AMERICAN ARBITRATION ASSOCIATION

Case No. 01-24-0006-6249
Grievance: 2186-24-05
(Termination of Dwayne Selden)

IN THE MATTER OF THE ARBITRATION ::

between ::

CITY OF PHILADELPHIA, :: **OPINION**

Employer, :: **&**

and :: **AWARD**

AFSCME DISTRICT COUNCIL 47, ::

Employee Organization ::

BEFORE: Michael J. Pecklers, Esq., Arbitrator

DATES OF HEARING: February 4, 2025; March 4, 2025

DATE OF AWARD: July 2, 2025

RECORD CLOSED: June 2, 2025 (Post-Hearing Briefs)

APPEARANCES:

For the Employer:

Ryan Mulgrew, Esq., CITY OF PHILADELPHIA LAW DEPARTMENT
Andre Mason, Esq., "
Michael Hengslter, Water Conveyance System Superintendent
John DeLeo, Deputy Commissioner of Operations, Depart. of Fleet Services
William M. Washington, Deputy Inspector General OIG
Candi B. Jones, Deputy Commissioner Human Resources
Yanee Claiborne, Senior Employee & Labor Relations Analyst

For the Union:

Felicia Carter, Esq., WILLIG WILLIAMS & DAVIDSON
Brett Bessler, Vice President & Business Agent, AFSCME Local 2186
Dwayne Selden, Interceptor Services Supervisor/Grievant
[redacted] [pursuant to subpoena]

I. BACKGROUND OF THE CASE

Dwayne Selden is a long-time employee of the City of Philadelphia Water Department. At all times that are relevant for the purposes of this case, he held the position of Interceptor Services Supervisor in the Flow Control Section of the Operations Department. On April 10, 2024, Mr. Selden was served with a 30-Calendar Days' NOTICE OF SUSPENSION WITHOUT PAY by Deputy Commissioner Human Resources Candi B. Jones. *See* City Exhibit 19. The attached NOTICE OF INTENTION TO DISMISS went on to allege at page 2:

> [o]n March 15th, 2024, PWD HR received an investigative summary from the Office of the Inspector General based on allegations of unauthorized secondary employment, falsification of time and misuse of a City Vehicle while on duty as a Philadelphia Water Department employee.
>
> An investigation was conducted by the Office of the Inspector General, which included surveillance, that established that you are employed as the owner and operator of Lonnie's D & M Auto Shop and that you drive to your secondary place of employment daily. Prior to the investigation into the allegations, you were served with a notice to appear for the investigation while actively working at Lonnie's D & M Auto Shop during employment with the City and in your PWD branded uniform.
>
> The OIG investigation included a one-on-one meeting with you which included an admission of wrongdoing on your part.
>
> A full analysis of the GPS data of your assigned Water Department Vehicle #140074 from [redacted] to [redacted], revealed that you visited the location in question for a total of 168 hours, 7 minutes and 56 seconds with these occasions occurring during the course of your workday.
>
> Photos taken of you at the location and GPS data from calendar year [redacted] also demonstrate the continued pattern of abuse of City resources and unauthorized secondary employment.

A Departmental Hearing was held on March 21, 2024, in which you indicated that, despite being a long tenured employee and in a position of supervision, you were not aware of the City's Policies for Secondary Employment and that you only visited the Auto Mechanic location during your lunch hours. [After] review of time records cross-referenced with your GPS data and including your self-completed "Weekly Vehicle Operation Reports," it has been found that you falsified your whereabouts to management on 54 separate dates during the period of [redacted], through [redacted].

Per Executive Order 12-16, City employees who wish to engage in a second job must submit a request for outside employment or self-employment. Employees should submit this form and receive approval from their supervisors before beginning their second jobs. The executive order also specifies that secondary employ[ment] should not '*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 employee; using any City-owned or leased resources, such as telephones, Blackberries, vehicles, printers, computers, or other supplies or equipment.*'

Pursuant to the Managing Director's Directive 64 governing City Vehicle Usage, '*City vehicles are municipal property that should be used exclusively for official City business. City employees shall avoid any vehicle use that might result in or create the appearance of impropriety with regard to public perception concerning the misuse of City vehicles.*'

Resulting from the OIG investigation, the Departmental Hearing, and your testimony, you are found to be in violation of the City of Philadelphia's Executive Order 12-16 governing Secondary Employment; the Managing Director's Directive 64 governing City Vehicle Usage; [you also] failed to demonstrate the appropriate conduct of a supervisor, and have falsified your time records for the known period between [redacted] through [redacted].

Therefore, the Department intends to dismiss you from City employment for the violations of falsification of time records, theft of time, misuse of City property for personal purposes, gross misconduct unbecoming of a supervisor in the organization, and violation of several City of Philadelphia policies.

See also NOTICE OF DISMISSAL, at City Exhibit 20; OIG MEMORANDUM OF INTERVIEW, at City Exhibit 8.

On April 11, 2024, the Union initiated an EMPLOYEE GRIEVANCE on behalf of Mr. Selden, filing the same at Step IV. This pled violations not limited to Articles 6 & 16 of the CBA, as well as 17.01 and 17.02 of the CSRs. *See* Joint Exhibit 2. Following a denial by the City, the Union executed a DEMAND FOR ARBITRATION with the American Arbitration Association ("AAA"). The AAA notified me on August 14, 2024, that I had been chosen to serve as the Arbitrator in the dispute.

Evidentiary hearings in the case were convened on February 4, 2025 at the Philadelphia City Hall, and on March 4, 2025, at the AAA Offices. At that time, counsel were provided with a complete opportunity to introduce relevant and admissible documentary evidence; to engage in oral argument; and to undertake the direct and cross-examination of witnesses, who testified under oath. No sequestration order was invoked. A verbatim transcription of the proceedings was provided by LEXITAS LEGAL PHILADELPHIA. In lieu of closing argument, post-hearing briefs were filed, with the record declared closed by AAA on June 2, 2025, following receipt of the submissions. This Award is submitted within the 30-day time period prescribed by AAA's Labor Arbitration Rules.

II. FRAMING OF THE ISSUE

Did the Water Department have just cause to terminate the Grievant, Dwayne Selden, and if not, what shall be the remedy?

III. STIPULATED CONTRACT LANGUAGE [Joint Exhibit 1]

* * *

Article 6 Separability and Savings

B. CIVIL SERVICE REGULATIONS — Intending to recognize the Civil Service Regulations as the most viable means for transplanting operations procedures for employees in a uniform manner both parties acknowledge that the Civil Service Regulations Apply to all employees under this Agreement. Where the regulations are in conflict with this Agreement, the Personnel Director will recommend to the Civil Service Commission an appropriate amendment of the Civil Service Regulations to implement the intent of the contract. Where there is a conflict as to whether language in the contract applies in the case of a particular grievance or whether Civil Service Regulation language applies, the contract language shall be assumed to prevail until otherwise adjudicated. Nothing in this paragraph shall be construed as interfering in any way with the right of the City to make selection decisions as described in the Management Rights Article, or as interfering in any way with the right of the City to make appointments or positions consistent with such regulations.

Article 7 — Grievance Procedure and Civil Service Appeal

AUTHORITY OF THE ARBITRATOR

The Arbitrator will make findings and render a decision to resolve the disagreement. The Arbitrator shall not have jurisdiction to add to, modify, vary, change or remove any terms of this Agreement. The scale of wages established by this Agreement shall not be changed by any arbitration decision.

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.

B. 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. This clause does not apply to probationary employees.

See also CIVIL SERVICE REGULATIONS, 17.01 *Dismissal, Demotion and Suspension,* at Joint Exhibit 2; 33.02 *Outside Employment*, at Joint Exhibit 3.

IV. POSITIONS OF THE PARTIES

City of Philadelphia

Grievant was terminated on April 22, 2024 for falsification of records, unauthorized outside employment, and misuse of a City-owned vehicle. For approximately ten months, Grievant abused the trust placed in him by the Department. He regularly engaged in unauthorized outside employment during working hours at an auto repair garage that he owns, Lonnie's D&M Auto ("Lonnie's"). During these visits, Grievant performed work for the benefit of Lonnie's in violation of City policies. Grievant never applied for, much less obtained, approval to engage in outside employment, per City policy. He traveled to and from Lonnie's in a City-owned vehicle in violation of City policy. By failing to disclose his visits to the garage, Grievant also fabricated vehicle movement logs in violation of Department policy. Grievant's numerous knowing violations of City and Department policies betrayed the trust placed in him by the Department. Such behavior is incompatible with continued employment.

The parties' contract requires the Department to have just cause to dismiss an employee. The concept of just cause essentially imposes a requirement of fairness. Among other things, it protects an employee from arbitrary discharge. *Earthgrains Co. and IBT, Local 455*, 2010 WL 6772805 (Snider, 2010) (citing to *Elkouri and Elkouri*, *How Arbitration Works*, p. 932 (6th Ed. 2003)). In disciplinary matters, the burden of proof is on the employer and the standard of proof is a preponderance of the evidence. *See, e.g.*, *Elkouri and*

Elkouri, *supra* at 949-50. Just cause requires proof that an employee has committed a disciplinary violation, and that the penalty imposed is justified in light of the gravity of the offense and the surrounding circumstances. *Ashland Petroleum Co.*, 90 LA 681 (Volz, 1988); *see generally Koven and Smith, Just Cause: The Seven Tests*, (3d Ed. 2006).

A determination of just cause is generally based on an analysis of the following seven factors: 1) notice of the work rule; 2) the work rule reasonably related to the orderly, efficient, and safe operation of the employer's business; 3) the employer conducted an investigation into the alleged misconduct; 4) the employer's investigation was fair and objective; 5) there was substantial evidence or proof supporting the employer's finding of misconduct; 6) the employer applied its rules fairly to all employees; and 7) the discipline meted out was proportionate to the offense and employee's record. *See, e.g.*, *American Fed'n of State, Cnty. & Mun. Employees, Dist. Council 88, AFL-CIO v. City of Reading*, 568 A.2d 1352,1355-56, n. 3 (Pa. Cmwlth. Ct. 1990). All of the elements of just cause have been met in this case.

The first two elements relate to the Employer's work rules. The credible evidence in the record establishes that Grievant had notice of the City's outside employment policy, the vehicle usage policy, and the employee expectations set forth in the Employee Handbook. Grievant's feigned ignorance of these policies cannot be believed. Grievant's actions and testimony demonstrated a lack of credibility. Grievant was made aware of the City's outside employment policy by

three separate emails and through the Employee Handbook. Tr19:16-236, 119:3-123:2; 124:2-9; City Exhibits 1, 3, 10,11. He also signed and returned a Vehicle-Usage Policy Acknowledgement form. City Exhibit 5.

Yet, throughout the case, he denied being aware of the City's outside employment policy. He even denied signing the Vehicle-Usage Policy Acknowledgement form. When shown the form bearing his signature at hearing, Grievant suggested that his signature was forged. Tr.270:21-271-1. He stated "[t]hat's not my handwriting." Grievant's denials are incredulous and self-serving. The Arbitrator should determine that Grievant is not a credible witness and that he was aware of the City's outside employment policy and signed a Vehicle-Usage Policy Acknowledgment form.

To find that Grievant was not aware of the outside employment policy would require a determination that both Mr. Hengstler and Ms. Jones lied under oath. Mr. Hengstler has no motivation to misrepresent any facts related to this case. Grievant has every incentive to invent a story. *See Crown Plaza Pontchartrain*, 2003 BNA LA Supp. 110398 (McDonald, 2003) (citing to Conrad, *Modern Trial Evidence*, 1956). Such a finding would also mean that the City somehow fabricated the emails presented at the arbitration hearing. His testimony should not be believed.

The outside employment policy and the prohibition on falsifying work records are included in the Employee Handbook. City Exhibit 10. Grievant was

aware of the Employee Handbook. The Handbook was revised in 2022. Ms. Jones testified that the revised version was made available to all Department employees, either in hardcopy or online at that time. Tr112:21-113:5. Ms. Jones' testimony on this issue is unrebutted. Grievant did not even allege that he was unaware of the Employee Handbook.

The Arbitrator also should find that Grievant read, understood, and signed a Vehicle-Usage Policy Acknowledgement form. His denial regarding this form is similarly self-serving. Believing Grievant here would also require a finding that the City contrived the signed acknowledgment form presented at the hearing. Moreover, Grievant signature on the acknowledgement form is remarkably similar to (if not indistinguishable from) Grievant's signatures on his annual performance evaluations. *Compare* Union Exhibit 2 with City Exhibit 5. His testimony directly conflicts with that of Mr. Hengstler and the documentary evidence. This is just another example of a self-serving lie and should not be believed. The Department made Grievant aware of the City's outside employment policy, the vehicle-usage policy, and the Employee Handbook. The Arbitrator should conclude that Grievant had notice of these work rules.

There can also be little doubt that the policies in question are reasonably related to the orderly and efficient operation of the Department. The outside employment policy was specifically designed to promote the efficient operation of City government. *See* City Exhibit 2, pp. 3-6. MDO Dir. 64, in general, serves a similar purpose. Its goals are "to improve and streamline fleet management

practices, enhance accountability for vehicle usage, contain the size of the City's fleet, decrease environmental impact, contain or reduce fleet-related expenditures (including parking), and promote the uniform, efficient, safe and ethical use of the City's fleet." City Exhibit 4, p. 1.

The reasonableness of the relevant provisions of the Employee Handbook cannot be overstated. The handbook prohibits employees from falsifying work records. City Exhibit 10, p. 23. The Department relies on records such as the move sheets for operational purposes – to verify whether and when specific portions of the City's sewer system have been serviced. It also uses the move sheets for certain payroll purposes. Tr32:17-34:14, 179:21-180:8.

Additionally, the heightened expectations of supervisors are also crucial to the ability of the Department to function. The facts of this case make clear that the Department must be able to place a significant amount of trust in its supervisors. A superintendent (like Mr. Hengstler) must be able to rely on his first-level supervisors (like Grievant) to faithfully perform his supervisory duties. Without this heightened level of trust in supervisors, the Department's efficient operation would be severely limited. The Department's work rules are related to the orderly, efficient and safe operation of City government. Therefore, the Arbitrator should conclude that the City satisfies this element.

The Department's investigation was fair and objective. Prompted by a civilian complaint, the Department quickly determined that a City-owned vehicle

assigned to Grievant had been seen parked at Lonnie's. Tr124:21-129:22. The Department then conducted internet research and found that Grievant was one of the owners of Lonnie's. Tr3:7-24, City Exhibits 16, 17. Because of this, the Department suspected that Grievant was working there. Ms. Jones then checked to see if Grievant had submitted an application for approval of secondary employment. Tr130:10-131:6. He had not.

The Department also pulled the GPS data on Grievant's City-owned vehicle, which showed numerous visits to the area immediately around Lonnie's. Tr129:21-130:6, City Exhibit 6. The Department cross-referenced the GPS data with Grievant's move sheets. Tr113:11-135:8, City Exhibits 6, 7. This analysis reveals numerous discrepancies. City Exhibit 16. Having determined that Grievant was spending a lot of time at an auto garage that he owns during working hours, using his City-owned vehicle to travel there, and not recording these visits on his move sheets, the Department suspected Grievant was engaged in misconduct. For this reason, the Department referred this case to the Inspector General. Tr137:11-138:15.

