

American Arbitration Association  
Case Number: 01-20-0000-2420

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In The Matter of the Arbitration

Between

AFSCME DISTRICT COUNCIL 47  
"UNION"

**OPINION**

-and-

**AND**

CITY OF PHILADELPHIA  
"CITY"

**AWARD**

Grievance 2187-20-08  
Marchs Bourne – Notice of Intent  
And Suspension

-----X  
BEFORE: Randi E. Lowitt, Esq., Arbitrator

**APPEARANCES**

**For the City**

Erica Elizabeth Kane, Esq.

**For the Union**

James Glowacki, Esq.

Willig Williams Davidson

Pursuant to the provisions of the collective bargaining agreement between THE CITY OF PHILADELPHIA (hereinafter, "the City") and AFSCME DISTRICT COUNCIL 47 (hereinafter, "the Union"), the above-named arbitrator was designated by the American Arbitration Association as Arbitrator to hear and decide the matter in dispute between the above-identified parties.

A hearing was held by ZOOM, with consent of all parties, on February 1, 2021. The parties were represented by counsel and were afforded a full and fair opportunity to conduct direct and cross examination of sworn witnesses, to present relevant evidence and to argue their relative positions. The record was closed after oral closing arguments. All matters, while not necessarily cited in this Opinion and Award, have been considered. All Claims not expressly granted herein are denied.

Some quotation marks (""") may be used to denote parts of testimony or argument. While no court reporter or stenographer was present and no actual record was taken of the proceedings, the quotation marks denote portions of the notes taken by the Arbitrator during the course of the hearing and represent a close approximation of what was said by a witness or by counsel. Those notes and all attendant materials will be destroyed at the time this Opinion is disseminated.

**The Issue:**

**Was the Grievant, Mr. Marcus Bourne, suspended and subsequently discharged for just cause?**

**If not, what shall be the remedy?**

## BACKGROUND

The parties stipulated to a few facts.

### Stipulation of Facts

1. The Grievant's date of hire was October 4, 2010.
2. The Grievant's date of termination was June 22, 2019.
3. The date of the incident leading to the Grievant's termination was [REDACTED].
4. The Grievant's position at the time of termination was a Revenue Examiner II.

On [REDACTED], Mr. Marcus Bourne, a Revenue Examiner II, attended a field audit for [REDACTED] at the offices of its CPA, Mr. J [REDACTED] B [REDACTED], in Glenside, PA. He attended with his coworker, Ms. A [REDACTED] M [REDACTED], also a Revenue Examiner II, who was the person conducting the field audit. Mr. Bourne drove to the office in Glenside and parked in the lot. Ms. M [REDACTED] arrived separately and at a different time than Mr. Bourne. When the audit concluded, Mr. Bourne and Ms. M [REDACTED] went to lunch in Glenside, after which Mr. Bourne returned to his car. Mr. Bourne did not return to the office that day. The City determined that Mr. Bourne had stolen time and charged him with theft of time, issuing a thirty (30) day suspension with Intent to Dismiss. The case proceeded through the grievance process, resulting in the instant arbitration. (Joint Exhibit #1).

Mr. J [REDACTED] B [REDACTED] is a CPA. On [REDACTED], he wrote an email to Mr. J [REDACTED] S [REDACTED], Director of Tax Compliance, and Mr. Bourne's immediate superior.



aware that two of his investigators...doing a field audit...didn't return to the office...workday had not ended.... I conducted an investigation of both of the employees involved."

Mr. Harper interviewed Mr. Bourne. When asked by Mr. Harper where he was after the audit, Mr. Bourne "said he worked from his car. ...He had driven...taken work with him...field audit concluded, broke for lunch, worked from his car for the balance of the day." Mr. Harper said that Mr. Bourne had not shown him "any work product or documents to show he worked from the field;" nor did Mr. Bourne tell Mr. Harper which other cases he was working on. Mr. Harper was not persuaded that Mr. Bourne had worked from his car.

Mr. Harper was shown the timesheet for the day in question and acknowledged that both Mr. Bourne and Ms. M [REDACTED] were denoted as "direct," meaning that they were not in the office for the entirety of the day. (City Exhibit #4). He noted that Mr. Bourne was marked as having worked 7.5 hours. Mr. Harper said that Mr. Bourne should have followed the "acceptable practice...to call in...request permission to leave from the field...use some other time to basically say, I'm just gonna leave from here." Additionally, according to Mr. Harper, "we did request Mr. Bourne produce some work product, but it was not forthcoming." Mr. Harper recalled that, subsequently, there was an "assertion ...both employees

returned to B█████'s office and worked in a vacant conference room for the balance of the day."

