A R B I T R A T I O N A W A R D

In the Matter of Arbitration between:	*	
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AFSCME, DISTRICT COUNCIL 47, LOCAL 2187, Union or AFSCME	*	AAA Case No. 01-22-0001-1189
	*	
and	*	Issue: John Baukus – 3-Day Suspension
CITY OF PHILADELPHIA, Employer or City	*	

Impartial Arbitrator: William W. Lowe

Place & Date of Hearing: American Arbitration Assn., 230 S. Broad St., Philadelphia, PA
May 23, 2023

Appearances for Union: Jordan Konell, Esq., Counsel for AFSCME DC 47, Attorney-Advocate
John ("Jack") Baukus, Construction Plans Review Specialist, Phila. Dept. of Licenses & Inspections (Grievant)

Appearances for City: Elliot Griffin, Esq., Counsel for City of Philadelphia, Attorney-Advocate
[redacted], [redacted], Phila. Dept. of Licenses & Inspections (Witness)
[redacted], [redacted]., Phila. Dept. of Licenses & Inspections (Witness)

Proceedings: Grievance filed April 8, 2021. Witnesses sworn, not sequestered. Proceedings transcribed; transcript received June 7, 2023. Record closed July 24, 2023, following receipt and exchange of post-hearing briefs.

Date of Award: August 11, 2023

AFSCME, DISTRICT COUNCIL 47, LOCAL 2187

AND

CITY OF PHILADELPHIA

GRIEVANCE: 3-DAY SUPSENSION – JOHN BAUKUS

ADMINISTRATION

By American Arbitration Association Notice of Appointment, dated June 21, 2022, the undersigned was notified of his selection by the parties to hear and decide a matter in dispute between them. Arbitration proceedings were commenced on May 23, 2023, at the American Arbitration Association in Philadelphia, PA wherein the parties presented testimony and evidence in support of their respective positions. Following the acceptance of oral testimony and documentary evidence into the record and the receipt of post-hearing briefs on July 24, 2023, the record was closed. There being no contention regarding procedural or substantive arbitrability, the matter is ripe for determination.

At the outset of the hearing, the parties agreed to the introduction of three (3) Joint Exhibits identified below.

1. Joint Exhibit No. J-1: Applicable portions of the Collective Bargaining Agreement.
2. Joint Exhibit No. J-2: Baukus suspension notice, dated March 31, 2021.
3. Joint Exhibit No. J-3: Baukus grievance filed by Union on April 8, 2021.

The Management Advocate, Attorney Elliot Griffin, introduced the following five Employer Exhibits.

1. Employer Exhibit No. E-1: Emails dated 12/7/2020 from [redacted] (Litigation Support Unit) and 12/15/2020 from [redacted] (Construction Div., Department of Licenses & Inspections ("DLI"), regarding scheduled virtual appearance before the L&I Review Board ("LIRB").
2. Employer Exhibit No. E-2: L&I Policy No. 23-0216, Subject: Court and Board Hearing Testimony, dated February 4, 2016.
3. Employer Exhibit No. E-3: Memorandum, dated December 28, 2020, Subject: Administrative Hearing Request for John Baukus.

4. Employer Exhibit No. E-4: Notice of Suspension (3 days), dated May 3, 2019, for another L&I Building Inspector who failed to attend two cases in Municipal Court.
5. Employer Exhibit No. E-5: Census Track for John Baukus for work completed between December 1, 2020 and December 31, 2020.

The Union advocate, Attorney Jordan Konell, introduced three Union Exhibits into the proceedings. They are identified below.

1. Union Exhibit No. U-1: Annual Performance Reports for John Baukus for 2015, 2017, 2018 and 2019.
2. Union Exhibit No. U-2: Two emails, dated [redacted], from [redacted] (Deputy City Solicitor) and, a second email, dated [redacted], from [redacted] (Litigation Support Unit) regarding the [redacted] hearing regarding an appeal of a violation notice. The first email ([redacted]) was addressed only to L&I inspector [redacted]. The second email ([redacted]) was addressed to both [redacted] and Grievant Baukus regarding their testifying at the [redacted] appeal hearing concerning a violation notice for [redacted]
3. Union Exhibit No. U-3: Daily Inspection Report for [redacted] showing Grievant Baukus's inspection activities the day of the [redacted] LIRB appeal hearing.

BACKGROUND AND FACTS

The central issue in this matter involved the Grievant, John ("Jack") Baukus ("Grievant" or "Baukus") who is employed by the City of Philadelphia, Department of Licenses and Inspections ("DLI"). Baukus has been employed by DLI since 2014. His position is a Construction Plans Review Specialist (" Building Inspector"). That position required Baukus to review proposed building plans and to inspect the actual work performed. Part of the job also involved responding to Law Department requests to appear at appeal hearings to provide testimony after a violation was found in the work inspected. Once a violation is found and reported, if the builder desires, he/she can appeal the violation. The appeal goes before a L&I Review Board ("LIRB") where a hearing is held and the Inspector is called to testify on behalf of the City of Philadelphia.

