disparate treatment. Had the Grievant been suspended only for discourteous behavior, the Union's argument would have merit. But that is not the case here.

Public Disrepute

The City argues that the Grievant's actions resulting in his arrest brought the Fire Department into public disrepute. As noted above, to discipline a public employee for off-duty conduct, there must be a connection between the off-duty conduct and the workplace. Arbitrators find a nexus when the employee's conduct harms the employer's

business, adversely affects the employee's ability to perform his or her job, or leads other employees to refuse to work with the offender. Harm is usually defined as actual business loss or damage to the employer's reputation. Arbitrators usually consider the amount of adverse publicity and embarrassment to the employer, and the likelihood the employer will lose business or suffer other adverse consequences if the employee is not disciplined. Widespread publicity or that the publicity has connected the employee to the employer in the public's mind is an important factor. However, other than the Grievant's testimony that his arrest was in the newspaper, there was no evidence that there was widespread publicity or the Grievant was connected to the City in the public's eye. And the mere showing that an employee has been arrested as a matter of public record is insufficient.

In the public sector, arbitrators have tended to protect the government employer's reputation and mission, citing the public trust. That is, whether the off-duty misconduct has brought the employer into public disrepute. For example, a police officer found to have committed insurance fraud violated the public trust by casting doubt on the officer's credibility. Likewise, a firefighter determined to have lied during an investigation into off-duty conduct damaged the prestige of the department. See *Discipline and Discharge in Arbitration*, (BNA 1998), pp. 312-15. As noted above, though, there was no widespread publicity. And this is not the case where the conduct in and off itself was sufficient to presume harm to the City. The Grievant did not engage in fraud, theft, or other deceit. He was not charged with arson, breaking and entering, or similar serious criminal conduct. Rather, he was arrested for a domestic dispute that was eventually dismissed based, in part, on inconsistent statements by Bratcher. (UX 5). Public

employees are human, have the same foibles, and make the same mistakes as private sector employees. They should not be deprived of the normal inadequacies and failures common to society. It goes without saying that domestic disputes are not uncommon and being caught up in one does not cause the notoriety of widely disapproved of acts such as drug dealing, child abuse, or human trafficking. Simply put, there was no evidence that the Grievant's conduct harmed the City's reputation or business, that the conduct adversely affected the Grievant's ability to do his job, or that others refused to work with him. On this evidence, the Arbitrator concludes the City failed to prove the Grievant's conduct brought the Fire Department into public disrepute.

Accessing and Disclosing CAD information

The Grievant concedes that he should not have accessed the CAD system for personal reasons and deserves some corrective discipline for this. Additionally, he disclosed the photo of the CAD to Harms and asked her to verify the information. The Firefighters argue that the Grievant did not violate HIPAA by doing so and should not be disciplined for sending it to Harms. However, SOP 103.VII.3 specifically provides that employees shall not "disseminate any information to which they have access as a result of their employment without written permission from the Chief…" (CX B-4). The Handbook section on Confidentiality includes "Employees may not use information obtained through their employment with the City for their personal gain…Employees must avoid situations that create the appearance of misuse of information for personal profit or gain." (CX B-5). There can be little question that the Grievant accessed the CAD system as a result of his employment with the City and used it for his personal gain. He wanted to find out what Bratcher was claiming and whether he would be

arrested. It matters not whether the information fell under HIPAA. The CAD screen he accessed was a police dispatch record.

The Arbitrator does not address the issue that he was able to access it. As Deputy Chief Vaughn testified, the system was somehow set up that way and the Fire Department was not aware firefighters could access police dispatch calls. The Arbitrator understands that the Grievant was not disciplined for accessing the police dispatch, only that he accessed it for personal reasons and disclosed it to Harms. Further, the Firefighters assert that the information in the photograph was no longer confidential at that time. This is irrelevant. The Grievant was disciplined for accessing information that he could access only because he was a firefighter. That is, the information was confidential because only the Police and Fire Departments had access to it. It was not information available to the public. Whether it was covered by HIPAA does not matter.

Violation of Sick Leave Policy

Finally, there is the issue of sick leave abuse. The Employer contends that the Union conceded the Grievant should not have called in sick. The Union counters that the Grievant did not report for work as scheduled and he should have, but that he did not violate the sick leave policy because he did not lie about being sick. Rather, it contends, the Grievant told Matheny that Bratcher got him “hooked up” (arrested) and only asked for PC or vacation time. He only asked for sick time when Matheny said there was no other time available. The Arbitrator disagrees. The sick leave policy is clear that permissible use includes when the employee is sick or injured or needs to take care of an ill or injured family member. (CX B-5). There is no question the Grievant was not sick or injured. The Union claims that he did not lie about being sick, which is

true, but it is disputed whether he asked for something besides sick time. In his statement, Matheny testified the he could not recall “exactly” whether the Grievant asked to use other time, but specifically recalled him asking to use sick time. He also did not remember checking whether other time were available. Matheny did not say that he told the Grievant there was no other time available except for sick leave. (CX C-3). This contradicts the Grievant’s testimony that he only asked for sick time in response to Matheny. On this record, the Arbitrator determines that the Grievant violated the sick leave policy.

Reasonableness of the Penalty

There is no need to unduly lengthen this Opinion. The Arbitrator has concluded that there was no violation of official misconduct. There is no rule or policy regarding official misconduct and the Grievant’s conduct was off-duty. The Arbitrator found the Employer failed to prove violations for abuse of position or bringing the Fire Department into public disrepute. The Employer did prove violations of the sick leave policy, and accessing and disclosing the CAD information. Additionally, there was the issue of being discourteous, which the Grievant admitted but was not brought as a separate charge. While SOP 102.03.II.F requires employees to be courteous to the public and other city employees, the Employer argued this as part of the abuse of position violation. The Arbitrator has concluded that there was no abuse of position, but the Grievant was discourteous toward Squires.

Since not all of the charges were proved, the Arbitrator finds that a 10 working day suspension was not reasonable. Since all the violations were taken together in determining the 10 day suspension, it is difficult to determine how the Employer

assessed each violation in reaching the 10 day suspension. It is unlikely that it assessed two days for each of the five violations set forth in the Record of Disciplinary Action. (CX D). After all, not all of the violations have the same level of seriousness. The Arbitrator finds that accessing the CAD system and disclosing the photo of the CAD screen are the most serious violation and this was proved. Accessing such confidential information for personal reasons is serious misconduct and the Grievant should be put on notice of its seriousness, if he does not know already. In the Arbitrator's experience, employers would typically impose a suspension of approximately two weeks for this violation only. The sick leave and discourtesy violations were also proved, though these are the least serious in the Arbitrator's experience. Abuse of position and bringing the Fire Department into disrepute are more serious than sick leave and discourtesy, but less than accessing and disclosing the CAD information. Since these charges were not proved, the penalty should be reduced. The Arbitrator therefore finds that the suspension should be reduced to six days.

VIII. AWARD

The grievance is denied in part and upheld in part:

1. The 10 working day suspension is reduced to six days.

2. The Grievant's personnel records are to be modified to reflect only a six day suspension.

3. The Grievant is to be paid for the four additional days assessed and otherwise made whole.

4. The Arbitrator retains jurisdiction for 60 days to resolve any disputes as to the remedy only.

Dated: January 19, 2018

Daniel G. Zeiser
Arbitrator