Mr. Harper authored the Notice of Suspension and presented it to Ms. Delores Davis, the Deputy Commissioner, for her input. (City Exhibit #1). He said that his ultimate conclusion was "essentially only two to three hours of compensable work was performed that day...could not substantiate any assertion that there was other work...7.5 hours of work...that after 11:00 a.m., no further work was performed." Mr. Harper did say that he had not corresponded with either Mr. B█████ or Mr. S█████ in the preparation of the disciplinary documents. (City Exhibit #s 2, 3).

On cross examination, Mr. Harper said that he had interviewed Mr. Bourne one time; he had also interviewed Ms. M█████, had spoken with Mr. S█████, and had spoken to Mr. M█████ G█████ who "gave an indication of the correct procedure to leave from the field before work ended." When asked about Mr. S█████, Mr. Harper said "he was the person who...brought to attention the issue...leaving prior to the close of business." Mr. Harper acknowledged that Mr. S█████ does not work for the City anymore.

Mr. Harper was shown the timesheet and acknowledged that he could not determine who had completed it, but acknowledged it did not look like it was completed by Ms. M█████ or Mr. Bourne. Mr. Harper also

said that, although he was generally familiar with timesheets, he was not specifically familiar with the timesheets in the Revenue unit and was not specifically familiar with how they are filled out.

Mr. Harper acknowledged that Mr. Bourne told him that he had worked from his car the remainder of the afternoon. Mr. Harper was unclear who had told him that they might have worked from a conference room, saying that it had been a long time since this occurred, that he did not have the notes he had taken. He could not specifically recall hearing this alleged changed story from Mr. Bourne.

Ms. Delores Davis has worked for the City for thirty-two (32) years. She has been with the Department of Revenue as a Deputy Revenue Commissioner since 2016. She participated in the disciplinary decisions regarding Mr. Bourne, in conjunction with Mr. Harper's recommendations and with her superiors, specifically Ms. Kathleen McColgan, the First Deputy Revenue Commissioner. Mr. Harper "presented information to me...I did bring it to the attention of Ms. McColgan...she and I discussed it...this is typical, cases that are egregious or serious, to determine what the recommendation should be. We agreed...recommendation of termination... thirty (30) days with Intent to Dismiss. After the disciplinary hearing, Mr. Harper spoke to me again...to determine if anything had changed...to change the recommendation." She said it had not.

Ms. Davis was asked about the timesheet. (City Exhibit #4). She said that her understanding was the notation of "direct" was because Mr. Bourne had gone directly to the jobsite and had not come to the office beforehand.

Ms. Davis related her reasons for believing termination was the appropriate penalty. "A Revenue Examiner is a person...who has a lot of authority and autonomy...access to taxpayer records...access to make very long-lasting decisions...consider this person ...in a position of trust. When we look at an auditor who goes into the field and there is uncertainty about their time...that is...employees who are not truthful about their time and attendance...it gives us...concern about being trustworthy...erodes the public trust. We saw this as an egregious offense warranting termination."

On cross examination, Ms. Davis recalled attending the third step grievance meeting. She acknowledged that, beyond reviewing the case, she did not have any personal involvement in the investigation.

Ms. Kathleen McColgan is the First Deputy Revenue Commissioner, reporting to the Commissioner. She has responsibility over the auditors. Additionally, in 2016, she became the Deputy Integrity Officer, working with the Inspector General's office. Ms. McColgan recalled that she reviewed with Ms. Davis the recommendation of a thirty (30) day suspension with Intent to Dismiss. "Based on the facts



presented...determined that Mr. Bourne did commit theft of time...third level grievance...inconsistencies with his testimony. We are in a position of public trust and authority...extremely important that the Department be able to trust it's examiners...when that trust is broken...an offense of theft of time...really is an egregious offense."

Specifically, with regard to the alleged inconsistencies in the third step, Ms. McColgan said that Mr. Bourne could "not answer clarifying questions...times when he answered a question with a question...he said he returned after lunch to work in the office but prior he said he worked in his car.... Inconsistencies with him and M██████." Ms. McColgan reviewed the information with the Commissioner who agreed with the determination for termination.

On cross examination, Ms. McColgan acknowledged that she did not do any underlying investigations, that she only reviewed the meeting and investigatory notes. She relied on the investigation when making her determination. She also said that Mr. Bourne would be subject to the Field Audit Policy. (Joint Exhibit #3).