This particular matter involved the violation notice presented regarding the property at [redacted] in Philadelphia. Baukus had previously inspected the work and found the deck to be old and prepared and issued a violation for the deck. However, Baukus testified that the [redacted] property had been transferred to another Inspector ([redacted] a month or two before the hearing scheduled for [redacted], and was no longer under his purview. The Grievant testified that he normally would not testify about a property no longer under his [redacted] (within his assigned census tract) and that the other Inspector (then assigned to that census tract) would normally testify. However, counter testimony from [redacted], who was the Manager of Construction and Inspection for the L&I Dept. in 2020 at the time of the alleged infraction, testified that former inspectors of properties (as Baukus was) are called to testify about their violation notices and that they would normally re-inspect the property before the hearing although other inspectors could testify.

In this matter, the Deputy City Solicitor sent an email to Inspector [redacted] ("[redacted]"), dated [redacted], advising him of the appeal of the violation notice at [redacted]. and the hearing to be held on [redacted] at 1:00 PM via Zoom. The Deputy City Solicitor advised that [redacted] would need to testify about his observations during his inspection and to submit photos and documentation necessary to affirm the violation. He also advised he would forward a link for the Zoom meeting for [redacted] to use. Baukus was not issued a copy of this email at the time. However, a week later, on December 10, 2020, [redacted] ("[redacted]") of the Litigation Support Unit issued an email to both [redacted] and Baukus advising that one of the two of them would need to appear at the [redacted] appeal hearing and provide testimony regarding the inspection. While he sent the calendar appointment to Baukus, he commented that either of them ([redacted] or Baukus) would be able to assist the Deputy City Solicitor as indicated above.[1]

What then happened on [redacted] to cause Grievant Baukus to be suspended for three days? Baukus testified that the incident occurred during the height of the Covid-19 pandemic and that the pandemic had changed a number of things. For one, appeal hearings

[1] Union Exhibit No. U-2, Emails from Deputy City Solicitor [redacted] and [redacted] (Litigation Support Unit) regarding the [redacted] appeal hearing of the [redacted] property.

were no longer conducted in person, but were done through Zoom hearings or virtually. Baukus first testified that he was unaware of the hearing as his supervisor had never discussed it with him as was typically done before most in-person hearings were conducted. Baukus also testified that he was never trained in Zoom and was not particularly skilled in the use of electronic equipment or the use of Zoom. He claimed he was unable to use Zoom and also that there were difficulties, at that time, using the city phone that he was issued. Further, he testified that his day was very busy on [redacted] and that when he was conducting inspections, he did not use or answer his phone.

Baukus testified to Union Exhibit No. U-3 which was his Daily Inspection Activity Report which showed a number of inspections to have been conducted that morning and afternoon. Baukus testified that when he comes into work, his typical day starts by turning on his computer and checking his work scheduled for the day. He then answers any calls that had been made to him and then begins his day with inspections. He normally meets with his supervisor and discusses jobs to be accomplished and changes in assignments. He testified that he has not had all that many appeal hearings that he was involved with, but that normally he and his supervisor would discuss upcoming hearings. However, that never occurred in this case. He also claimed he was never trained in Zoom and never received any policy or procedure about the use of Zoom. Baukus also testified that normally he would not testify about properties no longer in his census track, and that he had been reassigned to a different census track a month or two before the [redacted] scheduled hearing.

With regard specifically to [redacted], Baukus testified that he arrived at the office at 7:30 AM and saw that he had a hectic inspection day before him. He testified that he left his office at 10:15 AM to begin his inspections. He testified that had he known he was scheduled to testify at the appeal hearing that he would not have booked such a hectic inspection day. He testified that with regard to Union Exhibit No. U-2 (emails regarding the [redacted] hearing) he believed Inspector [redacted] was charged with testifying regarding the [redacted] property as he ([redacted] was assigned that census track at that time, and that he (Baukus) had only viewed the property a month or two earlier. Baukus also testified that city email, at that time, was not on his phone and that he does not use his city phone during

inspections. The City had issued Baukus an email (Employer Exhibit No. E-1) time stamped at [redacted] on [redacted] while Baukus was in the midst of an inspection. It asked Baukus to confirm his attendance at the 1:00 PM hearing that day. The same document, E-1, contained another email that [redacted] had supplied to five different individuals (including Baukus) on [redacted], advising them to attend the virtual hearing on [redacted] via Zoom and provided the link to it. It also advised them to conduct a pre-court inspection of their assigned property and add any photos and documentation needed. Baukus's response was that he believed that [redacted] was to handle the testimony on the [redacted] property, not him, although [redacted] was not an addressee on either of the two emails contained in E-1.

HR Manager, [redacted], testified that HR was contacted to attempt to get in touch with Baukus about the 1:00 PM meeting when he didn't show. [redacted] testified that that she and her HR Assistant were unsuccessful in their attempts to call Baukus the afternoon of [redacted] [redacted] then attempted to contact Baukus's emergency contact and had to leave a message as the phone call was not answered. [redacted] also testified regarding Employer Exhibit No. E-2, the L&I Department's policy entitled Court and Board Hearing Testimony, dated February 16, 2016. She testified that the policy requires that any L&I employee who is requested to appear to do so as the request is equivalent to a subpoena and that failure to appear is considered grounds for disciplinary action.

The Employer's attorney, Elliot Griffin, also introduced Employer Exhibit No. E-3, correspondence from the Manager, Construction Division, Dept. of Licenses and Inspections, dated [redacted], regarding an administrative hearing for Baukus. Employer Exhibit E-3 described Baukus's failure to attend the appeals hearing on [redacted], to testify regarding the violation cited for [redacted]. E-3 cites in pertinent part,

> *Jack Baukus was sent a mandatory meeting invite on [redacted] at [redacted] by [redacted] of the Litigation Support Unit. A follow up email was sent on [redacted] by Mr. [redacted] reiterating the requirement for Jack to attend the virtual hearing. The day of the hearing, a reminder email was sent by Manager [redacted] at [redacted] am to all 4 Construction Inspectors that were scheduled to appear that afternoon. The email required them to confirm that they would appear in the virtual hearings at the scheduled times. When*

Inspector Baukus failed to reply, multiple attempts to contact him by phone were made. Attempts were made to his office, city cell and personal cell.

. . . . By 2:00 pm after exhausting all attempts to contact Jack, Manager [redacted] informed Attorney [redacted] that Jack could not be reached and asked that he request a continuance from the Board. The request for a continuance was granted.

At 2:29 pm Manager [redacted] was finally successful in reaching Jack on his City Cell. He claimed he just got back to the office and was unaware of the hearing.

Following the Administrative Hearing on March 16, 2021, Baukus was issued a Notice of Suspension (Joint Exhibit No. J-2) on March 31, 2021, advising that he would be suspended for three (3) days, April 12-14, 2021. AFSCME, Local 2187 filed a grievance on Baukus's behalf on April 8, 2021 (Joint Exhibit No. J-3). The grievance contends that there was no progressive discipline, that no training was provided to the Grievant, and that there was no just cause for the disciplinary action imposed.

ISSUE

The issue to be decided is whether the City showed just cause for the three (3) day suspension of Inspector John Baukus and, if not, what shall the remedy be?

PERTINENT CONTRACTUAL AND POLICY PROVISIONS

A. COLLECTIVE BARGAINING AGREEMENT[2]

ARTICLE 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.

[2] Joint Exhibit No. J-1, Collective Bargaining Agreement, Applicable portions of the Collective Bargaining Agreement between the City of Philadelphia and AFSCME, District Council 47, Local 2187.

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. PROGRESSSIVE DISCIPLINE. The City shall have the right to discipline or discharge any employee in the bargaining unit for just cause only. Disciplinary action shall be progressive in nature when 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.

D. EXPUNGEMENT OF REPRIMANDS. An employee who receives no written reprimands or any more severe discipline for a period of at least two (2) years shall have any prior-received written reprimands expunged from his/her personnel file.

B. DEPARTMENT OF LICENSES AND INSPECTIONS POLICY NO. 23-0216[3]

COURT AND BOARD HEARING TESTIMONY (Pertinent parts)

A request to appear in a Court of law or board hearing from the Law Department shall be considered equivalent to a subpoena. Anyone receiving such a request must appear and be prepared to testify to any matter related to the court's proceedings. Failure to appear shall be considered grounds for disciplinary action.

Inspectors and other employees scheduled to appear at a hearing must arrive as directed in the notice, prepared to testify under oath.

[3] Employer Exhibit No. E-2, Department of Licenses and Inspections Policy No. 23-0216, dated February 4, 2016.

POSITION OF THE PARTIES

A. Employer/City Position. The Employer makes the case that an important part of the Building Inspector's job is not only to issue citations or stop work orders but also to testify in court or department hearings (in this case a hearing before the Licenses and Inspections Review Board ("LIRB"). In this case, Building Inspector Baukus was issued several emails requesting his appearance at the [redacted] LIRB hearing to testify about the citation issued for the property at [redacted]. As indicated in the Department's policy # 23-0216, requests for employees to appear at a board hearing is equivalent to a subpoena and when employees fail to appear they are subject to disciplinary action. Baukus failed to appear for the scheduled hearing at 1:00 PM on [redacted], and the hearing was required to be scheduled at a later date. The Employer contends that Baukus's excuses for failing to attend the scheduled hearing kept changing. Baukus's initial excuse was that he was unaware of the hearing. Later, he claimed not to be familiar with the Zoom process used in hearings as he was never trained in Zoom. Later, he claimed that he left his mobile phone in his truck. Finally, at the hearing Baukus claimed he had been assigned to a different census tract and that the [redacted] property was no longer his responsibility.

After Baukus failed to appear at the hearing, his supervisors sent a request to Human Resources for an administrative hearing. As a result of the hearing, Baukus was issued a 3-day suspension for his failure to attend the [redacted] LIRB virtual hearing. The Employer avers the discipline was for just cause and was consistent with past practice in that a year and a half earlier, in [redacted], it had issued a 3-day suspension to another Building Inspector for failing to appear for two Municipal Court hearings despite being properly notified (Employer Exhibit No. E-4).

In its post-hearing brief, the Employer contended that the arbitrator's role is not to second guess management's decision but rather to determine whether the discipline was within the Employer's *"reasonable range of discretion, taking into account all relevant circumstances including mitigating and aggravating factors."* Citing a 1945 arbitration award, the Employer contends its penalty can rightfully be set aside where "discrimination, unfairness, or capricious and arbitrary acts" are proven. The Employer, in the instant case, contends that its actions did

not meet any of these conditions but that its decision to impose a 3-day suspension was based on proven facts, was taken for just cause, and was consistent with past practice. In its argument, the Employer made three basic contentions as follows.

(1) Baukus's actions violated Department policy. Baukus had received several notices of his requirement to attend the virtual hearing – on [redacted], and [redacted]. When he failed to attend the 1:00 PM hearing on [redacted], managers were contacted and attempted to reach Baukus by several different means – calls to him, to his emergency contact, emails and texts all to no avail until approximately ninety minutes later when Baukus was reached by phone, but by then the decision was made to reschedule the hearing.

(2) Baukus's Testimony was not Credible and did not Mitigate his Conduct. The Employer alleges that Baukus gave several different and dubious excuses for failing to appear at the virtual hearing. Meanwhile, he had received at least three separate notifications of the hearing and several calls which he did not answer. Also, his response about not being trained in Zoom was not credible in that Zoom had been used since the on-set of the pandemic eight months earlier which was when the Department transitioned to Zoom hearings. Even if Baukus was unfamiliar with the Zoom process, he had ample time from the time of his notices until the day of the hearing to arrange for assistance with the process. Also, Baukus's claim that he left his mobile phone in his truck and was therefore unable to contact anyone lacked merit as it is his responsibility to have his Department-issued phone with him to respond to Department calls. Lastly, Baukus's excuse that he believed Building Inspector [redacted] was the proper inspector to testify at the hearing is a dubious excuse in that he had multiple days to notify [redacted] Mr. [redacted] and/or Attorney [redacted] that he did not consider himself a necessary witness and did not plan to attend the hearing.

(3) The 3-day Suspension was Appropriate under the City's Policy and Must be Upheld. After the violation of the Employer's policy was established, the next issue is the appropriateness of the penalty, which is a function of management and that arbitrators should hesitate to substitute their personal judgment for that of the Employer. The Employer's brief

cites several prior arbitration awards substantiating its contentions. The Employer contends that misconduct was proven. It relied heavily on its own past practice of disciplining a like Building Inspector with a 3-day suspension for a like offense of missing a hearing after reasonable notification. In conclusion, the Employer avers that it gave numerous messages to Baukus to attend the hearing, but that he failed to comply or even to question management's request. The discipline was fair and impartial and complied with the Department's own past practice. Thus, Baukus's 3-day suspension must be upheld and his grievance denied.

B. Union/AFSCME Position. The Union paints the picture of John Baukus as a dedicated, hard-working employee whose work and disciplinary record were unblemished during his years of employment as a Building Inspector for the City of Philadelphia. The Union contends that the City failed to consider its confusing messages that were sent to Baukus regarding the hearing. First, Baukus had been reassigned out of Census Tract 025400 where the [redacted] property was located and another Building Inspector ([redacted] was assigned that tract about a month or more prior to the hearing date. Accordingly, when the hearing was set for [redacted], the Deputy City Solicitor, [redacted], sent an email, dated [redacted] to [redacted] advising him to be present at the hearing and to testify about his observations as a result of his inspection of the property. Baukus was not even aware of this email request until a week later on [redacted] when [redacted] of the Litigation Support Unit sent an email to [redacted] and Baukus advising that one of the two needs to appear and provide testimony at the [redacted] hearing. He ends the email with the comment, *"I believe either of you will be able to assist* [redacted]*."* This was the first that Baukus was even aware of the hearing, but believed, based on the [redacted] email sent by Attorney [redacted] that [redacted] was charged with performing the inspection and testifying at the hearing.[4]

There were two other emails which Baukus received regarding the hearing– one dated [redacted] and the other dated [redacted] at [redacted] (the day of the hearing) advising Baukus to attend the hearing, but only the latter of the two was sent to Baukus's supervisor asking Baukus to confirm his attendance with his supervisor, [redacted]. Baukus was in the

[4] The emails referred to ([redacted] and [redacted]) are included in Union Exhibit No. U-2

field inspecting properties at the time that the last email was sent and did not see it until after the hearing had been continued. Also, Baukus testified that normally, when a hearing is being held, his supervisor and he discuss the matter beforehand; however, in this case, neither his supervisor nor any other Department manager discussed the upcoming hearing with him.

Further, the Department relied on a prior disciplinary/suspension notice (E-4) when it disciplined Baukus for failing to attend the hearing. That prior notice was issued nearly two (2) years (22 months and 28 days) prior to Baukus's notice and was for missing two hearings in a formal courtroom setting, not a virtual Zoom hearing. Also, that prior notice was prior to all the confusion and changes that resulted from the pandemic. The Employer, according to the Union, felt it was maintaining consistency in its 3-day suspension of Baukus. The Union alleges that the Employer's communication to Baukus to attend the hearing was *"confusing, sloppy and negligent."* Further, when reviewing Baukus's work history, he had received very positive feedback for his work and high marks for dependability in his prior performance reports.

At the time of his failing to attend the [redacted] hearing, there was much confusion and uncertainty due to the pandemic. One of the key changes that was made to hearings was that they were being conducted using the Zoom platform, and Baukus testified that he was "not a computer or electronic savvy person." He also testified that he had never been trained in the use of Zoom and did not receive any directive or assistance in using that platform.

Also, there were four emails testified to about the [redacted] virtual LIRB hearing. In the first, dated [redacted] Baukus was not even supplied a copy as the author (Attorney [redacted]) advised Building Inspector [redacted] of his responsibility to attend the hearing and to testify regarding his inspection of the property. A second email, dated [redacted], was sent by [redacted] of the Litigation Support Unit to Baukus advising Baukus to appear virtually at the hearing. However, a later third email, dated [redacted], again from [redacted] to both [redacted] and Baukus, advised that one of the two of them needed to be available to attend the virtual hearing and ended his email by stating, *"I believe that either of you will be able to assist* [redacted]*."* Then, a fourth email was

sent to Baukus at [redacted] on the date of the hearing, [redacted], by [redacted] advising Baukus to confirm his attendance with his supervisor, [redacted], who had not been listed on any of the three prior emails. This was approximately ninety minutes prior to the hearing while Baukus was in the midst of conducting his building inspections that day as he had assumed all along that [redacted] would be the Building Inspector to testify at the hearing regarding the [redacted] property since that tract had been assigned to [redacted] approximately a month earlier and the initial email of [redacted] assigned him to attend and testify regarding the property.

The Union in its post-hearing brief set forth several specific arguments – (1) that the Employer failed to meet its burden of establishing just cause for the disciplinary action issued to Baukus; (2) that the Employer failed to show it had provided Baukus with sufficient notice that he was to participate in the LIRB hearing on [redacted]; and (3) if a penalty is to be imposed, just cause requires imposition of progressive discipline – at most a written reprimand.

1. Employer failed to prove just cause in its disciplinary action issued to Baukus. The Union provided several prior arbitration awards which addressed the meaning of just cause using such terms as "reasonableness, proof, equity, fairness," The Union also referenced another prior award citing use of the term "preponderance of the evidence." In short, the Union believed there was no proof, no reasonableness, no equity, and no fairness in the Employer's actions. The Union argues there was no just cause based on the confusing and deficient communications to Baukus and [redacted] in the emails from Department personnel regarding the [redacted] hearing. Unquestionably, the four emails cited above were confusing at best and left Baukus feeling he was not responsible for testifying at the hearing, but [redacted] was. Further, when considering Baukus's unblemished work record and history of dependability, those are mitigating circumstances that show the Employer did not have just cause for its disciplinary action against Baukus.

2. Employer failed to show it provided Baukus with Sufficient Notice to Participate in the [redacted] hearing. The Union contends that Baukus did not engage in any wrongdoing in that he did not have clear notice of the requirement to appear at the hearing. There were four confusing emails which gave Baukus the clear impression that [redacted] was the Building Inspector to participate – especially since [redacted] had been assigned the census tract for the [redacted] property over a month before the hearing, and especially since [redacted] had been singled out by the Deputy City Solicitor, [redacted], to testify at the proceeding. Even a later email advised that either [redacted] or Baukus could assist Attorney [redacted] at the hearing. Then the last email was sent to Baukus on the day of the hearing approximately ninety (90) minutes prior to the hearing start time advising him, for the first time, to confirm his attendance with his supervisor. However, Baukus did not read the email as he was busy with his inspections at the time of its receipt. Baukus also testified that the normal process was for his supervisor at one of their early daily meetings to discuss the upcoming hearing, but this never occurred with respect to the [redacted] hearing. Baukus was never approached, called, or had a discussion with any supervisor from the Department regarding this hearing or to ensure his attendance at the same.

3. If a penalty is imposed, just cause requires the imposition of progressive discipline – at most a written warning. The Union, in its post-hearing brief, cites the provision in Article 16, Section C of the parties' collective bargaining agreement which cites, *"disciplinary actions shall be progressive in nature where appropriate."* It argues that if this arbitrator finds a penalty is appropriate, just cause and progressive discipline dictate that a warning is the appropriate penalty. It further argues that discipline should be imposed in increasing, gradual amounts except in the most egregious offenses. The Union goes on to argue that in this case, there was a failure of supervision as well as a failure of training. It contends Baukus did not refuse a directive nor did he forget to attend. He received a series of confusing emails and no supervisory discussion of the upcoming hearing or his responsibilities for same. Also, there was no consistency between the suspension of a Building Inspector two years prior and Baukus's suspension. The comparator suspension was for missing two hearings at Municipal Court, not a single virtual hearing before the Licenses and Inspections Review Board. Also, the comparator employee was suspended for not conducting a pre-court inspection. This

was not a charge in Baukus's disciplinary action. The comparator employee was cited for putting the City in the position of being unable to collect the full amount of the fine being sought. This was not cited in the Baukus matter. Further, the comparator employee was disciplined for admitting that he/she "forgot" to attend the hearing. This was not so for Baukus who testified that he was "unaware" that he was to attend the hearing, not that he forgot about it. Lastly, there was no indication in the comparator case of what communication was provided to the Building Inspector prior to the hearing, i.e., whether the same vague, confusing communications were provided to him/her as was provided to Baukus.

The Union also makes special note of Baukus's record of service of nearly seven years at the time of his suspension with a clean disciplinary record and with performance evaluations showing him to be extremely dependable. He was a very satisfactory or above employee during his employment and not one to shirk his responsibility. He testified during the hearing that he had been apologetic and stated,

> *I'm not a malicious person. I'm not a vengeful person. Believe you me, it was an oversight, misunderstanding.*[5]

The Union concludes for all the above reasons, the 3-day suspension of Baukus was a totally inappropriate penalty under the circumstances. It requests that the grievance be sustained and that Employer be directed to make whole Baukus for all losses as a result of the unjust suspension, plus interest. The Union further requests that the arbitrator retain jurisdiction for the sole purpose of adjudicating any disputes arising from implementation of the remedy.

[5] Transcript, p. 102.

DISCUSSION

As in many arbitrations, there are a number of issues that need to be examined and decided in reaching a fair and equitable decision in the matter. This case involves John Baukus, a Building Inspector employed in the City's Licenses and Inspections Department for nearly seven years at the time of his alleged violation of policy and subsequent three-day suspension. Baukus had owned and operated a construction business for nearly forty years before becoming a City Building Inspector. He enjoyed a reputation as a hard worker and dedicated employee with a penchant for dependability and, during his nearly seven years of employment with the City, had an unblemished disciplinary record. Then comes the [redacted] appeal hearing before the Licenses and Inspections Review Board wherein Baukus failed to appear for a hearing involving a property at [redacted]. As a result of his failure to appear, the hearing had to be continued at a later date, and Baukus was issued a three-day suspension for his failure to appear after receiving notices to do so. Baukus's 3-day suspension notice was issued on March 31, 2021, and several days later on April 8, 2021, Baukus's Union filed a grievance alleging that the suspension was not progressive discipline and that there was no just cause for issuing the suspension. The positions of the parties are shown above in the prior section of this Award.

The issues addressed by both the Union (AFSCME D.C. 47, Local 2187) and the Employer (City of Philadelphia) are consolidated and addressed below.

1. Violation of Department Policy. The Department of Licenses and Inspections has a well-established policy[6] that stipulates the following:

> *A request to appear in a Court of law or board hearing from the Law Department shall be considered equivalent to a subpoena. Anyone receiving such a request must appear and be prepared to testify to any matter related to the court's proceedings. Failure to appear shall be considered grounds for disciplinary action.*

[6] Employer Exhibit No. E-2: Department of Licenses and Inspections Policy No. 23-0216, Subject: Court and Board Hearing Testimony.

Testimony showed that Baukus was notified of the hearing in advance and of his requested presence and yet failed to appear so, yes, there was a violation of policy by Baukus. However, there are some extenuating circumstances that must be considered in evaluating the penalty that was proposed. As noted in the position of the parties above, there was more than a little confusion concerning the notices that were given regarding the hearing. First, as testified by Baukus, the census tract where the [redacted] property was located was reassigned from Baukus and given to another Building Inspector, [redacted], a month or more before the scheduled [redacted] hearing. Thus, Baukus believed [redacted] would be the person to testify at any hearing.