Investigators from the Inspector General's Office observed Grievant at Lonnie's during working hours. Tr101:8-23. They interviewed Grievant, where he admitted to visiting Lonnie's in his City-owned vehicle and overseeing or managing his subordinates there. Tr102:24-104:19; City Exhibit 8. Grievant attempted to minimize (but not deny) these visits, alleging that he would only stop by for fifteen to thirty minutes if he was in the area or on a break. As such, the

Inspector General concluded that Grievant was working at Lonnie's without approval and reported this information to the Department. City Exhibit 9.

At the hearing in this matter, Grievant denied making this admission. Tr245:10-246:12. Mr. Bessler also testified concerning the Inspector General's interview. He stated that he could not recall if Grievant made these admissions during the interview. Tr200:19-201:16. Once again, Grievant's denial is self-serving, incredulous, and should not be believed. The Inspector General's Memorandum of the interview (created contemporaneously) states "[Grievant] reported he would go to his auto shop to manage and direct his employees during City time." City Exhibit 8. Mr. Washington's recollection of Grievant's statements is wholly consistent with the Interview Memorandum. *See* Tr102:24-103:14; 104:12-19.

The conflicting accounts provided by the Inspector General's Office on one hand and the Grievant and his labor representative on the other cannot both be true. Mr. Washington is a successful and long-term employee of the Inspector General's Office. Tr99:1-3; 99:15-19. He has participated in hundreds of investigations into employee misconduct. These investigations would not withstand scrutiny if the office's investigators misrepresented key facts. It is in Mr. Washington's own professional interest to be truthful and forthright. Additionally, the Inspector General's Office is not part of the Department. Mr. Washington does not answer to Department management. Thus, he has absolutely no reason to lie about what Grievant said at his interview.

With the information from the Inspector General in hand, the Department convened a disciplinary hearing. Tr137:3-10, 138:16-24. The Department presented its allegations to Grievant and provided him with an opportunity to explain himself. At a separate internal grievance hearing, the Inspector General's investigator presented the office's findings to the Department. Specifically, an investigator stated that Grievant was working at Lonnie's on City time. Both Grievant and Mr. Bessler deny that the investigator conveyed this information. Again, their testimony is not to be believed.

After considering all of the evidence and Grievant's defense, the Department determined that discipline was appropriate. Tr140:4-10. The Department investigated this incident before making any decision on Grievant's culpability. *See Marriot Beach Resort*, 131 BNA LA 1385 (Milinski 2013). Just cause does not require the Department to conduct a perfect investigation. *See, e.g.*, *State of Iowa, Dep't of Corrs.*, 130 BNA LA 1130 (Jacobs, 2012); *Dep't of Veteran's Affairs*, 133 BNA LA 1688 (McReynolds 2014). An investigation is sufficient if it yields enough information to establish the essential facts. A review of this case makes clear that the Department's investigation was sufficient to reveal the essential facts. These facts being: Grievant owned Lonnie's; he worked at Lonnie's, often during City working hours; he traveled to and from Lonnie's in his City vehicle; and his move sheets did not accurately reflect his whereabouts. There are no other investigative steps that the Department could have taken. Given these circumstances, the Department's investigation satisfies

the rigors of just cause. As such, the third and fourth elements of just cause are satisfied.

Apart from being fair and objective, the Department's investigation also provided ample proof that Grievant habitually violated its policies. The record clearly shows Grievant violated the City's outside employment policy in two ways: 1) he worked at Lonnie's without prior approval from the Department and 2) he worked at Lonnie's on Department time. This conclusion is based on the GPS data, the Inspector General's report, and Grievant's failure to seek approval to engage in outside employment. First, the GPS data in this case is reliable and accurate. Throughout the disciplinary investigation and grievance process, Grievant and the Union have asserted that the GPS data is inaccurate and unreliable. There is little support for their assertion in the record. The Arbitrator should conclude that the GPS data is accurate and provided a sufficient basis for the Department to determine Grievant's whereabouts.

To support their assertion, Grievant testified that the GPS systems did not operate properly on one particular occasion. He recounted a story where a City-owned vehicle operated by a Department employee became stuck in the mud at the Philadelphia Navy Yard. Tr237:7-239:6. According to Grievant's telling, he asked Mr. Hengstler if the vehicle could be located using the GPS system. In response (according to Grievant), Mr. Hengstler implied that the GPS system does not function properly when several City-owned vehicles are located in the same area.

Grievant's account is dubious and, even if true, would not call into question the accuracy of the GPS data. First, when questioned about this incident, Mr. Hengstler could not corroborate Grievant's version of events. Tr45:24-46:7. Mr. Hengstler instead maintained that he's never had any issues related to the reliability of the GPS system. Tr44:20-23. Moreover, Grievant's suggestion is inconsistent with Mr. DeLeo's testimony. Mr. DeLeo, who has worked extensively with the GPS system since its inception, stated unequivocally that the GPS system is accurate and reliable. Tr60:5-61:20, 61:21-64:7. He explained that the system is capable of accurately pinpointing the location of a vehicle within sixteen to twenty feet. Tr73:7-75:21. There is no evidence in the record that would suggest that either Mr. Hengstler or Mr. DeLeo have any interest in this proceeding or would benefit in any way by providing false testimony.

Even assuming that Grievant's account was credible, it does not show that the GPS data is inaccurate. According to Grievant, Mr. Hengstler was unable to precisely locate the disabled City-owned vehicle because there were "too many in that area" and he "can't make out which one it is." Tr238:6-19. Thus, even if Grievant was telling the truth, his account proves that the GPS system works. It shows that Mr. Hengstler was able to locate the vehicle in question but could differentiate it from other City-owned vehicles in the immediate vicinity. Even assuming again that Grievant's account is true, there is no evidence in the record that there were other City-owned vehicles in the vicinity of Lonnie's during the relevant period. Thus, even if his theory were true, there are no facts to back it

up.

Mr. Washington's testimony also weighs against Grievant and the Union. Mr. Washington and his colleague served an interview appointment notice to Grievant in person. During his testimony, he explained that they were able to predict Grievant's whereabouts based on the GPS data. Tr101:8-23. That is to say, the Inspector General's Office was able to rely on the GPS to locate Grievant. For all of these reasons, the Arbitrator should disregard the assertions by Grievant and the Union regarding the accuracy of the GPS data.

The Union suggested that many of Grievant's visits to Lonnie's or to the area around Lonnie's were for legitimate purposes. *See* Tr80:11-92:23, 171:15-175:5, 188:14-189:1. First, the Union claims that Grievant was actually stopping at Department facilities in the area and performing work on behalf of the Department. Tr206:2-209:18. The Union produced a map showing Department facilities in the general area. Union Exhibit 2. Grievant claimed that, if he could not find a parking spot in front of the Department facility, he would park at Lonnie's and walk to the site. Tr232:15-22.

This claim cannot be believed. Initially, for all of the reasons discussed above, Grievant is not a credible witness. His self-serving attempts to escape accountability should not be believed. Second, the map shows one facility that appears to be about two blocks south of Lonnie's. Union Exhibit 1. The other facilities, located to the north and northwest along Cheltenham Avenue, are

several blocks away. These locations are essentially sewer access points or manhole covers. Tr220:15-221:8. Grievant testified that his work involved using "heavy bars with ropes and picks and hooks" to clear obstructed sewers. *Id.* Grievant's assertion that he would park far away from a work site and walk several blocks carrying heavy tools and gear before climbing down a manhole, rather than parking nearby, even if blocking traffic, belies common sense.

The Union also highlighted a selection of GPS entries from [redacted] showing Grievant on Ogontz Avenue about one-half mile away from Lonnie's. Tr83:5-88:9, 90:14-93:8. The Union alleged that these entries showed that Grievant's vehicle was idling in a parking lot, not at Lonnie's. The significance of these entries is not clear. The GPS data shows that Grievant visited the area 352 times between [redacted] and [redacted]. City Exhibit 6. The Union has supposed that the entries of a single day can explain this away. This is a distraction. Even if this is true (and Grievant was, perhaps, eating lunch) the entries highlighted by the Union do not detract from the overall probative value of the GPS data. The several hundred other entries still demonstrate that Grievant was stopping at Lonnie's or in the immediate area regularly during his working hours.

Grievant also claimed that his visits to Lonnie's were brief and limited to his breaks. Tr244:22-245:2; 255:2-19. This claim is refuted by the timestamps on the GPS data. The data shows that Grievant visited Lonnie's at various times

throughout the day and for varying lengths of time. City Exhibit 6. Some of his visits lasted nearly two hours. *See, e.g.*, City Exhibit 6, lines 1,444; 1,850; 4,318; 5,416; 11,554; 12,331; 15,307; 17,735; 25,097. All told, the GPS data relied upon by the Department clearly shows that Grievant visited Lonnie's almost every working day for months.

The Department's investigation also proved that Grievant was performing work for Lonnie's during working hours. The Department suspected as much based on the GPS data. However, this fact was confirmed by Grievant's admission to the Inspector General's investigators. *See* City Exhibit 8. During his interview with the investigators, Grievant admitted that, while at Lonnie's, he would "manage and direct his employees during City time."

Grievant admitted to supervising and overseeing employees at the garage during working hours. Perhaps not hands on, but this still constitutes working for another employer. He tried to downplay his role a Lonnie's by claiming he would only stay for "fifteen to thirty minutes." Again, this is not supported by the GPS data. Regardless of how much time he spent doing it, he still admitted to the Inspector General's investigators that he worked at Lonnie's during the working day. The Inspector General based its findings on Grievant's admission. The Department based its conclusions on the Inspector General's report. The evidence in the record proves that Grievant worked at Lonnie's during the workday.

Grievant did not submit an application for approval to engage in outside employment as required under City policy. Tr130:10-131:6. The Union does not dispute this. The City's policy prohibits employees from working a second job (even during non-working hours) without approval. Grievant worked at Lonnie's without approval. He clearly violated the City's policy. Moreover, Grievant worked at Lonnie's when he was supposed to be working for the Department. This too is expressly prohibited by the City's policy. *See* City Exhibit 6, § 2(a)(3).) As such, the record clearly shows Grievant violated the City's outside employment policy.

Grievant also violated the City's vehicle usage policy, MDO Dir. 64. The record makes this plain. The policy flatly prohibits the personal use of City-owned vehicles. City Exhibit 4 § 6.1. The hundreds of trips Grievant made to Lonnie's were made in his City-owned vehicle. During his visits, he performed managerial work for the benefit of Lonnie's, which he partly owns. His visits to Lonnie's in his City-owned vehicle had nothing to do with his work for the Department. The record clearly shows that Grievant used his City-owned vehicle for personal reasons. Grievant violated MDO Dir. 64.

Finally, the record also shows that Grievant violated provisions of the Department's Employee Handbook when he submitted false move sheets. The Employee Handbook prohibits falsification of "any work record." City Exhibit 6, p. 23. Department employees with driving privileges are required to account for their movements throughout the day in these logs. Tr32:17-34:14. The move sheets submitted by Grievant conflict with the GPS data. City Exhibits 6, 7, 18.

There can be no doubt that the move sheets Grievant submitted are inaccurate.

Ms. Jones explained that she considered the discrepancies between the GPS data and the move sheets to be deliberate falsifications. Tr180:20-25. [redacted] on the other hand, alleged that Department employees generally approximate their whereabouts on their move sheets. Tr273:13-275:3. Because the move sheets are not intended to be precise, [redacted] suggested that Grievant's logs were unintentionally inaccurate, not falsified. [redacted] suggestion should not be believed. His testimony conflicts with that of Ms. Jones, who explained that the Department relies on move sheets and it is important to the Department that they are accurate. Tr179:21-180:8.

Furthermore, Grievant's move sheets are more than just inaccurate. They show that Grievant misrepresented his location almost every time he visited Lonnie's. For example, in [redacted] alone, while the GPS data shows that his vehicle was on the 6800 block of Ogontz Avenue (where Lonnie's is located), his move sheets list the following locations: Brous St., Fox St., C run, CFD run, T run, "between C run and Fox St.," "between CV1 and Fox St.," "between Fox St. and R run," and "Fox Street, Hasbrook and CV1." City Exhibit 18 lines 2-3, 9-12, 20-28, 31-36, 39-44, 48-53, 60-65, 70-71, 84-87, 92, 95-103, 108-111, 115-119, 122-125, 130-133. In this example, the GPS data shows he was in one place while his movement logs show nine different locations spread throughout North Philadelphia. Other dates show similar discrepancies. Such a wide range of locations cannot be the result of attempted approximation.

On the contrary, it is more suggestive of a deliberate misrepresentation. Grievant had to cover his tracks. He had to make something up to account for the time he spent working at Lonnie's. The evidence in the record demonstrates that Grievant falsified his move sheets in violation of the Department's Employee Handbook. At a minimum, the persistent discrepancies between the GPS data and the locations he listed on his move sheets show a flagrant disregard for Department policy. The evidence in the record provides sufficient proof that Grievant violated three policies: the outside employment policy (in two ways), the vehicle-usage policy, and the prohibition against falsifying work records. Thus, the fifth element of just cause is met.

When compared to other employees, the Department punished Grievant fairly. Both the City's outside employment policy and the MDO's vehicle usage policy provide for discipline up to and including termination for any employee in violation of the policies. City Exhibits 2, 4. Ms. Jones, who oversaw employee discipline in the Department for many years, testified that the Department has terminated employees found to have falsified work records. Tr110:24-111:5, 111:6-8, 145:3-7. As such, Grievant was disciplined in accordance with City and Department policy and consistent with the Department's usual practice. The City has satisfied the sixth element of just cause.

Finally, the punishment in this case was appropriate under the circumstances. Nearly every day for ten months, Grievant traveled to and worked at Lonnie's during City working hours. In the simplest of terms, he was working a

second job while he was supposed to working for the Department. While the Department was paying him, he was working at Lonnie's. He used a City-owned vehicle to travel back and forth between jobs. On top of all of that, he falsified his move sheets to cover his tracks.

His conduct was a clear violation of three important policies. Any one single violation of these policies could have resulted in termination. Grievant violated all three policies a tremendous number of times. He took his City-vehicle to Lonnie's several hundred times. He worked at Lonnie's consistently throughout this period (on and off the clock). He falsified his move sheets week after week. This pattern of behavior shows an utter disregard for the Department's rules and warrants termination. *See, e.g.*, *Cornerstone Chemical Co.*, 136 BNA LA 7 (Jennings, 2015); *Sandia National Laboratories*, 1999 BNA LA Supp. 104428 (Bognanno, 1999).

Ms. Jones discussed the possibility of lesser punishments during her testimony. Tr146:24-147:25. She explained that Grievant's conduct was so egregious that, in her eyes, he was completely untrustworthy. Grievant had held a position of pivotal importance within the Flow Control Unit. Now, however, he was no longer trustworthy enough to be left unsupervised. In Ms. Jones' determination, Grievant cannot be trusted to travel throughout the City between Department facilities to supervise crews of subordinates. He cannot be trusted to work independently in any way. At bottom, Grievant's actions caused Ms. Jones to lose all confidence in his ability to perform his job.

Ms. Jones further explained that a suspension or a demotion would not rectify the relationship between Grievant and the Department. The Department could not trust Grievant to do something as basic as not working for another employer on City time. How could it trust him after a suspension or in a lower position? Because of this, Ms. Jones decided that termination was the most appropriate punishment. *See, e.g.*, *Transoceanic Cable Ship Co.*, 2003 BNA LA Supp. 110140 (Mazaroff, 2003); *Reliance Steel & Aluminum Co.*, 2023 BNA LA 71 (Nicholas, 2023); *Labor Arbitration Decision (Names Redacted)*, 2024 BNA LA 81 (Siegel, 2024).

Grievant's behavior throughout the investigation and grievance process confirms Ms. Jones' assessment. Not only did Grievant engage in misconduct, but the record also clearly shows that he repeatedly lied about it. He falsified his move sheets. He pretended to be unaware of Department and City policies. He lied about all of these things during his arbitration hearing testimony. Grievant could have admitted his mistakes and accepted responsibility for his actions. Instead, Grievant has unwaveringly avoided accountability. His dishonesty is incompatible with continued employment with the Department.

It is true that Grievant was a long-term employee of the Department, a supervisor, and consistently received positive performance evaluations. This, however, makes Grievant's conduct worse. Because of his track record of success, the Department expected more of him. As a more senior supervisor, the Department relied more heavily on him than other employees. Grievant betrayed

the trust that the Department placed in him. The heightened level of trust placed in Grievant makes his conduct all the more unforgiveable.

In conclusion, Grievant worked a second job while on City time. He did this using a City-owned vehicle. He submitted falsified reports to hide his misconduct. Grievant's conduct occurred continuously over the course of ten months. His conduct was in clear violation of the City policy. The Department had just cause to terminate Grievant's employment. Accordingly, the City urges the Arbitrator to deny this grievance.

AFSCME District Council 47

The CBA prohibits the City from terminating Dwayne Selden without just cause. Joint Exhibit 1, Art. 16. Because discharge is "the industrial equivalent of capital punishment," *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 421 (1981) (Powell, J., concurring) (quoting Whitman, *Wild Cat Strikes: The Union's Narrowing Path to Rectitude*?, 50 Ind. L. J. 472, 481 (1975)), the Employer bears the heavy burden of proving that it discharged the grievant for just cause. Arbitrations have long recognized that, to satisfy its burden, the employer must prove, among other things (a) the employer provided adequate notice of rule; (b) the investigation into the alleged wrongdoing was conducted fairly; (c) it had substantial evidence the employee engaged in the wrongful act; (d) the rule was applied fairly among employees; (e) and the level of discipline imposed was reasonably related to the seriousness of the employee's proven offense and the

employee's work record. *Enterprise Wire Co.*, 46 LA (BNA) 359, 363-64 (*Daugherty*, 1966). A negative response to any of the above-referenced inquiries usually indicates that there is no just cause for the degree of discipline imposed. *Id.* at 362-63. Here, the City failed to meet its burden, and only Mr. Selden's reinstatement can ensure that the just cause standard is upheld.

While the City may argue that Mr. Selden failed to follow the secondary employment and fleet maintenance policy, it did not demonstrate that it provided adequate notice to Mr. Selden regarding these rules. Mr. Selden had owned several businesses even longer than he was employed by the City. Tr215. From the time the City interviewed Mr. Selden until the day he was terminated, he consistently owned a business. *Id.* He spoke openly about his businesses with colleagues and management. Tr248. Yet, no one inquired about his secondary disclosure form. Not a single supervisor ever requested or received a form from Mr. Selden despite the policy's requirement for supervisors to obtain them. The City asserted that three emails over eight years regarding a policy that must be updated annually constituted sufficient notice about the rules.

In the eight years Mr. Selden was a supervisor, the Department only sent three emails regarding the policy, which was atypical of other City departments. Tr198. The Directive requires that an employee "submit the completed forms to the Human Resources Manager or Designee after they transfer to another City department, agency or office..." City Exhibit 2. Yet, the City could not offer any

evidence that it followed up with Mr. Selden about the policy when he became a supervisor. The secondary employment policy is enforced across all departments in the City. Joint Exhibit 3; City Exhibit 3. In the Department of Parks and Recreation, an email was distributed yearly among all workers to ensure proper compliance. Tr198. Here, the evidence showed that the policy was only discussed in emails in 2017 and 2022. City Exhibits 1, 3, 11. Mr. Selden only received an email from Hengstler about the policy around the same time as the OIG interview. Tr254.

The Department offered no training for Mr. Selden. In his new role as supervisor, he learned all his duties and responsibilities from his coworker or on-site observation. Tr243. Given the City's lax approach to onboarding, there was limited institutional knowledge being passed down to Mr. Selden. The City needed to verify that Mr. Selden had learned all the necessary functions of his job, including enforcing the secondary employment ule. The City made minuscule efforts to ensure the enforcement of the secondary employment disclosure policy. Shortly after Mr. Selden was remanded, the Department found numerous individuals with secondary employment who never disclosed such employment. Tr277. The City cannot reasonably maintain that the policy was effectively communicated and enforced in the office if no one followed it.

While the City offers some evidence that it attempted to inform Mr. Selden through emails about the secondary employment disclosure, it offered absolutely no evidence that it trained Mr. Selden on the City of Philadelphia

Managing Director's Directive 64 (hereafter "Directive 64"). The Directive requires all trainees to sign acknowledging receipt, but the City had no signed copy from Mr. Selden. Tr204. Shifting its responsibility for training workers, the City speculated that Mr. Selden refused to sign Directive 64 because the City has "issues with union-represented employees signing" without any proof to back up its theory. Tr113. Mr. Selden adamantly denied receiving training on Directive 64, and the City offered no witnesses to challenge Mr. Selden's recollection.

Since the Department struggled to disseminate its rules, it lacked any infrastructure to determine if anyone violated the rules. Therefore, the Department relied heavily upon the OIG to supply evidence for its investigation into Mr. Selden. The City alleged that it first learned of Mr. Selden's secondary employment from an investigation conducted by OIG. Investigator Smith investigated Mr. Selden's secondary employment Tr102. Investigator Smith made blanket conclusions about Mr. Selden's behavior based on a single interview with him. Investigator Smith typed up his assessment and provided it to the City. No one recorded the interview so the City was left with secondhand testimony of Mr. Selden's words. Both Mr. Selden and Vice President Brett Bessler, who attended the interview, disputed the investigator's report and recollection of the investigation. Yet the City based the bulk of its investigation upon the OIG's finding.

The City then used the OIG's conclusions as the starting point for its investigation. The City selected pictures from the OIG to bolster its evidence against Mr. Selden. Although the City reviewed GPS data from Mr. Selden's vehicle, the City used the data to affirm the OIG's findings rather than investigate the facts. The City did not to investigate whether Mr. Selden actually engaged in wrongdoing. So determined to prove that Mr. Selden used his City vehicle improperly, it never questioned the accuracy of the GPS data.

The City assumed that Mr. Selden's run sheets reporting different times than the GPS data must show that Mr. Selden was falsifying records. The City also assumed that if the GPS picked up Mr. Selden's work vehicle at his autobody shop during the day, he was stealing time working at another job. At no point did the City attempt to determine the standard operating procedures of Interceptor Services Supervisors in the Water Department. The City never sought out an alternative explanation to Mr. Selden's vehicle behavior beyond what the OIG offered. The City affirmed the OIG's conclusionary evidence without fairly investigating whether or not Mr. Selden committed any wrongdoing.

The City heavily relied on GPS data from Mr. Selden's City-issued vehicle to support its assertions, but it did not provide any evidence regarding the accuracy of this data. While Mr. Selden openly admitted to holding secondary employment without seeking additional authorization, the City failed to demonstrate Mr. Selden knowingly tried to violate the secondary employment policy through willful omission or deceit.

Since the City issued Mr. Selden a work vehicle, the City used the GPS data from this vehicle as the primary determinant for investigating Mr. Selden. The City collected all the data from Mr. Selden's vehicle and compiled it into a report. City Exhibit 6. The data provided the date, time, and location of Mr. Selden's work vehicles for multiple years. *Id.* The City compared the data from the report and Mr. Selden's travel sheets, and the location of Mr. Selden's autobody shop. Anytime Mr. Selden's vehicle was said to be at Mr. Selden's autobody shop, the City claimed Mr. Selden worked at his secondary employment during his City hours.

Yet, this simplistic analysis of the GPS data does not prove Mr. Selden worked at his secondary employment during his City hours. The City acknowledged that the GPS data could not provide a precise location of any City vehicle. Tr75. Not only can the GPS be off by 16 or 20 feet, but the weather also plays a factor in the GPS's accuracy. Tr75. However, the City assumed that whenever the GPS on Mr. Selden's City-issued vehicle populated an address, it was precise.

Mr. Selden's autobody shop was located on 6839 Ogontz Ave. Philadelphia, PA 19138. Tr209. There were 5 different sites within the same zip code as Mr. Selden's autobody shop. Tr208; Union Exhibit 1. One of those required sites Mr. Selden needed to visit was about a block from Mr. Selden's autobody shop. Tr208; Union Exhibit 1. However, the City never demonstrated that if the GPS stated his City vehicle was at the shop that Mr. Selden was in

fact at the shop and not parked somewhere near his shop or his work location. On the dates in dispute, the City never verified with any coworkers about Mr. Selden's whereabouts. No City official saw Mr. Selden at his autobody shop during his work hours. The City's evidence relies solely on GPS data, despite its known imprecision.

Even if the vehicle was at Mr. Selden's shop on some days, the City never verified whether or not Mr. Selden was parked at the shop while on break or running his shop while there. The City never provided any evidence that he was, in fact, working while visiting the shop. Even Investigator Smith never stated whether he saw Mr. Selden doing work at his secondary job. Tr285. Mr. Selden is provided two 15-minute breaks along with a 30-minute lunch. Tr234. Mr. Selden often dropped in at the shop for the restroom. Tr235. The City acknowledged that if Mr. Selden was working at a secondary employment during his break, only then would he violate the secondary employment policy. Tr175.

Not only did the City rely on the GPS data to substantiate its charges of working secondary employment during work hours, but the City also attempted to use the data to demonstrate Mr. Selden used his work vehicle in a personal capacity. Since the City assumed Mr. Selden was working his secondary job during his City hours, the City assumed he used his vehicle for personal use. The City attempts to compound additional violations onto Mr. Selden, assuming it has proven its initial charge of working secondary employment.

The GPS data never captured Mr. Selden's work vehicle operating outside of his working hours. Therefore, the City must show that during Mr. Selden's working hours, he used his vehicle for personal use. But, as mentioned above, the City never provided any evidence that Mr. Selden worked his secondary employment during business hours. Even when Mr. Selden's City-issued vehicle was tracked at retail locations such as McDonald's during working hours, as Former Department Human Resources Director Candi Jones stated, that is not a violation of the fleet vehicle policy. Tr175-176. Mr. Selden's duties included noting his comings and goings during the work week.

Each day, Mr. Selden had to visit different City sites that control the City's waterways. Each location is an area called a "run". Tr229. Certain runs had many sites within them, and others only had a few. Each day, he would receive a run sheet listing all the job sites ("runs") he needed to visit in a day. Tr240. At the end of the week, he also needed to fill out a travel sheet. The travel sheet included a summary of all the runs he visited, including times he arrived and left at runs for the week. Tr293.

The sheets generally sat at a desk in his office for weeks, even months, before they were transferred to a cabinet on the upper floor of his office building. Tr239. Before his termination, no one ever collected or logged his entries from the run and travel sheets. Tr239. After the OIG's secondary employment investigation, the City reviewed his travel sheets. The City compared his travel sheets with the GPS data from his City vehicle. Since the travel sheets and the

GPS's data did not match, the City asserted that Mr. Selden falsified his time. However, the discrepancy between the two data points alone cannot demonstrate falsification of time. Falsification of time generally requires three elements: the employee's intent to deceive, a material misrepresentation to the employer, and resulting benefit or avoidance of a consequence that would not otherwise be available. *Texeira v. U.S. Postal Serv.*, 267 F. App'x 950, 952-953 (Fed. Cir. 2008). Here, the City failed to prove Mr. Selden's intent to deceive the City. Mr. Selden was not offered any training on how to complete the travel sheets. Tr241. For nearly a decade, he made estimates about his arrivals and departures on runs. Tr240. Therefore, his time entries on travel sheets would always be different than the time recorded from the GPS coordinates. Not a single supervisor questioned the accuracy of his travel sheets.

Furthermore, the City cannot verify that the GPS accurately captured the location of Mr. Selden's City-issued vehicle. In the City's report concerning the GPS coordinates of Mr. Selden's City-issued vehicle, the GPS often showed Mr. Selden's vehicle idling with the engine running in a parking lot. City Exhibit 6. On [redacted], Mr. Selden's work vehicle was sitting with the engine on in the parking lot of a Department of Motor Vehicles office for over 20 minutes. Tr84, 86, 90, 91; City Exhibit 6. Mr. Selden has never sat with the engine running in the DMV parking lot.

Often, his travel sheet showed a different work location than the one provided by the GPS. The City never questioned Mr. Selden if he had simply

made a mistake on his travel sheet, either. Tr185. Given the major inconsistencies within the City's GPS report, it is highly doubtful that the GPS provided a more accurate account of Mr. Selden's comings and goings. Mr. Selden never hid his travel sheets. He completed his travel sheet the same way his peer, [redacted], made his travel sheets. Tr274-275. He never believed he was breaking any rule when conducting his travel sheets. Only after his investigation with OIG did Hengstler provide any instruction or feedback on the travel sheets. Although former Department Human Resources Director Candi Jones asserted that the travel sheets are tied to payroll, Mr. Selden's travel sheets were not reviewed by his direct supervisor or payroll clerk. Tr181. The travel sheets merely reflect where Mr. Selden went during his shift. Mr. Selden earned no advantage by completing his travel sheet in the manner he kept them.

During his meeting with the Inspector, Mr. Selden openly admitted to having the shop. He never knew he would potentially be reprimanded. The City failed to prove that Mr. Selden willfully violated this policy. "Intent must be given some weight in enforcing ... or any rule." *Atlantic Steel Co.*, 79 BNA LA 163 (1982). After Mr. Selden met with OIG personnel, he met with Hengstler to get his secondary employment reported. Tr254. He by no means sought to hide it from anyone. Arbitrators often relied on Webster's definition of intention to apply it to grievants. Int'l Paper Co. --, 95/04759, 106 BNA LA 464 (1996). Webster defines intention as "obstinately and often perversely self-willed," or "done deliberately, " or "intentional." *Id.*

Assuming the City has satisfied its burden of proving Mr. Selden violated Department rules, the City failed to apply the rules evenly among workers. The City seeks to hold Mr. Selden accountable for falsification of time records despite other coworkers not being held to the same standard. Since Mr. Selden's travel sheets did not reflect the coordinates from his vehicles' GPS history, the City asserted he falsified time. Mr. Selden stated his entries on his travel sheets were summaries, not minute-by-minute logs. He was not the only Interceptor Services Supervisor completing travel sheets in the same manner. [redacted] also made his run sheets in the same manner. Tr 275. No one ever questioned [redacted] about his travel sheets. *Id.*

Even when [redacted] disclosed his secondary employment to the Department, he learned the Department never presented his forms to the proper channels inside the OIG. Tr271. When employees finally disclosed their secondary employment, the Department lacked a proper infrastructure to process the disclosures. Just cause requires that Mr. Selden be held to the same standard as his coworkers.

Beyond the City's failure to dole out discipline consistently and fairly to Mr. Selden, just cause requires that the selected disciplinary penalty be proportionate to the proven misconduct. THE COMMON LAW OF THE WORKPLACE THE VIEWS OF ARBITRATORS, 2d ed., Ch. 6 (Bloomberg BNA), Section 6.I.7 provides that: "The employer's chosen level of discipline itself must be 'just.'" The principles of progressive discipline dictate that discipline be imposed in increasing, gradual

amounts, except in cases involving egregious offenses. "The primary object of discipline is to correct rather than to punish." *Id.* In addition, various factors impact the appropriateness of a penalty, including "the nature and consequences of the employee's offense, the clarity or absence of rules, the length and quality of the employee's work record, and the practices of the parties in similar cases. Discipline must bear some reasonable relation to the seriousness or the frequency of the offense." *Id.*

Mr. Selden had worked for the City for over 20 years at the time he was terminated and had no prior discipline of any kind, even remotely related to the allegations for which he was discharged. Mr. Selden had glowing performance evaluations for over a decade and received multiple promotions throughout his career. Tr253, 263; Union Exhibit 2. Mr. Selden never received any kind of discipline during his two-decade career with the City. He was a model worker who loved his job. Indeed, he had no serious discipline of any kind in his record.

In addition, other mitigating factors existed that would have warranted readjustment of any high level of discipline by the City. First, Mr. Selden acted in good faith and was open about his side business. He did not remember ever hearing about the secondary employment policy. Second, the City has allowed at least one other [redacted] to not complete his travel sheets without reprimand. The City is holding Mr. Selden to a higher standard even among [redacted] regarding his responsibilities and obligations.

In conclusion and for the reasons set forth above, the Union respectfully requests that the grievance be sustained. The City should be directed to reinstate Dwayne Selden and make him and the Union whole for any and all losses sustained as a result of the termination, including back pay, restoration of any and all benefits lost as a result of the termination, and any other relief the Arbitrator deems appropriate. The Union further requests that the Arbitrator retain jurisdiction regarding any disputes arising out of the implementation of the remedy.

V. STATEMENT OF THE CASE

The City of Philadelphia, Pennsylvania ("the City") and AFSCME District Council 47, Local 2186 ("the Union") are parties to a Collective Bargaining Agreement ("CBA") with stipulated excerpts entered herein as Joint Exhibit 1. The subject grievance at Joint Exhibit 2 arose under the same, and proceeded through the steps of the grievance procedure without resolution. Initially, because no jurisdictional threshold challenges to arbitrability have been made, I find that the grievance was timely filed and is accordingly properly before me.

Because this is a discipline case, the City accepts the preliminary burden of making a *prima facie showing* of just cause for the termination, by a preponderance of the credible evidence. *See Complete Auto Transit, Inc., v. Reis*, 451 U.S. 401, 421 (1981). In that event, the burden of production will shift to the Union to establish its exculpatory or affirmative defenses. Upon a careful

analysis of the record evidence, with full consideration given to the respective arguments of the parties with supporting case citation, I find that the grievance must be **DENIED**, as the Union has failed to rebut the City's overwhelming proofs.

The material facts of the case are both disputed and undisputed, requiring that credibility determinations be made. In *Indian River Medical Center and International Brotherhood of Teamsters, Local 769*, FMCS Case No. 11-51617-3 (Pecklers, 2011) at page 32, n.4., I endorsed the Medical Center's reliance upon the award of Arbitrator Berquist in *Abbott-Northwestern Hospital*, 94 Lab. Arb. (BNA) 621 (Berquist, 1990), who took the following factors into consideration when evaluating witness credibility:

(1) Interest or lack of interest in the outcome of the case;

(2) The relationship to the party;

(3) The ability and opportunity to know, remember, and relay the facts;

(4) The witness's manner and appearance;

(5) The witness's age and experience;

(6) The witness's frankness and sincerity, or lack thereof;

(7) The reasonableness or unreasonableness of the testimony in light of all the evidence in the case;

(8) Any impeachment of the testimony; and

(9) Any other factors that bear upon believability and weight.

On balance, and when viewed against this matrix, I have concluded that the

testimony of the City's witnesses was more credible and trustworthy than that of the Grievant, which was at times incredible and self-serving.

The record indicates that the catalyst for the instant disciplinary action[1] was an anonymous civilian complaint received by Deputy Commissioner Human Resources Candi Jones. This indicated that a Philadelphia Water Department employee vehicle was observed on a regular basis parked near Lonnie's D & M. After determining that the vehicle belonged to Mr. Shelden, Ms. Jones requested GPS data for Vehicle 140074. *See* City Exhibit 6.

The City's data base on approved second employment was likewise accessed, with a determination made that Mr. Selden had not completed the REQUEST TO ENGAGE IN OUTSIDE OR SELF-EMPLOYMENT at City Exhibit 2, and therefore did not have approval from the City to work a second job. After conducting an online search, Ms. Jones also learned that Mr. Selden was one of the owners of Lonnie's D & M. *See* City Exhibits 16-17. She then cross-referenced the GPS date with the "move sheets" at City Exhibits 6 & 7, which the Water Department employees with cars assigned to them fill out. Because they did not match and based on City Exhibit 18, a conclusion was reached that the records had been falsified by Mr. Selden. These findings were then sent to the Office of Inspector General. ("OIG").

1/ The Union urges that the Department relied heavily on the OIG to supply evidence into its investigation of Mr. Selden, and that the City alleged it first learned of Grievant's secondary employment from its investigation. These assertions are not supported by the record evidence. Rather, as detailed above, Ms. Jones exercised due diligence in determining the facts before the OIG referral.

On March 1, 2024,[2] OIG Deputy Inspector General William Washington and Investigator Miles Smith interviewed Mr. Selden, who was present with Union Vice President Brett Bessler. *See* MEMORANDUM OF INTERVIEW, at City Exhibit 8. On March 15, 2024, Deputy Inspector General Washington sent a correspondence to Assistant Deputy Commissioner Jones. *See* City Exhibit 9. This provided in full:

> Dear Assistant Deputy Commissioner Jones:
>
> On February 15, 2024, the Philadelphia Water Department (PWD) referred a misconduct complaint against PWD Interceptor Services Supervisor Dwayne Selden (Selden) who allegedly has outside employment at Lonnie's D & M Auto Shop and his GPS logs suggest vehicle misuse and theft of time.
>
> An investigation conducted by the OIG, which included surveillance and an admission of wrongdoing, established that Selden is employed at Lonnie's D & M Auto Shop. Moreover, on [redacted], while conducting surveillance, investigators hand delivered an OIG appointment letter to Selden while he was at the shop with his City vehicle
>
> During his OIG interview, Selden admitted to co-owning and working at Lonnie's D & M Auto Shop without permission from PWD. He also admitted to driving there daily in his City vehicle to check on his mechanics, saying that he usually stays on site for approximately fifteen minutes. Investigators then presented him with a collection of GPS logs contradicting his timeframe, but he questioned the accuracy of the data.
>
> Selden has worked for PWD for over twenty years and is currently

2/ The Union maintains that both Mr. Selden and Mr. Bessler, who was present at the interview, dispute the investigator's report and recollection of the investigation. This is particularly so with regard to the Grievant's admission of wrongdoing. Mr. Washington reiterated this fact upon cross-examination. When viewed in light of the *Berquist* considerations, the Deputy Inspector General's testimony and the findings contained in the IM are credited. Parenthetically, as the City has argued, Mr. Washington is a successful and long-term employee of the Inspector General's Office, who has participated in hundreds of interviews. It is therefore in his best interest to be truthful and forthright. The fact that Mr. Selden was served with the OIG appointment letter at Lonnie's D & M following surveillance also fatally undercuts the Union's posture that no City employee saw Mr. Seldon at his autobody shop during working hours.

> a supervisor. The assertion that he was unaware of the rules surrounding his misconduct lack merit because he is in a leadership role at PWD. His blatant disregard for the City policy combined with the amount of time spent at his second job during his workday, truly questions his overall fitness for duty. We therefore recommend that Selden be disciplined in accordance with departmental guidelines up to and including termination.
>
> Upon imposition of any discipline on Selden, in accordance with Executive Order 7-14, the Department should forward a copy of the Disciplinary Report to the Inspector General indicating what actions have been taken in response to this investigation.

Both sides have relied upon the seven tests of just cause, as articulated by Arbitrator Carroll Daugherty in his seminal decision in *Enterprise Wire Company*, 46 LA (BNA) 359, 363-364 (Daugherty, 1966), which require an analysis of the following factors: 1. notice of the work rule; 2. the work rule is reasonably related to the orderly, efficient and safe operation of the employer's business; 3. the employer conducted an investigation into the alleged misconduct; 4. the investigation was fair and objective; 5. there was substantial evidence or proof supporting the employer's finding of misconduct; 6. the employer applied the rules fairly to all employees; 7. the discipline imposed was proportional to the offense and the employee's record. *See e.g.*, *American Federation of State, County & Municipal Employes, District Council 88, AFL-CIO v. City of Reading*, 568 A.2d 1352, 1355-56, n. 3 (Pa. Commonwealth Ct. 1990); *see also Ashland Petroleum Company*90 LA 681 (Volz, 1988); *Koven & Smith, Just Cause, The Seven Tests.* (3d Ed. 2006).

By virtue of his long tenure with the City of Philadelphia Water Department,

and elevated supervisory status, an extremely dim view must be taken of Mr. Selden's representation that he was unaware of the policies he is now charged with violating. The record demonstrates that since he was on the distribution list, Grievant had actual knowledge of the outside employment policy by virtue of the January 17, 2017 and November 15, 2022 emails sent to him by Mr. Hengstler. See City Exhibits 1, 3. Tr19. *See also* LEATHERMAN January 12, 2017 email at City Exhibit 12. Ms. Jones additionally testified that because he had a City Water Department email, Mr. Selden would have received a digital copy of the EMPLOYEE HANDBOOK. The PWD family was further reminded of the outside employment policy in an April 15, 2024 email. *See* City Exhibits 10, 11; Tr112-113, 119, 123-24.

Mr. Selden maintained that it was not his signature on the VEHICLE-USAGE ACKNOWLEDGEMENT FORM at City Exhibit 5, which in pertinent part provides that the "[v]ehicle may only be used for city business and not used for personal use or personal gain. Any violation of this will result in loss of take-home privileges and disciplinary action." This was signed on May 3, 2018, and I credit the City's contention that Grievant's signature is indistinguishable from that which appears on his Performance Report For Permanent Employees at Union Exhibit 2. Mr. Selden's representation is also at variance with the credible testimony of Mr. Hengstler, who had no motive to fabricate.

These considerations mandate a finding that Mr. Selden had notice of the City policies that he is being charged with violating. The second *Daugherty* test

concerns the question of whether the policies at issue are reasonably related to the orderly, efficient and safe operation of the City's business, and arbitral notice of this fact may be taken. As the City has argued, the outside employment policy was specifically designed to promote the efficient operation of City government. *See* City Exhibit 2, pp. 3-6. It follows that MDO Directive 64 serves a similar purpose. *See* City Exhibit 4. The City insists that the reasonableness of the Employee Handbook cannot be overstated, as it prohibits employees from falsifying records. *See* City Exhibit 10, p.23. Emphasis is placed upon the fact that the "move sheets" are used for operational purposes to verify whether and when specific portions of the City's sewer system have been serviced. Tr32, 179-180.

The evidentiary record in this case conclusively establishes that the City conducted a fair and objective investigation that uncovered substantial evidence or proof supporting the findings of misconduct, initially by Ms. Jones as later confirmed by the OIG.[3] This included the fact that Mr. Selden was an owner at .

3/ A significant part of the Union's theory of the case was that the GPS data upon which the City relied was unreliable but such a conclusion is not supported on the record before me. To bolster this claim, Mr. Selden testified to an instance where a City-owned vehicle got stuck in the mud at the Philadelphia Navy Yard. According to the testimony. he asked Mr. Hengstler if the vehicle could be located using GPS, but was told that the system does not function properly when several City-owned vehicles are in the same location. Tr237-239. On cross, Mr. Hengstler could not corroborate the incident, and testified that he has never had any issues with the GPS system. Tr.45-46. Even if believed, no evidence was presented by the Union that other vehicles where parked in the vicinity of Grievant's car on any cited occasion. Expansive and credible testimony was also provided at hearing by Deputy Commissioner of Operations, Department of Fleet Services John DeLeo. This included that the GPS system was accurate and reliable, and was able to accurately pinpoint the location of a vehicle to within fifteen to twenty feet. Tr.60-64. Union Exhibit 2 is a map that shows other City facilities in the general location of Lonnie's. This is used to contend that when he was going to those locations and unable to park, Mr. Selden would park at Lonnie's and walk back. The City has cited the implausibility of this scenario, given that Grievant was often tasked with using heavy equipment to clear obstructed sewers. It therefore is extremely unlikely he would walk two or three blocks carrying the same as opposed to just blocking traffic. In light of the fact that the City determined that Mr. Selden had visited the area of Lonnie's 353 times between [redacted] and [redacted], as reflected by City Exhibit 6, isolated events even if established (which they were not) are of no moment. I further reject the Union's arguments that Mr. Selden gained no advantage by completing his travel sheets in this manner.

Lonnie's D & M, and had not received approval for this from the City; he frequently worked there directing his mechanics during the hours he should have been performing his supervisory duties; traveling to and from in his City vehicle, with his move sheets not accurately representing his whereabouts.

The remaining *Daugherty* tests have also been satisfied by the City. There is no evidence of disparate treatment or that the rules were not applied fairly. Ms. Jones testified that during her tenure at Human Resources, employees had been fired for the falsification of records. Tr110-111. The Union has made arguments related to the City's practice *vis-à-vis* the move sheets regarding [redacted] and other Water Department employees. However, these concern post-discharge conduct that pursuant to prevailing arbitral practice, may not be considered except in certain limited circumstances not present here.

In conclusion, the City established that Mr. Selden violated the outside employment policy by working a second job without approval. He also ran his business when he was supposed to be supervising his Water Department team for the City, in violation of the policy. *See* City Exhibit 6. A violation of MDO Directive 64 was also established, which prohibits the personal use of City-owned vehicles. *See* Exhibit 4. Finally, Ms. Selden submitted false move sheets in contravention of the Employee Handbook at City Exhibit 10.

Citing to the enhanced expectations for supervisory employees coupled with the lack of trust in placing Mr. Selden on the street in an unsupervised

position again, the City decided that termination was the appropriate discipline to be imposed. Because the applicable policies provide for this quantum of discipline and under the "four-corners" proscription of Article 7 of the CBA, I may not substitute my judgement for the City. The Union has properly amplified Mr. Selden's twenty-years of service with no existing discipline. However, any good will that generated has been eviscerated by Grievant's misconduct. He also failed to accept responsibility for his actions, and in fact was dishonest about his conduct. Accordingly, based upon the totality of the foregoing, I find that the City has established just cause for its actions within the contemplation of Article 16.A of the CBA. The grievance is **DENIED** and IT IS SO ORDERED.

VI. CONCLUSION

The City of Philadelphia Water Department has established by a preponderance of the credible evidence that it had just cause to terminate the Grievant Dwayne Selden.

AWARD

THE GRIEVANCE IS DENIED.

July 2, 2025

MICHAEL J. PECKLERS, ESQ., ARBITRATOR

STATE OF NEW JERSEY
SS :
COUNTY OF HUDSON

ON THIS 2ND DAY OF JULY, 2025, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.,** TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

ANGELICA SANTOMAURO
NOTARY PUBLIC
State of New Jersey
ID # 2387931
My Commission Expires 7/29/2029