Mr. Bourne testified on his own behalf. He had worked for the City since October 2010, most recently as a Revenue Examiner II. He explained the type of work he did and also what a Field Audit is. He was familiar with the Field Audit Policy, specifically with Audits done out of the office and out of Center City.

Mr. Bourne explained that on [REDACTED], he worked with Ms. M [REDACTED] at Mr. B [REDACTED]'s office in Glenside, PA. "I was accompanying her in the field that day...I had brought my own work to do that day...she was a newer hire on the seniority list...my role was...to help her understand...she just really started going in the field...more like holding her hand." Mr. Bourne said he arrived at approximately 9:00 a.m., having driven from his home. He was shown the auditor's assignment sheet, which "showed the auditors who were in the field that day..." He noted that he had not written on the sheet for the day in question; Ms. M [REDACTED] had entered her and his names on the sheet. (Union Exhibit #3).

As to the audit, itself, Mr. Bourne said it began at "10:00 a.m. I had arrived at 9 under the assumption it would start at 9...I called her...she was on the way...she notified me...it was 10. I began working from my car until she showed up." Mr. Bourne said that an "audit filled workday is 9 to 4." As to what he was working on both before and after the audit at Mr. B [REDACTED]'s office, "I brought an audit with me...I don't remember the file...I had a large backlog. I had a case with me and I was working on it that day. ...I had the audit folder and my laptop...where I compiled my audit work papers. ...I could work anywhere. ...parked in the parking lot of the business. ...She arrived in the 10:00 hour. We went inside to conduct the audit with Mr. B [REDACTED]...a couple of hours. ...Then we went to lunch a block or two away...we walked there, me and A [REDACTED].

...about an hour we were at lunch at the location...walked back to my vehicle. ...I told A [REDACTED] I was there...she said ok, great, I'm gonna call us in. ...I continued to work from my car until 4."

When asked about why he did not return to the office, Mr. Bourne said that the time he would have spent driving back to Center City to the office was better spent working. "No rule in the audit manual requires you to go back after an audit...instead of wasting multiple hours travel time to go back to Center City...I decided to continue to work from the vehicle." He did not call the office to tell them he was doing that because "there is no such requirement to do so." Mr. Bourne said that he had done "well above 50...maybe under 200" field audits. And, he "would hang around the business to complete the work day...done that numerous times with numerous examiners and supervisors." Having never been told not to do that, he did not think it was problematic for him to work from his car on this day. Mr. Bourne said he worked until 4:00, from the parking lot, and then "called A [REDACTED] and said it's 4 and you can call us out and she said I got you. Typically, when we work as a duo...the person responsible for the audit would do the calling out of said audit."

The last day Mr. Bourne worked for the City was March 29, 2019, notwithstanding some documents implying his separation date was in June. "On Monday, April 1, I called into the office and told them I was

taking a vacation day because my son was born on Sunday. On April 2, I got a notice saying they were terminating me.”

On cross examination, Mr. Bourne reiterated that he did not work “together” with Ms. M [REDACTED], “but more so as I accompanied her...if she had any questions, I could assist her directly...I brought my own work.” He reiterated that he did not call into the office to report that he had arrived at Mr. B [REDACTED]’s office because Ms. M [REDACTED] “was the person responsible for calling us in.” Mr. Bourne reiterated that Ms. M [REDACTED] arrived at 10:00 but he had arrived at 9:00, and that prior to her arrival, he was working on a different audit in his car. He could not recall which audit but said that if he saw the “production report from January...I could give you the exact case and show you what I was working on.” When asked if he presented the other case to Mr. Harper during the investigatory interview, Mr. Bourne said he told Mr. Harper that his production was one of the highest. Mr. Bourne related that he did not possess that information at the time of the investigatory interview. He said he “did not provide any actual physical work papers” to Mr. Harper, and that the “substantiation was based on the production report,” but he did not give that to Mr. Harper.

Mr. Bourne was asked if he “routinely” worked from his car. He said that he had one so before, but did not recall how many times. He reiterated that he did not notify the City, but that the City had been “notified I was in the field.” Mr. Bourne reiterated that he did not have a

specific recollection of what he had worked on while in his car. Mr. Bourne did not recall telling anyone that he worked from a conference room at any time after lunch, only that he had worked from his car.

Mr. David Mora is the Vice President of Local 2187 and was the Staff Representative for this case when it arose. Mr. Mora explained that the Field Audit rules had been bargained for. (Joint Exhibit #3). Mr. Mora said he was not aware of any other auditor who had been disciplined or terminated for working in their car after a Field Audit. Mr. Mora asserted that progressive discipline is provided for in the collective bargaining agreement.

