

AMERICAN ARBITRATION ASSOCIATION
LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between

CITY OF PHILADELPHIA

and

LOCAL 2186, DISTRICT COUNCIL 47, AFSCME

AAA Case# 01-22-0000-2863 CN

AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Based on the evidence submitted, there was not just cause for the discharge of Crystal Wilcox. The Grievant shall be reinstated forthwith to her former position with uninterrupted seniority and benefits and full back pay, less any substitute interim earnings. The Arbitrator hereby retains jurisdiction for the purpose of resolving any dispute that may arise regarding the implementation or calculation of the remedy ordered pursuant to this Award.



January 20, 2023

Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 20th day of January 2023 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.



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Hearings in the above-entitled matter were held by video conference on January 11 and 13, 2023 before Daniel F. Brent, duly designated as Arbitrator. Both parties attended these hearings, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross-examine witnesses, and to present evidence and arguments. The record was declared closed on January 13, 2023.

APPEARANCES

For the Employer

Fara Cohen, Esq.

Frank Breslin, Revenue Commissioner, City of Philadelphia

Wayne Garris, Program Administrator, Office of Labor Relations

ShaRonn Mitchell, Director of Administration, Department of Revenue

Krystie Baker, Deputy Chief Integrity Officer

Tara Saunders, Investigator, Office of the Inspector General

For the Union:

Jessica Brown, Esq., of Willig Williams & Davidson, Esqs.

Gennifer Reed, President, Local 2186

Cheryl Grandy, Shop Steward

Crystal Wilcox, Grievant

ISSUE SUBMITTED

Was there just cause for the discharge of Crystal Wilcox?

If not, what shall be the remedy?

NATURE OF THE CASE

The Grievant was employed by the City of Philadelphia as a Revenue Investigations Supervisor in the Department of Revenue. The Grievant also engaged in work outside her City duties for With Compassion Home Care, a Philadelphia based company, pursuant to a program established by the Commonwealth of Pennsylvania to reduce the cost borne by the public to fund nursing home expenses by paying relatives to care for elderly or infirm persons who required help in their tasks of daily living, including preparation of food, bathing and toileting, assistance in dressing, and administration of medication. The Grievant's City-approved outside employment was to be performed entirely outside the scope of her duties for the City.

The City's Office of Inspector General (hereafter, the OIG) received a complaint alleging that the Grievant was bilking her relatives of their benefits. The OIG investigated this claim and determined it to be unfounded. In the course of this investigation, the OIG Investigator subpoenaed time sheets submitted by the Grievant to With Compassion Home Care. These documents were interpreted by the OIG, and later by Department of Revenue management, as evidence that hours for which the City was paying the Grievant overlapped with times she was billing With Compassion Home Care. The City concluded that the Grievant was working for With Compassion Home Care at the same

time she was also being paid by the City of Philadelphia, and Grievant's employment with the City was terminated for dishonesty. More specifically, she was charged with violating Civil Service Regulations 33.028 and 33.210 and City Executive Order 12-16.

The Union grieved the discharge as being imposed without just cause. The Union asserted that the Employer's conclusion that the Grievant had performed work for her outside employer at the same time she was being paid for performing her City job as evidence of fraud or misconduct was based on an erroneous interpretation of the time sheets the Grievant had submitted to With Compassion. The Union further asserted that any care provided to by the Grievant to her vulnerable relatives while the Grievant was on three days of approved paid FMLA or sick leave was necessitated by the relatives' reliance on her providing uninterrupted meals, medication, bathing, and other essential tasks of daily living and thus did not justify discipline, particularly discharge.

The parties were unable to resolve their dispute within the contractual grievance procedure, and the matter was brought to arbitration

APPLICABLE CIVIL SERVICE REGULATIONS AND EXECUTIVE ORDER

Civil Service Regulation 33.028:

Sick leave or injury benefits prohibited while working in outside employment-

An employee shall not perform outside work while receiving sick leave or injury benefits from the City.

Civil Service Regulation 33.210:

Penalties-

Utilization of sick leave during outside employment or failure on the part of the employee to immediately report any injury, disability or illness resulting from outside employment shall be considered grounds for dismissal, or other disciplinary action, and for recovery of wages or benefits paid by the City attributable to the outside employment.

