

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

AFSCME District Council 47

and

City of Philadelphia

:  
:  
: AAA Case No. 01-20-0005-6044  
:  
: Grievance: 2187-20-23  
: Michael Bergen Suspension  
: and Discharge  
:  
:

OPINION AND AWARD

Hearing Dates: December 8, 2020 and February 26, 2021

Arbitrator: Thomas P. Leonard, Esquire

Appearances:

AFSCME District Council 47

Jessica Brown, Esquire  
Willig, Williams & Davidson

City of Philadelphia

Tiffanie Allen, Esquire  
Lisa Swiatek, Esquire  
City of Philadelphia Law Department

## **Procedural History**

AFSCME District Council 47 (Union) and the City of Philadelphia (City or Employer) are parties to a collective bargaining agreement for a unit of employees in the City's Department of Licenses and Inspections (L&I). The CBA has a grievance procedure with the right to binding arbitration administered by the American Arbitration Association (AAA). On July 7, 2020, the AAA notified the undersigned that the parties had selected him as the arbitrator for a grievance filed over the suspension and discharge of Michael Bergen.

Two days of virtual hearings were held on December 8, 2020 and February 26, 2021 on the Zoom platform. At the hearings, the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties made closing arguments on the record.

## **Issue**

Whether the discharge of Michael Bergen was for just cause? If not, what shall be the remedy?

## **Relevant Contractual Provision**

### **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.
- B. DISCIPLINARY ACTION HEARINGS. An employee subject to disciplinary action shall not be suspended without pay or discharged prior to completion of Step III of the Grievance Procedure unless in the judgment of the appointing authority or designee said employee poses a threat to himself/herself or other person or persons.

- C. PROGRESSIVE DISCIPLINE. The City shall have the right to discipline or discharge an employee in the bargaining unit for just cause only. Disciplinary actions shall be progressive in nature where appropriate. The City and Local 2187 agree that discipline should be directed toward maintaining or improving the City's services. This clause does not apply to probationary employees.

### **Facts**

Michael Bergen was employed by the City of Philadelphia's Department of Licenses and Inspections (L&I) as a Construction Plans Review Specialist. Before his discharge he was employed for approximately three years in a variety of positions in L&I. Before L & I, he spent 50 years in the private sector in construction and carpentry. At the time of his discharge, he was assigned to the front counter of the permit issuing division and was responsible for taking permit applications.

L & I is responsible for insuring building safety throughout Philadelphia. It has several divisions, including the permit issuing division and a division that is responsible to review plans for their compliance with building codes. The Department issues building permits to contractors and technicians working on renovations and building projects. The Department also includes a division that employs inspectors and engineers who visit building and construction sites to verify compliance with submitted plans, permits and building codes.

Due to the nature of L & I's work, the Department has put its employees on notice that they are not to engage in any conduct that can negatively affect the public's confidence in the integrity of L&I 's operations or has the appearance of impropriety. L & I has its own Employee Handbook which states this policy at Section 2.1, Standards of Conduct, Ethics and Integrity.

Bergen's direct supervisor was R [REDACTED] M [REDACTED] Construction Management Specialist Supervisor. He is responsible for the supervision of the front counter employees. The counter employees issue a range of permits, including Make Safe permits, zoning permits, building plan permits and same day permits (also called EZ Permits). The last category covers minor work that can be done in one day and that does not require the submission of plans and a review of those plans.

In November, 2017, Bergen transferred from a field office inspector position to the inside counter of L & I's main office. He was trained by M [REDACTED] then began his work with the EZ Permits. M [REDACTED] taught Bergen on the proper written standards and protocol for issuing EZ permits and gave them to Bergen at the beginning of his training.

The protocol for all applicants for permits is that they take a ticket in the front waiting room, go to a concierge room to be pre-screened (to make sure they are qualified and are seeking the proper permit) when they are called and then go to the counter after they have been pre-screened. Applicants are limited to three (3) permit applications per ticket per transaction. This protocol is the same for one property or for multiple units in a property, such as an apartment building. M [REDACTED] made the protocol clear to staff in several emails. The supervisor will grant exceptions if the counter is busy, but the staff must first come to the supervisor for approval. If M [REDACTED] is not available, there are two other supervisors to fill in for him. M [REDACTED]'s supervisor is C [REDACTED] D [REDACTED], the Director of Permit Services.

In this arbitration hearing, M [REDACTED] testified that on at least a "couple dozen" occasions he made this protocol and other protocols clear to Bergen. Some of the occasions were due to Bergen's failure or inability to follow directions and led to M [REDACTED] writing up Bergen for insubordination.



In March, 2019, M [REDACTED] had to bring Bergen's failure to follow protocol to the attention of his supervisor at the time, E [REDACTED] B [REDACTED]. The case involved Bergen making up his own language for EZ Permit applications. He received a one day suspension.

In May, 2019, M [REDACTED] had to counsel Bergen on the protocol for electrical certifications. On September 11, 2019, M [REDACTED] told Bergen to stay with his assigned task, plumbing applications, and not take applicants at the counter without first getting his supervisor's approval. On October 7, 2019, M [REDACTED] wrote up Bergen for working outside his assigned area. In the meeting to discuss the write up, Bergen was loud and shouting.

In November, 2019, Bergen engaged in two separate instances of misconduct that caused M [REDACTED] to report him to management and Human Resources to bring more serious discipline against Bergen.

On Saturday, [REDACTED], Bergen saw work being done at [REDACTED] around the corner from his home. The site was a residence where the front of the building had collapsed. He was concerned about whether the work was being done properly because it appeared to him that the workers had not installed proper structural support for the mansard roof. He engaged a worker at the site and also the supervisor about the way he was constructing the property. He did not identify himself as an L & I employee, but said that he was a concerned citizen and an experienced carpenter. He asked to see the plans. Later, he went into L&I's internal computer system to review the plans.

On Monday, [REDACTED], Bergen emailed L&I's Construction Division Manager B [REDACTED] M [REDACTED] about what he had seen at the Seymour Street site. M [REDACTED] does not supervise Bergen. The email implied that a co-worker did a less than satisfactory review of the plans. He also contacted the Contractual Services Unit inspector to describe what he had seen.

On [REDACTED], Bergen showed M [REDACTED] a copy of his email to M [REDACTED]. M [REDACTED] then forwarded the email to C [REDACTED] D [REDACTED] and E [REDACTED] B [REDACTED], L&I's Integrity Officer. M [REDACTED] did this because he believed that Bergen was performing inspections in the field when it was not his assignment and that he had gone outside the chain of command.

On [REDACTED], Bergen was assigned to work on a backlog of electrical permits. He went outside of that assignment and took an application from an expediter (a runner for contractors) for 29 permit applications at the same address, an apartment building. The day before, M [REDACTED] observed Bergen talking with this same expediter. Bergen took the 29 applications without first seeking approval from his supervisor. When the applications were reviewed by a Department engineer in consultation with M [REDACTED], it was determined that plans are required and that, at a minimum, accessibility issues needed to be addressed.

The two November incidents resulted in Bergen being called to an administrative hearing on [REDACTED]. The purpose of the administrative hearing is to give the employee an opportunity to respond to written charges against him before the Department proceeds to discipline the employee. Bergen attended with two Union representatives. Present for the City were L & I Deputy Commissioner for Building Safety and Integrity Officer, Ralph DiPietro, L & I's [REDACTED] A [REDACTED] P [REDACTED], Human Resources Manager Katelyn Coughlin, Permits Director C [REDACTED] D [REDACTED] and Administrative Services Director Kirk McLaren.

In the meeting, the Department presented its case against Bergen for the two incidents. He responded in an argumentative and combative way. He glared angrily at P [REDACTED]. He asserted that he was simply taking the initiative to process applications to save time for other staff. He disputed that he needed the supervisor's approval to take an application.

The meeting went longer than usual. At the conclusion of the meeting, DiPietro and Coughlin had to go to other appointments, so the Department representatives were not able to have their usual post-meeting debriefing of the issues, reach a conclusion and make a recommendation to the Commissioner. The debriefing was pushed back to later in the afternoon.

The Department never got to that point for the November charges because of Bergen's actions following the administrative hearing.

At approximately 3:05 on [REDACTED], P [REDACTED] saw Bergen in the elevator lobby as she was waiting to go downstairs. While she was waiting for an elevator, Bergen came toward her. When she saw him, she backed up and put her back against the wall to give the widest berth she could. But he walked right to her. He leaned his left shoulder within four (4) inches of her. He was so close to her that P [REDACTED] could smell his breath. In a strong, growling voice, she said to her, "I am not dirty." P [REDACTED] took his statement to mean that he thought that she suspected him of taking bribes from an expediter and that she had made that insinuation at the administrative hearing. She told him that he should not be talking to her. He kept talking. He again said that he was "not dirty." She repeated that he should not be talking to her.