On cross examination, Mr. Mora acknowledged that Mr. Bourne had not provided the Union with proof of any work he had done from 1:00 p.m. to 4:00 p.m. on the day in question. And, Mr. Mora acknowledged that Mr. Bourne worked in a position that requires public trust.

On rebuttal, Ms. Davis recalled that, during the Step 3 hearing “we give the employee the opportunity to either refute or walk us through what happened. Mr. Bourne indicated he called in at 9:00 a.m. on behalf of both...that they arrived and ...at 4:00 p.m. Ms. M██████ made the call on behalf of both of them.... (I) learned for the first time that Ms. M██████ did not arrive until 10:00 a.m. and it...gives me concern regarding trust and honesty.” Ms. Davis memorialized the Step 3 in writing. (City Exhibit #7).

## RELEVANT PORTION OF THE CBA

### 16. DISCIPLINE AND DISCHARGE

- A. **JUST CAUSE.** It is agreed that management retains the right to impose disciplinary action or discharge provided that this right, except for an employee in probationary status, is for just cause only.

(Joint Exhibit #1)

## POSITIONS OF THE PARTIES

### The City:

The City maintains that it had just cause to suspend and to discharge Mr. Bourne. The City avers that Mr. Bourne “is simply not credible...shifting explanations as to what he did between 1 and 4...he worked in his car...which is curious for January in Philly...and at another point he said he worked out of a conference room. Pointing to what it considers to be the inconsistencies in Mr. Bourne’s story, the City highlights the fact that they continued, with Mr. Bourne claiming he called into the

office at 9:00 a.m., and then Mr. Bourne claiming that Ms. M [REDACTED] made the call, although she was not there until 10:00 a.m.

The City insists that Mr. Bourne is “guilty of the offence. Mr. Bourne is in a position of significant public trust. Taxpayers have to be able to trust our Revenue Examiners are truthful.” The City insists that this issue “goes beyond simply falsifying three hours work,” and contends that Mr. Bourne, by not providing Mr. Harper with any substantive information to show that he had been working, “speaks volumes” as to his veracity. Finally, the City maintains that Mr. B [REDACTED] would have no reason to lie about Mr. Bourne and his whereabouts, but that Mr. B [REDACTED] did not see Mr. Bourne at any time after he and Ms. M [REDACTED] left the office.

Therefore, the City demands that the grievance be denied.

**The Union:**

The Union avers that the burden of proof is on the City and that the City has not met its burden. It argues that Mr. Bourne was entitled to Due Process and that the City had not given him Due Process. The Union highlighted the fact that Mr. Bourne was not given the opportunity to confront Mr. S [REDACTED], and that, during the arbitration, Mr. Harper admitted he was “a little fuzzy...didn’t know anything unit specific in detail.” The Union noted that Mr. B [REDACTED] admitted he did not know and would not know if Mr. Bourne had been out in the parking lot. “The City testified

credibly...it is a position of public trust. It is true that ...there is an assumption that the investigation was conducted fairly. ...This was not. Trust does not mean that you can deprive an employee of due process.”

The Union examined the Field Audit rules. It denies the City’s contention that Mr. Bourne had to return to the office and specifically argues that, going bullet point by bullet point, the City cannot accurately and correctly assert that Mr. Bourne did not follow or comply with the rules. And, the Union reminds the Arbitrator that the Field Audit rules were negotiated. Therefore, if the City wants to enforce them differently, the City must negotiate that. “The City knows how to require office time when it has to. The City Center Field Audit bullet two says that. The Field Audits do not contain that requirement. Mr. Bourne was not required to return.” Further, the Union argues that Mr. Bourne testified credibly and that Mr. Mora testified credibly.

The Union acknowledges that Mr. Bourne may have been working at the edge of a rule, since Ms. M ██████ called in for both of them. But, it argues that this is common practice, something that was unrebutted by the City. “Even if Mr. Bourne erred, it was *de minimis*. That does not typically lead to termination. And, given the progressive discipline policy, it cannot lead to termination.” Finally, the Union argues that the City should not be permitted to shift the burden of proof by saying that Mr. Bourne should have provided information to Mr. Harper that would prove



he was working in his car. "It is the City's burden to bear, a heavy burden to prove just cause, which they cannot do." Therefore, the Union demands that the grievance be sustained and that Mr. Bourne be made whole.