EXECUTIVE ORDER NO. 12- 16 [Excerpted]

Regulation of Outside Employment and Self-Employment of City
Officers and Employees

WHEREAS, the citizens of Philadelphia deserve City officers and employees who conduct the City's core services effectively and efficiently and provide exemplary customer service for the residents, businesses and visitors of Philadelphia; and

WHEREAS, individual City officers and employees may wish to engage in outside employment or self-employment during the hours they are not performing their City jobs; and

WHEREAS, Civil Service Regulation 33.02 permits City officers and employees covered by Civil Service are permitted to engage in outside employment or self-employment as long as such employment will not adversely affect their job performance for the City or otherwise conflict with the City's interests; and

WHEREAS, Non-Civil Service officers and employees are also permitted to engage in outside employment or self-employment as long as such employment does not adversely affect their job performance for the City or otherwise conflict with the City's interests;

NOW, THEREFORE, I, JAMES F. KENNEY, Mayor of the City of Philadelphia, by the powers vested in me by the Philadelphia Home Rule Charter, do hereby order as follows:

SECTION 1. Definitions

For purposes of this Executive Order, the following definitions shall apply:

- a) Officer or Employee. For purposes of this Executive Order

only, officer or employee refers to the Mayor of the City or any individual appointed to a salaried position in a City department, agency or office within the Executive and Administrative Branch. It does not include members of boards or commissions, or regular part-time employees.

b) Outside Employment. Any form of non-City employment or business relationship for which a City officer or employee is compensated, including, but not limited to, service as an officer, director, employee, agent, advisor, attorney, consultant, contractor, general partner, trustee, teacher, or speaker. It includes writing when done under an arrangement with another person or entity for production or publication of the written product. The definition does not include positions as trustee for a family trust for which the only beneficiaries are the employee, the employee's spouse or life partner, the employee's minor or dependent children, or any combination thereof.

c) Self-Employment. A form of non-City employment where an individual is engaged in a trade or business as a sole proprietor or an independent contractor.

SECTION 2. Restrictions on Engaging in Outside Employment or Self-Employment

a) City officers and employees may engage in outside employment or self-employment that is compatible with the proper discharge of their official duties and as long as such employment does not:

1) Bring disfavor or disrespect upon the officer or employee; the City; or the department, agency or office in which the officer or employee works, in accordance with the judgment of the appointing authority of his or her department, agency or office.

2) Impede, or adversely affect, the performance or proper discharge of the officer's or employee's official duties.

3) Take place during the time the officer or employee is being paid for or is conducting City work; in City uniform, or while wearing a badge or other insignia that identifies him or her as a City officer or employee; using any City-

owned or leased resources, such as telephones, Blackberries, vehicles, printers, computers, or other supplies or equipment.

City officers or employees may not perform outside employment or self-employment while receiving sick leave or injury benefits from the City. An officer or employee who is injured, disabled or becomes ill as a result of his or her outside employment or self-employment shall not be given paid sick leave or injury benefits by the City.

SECTION S. Penalties

Failure to comply with this Executive Order by any City officer or employee, or to comply with additional policies adopted by individual departments, offices or agencies pursuant to Section 6.c of this Executive Order, shall be considered grounds for dismissal or other disciplinary action, and for recovery of wages or benefits paid by the City.

a) Individual City departments, agencies or offices may adopt stricter policies governing the requirements, conditions and necessary approvals for outside employment or self-employment by their officers and employees to strengthen the integrity of the mission of their department, agency or office. Such policies must be consistent with this Executive Order, and must be made known to covered officers and employees. Any department, agency or office that adopts its own policies should provide a copy of such policies to the Office of the Chief Integrity Officer and the Office of Human Resources.

DISCUSSION AND ANALYSIS

The Grievant was granted formal permission by the City to engage in off-duty employment caring for two disabled relatives who lived in her home. Such care included preparing meals, monitoring their activities of daily living, and supervising their medication. She testified that she provided such care for two, and then one, of her cousins every morning before commencing her City duties, left lunches she had prepared the night before to be heated and consumed at midday, and provided evening meals and nighttime care after she returned from her City job. None of this testimony was refuted by the Employer.

If the evidentiary record in the instant case had established that the Grievant was paid for performing home-health care duties for her disabled relatives at the same times she was also being paid for performing her duties as a Water Revenue Investigations Supervisor in the City's Department of Revenue, then the record would mandate a finding of culpability that would justify imposing substantial discipline, up to and including discharge. However, careful analysis of the facts adduced by credible testimony, including the fact that her relatives lived with her in her home, and documents in evidence precludes such a finding.

The instant case provides an example of a well-intentioned paperwork snafu and demonstrates an exception that proves a fundamental workplace rule. The Employer based its decision to dismiss the Grievant, a long-service employee with an unblemished disciplinary record, on time sheets the Grievant submitted to With Compassion Home Care that were subpoenaed by the Office of the Inspector General in conjunction with its official investigation responding to an anonymous complaint alleging that the Grievant was bilking one or more of her relatives of their public benefits. The OIG found this allegation to be unfounded. However, during its investigation of the outside complaint the OIG discovered that the Grievant worked for With Compassion Home Care as a certified provider of home health care to two of her cousins, who were living in her home. Further inquiry into the hours reported for the outside employment on forms submitted to With Compassion Home Care were interpreted by the OIG Investigator, and later by Department of Revenue management, as evidence that hours for which the City was paying the Grievant overlapped with times she was billing With Compassion Home Care.

Upon cursory examination and comparison, records from the City's OnePhilly personnel management system and time sheets submitted by the Grievant to her approved outside employer, With Compassion Home Care, overlap in midday and on occasional weekend overtime work. These entries in the With Compassion time sheets appear to demonstrate that the Grievant was

working for With Compassion Home Care when the Grievant was scheduled to perform her assigned duties for the City and was being paid for performing her assigned duties, particularly regarding the midday lunch break interval.

There is, however, no evidence in the record establishing that the Grievant did not fully and competently fulfill her assignment as a City employee to supervise Water Revenue Investigators on all days when she reported to work. Nor does the record demonstrate that the Grievant did not work the hours for which she was paid by the City during her flex schedule, the parameters of which afforded a level of flexibility regarding arrival times. Even if such overlap was reliably established, there is no evidence that the Grievant was defrauding the City. Moreover, any apparent overlap on days she was at work for the City was credibly explained by the Grievant in her testimony at the arbitration hearing.

Several factors buttressed the Grievant's testimony. First, the Grievant had a flexible work schedule under which she was permitted substantial latitude regarding the time she arrived at work. Her morning duties could be performed before she left for work. Second, the relatives for whom she cared lived in her home, thus facilitating the provision of early morning care before the Grievant reported to her City job. Third, there is no evidence that the Grievant returned home in the middle of the day personally to serve lunch or otherwise to provide direct care to her vulnerable charges.

Fourth, if the Grievant was remiss in the manner she provided midday care, assuming this interval was not covered for her by her daughter, any shortcoming in actual service or apparent misrepresentation of hours worked during the middle of the Grievant's shift would be an appropriate concern of With Compassion Home Care, rather than cause for the City to impose discipline. Given the absence of evidence that the Grievant was not at work for all hours she was paid by the City, any inaccuracy portrayed by the With Compassion time sheets created cause for concern by her outside employer rather than a valid basis to discharge a long-service employee with a good work record and unblemished disciplinary history.

All the Employer's contentions about the seriousness of theft of time, the necessity of relying on an employee's honesty, the clear prohibitions in Civil Service Rules and Executive Orders against performing outside work on City time when an employee is also being paid to work for the City, and the disciplinary consequences for such misconduct are entirely accurate and govern proven instances in which a City employee knowingly accepts pay from the City for time spent also spent working for another employer. The proofs, particularly the timing of her outside employment duties primarily before and after her City workday, do not support such a conclusion in the instant case. The Grievant's entries on With Compassion Home Care time sheets are insufficient to establish that she provided services to her cousins at any time that the Grievant was actually on duty or supposed to be on duty for the City.

The City could have inquired further into any apparent overlap of duties purportedly established by With Compassion time records, but apparently did not seek additional information from With Compassion management or explanation from the Grievant. The Employer's conclusion that the Grievant lied to the City about when and how completely she performed her City duties cannot be sustained on the unproved basis that the With Compassion Home Care entries accurately established that the Grievant stole time from the City or "double dipped" during her midday breaks.

The City failed to establish that the Grievant was not at work performing her City duties when she said she was or as reflected in OnePhilly records chronicling the hours for which she was paid. Investigators and management evaluators assumed that the entries on the With Compassion Home Care sheets were accurate and thus the time entries on the Department of Revenue work records portrayed payment to the Grievant for hours when she was working on her outside job. Given the Grievant's credible explanation under oath, the more reasonable conclusion is that the entries on the With Compassion Home Care time sheets were pro forma entries she made that did not accurately demonstrate that the Grievant provided midday care for her relatives or otherwise was paid by With Compassion Home Care for work performed while the Grievant was also being paid by the City of Philadelphia.

The discrepancies that the Employer attributed to dishonesty and theft of time were explained by the Grievant, who prepared lunches the night before for her cousins to microwave or retrieve from the refrigerator and serve themselves their midday meals. The discrepancies regarding the lunch time entries did not justify the dismissal of a long-serving City employee who has demonstrated her competence and reliability in a succession of increasingly responsible City jobs since she was hired in 2003. Thus, the City has not proved that the Grievant was working for With Compassion Home Care at the times she was being paid by the City of Philadelphia.