P [REDACTED] felt as if Bergen was trying to intimidate her by his larger and taller size, by how close he was standing to her and by the tone of her voice. She believed that he was going to hit her. Eventually, an elevator opened and she had to maneuver around him and jump into the elevator to get away from him.

At 3:19 PM P [REDACTED] emailed DePietro, McClarren and Coughlin about the incident, describing how upset she was. Her email also stated that she was not sure that she

could be in the same workplace as Bergen and that she feared that she would run into him and he would repeat what he did the day before.

Coughlin met with P [REDACTED] later that afternoon to discuss her allegations. Coughlin decided that P [REDACTED]'s allegations against Bergen were serious enough to warrant his immediate suspension under L&I's Workplace Violence Policy and Section 16 B of the CBA.

The next day, [REDACTED], Coughlin notified Bergen that he was suspended. She wrote:

“Your actions constitute threatening and intimidating behavior which has caused Ms. P [REDACTED] to reasonably fear for her personal safety. You are posing a threat. You were grossly insubordinate to the point of causing a disturbance.”

J [REDACTED] L [REDACTED], Manager of the Construction Services Department, testified in this arbitration hearing that he saw P [REDACTED] after her encounter with Bergen. She was upset. In his words, “she looked like she saw a ghost.” He saw her eyes were welling up with tears.

L & I has made Bergen, and all other employees, aware of how serious it considers workplace violence. The Department has given all employees Employee Handbook with . Section 2.16, Workplace Violence, addressing the subject. It states that L& I “is committed to providing its employees workplace free from violence and threats of violence . . .” and directs the employee to a website for L & I's Workplace Violence Policy, which states, in relevant part,

Workplace violence is any intentional verbal or physical conduct affecting the workplace that causes an individual to reasonably fear for his or her personal safety, the safety of his or her family, friends, co-workers and/or property.

Violence, as the term is used in this policy, includes harassing or threatening phone calls, letters, e-mails or other written communications; physically or verbally threatening another individual; the use or threat of physical force; stalking; vandalism or destruction of property; and the use or possession of any weapon, unless the specific weapon is authorized by the city for a particular work assignment.

On February 25, the Department conducted an administrative hearing to discuss the [REDACTED] incident with P [REDACTED]. Bergen attended with his Union representatives. For management was HR Manager Coughlin, Deputy Commissioner DiPietro and P [REDACTED]. They heard testimony from P [REDACTED] and Bergen. At the end of the meeting, DiPietro and Coughlin came to the conclusion that P [REDACTED] was credible about the [REDACTED] incident and that Bergen had threatened her. They did not find Bergen's explanation to be believable.

They determined that Bergen violated the workplace violence policy in his encounter with P [REDACTED] on [REDACTED]. They also determined that they had enough evidence from the [REDACTED] administrative hearing as well to find Bergen was insubordinate.

Regarding the [REDACTED] incident, they found that Bergen acted improperly by not identifying himself at the worksite as an L&I employee, by not contacting 911, 311 or Municipal Radio to express his concerns about a construction, by using L&I resources to look into a matter that was not assigned to him, by disobeying direct instructions to follow the chain of command and by making comments about a co-worker to B [REDACTED] M [REDACTED] so as to undermine the work environment.

Regarding the [REDACTED] incident, they found that he was insubordinate. Despite counseling and warnings, he repeatedly did not follow directions. He was not apologetic and did not accept responsibility. DePietro and Coughlin took from the first hearing that Bergen's immediate supervisor M [REDACTED] and M [REDACTED]'s supervisor, Director of Permit Services C [REDACTED] D [REDACTED], were completely exasperated by his unwillingness or inability to follow orders or stay with his assigned duties.

Coughlin and DePietro looked at the totality of the facts from both hearings and determined that the termination of Bergen was the appropriate discipline and made that formal

recommendation to Commissioner David Peri. Commissioner Peri accepted their recommendation.

On March 9, 2020, Commissioner Peri issued Bergen a notice of suspension without pay for 30 days (2-20-20 to 3-20-20) with intent to dismiss. On March 13, Commissioner Peri issued Bergen the dismissal letter.

On March 13, 2020, the Union filed a grievance on Bergen's behalf, alleging that his termination was not progressive discipline under the CBA and that it was not done with just cause.

### **Discussion**

The Union's grievance alleges that the City's decision to discharge Bergen was not for just cause. The City, as the employer, has the burden of proving the termination was for just cause.

The Union argues that the City has not met its burden of proof because of two overarching reasons. First, the City did not give Bergen due process in the administrative hearings. Second, the City did not prove the allegations in the charges.

The Union's due process argument is that the City unfairly stacked the evidence from the [REDACTED] administrative hearing into the February 25 administrative hearing. By doing that, the City deprived Bergen of reasoned explanations and conclusions regarding the two allegations from the first hearing, the Seymour Street incident on [REDACTED] and the alleged improper handling of bulk permits on [REDACTED]. Also, if the City had made separate

findings as to those two original allegations, the City may have applied progressive discipline to him rather than the ultimate penalty of a discharge.

I must find that the City did not deny Bergen due process by conducting the administrative hearings as it did. Bergen's conduct after the [REDACTED] hearing forced the City to immediately suspend him and grant him a hearing on that issue. At that hearing he was represented by the Union and had an opportunity to respond to that charge just as he did for the first hearing. The City acted reasonably in rendering one decision for both hearings. The City provided its explanations and reasoning in that decision. Additionally, Deputy Commissioner DiPietro explained credibly why the City acted as it did. I must conclude that the City's handling of the disciplinary charges against Bergen were fair and reasonable and did not violate his rights to due process.

The Union's second just cause argument is that the City did not prove Bergen violated policies or standards for the two [REDACTED] incidents to justify being disciplined, much less discharged.

The [REDACTED] Seymour Street Incident---The Union argues that Bergen properly acted as a concerned citizen. He admits that he did not tell the workers at the site that he was an L&I employee. He was trying to make sure the work was being done safely, due to a career in construction that raised questions about the project. He brought the issue to the attention of B [REDACTED] M [REDACTED], another division supervisor, because he believed that was what he should have done. As for improperly accessing the City's database, the Union argues that Bergen was acting

under the Department's "friends and family" policy which allows employees access if it is to respond to complaints from friends and family.

The City replies that if the work at the site was as dangerous as Bergen claimed, he should have called 911, 311 or the Department's hotline. Furthermore, an employee who wants to use the "friends and family" policy to access the City's database of plans must first call 311. Also, Bergen should have brought this matter to the attention of his supervisor instead of reporting it to another division of L&I. As his supervisor pointed out, Bergen had more appropriate options to pursue rather than the option he chose. He decided to go around the chain of command, crossed into another division and acted on his own, all actions that he had been warned about before.

I find that the City proved that Bergen's actions violated City policy and his supervisor's prior instructions and counseling.

#### Bulk Permit Applications

Bergen defended his action in taking the bulk permits for [REDACTED] because he thought that he was saving the Department and the applicant time and money since they were 29 permits for the same work in different apartments at the same address. He contends that the Department never told him that they were limited to taking three permits at a time. The work was minor in nature, the lowest level of work. Some of it, in his opinion, was not even covered by the Building Code. Issuing such permits was within the scope of his duties.

I must conclude that the City presented testimony that Bergen's actions on [REDACTED] violated Department standards and constituted insubordination. First, there was ample testimony of Bergen's supervisors telling him numerous times about the Department's standards



and protocols for issuing permits. Second, on [REDACTED], M [REDACTED] told him not to issue permits that day, but to work on something else. Third, his supervisors clearly testified that it was not appropriate to approve so many permits for one location instead of submitting plans for review because it was a mixed use, multi-unit apartment and commercial project. M [REDACTED] testified that he told Bergen that he was not supposed to issue these permits without his approval. Finally, there was no evidence that any other employee processed more than three permits per applicant at a time.

#### [REDACTED] Incident with P [REDACTED]

The Union argues that Bergen did not threaten P [REDACTED] and therefore did not violate the workplace violence policy. At worst, this is a case of an employee who was upset over an attack on his reputation. It was understandable that he was upset because he had just left a meeting where he believed that the L&I's [REDACTED] was suggesting that he would take a bribe from an expediter. The timing of the encounter was due to his heading to the mens' room across the hall in the elevator lobby, not because he was seeking out P [REDACTED]. He testified that his only purpose was to ask her one question: why would she think he was dirty? He did not intend to threaten her. The Union argues that P [REDACTED] overreacted to his question, due to her predisposition to find Bergen guilty, as evidenced by her insinuations toward Bergen in the administrative hearing earlier that day.

The Union also argues that a charge of a workplace violation policy requires an analysis of the incident from the perspective of a reasonable person, not from the subjective perspective of the victim, P [REDACTED], who was predisposed to find Bergen guilty. It also questions if P [REDACTED] was overthinking the encounter with Bergen. It also casts doubt on P [REDACTED]'s

claim that she was intimidated by suggesting that the day after the incident, when P [REDACTED] saw Bergen in the lobby at the beginning of the work day, she did not give any indication that she was upset to be seeing him.

The City presented convincing evidence and persuasive arguments in response to each of the Union's arguments.

I must conclude that Bergen's conduct toward P [REDACTED] right after her hearing was threatening behavior that violated L &I's Disciplinary Policy and the City's Workplace Violence Policy. The policy includes the definition of workplace violence to include "physically or verbally threatening another individual." The conduct described by P [REDACTED] meets that definition. Bergen did more than communicate his anger and frustration over that day's hearing. He could have gone to the mens' room but he intentionally took the time to walk over to her. He leaned into her, within four (4) inches of her. He was so close to her that she could smell his breath. He is taller and larger than P [REDACTED]. She felt intimidated. After P [REDACTED] told him that he should not be talking with her, he ignored her and repeated his statement that he was not dirty. This incident occurred shortly after the end of the meeting when Bergen had been showing anger toward her.

Bergen denied his behavior was threatening. However, I find that P [REDACTED]'s testimony about the encounter was credible and convincing as to the details of the encounter, such as Bergen's tone, his physical closeness, his size and his repeating his claim that he was not dirty.

As for the claim that P [REDACTED] was not really intimidated, the City introduced the testimony of two witnesses who corroborated P [REDACTED]'s state of mind on that day about conversations with her that were contemporaneous with the incident. J [REDACTED] L [REDACTED], who saw her

that day, said that she looked like she had seen a ghost. Deputy Commissioner DiPietro received an email from P [REDACTED] shortly after the incident that set forth what had happened.

As for the Union's claim that P [REDACTED] was not intimidated because when she saw Bergen in the lobby at the beginning of the work day, she did not give any indication that she was upset, P [REDACTED] offered quite a different picture of her reaction in this arbitration hearing. She was very upset to see him. She had asked I [REDACTED] and Coughlin to accompany her into the building at the start of the day.

The Union has also argued that the City should have imposed something less than discharge.

I must conclude that the City has proven that it had just cause to discharge Bergen. The incidents of [REDACTED] and [REDACTED], when combined with Bergen's threatening conduct toward P [REDACTED] on [REDACTED] are sufficient grounds for discharging Bergen.

Even if one accepted the Union's argument that Bergen should have had the benefit of progressive discipline for the first two incidents, the Employer proved that Bergen violated L&I's workplace violence policy regarding the [REDACTED] encounter with P [REDACTED] and gave the City just cause to discharge Bergen. The facts of the elevator lobby incident are so serious that, standing alone, they would be grounds for discharge.

Additionally, DiPietro and Coughlin testified that the totality of the circumstances of the three incidents led them to conclude that discharge was the appropriate penalty. As for the first two incidents, they came to the conclusion that because of his repeated failure to follow directions and stay with assigned work, there was no where else to put him. The third incident was even more cause for concern. DiPietro was concerned that if Bergen would threaten

P [REDACTED], L&I's [REDACTED] what would he do to lower level employees with whom he had disagreements.

Analyzing these set of facts under the objective standard of how a reasonable person would respond, I must conclude that Bergen's conduct would be a violation if it was aimed at any fellow employee. The fact that it was directed at P [REDACTED] was a [REDACTED] and its [REDACTED] is certainly a violation of the Policy and was just cause for discharge.

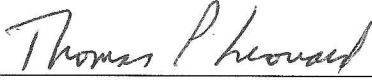
As for the Union's argument that the City ignored the bargained for progressive discipline in the CBA, such a claim may have merit when considering the first two incidents. But the [REDACTED] incident with P [REDACTED] is a more serious matter, one that is not presumptively covered by progressive discipline. The CBA itself recognizes that progressive discipline is not automatically applied to all offenses. Article 16 states that the progressive discipline is to be followed "where appropriate." There are no reasons to find that is appropriate to apply progressive discipline to the [REDACTED] incident.

For all of the reasons stated above, the City has proven that it had just cause to discharge Bergen.

#### **Award**

The grievance is denied.

March 26, 2021  
Harrisburg, Pennsylvania

  
Thomas P. Leonard, Esquire