### **OPINION**

After a complete review of all the evidence and testimony, I find that the City did not have just cause to discharge Mr. Bourne. My reasoning follows.

As an initial matter, Mr. Bourne's case is distinct and different than that of Ms. M■■■■■■'s. Mr. Bourne testified with much more clarity about everything that transpired on the day in question, including about the Flex Time policy. The Flex Time policy specifically states:

#### **Field Audits**

- The hours for regular field audits are 9-4.
- An Audit Unit employee leaving the office for a field destination will sign out (your name, name of taxpayer's representative, audit location, phone and appointment time) on the Auditor's Assignment Sheet, which is located where the daily sign-in sheets are kept.
- If returning to the office from a field destination, the employee must record on the Auditor's Assignment Sheet the time of his/her return to the office. The employee signs out on the same sheet at the end of the day. (A sample is included in the Appendix.)
- An Audit Unit employee in the field must call the unit secretary at 9:00 a.m. upon arrival at the taxpayer's location and at 4:00 p.m. when leaving the taxpayer's location.

(Joint Exhibit #3). The policy is clear when it says “**if** returning to the office from the field destination....” The policy does not say that an auditor must return to the office. The policy does not say that an auditor may not work from either an office or a vehicle, as long as that auditor is working. Additionally, while the policy says that the Audit Unit employee must call the unit secretary at 9:00 a.m....and at 4:00 p.m., the testimony from Mr. Bourne was unrebutted that the practice was to have the lead person call the office. Mr. Bourne testified that Ms. M [REDACTED] had called in and called out for both of them. Whether Ms. M [REDACTED] should have called herself in at 9:00 a.m. is of no consequence in this hearing. However, there was no testimony from the City controverting Mr. Bourne’s assertion that he had been called in and out at the appropriate times. There was nothing in Mr. Harper’s investigation or in the Notices to Mr. Bourne that rebutted the assertion that he had been called in and out at appropriate times.

Additionally, Mr. Harper testified that he was not given any information from Mr. Bourne that would prove Mr. Bourne worked from his car. Mr. Harper conducted an “Investigatory Interview” on January 30, approximately [REDACTED] weeks after the alleged incident. During that interview, Mr. Harper recalled Mr. Bourne telling him that he had worked from his vehicle on a different audit. Mr. Harper did not testify to or put in his report that he had actually checked into any documentary evidence

that would be within the records of the Revenue Department in order to determine whether Mr. Bourne was telling the truth. He did not testify to or put in his report whether he had checked with Mr. S [REDACTED] for any exculpatory evidence that would have corroborated Mr. Bourne's contention. If his investigation were to be complete, Mr. Harper should have and could have looked. Mr. Harper also said that Mr. Bourne told him that Mr. M [REDACTED] had called in for them. Mr. Harper makes no reference as to whether he checked this assertion for veracity. Additionally, when asked about the time sheet, Mr. Harper acknowledged that he was not familiar with the way the Revenue Department filled it out. And, Mr. Harper said he spoke to other supervisory personnel who said that, if remaining in the field, acceptable practice would be to call in, which he did not ascertain was not done on Mr. Bourne's behalf. This investigation was not thorough with regard to Mr. Bourne. Although Mr. Bourne did not give any specific information to Mr. Harper, it is incumbent upon the charging party, the City, to prove its case, and not vice versa. While I find that Mr. Harper, Ms. Davis and Ms. McColgan were credible witnesses, the City did not meet its burden.

The City did not have just cause to discharge Mr. Bourne. A written reprimand would be appropriate.

In view of the foregoing, I issue the following

**AWARD**

1. Mr. Bourne is to be returned to work within thirty (30) days of the issuance of this Award, if practicable, in light of the COVID pandemic.
2. Mr. Bourne is to be reinstated to payroll within thirty (30) days, even if he is not returned to work, in light of the COVID pandemic.
3. The parties are to discuss back pay owed to Mr. Bourne. If the parties are unable to reach a determination regarding back pay owed, then they may return to the Arbitrator for assistance in that determination.
4. Mr. Bourne's seniority, pension rights, et cetera shall be bridged.
5. The Arbitrator shall retain jurisdiction for the implementation of this Award for one (1) year from the date of issuance.



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Randi E. Lowitt  
Arbitrator

Dated: February 14, 2021

State of New Jersey    )  
                                  ) ss.:  
County of Morris        )

I, Randi E. Lowitt, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.



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Randi E. Lowitt  
Arbitrator

Dated: February 14, 2021