The Grievant's discharge was also predicated on her working while on FLMA or other paid sick leave in contravention of applicable Civil Service Regulations and Executive Order 12-16, which are cited above. The three days on which she was granted 7.5 hours of paid FMLA sick leave per day when she also continued to provide essential feeding, medication, and related assistance with tasks of daily living to one or both of her vulnerable relatives, who lived with the Grievant, created a technical violation of several applicable Civil Service regulations and a City Executive Order, but the specific nature of this particular "outside work" did not justify a conclusion of intentional dishonesty that would justify summary discharge.

The record did not include any request by the City for additional information about the nature or extent of the Grievant's illness on these three days. The Employer simply compared the records submitted by the Grievant to

With Compassion Home Care to her paid working hours as recorded in the City's OnePhilly personnel data system and concluded without inquiring further that the Grievant had worked at paid outside employment while also being paid by the City and that she was improperly paid for working while she used a benefit such as FMLA or sick leave.

The City is entitled stringently to enforce its valid prohibition against employees' working on their outside job while on disability leave, sick leave, or FMLA leave, as such restrictions are necessary to avert compensating employees who are too sick or disabled to perform their City duties but nevertheless report to their outside job, and to protect the City from liability for injury or exacerbation of a disabling condition while working at their outside job. This instant case presents a compelling exception to this rule.

Just as a parent who is responsible for young children may be obligated to fulfill childcare responsibilities such as feeding and bathing them while the parent is suffering from a temporarily debilitating bout of illness, the Grievant's responsibility to care for her cousins required ensuring that they were fed, received their medication, and were assisted in performing the necessary tasks of daily living despite whatever temporary malady the Grievant was experiencing that justified the use of three full days of paid sick leave. Nothing in the record suggested that the Grievant was not ill when she utilized three full days of FMLA or other paid sick leave.

Thus, her receipt of compensation from With Compassion Home Care for continuing uninterrupted service to her dependent cousins can readily be distinguished from a situation where a City employee on paid sick, disability, or FMLA leave elects to report to an outside job where the adverse consequence of not performing the outside job is loss of income, not dereliction of a compelling duty to care for a vulnerable child or an elderly or debilitated dependent relative.

If the circumstances underlying the instant case established that a City employee had performed outside work while also being paid to perform her City duties, the Employer's characterization of the Grievant's conduct as violating multiple Civil Service regulations and Executive Orders, of which the Grievant reasonably should have been aware, would justify imposing stringent discipline, up to and including summary discharge. However, the proofs did not meet the applicable standard for several reasons.

First, the Grievant's core duties in her City-approved outside work, consisting primarily of caring for one or two cousins with debilitating medical conditions who lived in her home, occurred primarily before and after her regular City work hours. Second, according to the testimony, the Grievant worked a flex schedule at her City job and thus did not have a hard deadline for starting work each day provided that she arrived within the range established by the flex schedule and performed her duties for the full seven and a half-hour shift. Except for comparing the times when the Grievant was

at work for the City and the hours shown on the subpoenaed time sheets she submitted to With Compassion Home Care, the documentary record did not provide an independent basis to establish that the Grievant was not fulfilling her work obligations for the City as scheduled, except when she applied for intermittent FMLA leave because of a personal medical condition that occasionally flared up on her way to work. Fourth, nothing in the record established that the Grievant personally provided service to her cousins in her home between 1:00 and 2:00 p.m. as reflected by her entries on the With Compassion Home Care time sheets. Finally, any improper misstatement of hours worked on time sheets submitted to With Compassion Home Care during the interval that preceded the imposition of discipline in the instant case inured to the detriment of With Compassion Home Care, not to the City.

There was no valid basis to view these three days as an independent basis to discharge the Grievant for dishonesty. The particular facts of the technical violations while receiving FMLA sick leave discussed above did not constitute a basis for the imposition of discipline beyond explaining to the Grievant applicable City policies and Civil Service regulations governing outside work while on paid sick or FMLA leave.. At most, her efforts caring for her relatives in her home while too ill to report for her City job on these days justified a written warning regarding the applicable rules and regulations and counselling on how to notify her employer and seek guidance from management in such circumstances.

Therefore, based on the evidence submitted, there was not just cause for the discharge of Crystal Wilcox. The Grievant shall be reinstated forthwith to her former position, with uninterrupted seniority and benefits and full back pay, less any substitute interim earnings.

The Arbitrator hereby retains jurisdiction for the purpose of resolving any dispute that may arise regarding the implementation or calculation of the remedy ordered pursuant to this Award.

January 20, 2023

Daniel F. Brent, Arbitrator