

IN THE MATTER OF THE ARBITRATION BETWEEN

State of Ohio  
Ohio Department of Commerce  
Division of Industrial Compliance  
Employer

Grievance No.: COM-2021-01526-07

Arbitrator Meeta A. Bass

AND

Ohio Civil Service Employees Association  
Grievant: Anthony Wiencek  
Union

Opinion and Award

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APPEARANCES FOR THE PARTIES

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## **PROCEDURAL HISTORY**

State of Ohio Department of Commerce is hereinafter referred to as "Employer." The Ohio Civil Service Employee Association is hereinafter referred to as the "Union." Anthony Wiencek is hereinafter referred to as "Grievant."

The Employer and the Union were parties to the Collective Bargaining Agreement effective April 21, 2021 through February 28, 2024. The Union submitted this grievance to the Employer in writing pursuant to Article 25 of the Parties' Agreement. Following unsuccessful attempts at resolving the grievance, the Union requested that the grievance be advanced to arbitration. Pursuant to the Agreement between the Employer and the Union, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on March 11, 2022 at the hearing of the above-entitled matter, held via Zoom, a virtual platform.

The parties stipulated to the following issues for resolution by the Arbitrator:

Was the Grievant, Anthony Wiencek, removed from his position as a Building Inspector for Just Cause? If not, what shall the remedy be?

During the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of the witnesses, and oral argument. Witnesses other than the representatives were sequestered.

The following individuals testified at the hearing:

1. Keith Cutright, Labor Relations Officer 3
2. Geoffrey Eaton, Superintendent of Division of Industrial Compliance
3. Michelle Grago, Building Inspector Supervisor
4. Sheryl Maxfield, Director of the Department of Commerce
5. Ray Blackerby, Union Chapter President
6. Anthony Wiencek, Grievant

The Parties jointly stipulated to the following facts:

1. The grievance is properly before the Arbitrator, and there are no procedural objections.
2. Grievant was initially hired by the State of Ohio on June 16, 1997.
3. At the time of the incidents, Grievant was a Building Inspector with the Ohio Department of Commerce, Division of Industrial Compliance.
4. Grievant began working in the Division of Industrial Compliance on June 16, 1997.
5. At the time of the incidents, Grievant had been a Building Inspector since June of 1997.
6. At the time of the incident, Grievant was a Building Inspector Assigned to the Northeaster area of Ohio.
7. Grievant was placed on administrative leave on October 1, 2020.
8. Grievant was removed from his position effective May 7, 2021.
9. At the time of the incident, Grievant had no active discipline.

The Parties jointly stipulated to the following exhibits:

1. Joint Exhibit 1 - The 2021-2024 Contract between the State of Ohio and the Ohio Civil Services Employees Association.
2. Joint Exhibit 2 - Pre-Disciplinary Hearing report, authored by Amy Grover 05.05.21
3. Joint Exhibit 3 - Pre-Disciplinary Hearing Notice, 03.02.21
4. Joint Exhibit 4 - Pre-Disciplinary Hearing Notice, 04.30.21
5. Joint Exhibit 5 - Administrative Investigation report for Anthony Wiencek, 03.02.2021
- Attachment A- Anthony Wiencek Administrative Interview, on disk
- Attachment B- Email from Michael Thompson regarding Fredericktown Inspection
- Attachment C - Amanda System screenshot of CPA 2020020703
- Attachment D - Amanda System screenshot of CPA 2020020703 "ok with pics"
- Attachment E - Anthony Wiencek Itinerary for August 7, 2020
- Attachment F - CPA 2020020703 pictures of site
- Attachment G - Amanda System showing Anthony Wiencek August 7th and 20th, 2020 schedule

- Attachment H - Amanda System screenshot of CPA 2018021339 mileage
- Attachment I - Amanda System screenshot of CPA 2018021339, time entered
- Attachment J - Amanda System screenshot of CPA 2018021339, comments entered
- Attachment K - Amanda System screenshot of CPA 2018021339, job ticket
- Attachment L - Amanda System screenshot of CPA 2018021339, Log sheets
- Attachment M - Amanda System system screenshot of CPA 2020021209
- Attachment N - Log for CPA 2020021209
- Attachment O - Amanda System screenshot of CPA 2020021209, mileage
- Attachment P - Amanda System screenshot of CPA 2020021209, info tab
- Attachment Q - Ohio Building Code
- Attachment R - Department of Commerce Discipline Policy
- Attachment S - Michelle Grago email
- Attachment T - Building Inspection spreadsheet from Amanda database
- Attachment U - Anthony Wiencek Administrative Interview, on disk
- Attachment V - Third-party inspection report
- Attachment W - Foundation and slab-special inspection provision
- Attachment X - OBC 1704- 3rd Party Special Inspection
- Attachment Y - CPA #2018000736
- Attachment Z - CPA #2018021378
- Attachment A1- CPA #2018021264
- Attachment B1 - CPA #2018022445
- Attachment C1 - CPA #2019020525
- Attachment D1 - CPA #2019020668
- Attachment E1 - CPA #2019021832
- Attachment F1 - CPA #2019022000
- Attachment G1 - CPA #2019022931
- Attachment H1 - CPA #2020020837
- Attachment I1 - CPA #2020020954
- Attachment J1 - CPA #2020020983
- Attachment K1 - CPA #2020021060
- