
In the Matter of the Arbitration	:	
	:	
Between:	:	Opinion and Award
	:	
AFSCME District Council 47, Local 2187	:	Grievance: Curtis Smith 5-day
	:	suspension
and	:	
	:	
City of Philadelphia	:	

Before: Lawrence S. Coburn
Arbitrator

Appearances:

For the Union:

Willig, Williams & Davidson
By: Lauren M. Hoye, Esquire

For the City:

Elizabeth U. Okakpu, Assistant City Solicitor

I. Introduction.

Pursuant to the Collective Bargaining Agreement between the parties, I was designated to arbitrate the grievance in this case, which involves a claim by AFSCME District Council 47 (the “Union”) that the City of Philadelphia (the “City” or the “Employer”) violated the Collective Bargaining Agreement by suspending Curtis Smith (“Grievant”) for five days without just cause. On October 21 and November 3, 2022, I conducted a hearing via Zoom at which both parties were afforded full opportunity to present evidence and argument in support of their respective positions. The second day of hearing was required because one of the two City witnesses was unable to attend the first day of hearing. The Union objected to extending the hearing to a second day, arguing that if a second hearing day were directed, the City should be required to pay my fee for the day and interest on any back pay award resulting from the delay. I approved the second day of hearing and took under advisement the Union’s remedial requests which are addressed below. The parties made oral arguments at the close of the hearing, at which time the hearing was declared closed.

II. The Issues.

The issues for determination, as stipulated by the parties, are as follows:

1. Did the City have just cause to suspend Grievant, Curtis Smith, for five days?
2. If not, what shall be the remedy?

III. Pertinent Contractual Provisions.

The Collective Bargaining Agreement between the City and AFSCME District Council 47, Local 2187, provides in pertinent part:

Section 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 . . .

C. Progressive Discipline. The City shall have the right to discipline or discharge any 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 . . .

IV. The Disciplinary Action Policy of the Department of Licenses & Inspections.

The Disciplinary Action Policy of the Department of Licenses & Inspections provides in pertinent part:

The Department of Licenses & Inspections has the responsibility to establish reasonable rules of employment and standards of job performance and to inform employees of these rules. Employees, in turn, have the responsibility to know the rules and to comply with them. Prompt disciplinary action will be initiated in an equitable manner for violation of city, departmental, divisional, or other established rules or regulations; for failure or neglect in the performance of duty; and for conduct prejudicial to the best interest of the Department or the City . . .

V. L & I Employee Code of Ethics.

On January 15, 2010, Grievant signed a document acknowledging that he had received a copy of the Department's Employee Handbook. The document also included the Department's Employee Code of Ethics, which provided as follows:

- I will place public safety above all other interests.
- I will place public interest above individual, group or special interests and will consider my profession as an opportunity to serve society.
- I will maintain the highest standards of integrity.
- I will treat all persons courteously, equally and fairly.
- I will not utilize my position to secure advantage or favor for myself, my family or friends.
- I will refrain from using unfair means to secure an advantage with the City or to knowingly injure any individual, company or association to gain such advantage.
- I will not accept, nor offer any type of money, tip, gift, favor or service. If such incidents occur, I will report them immediately to my supervisor. Failure to comply with this request will result in the discharge of my duties.
- I will alert the proper authorities about any violations of this Code that I may observe on the part of other employees.
- I will carry on my contacts with other members of the Department with cooperation and loyalty to the aims and purposes of the Department of Licenses and Inspections and the City of Philadelphia.

VI. Department Policy relating to Friends and Family Requests for Service

On January 26, 2018, after the events that led to Grievant's five-day suspension, the Department promulgated a Policy regarding Friends and Family Requests for Service. In the introduction to the Policy, the purposes of the Policy were listed as follows:

- 1) to prohibit Department employees from influencing or giving the appearance of influencing a fellow employee in situations where relatives, friends, associates and/or neighbors seek assistance in matters and issues involving this Department; and
- 2) to provide guidance to the Department employee who has been asked for help.

The Policy provides a detailed procedure to be followed when a Department employee receives a request from relatives, friends, associates and/or neighbors for assistance.

VII. Background.

The Union represents professional employees employed by the City, including those working for the Department of Licenses & Inspections (the "Department"). Grievant began working for the Department in 2003 as a Building Inspector. Starting work on the same day in 2003 was [REDACTED], who underwent training with Grievant and became a close friend. During training, [REDACTED] and Grievant were instructed that, when meeting members of the public on duty, they should always show their Department identification badges. Likewise, they were instructed that they should not show their identification badges to members of the public while not on duty.

█████ ultimately became a ██████████ did not supervise Grievant but remained a good friend of his. While employed by the Department, ██████ and Grievant never worked for the same unit, but had occasional contact with one another. According to ██████, periodically he saw Grievant working late into the night, and heard that he was a good employee. ██████ found Grievant to be a “stand-up guy” and generous, and had no reason ever to question his ethics. Occasionally, ██████ observed Grievant interacting with members of the public, and found that the interactions always were good. Likewise, ██████ noticed that Grievant’s interactions with contractors were always professional.

As a Building Inspector, Grievant regularly went into the field to inspect building sites and, where appropriate, to issue citations for code violations. In 2016, Grievant became a Plan Review Specialist, which involved receiving and reviewing applications for permits in an office in the Municipal Services Building. As a Plan Review Specialist, Grievant no longer went to building sites in the field.

A review of Grievant’s Performance Reports from 2004 to 2007 shows that Grievant never received an unsatisfactory rating in any category of performance. Up until 2017, the Performance Reports allowed only a “satisfactory” or “unsatisfactory” rating. Grievant always received a satisfactory rating in each of the performance factors and in the overall rating. Grievant’s supervisors wrote detailed comments for each period, commending him for his oral and written communication skills, encouraging him to obtain additional certifications, and congratulating him for his self-motivation. Examples of the comments from 2004 to 2016 include:

- 5/22/04 - The best work qualities you have shown thus far have been your work relationships, initiative and quality of work. By building on these qualities, improving on the others, and regaining the testing momentum you had in your first four months, your future with the department looks promising.
- 8/21/06 - Although it’s new to you, the continued use of the new Hansen database will eventually become easier. As your quality and quantity of work has increased it is important that the daily work load be submitted daily. In the future, I suggest that you continue to obtain the code modules required for future promotional opportunities. Keep up the good work. Curt, your confidence level is rising. You do a great job. Thank you for the great effort, it is much appreciated.
- 9/1/08 - Curtis, in the past year you have continued to show that your communications skills are excellent and your relationships with contractors, the general public and co-workers are always professional and courteous. You continue to ask questions when needed for various

procedures, policies and codes and you are not often apprehensive about making decisions. When called upon for a specific task, you do so without complaint, this makes my job easier . . .

9/8/10 - Curt, your quality for inspections and documentation of same has been good; you deal with your co-workers and your clients in a professional, helpful manner. The backlog of recording and managing the data continue to be a problem for you. I have attempted to alleviate this concern since your work load is the second largest in the office and has been a factor in keeping up with the schedule. Keep working on this big elephant and sooner than later you will get it tamed . . .

9/17/12 - Curt, although I am relatively new to this District, I feel that I can make a good assessment of your performance for the last year. In the past year you have proven to be a good inspector in daily routine. Your paperwork is always neat and well organized. You work well with your coworkers and communicate with contractors and general public with a professional demeanor. I/we can always count on you to be polite, and helpful whether with coworkers or persons in the field . . .

9/15/14 - Curtis, I've been your Supervisor for only a couple of months but I've known you and your work ethics for many years. You are a very dedicated and dependable worker. There's nothing that I can say that you need improvement on. Keep doing the job that you're doing! It's a pleasure working with you.

In 2017, five categories of ratings were listed: "unacceptable," "improvement needed," "satisfactory," "superior" and "outstanding." His Performance Report dated 8/25/17 showed that he was rated unacceptable in no categories, improvement needed in no categories, satisfactory in six categories, superior in initiative and self reliance and outstanding in relationship with people, including effectiveness in dealing with the public. His overall rating was satisfactory.

His supervisor's comments were as follows:

Curtis has been progressing very well at his job at the front counter. He is very conscientious about his quality of work. He works well with his coworkers and provides excellent customer service.

VIII. The Facts Surrounding Grievant's Five-Day Suspension.

Since about 2013, Grievant periodically had his personal vehicle serviced at an auto-repair shop operated by [REDACTED] ([REDACTED]). Over the years, Grievant and [REDACTED] developed a cordial business relationship. In early April 2017, while Grievant was at the shop

getting his personal vehicle serviced, ██████ told Grievant that he might move his shop to a property at ██████, owned by ██████ and in which ██████ had invested some capital. ██████ Grievant that someone had alleged the building was unsafe and was trying to take over the building. Assuming that there had been code violations or conditions that could lead to code violations, Grievant offered to research the building to see if there were any open violations on it. Later, ██████ mentioned that he and his father were scheduled to attend a meeting at the building on the afternoon of April 19. While in the Department's offices, Grievant checked on his own to see if there were any open code violations on the property at ██████. Finding none, he then asked his friend ██████ to see if he had missed something.

██████ checked the records and confirmed to Grievant that there were no open code violations. When ██████ asked Grievant why he was inquiring, Grievant replied that an acquaintance was having an issue with a neighbor who had made complaints about the property and that there would be a meeting at the property which he was planning to attend. According to ██████, he told Grievant that if he were in Grievant's shoes, he would not go. Grievant said he would go on his own time, not as a Department representative, to help his acquaintance. ██████ said "ok," as it was Grievant's choice to do so on his own time.

On April 19, Grievant took a partial day of vacation in the afternoon and went to the ██████ property. After greeting ██████ outside the property, he looked into the front of the building and saw that there had been interior demolition and that there was a bright light shining inside. Three men were standing, looking up at the ceiling. As Grievant approached them, one of them asked who he was and why he was there, to which Grievant replied, "Curtis Smith." He then explained that he worked for the Department but was on vacation and was not there on behalf of the Department. He further stated that he was there on ██████ behalf, and that he had researched the records and found no open violations on the building.

Grievant was then asked what right he had to say that there were no current violations, and whether he had identification on him. At that point, Grievant produced his photo identification swipe card, which did not satisfy one of the men because it did not identify him as a Department employee. Then, after digging into his wallet, he found and showed to the man an outdated business card from his previous job with the Department, identifying him as a Building Inspector for the Department. One of the three men took a photo of the swipe card and returned it to Grievant. According to Grievant, he identified himself as a Department employee so that the men would understand that he was a credible source regarding his statement that there were no outstanding building code violations. After remaining at the building for about 30 minutes, Grievant left the property with ██████.

On April 27, 2017, ██████, P.E., an engineer for ██████, one of the three men at the ██████ property on April 19, 2017, telephoned a City supervisor to make him aware of Grievant's alleged conduct at the April 19 meeting. The matter was turned over to the Office of the Inspector General ("OIG") for investigation. In May, July

and August 2017, two OIG representatives interviewed a number of witnesses, including [REDACTED] and Grievant. In April 2018, the OIG issued a five page, single-spaced Report of Investigation which recommended disciplinary action up to and including termination for Grievant due to his “notable lack of judgment” and violating the public’s trust on April 19, 2017.

According to the Report, the subject property was one of several properties that allegedly had been stolen by [REDACTED], [REDACTED] brother, who was charged and ultimately convicted of having stolen multiple properties, not including the [REDACTED] property, via fraudulent quitclaim deeds. The Report also stated that the [REDACTED] building had deteriorated over time, which was substantiated by an April 25, 2017 Supplemental Report for Expert Testimony and Limited Engineering Assessment (the “Supplemental Report”), based on [REDACTED] visit to the site on April 19, 2017, by [REDACTED] on behalf of [REDACTED]. The Supplemental Report found, among other things, that: (1) the left side wall was not connected to the front wall, rendering it unsafe; (2) the stairs to the second floor, which were “over-spanned, not properly secured against lateral movement and are water damaged,” were “dangerous to occupants/users;” (3) the second floor was “very dangerous” due to wood rot and loose framing, and did not provide “a diaphragm system that is strong enough to restrain the exterior walls from movement;” (4) “Wood, wallboard ceilings, etc. are falling onto the first floor of the building,” making it hazardous to anyone in the building; (5) “the joists are rolling over and the floor framing is shifting” and “the wood is decayed, soft and rotted” and (6) “So much water has been pouring into this building that even some of the newer floor sheathing has started to rot;” and “when this floor fails, it will pull down the exterior wall with it because the joists are locked into the wall pockets.”

The OIG Report explained that the April 19, 2017 gathering at the [REDACTED] site was triggered by a legal proceeding to establish a conservatorship of the subject property brought by [REDACTED], the owner of an auto repair shop next door at [REDACTED]. [REDACTED] of the Court of Common Pleas of Philadelphia had issued an Order dated March 24, 2017 granting [REDACTED] and up to four representatives access to [REDACTED] Street to assess the structural integrity of the building. If the structural integrity of the building presented a danger to the surrounding area, the Court invited [REDACTED] to file an emergency petition for an early hearing.

The OIG Report made clear that it suspected, but had not found, that Grievant was involved in a criminal scheme regarding the ownership of the [REDACTED] property or had received any payment from [REDACTED] for showing up at the April 19 meeting:

It could not be determined from the evidence whether [REDACTED] presence during the inspection [on April 19] was associated with the fraudulent transfer of [REDACTED] [REDACTED] or a larger criminal scheme. Despite remaining questions about [REDACTED] knowledge of any criminal activity, the OIG recommends administrative discipline for [REDACTED], up to and including termination from employment . . .

It is unclear if [REDACTED] arranged with [REDACTED] to benefit from his

appearance at the inspection through discounted service of his personal vehicles. Both [REDACTED] and [REDACTED] acknowledged that [REDACTED] is a frequent customer . . .

After receiving the April 2018 OIG Report, [REDACTED], HR Manager for the Department, conducted an investigation of Grievant's conduct on April 19, 2017 at the [REDACTED] property. As part of her investigation, she reviewed the OIG Report (but did not have access to the witness statements compiled by the OIG), and telephoned [REDACTED] who informed her that he used to be employed by the City but not by the Department. She then arranged to hold an administrative hearing at which Grievant could provide his side of the story. [REDACTED] sent to Grievant a letter dated June 29, 2018 advising him to appear at the hearing in the Municipal Services Building on July 6, 2018. In the June 29 letter, [REDACTED] summarized the background of the case, concluding in the next-to-last paragraph that Grievant had violated the Department's Employee Code of Ethics by using his Department position to secure an advantage for his friend, and engaged in conduct adversely affecting public confidence in the operation of government:

You have violated the L&I Employee Code of Ethics, which states that all employees of the Department of Licenses and Inspections are held to a high standard and will not utilize his/her position to secure advantages or favors for his/her self, family or friends. The L&I Employee Code of Ethics also states that employees are required to comply with all rules, regulations, policies and procedures of the department and shall not engage in any conduct that negatively affects morale, public confidence in the operation of government, public respect for municipal employees or governmental efficiency.

Following the hearing at which Grievant testified, [REDACTED] believed that termination should be off the table in light of the fact that Grievant had a good record and had exhibited a momentary lapse of judgment on the day in question. [REDACTED] believed that the lapse in judgment was serious because, as [REDACTED] had found, the building at [REDACTED] posed serious safety issues. Moreover, to help an acquaintance, Grievant had interjected himself without Department authorization in a court-authorized assessment of the property on April 19, 2017. Accordingly, [REDACTED] recommended, and drafted for the Department Commissioner's signature, a Notice of Suspension dated July 24, 2018 listing the reasons why Grievant was to be suspended for five days without pay, including that he "attempted to interfere with a Court Ordered inspection on April 19, 2017," "misrepresented that you were an inspector and provided an old business card," and "represented that there were no open violations":

You have violated the L&I Employee Code of Ethics, which states that all employees of the Department of Licenses and Inspections are held to a high standard and will not utilize his/her position to secure advantages or favors for his/her self, family or friends. The L&I Employee Code of Ethics also states that employees are required to comply with all rules, regulations, policies and procedures of the department and shall not engage in any conduct that negatively

affects morale, public confidence in the operation of government, public respect for municipal employees or governmental efficiency.

As an employee of L&I for almost 15 years, most of which were as an inspector, you must be aware of the appearance you created by visiting the subject premises and stating that you work for L&I. Whether or not you were on the clock is irrelevant. By stating that you were from L&I, you provided the impression that you were there in an official capacity. You exhibited extremely poor judgment and utilized your position in an attempt to secure an advantage for an acquaintance that contacted you for assistance.

Accordingly, you are suspended without pay for five (5) days . . .

On August 6, 2018, the Union submitted on Grievant's behalf a grievance claiming that the five-day suspension was issued without just cause, claiming that the assertions made by OIG were unsubstantiated, and that Grievant had not breached any policy or procedure. In the grievance, the Union sought a make-whole remedy. Because the parties were unable to amicably resolve the grievance, it was submitted to arbitration for a final and binding resolution.

IX. Discussion.

The issue before me is whether the City had just cause to suspend Grievant for five days. In a discipline case, I must determine whether the employer has met its burden of proving that: (1) Grievant was aware of the policy or policies, the breach of which resulted in his suspension; (2) Grievant violated the policy or policies in question; and, if so, (3) the five-day suspension is appropriate under all the circumstances. I will address each of these elements in turn.

A. Was Grievant aware of the policy or policies that he was alleged to have violated?

Grievant was charged with violating one aspect of the Employee Code of Ethics of which he acknowledged receipt on January 15, 2010. He also was charged with exercising extremely poor judgment at the April 19, 2019 meeting, thereby undermining public confidence in the operation of government. Grievant's alleged exercise of poor judgment which undermined public confidence in the operation of government is encompassed by the Department's Disciplinary Policy prohibiting "conduct prejudicial to the best interest of the Department or the City," which was included among the policies of which Grievant acknowledged receipt on January 15, 2010. Accordingly, the City has satisfied its burden of proving that Grievant received notice of the Code provision and the Disciplinary Policy which he allegedly violated.

B. Did Grievant engage in the Code/Policy breaches that resulted in his five-day suspension?

In the Notice of Suspension, the City focused on two alleged violations: (1) the prohibition in the Employee Code of Ethics against using one's position with the Department to secure an advantage or favor for himself, family or friends; and (2) the Department's Disciplinary Policy prohibiting "conduct prejudicial to the best interest of the Department or the City," which would include the Department's claim that he had exhibited poor judgment that undermined public confidence in the operation of government.¹ I will address below each of the two specific charges.

1. Prohibition against using one's position to secure an advantage for himself, his family or a friend.

The City did not present any evidence that Grievant used his position to secure an advantage for himself or his family. To the contrary, Grievant spent a partial day of vacation to provide assistance for an acquaintance, thereby reducing his vacation for more pleasurable pursuits. █████ described Grievant as "generous." The competent evidence presented at the hearing confirmed that Grievant was generous with his time, as he spent a partial day of vacation to assist an acquaintance whom he knew as the man who serviced his automobile.

The City presented competent evidence that Grievant used his position with the Department to assist, and to potentially secure an advantage for, █████, whom the City appropriately described in the Notice of Suspension not as a "friend" but as an "acquaintance." But the City failed to satisfy its burden of proving that Grievant used his position in an attempt to secure an advantage for a friend, a family member or himself. The likely assumption of the drafters of the Code provision in question was that a Department employee would not be likely to use his position to secure an advantage for an acquaintance; but would much more likely to use it to secure an advantage for a family member or a friend.

But Grievant was unusual in his generosity of spirit; he went to the trouble of: (1) searching in the Department's data base for Code violations on the █████ property; (2) then asking █████ to do the same; and (3) proceeding to take a partial vacation day to go to the property and advise those at the "meeting" that there were no open Building Code violations on the property. The "advantage" he was seeking for █████, an acquaintance, was to make sure that those at the meeting knew the truth about whether there were outstanding Building Code violations on the property. Thus, the City did not meet its burden of proving that Grievant used his position to secure an advantage for himself, a family member or a friend.

¹ The Notice of Suspension also refers to Grievant's requirement to adhere to all aspects of the Code and policies, but such a broad statement does not satisfy an employer's due process obligation to provide notice of specific violations with which an employee is charged.

2. Prohibition against engaging in conduct prejudicial to the best interest of the Department or the City.

Unbeknownst to Grievant, on the afternoon of April 19, 2017 he walked into a hornet's nest at [REDACTED]. The City did not produce competent evidence that, before or during the April 19 meeting, Grievant had any knowledge that: (1) [REDACTED] brother allegedly had stolen multiple properties, including the [REDACTED] property, via fraudulent quitclaim deeds; (2) [REDACTED], the owner of the auto repair shop next door at [REDACTED], had brought suit to establish a conservatorship of the [REDACTED] property; (3) [REDACTED] had issued a Court Order permitting [REDACTED] and up to four representatives access to [REDACTED] to assess the structural integrity of the building; (4) the "meeting" that Grievant joined was a session pursuant to the Court Order, attended by [REDACTED] and [REDACTED] i, a structural engineer, to assess the structural integrity of the building at [REDACTED]; or (5) the assessment of the building by [REDACTED] would show serious structural defects. All he knew from [REDACTED] at that time was that there was some question about the safety of the building and that someone was trying to gain ownership of it from [REDACTED] family.

What should Grievant have done when he arrived at the assessment of the building at [REDACTED]? Before providing any information, he should have ascertained who the three men were at the site and why they were there. Once he learned that the three men were there to assess the building's structural integrity pursuant to a Court Order, he should have left the premises immediately without identifying himself as anyone other than an acquaintance of Jonathan. .

Instead, without knowing with whom he was dealing or that a Court sanctioned safety assessment was in progress, Grievant unwittingly and naively bungled forward, giving the impression that he was trying to interfere with the safety assessment that had been authorized by [REDACTED]. By so doing, he exercised poor judgment and engaged in conduct prejudicial to the best interest of the City and the Department, which tended to undermine public confidence in the operation of government.

3. Was the five-day suspension appropriate under all the circumstances?

Did Grievant commit a serious violation of the Disciplinary Policy? For several reasons I find that it was not: (1) Grievant's interruption of the safety assessment was brief, no longer than 30 minutes; (2) the assessment proceeded in a timely fashion; (3) Grievant had no knowledge of the circumstances leading up to the "meeting" on the afternoon of April 19; (4) he spoke honestly at the site, stating that he was on vacation, not on Department business, and that there were no outstanding Building Code violations on the property; and (5) Grievant's intent was a naive act of generosity to [REDACTED], to ensure that those at the "meeting" knew that there were no outstanding Building Code violations on the property.

Because I find that Grievant's conduct on April 19, 2017 was a violation of the

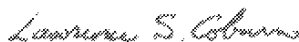
Disciplinary Policy, but not a serious one, I conclude that the City did not have just cause to issue Grievant a five-day suspension. Progressive discipline should be tailored to place an employee on notice that certain conduct is inappropriate and to deter similar conduct in the future. Typically, five-day suspensions are issued for serious offenses, or for employees who have had several recent less serious disciplinary actions on their record. Grievant had a clean disciplinary record and was viewed as a valued public servant. Under these circumstances, a written reprimand would be all that was needed to provide the necessary guidance to ensure that Grievant would avoid such a momentary lapse in judgment in the future. Accordingly, I will direct below that the City make Grievant whole for the improper issuance of a five-day suspension without pay, and substitute in his file a written reprimand for his five-day suspension without pay.

The Union also has requested additional relief due to the scheduling of a second day of hearing: (1) an award of interest due to the delay caused by the scheduling of a second day; and (2) a requirement that the City pay the entire amount of my fee for the second day of hearing. Even if the Collective Bargaining Agreement authorized me to issue an award of interest in certain circumstances, I would not award interest in this case, where the second day of hearing was scheduled within two weeks of the first one. With respect to the payment of my fee for the second day, the Collective Bargaining Agreement in Article 7 provides that an arbitrator's fee "shall" be split equally between the parties. Moreover, the first day of the hearing in this case was productive, stretching into early afternoon. Under all the circumstances, I conclude that the parties should share equally my fee for both days, as contemplated by Article 7.

VII. Award

For the foregoing reasons, I conclude that the City had just cause to reprimand Grievant, Curtis Smith, but did not have just cause to suspend him without pay for five days. Accordingly, the City is directed to forthwith: (1) substitute a written reprimand for the five-day suspension without pay; (2) remove all references to the five-day suspension from his personnel file; and (3) make him whole for the loss of pay due to his five-day suspension without pay.

November 17, 2022



Lawrence S. Coburn