Then, on [redacted], the first of four emails on attendance at the hearing was issued. It was issued only to [redacted] by the Deputy City Solicitor, [redacted], advising [redacted] of the violation notice at [redacted] and advising him of the [redacted] hearing at [redacted] via Zoom and of his need to present testimony about his observations during his inspection and to submit photos and documentation necessary to affirm the violations prior to the hearing. Baukus was unaware of this email at the time it was issued to [redacted]

On [redacted] an email was sent to Baukus, by [redacted] of the Litigation Support Unit ("LSU") advising Baukus that he was to appear at the [redacted] Zoom hearing and that if no pre-court inspection had been done, to complete one and submit photos and documentation – the same instruction that had been given to [redacted]

On [redacted], [redacted] of the LSU sent another email on the subject of the scheduling of the [redacted] hearing. This email was sent to both [redacted] and Baukus and advised that he was confirming that one of the two of them would appear and provide testimony at the hearing and ended his email with the statement, *"I believe either of you will be able to assist* [redacted]*."*

On the day of the hearing, [redacted], [redacted], Manager of the L&I Construction Division sent an email to Baukus at [redacted] before the [redacted] hearing start

time advising Baukus to confirm his attendance at the [redacted] hearing with his supervisor. Baukus was involved with other scheduled inspections at that time and did not see the email prior to the start of the hearing.

Baukus testified that from the time the issue was first brought up to him, he believed he had been relieved of responsibility for [redacted] as he had been assigned to other census tracts that did not involve that location any longer. He believed that [redacted] was the responsible Building Inspector and that he ([redacted] would testify. While I understand Baukus believing the assignment belonged to [redacted] I certainly do not understand why Baukus did not reach out to his supervisor, or [redacted], or [redacted] to explain his situation and his understanding rather than blithely dismissing the emails that named him to testify. Accordingly, this dismissive action on Baukus's part does require some corrective action.

Baukus also testified that normally when he was assigned to testify at a LIRB hearing, his supervisor would discuss the issue with him at one of their early morning sessions which they regularly held. However, regarding the [redacted] hearing, neither Baukus's supervisor nor any other L&I manager discussed the matter with him. In fact, Baukus's supervisor was not even sent any of the above emails until the day of the hearing when [redacted] emailed Baukus and his supervisor, [redacted], about the hearing.

I find that Baukus did violate the Employer's policy on Court and Hearing Testimony. However, I also find extenuating circumstances regarding the confusing messages that were sent out on the scheduling for the [redacted] hearing. I also find that confusion was also enhanced by the failure of Baukus's supervisor to discuss the upcoming hearing with him before the date of the hearing. Since Baukus's supervisor was not even listed on the emails regarding the date of the hearing until the last email issued on the actual date of the hearing at 97 minutes before it was to begin, I am not even sure he was sufficiently aware of the situation to be able to discuss the matter with Baukus.

2. Credibility. The Employer alleges that Baukus kept changing his reasons for failing to attend the hearing. His first response upon being advised he failed to attend was that he was unaware of his required presence at the hearing despite receiving several emails advising him to attend. Later, during his hearing, he advised he was not sure how to use Zoom. When asked why he did not answer his phone, he advised the phone was in his truck and also that he did not use his phone while conducting inspections as he felt it was unfair to the customer he was standing with to keep answering his phone while performing inspections at their location. Lastly, at the hearing, he testified that he believed [redacted] was the responsible Building Inspector and that he would testify at the hearing.

I do not find the fact that Baukus was called numerous times after the hearing was begun to be particularly important in supporting the 3-day suspension penalty. Baukus testified that he did not receive the calls and did not respond until he was called later at [redacted] by another manager asking Baukus if he was okay, but not mentioning anything about the hearing. With regard to the Employer's allegation that Baukus's testimony lacked credibility, I disagree. I believe his first response that he was unaware of the meeting was the key response. He had seen the emails that showed [redacted] was charged with testifying and believed that this was the proper action in that he (Baukus) was no longer responsible for that census tract; he had not discussed with, or been advised by, his supervisor of the hearing; and that the four emails were very confusing. He assumed, and rightfully so, that either his supervisor or another L&I manager would discuss the matter with him if in fact he was expected to attend the hearing. Yes, on questioning about his phone, he may have said he left it in the truck, and yes, he may have complained about not being trained in the use of Zoom, and perhaps should have either requested specific training or at least asked a manager to help him log onto or use Zoom if it came to that. However, they were explanations he gave upon further questioning. I find that his initial response that he was unaware of his need to attend the hearing was his clearly stated rationale for missing the hearing. I found nothing in his testimony to support the Employer's contention that his testimony lacked credibility.

3. Mitigation. The Employer asserted that its contention that he violated policy was proven. The Employer also contended that it had a recent past practice where another Building Inspector failed to attend a hearing and was suspended for three days. Thus, according to the Employer, past practice dictated that Baukus receive the same penalty. In the collective opinion of the Employer there were no mitigating circumstances in Baukus's case.

I do not find the Employer's assumptions about lack of mitigation to be accurate. I find there were multiple confusing emails and that Baukus could reasonably have assumed he was not required to attend the hearing and that [redacted] would take on that responsibility. Also, the fact that under normal circumstances his supervisor and Backus would have discussed such a hearing and the fact that this never happened enables me to understand why Baukus believed he was not required to attend the hearing.

Then, the Employer cites the comparator case of another Building Inspector being suspended for three days for failing to attend a hearing. While there may be some similarities, there are also some significant differences in the two suspensions. The comparator suspension occurred nearly two years prior to Baukus's suspension before the pandemic caused management to make some major changes to the hearing process. A major change was the move from in-person hearings to virtual hearings (via Zoom). That was not an issue in the comparator case, but in the Baukus case, there was no training in Zoom, and Baukus felt incompetent to participate in hearings via Zoom. Also, the hearing in Baukus's case was a virtual licenses and inspections hearing; not a court hearing where witnesses were required to testify in person in a courtroom. In the comparator case, the Building Inspector missed two hearings; Baukus missed one. In the comparator case there was clear notice of required attendance at the hearing not the convoluted, confusing four different emails that were present in the Baukus case. The comparator employee was disciplined for failing to conduct pre-court inspections; Backus was not so charged. The L&I Department also rebuked the comparator employee for putting the City in a position of not being able to collect the full amount of fine that was being sought; Baukus was not so charged. Lastly, the comparator employee was disciplined for "forgetting" to attend the court hearing/s whereas Baukus testified he was

"unaware" that he was to attend the hearing given all the confusion and the fact that another Building Inspector was responsible for the property being appealed.

I also find that Baukus's nearly seven years of employment with the City and his reputation for hard work and dependability are further factors to be considered in regard to mitigation. In short, I find that there were mitigating factors to be considered in the disciplining of Baukus.

4. Appropriateness of Penalty. With regard to the penalty of a 3-day suspension, I disagree with the Union's contention that progressive discipline is required. The parties' collective bargaining agreement provides for progressive discipline *"where appropriate."* Just because this is a first offense does not mean that a written warning is the appropriate penalty. Management determines the penalty based on the seriousness of the offense coupled with other factors already mentioned. In Baukus's case, I find that he did violate the provisions of the Department's Policy No. 23-0216 and that such is grounds for discipline. However, I also find that there were mitigating circumstances in Baukus's case. My belief is that in Baukus, the Employer has a hard working, honest, and dependable employee – one who in his years of employment with the Employer has enjoyed good performance evaluations and a discipline-free record. He was apologetic at the hearing, explaining that his failure to attend the hearing was a misunderstanding, an oversight. He testified that he is not a vengeful man, and I believe that to be the case.

I also believe that the comparator case that the Employer used to justify past practice was an overreach on its part. I believe the two cases to be different enough to justify a lesser penalty in Baukus's case. Additionally, I determine that the four emails regarding attendance at the [redacted] hearing to be truly confusing to Baukus. He no longer had the census tract that contained the [redacted] property, and [redacted] appeared to be the logical Building Inspector to handle the hearing. Two of the four emails are easily interpreted to permit [redacted] to testify at the hearing. The fourth email was not even sent out until less than two hours before the hearing was to commence and was not read by Baukus before the hearing.

I understand the Employer's contention that Baukus was wrong in his contention that [redacted] would have been the logical choice to testify as the property was in his census tract approximately a month before the hearing. [redacted], the L&I Department's Manager of the Construction Division at the time of the incident, testified that it is the policy of the Department for the inspector who wrote the violation to testify although he added others can testify. Baukus testified that his experience with hearings was somewhat limited but that he believed it was commonplace for the currently assigned inspector to testify. I find this not to be a deceptive ploy on the part of Baukus, but only his perception of the way things worked for testifying at hearings. Further, I do not find this incorrect perception on Backus's part to impact my decision on the penalty imposed.

I find, in consideration of all the above factors, for the 3-day suspension of John Backus to be excessive under the circumstances. While I do not find progressive discipline to require a written warning, I do find that he violated the policy and that the appropriate disciplinary penalty is a written reprimand – the least amount of discipline to correct the problem.

AWARD

The three-day suspension of John Baukus will be expunged from his record, and will be replaced by a written reprimand to remain in his personnel file for two (2) years. The Employer will reimburse Baukus for his unjust suspension. No interest is awarded in this matter. I will retain jurisdiction for a period of sixty (60) days for the sole purpose of ensuring implementation of the remedy.

W. W. Lowe
William W. Lowe
Arbitrator

Dated: August 11, 2023
Red Lion, Pennsylvania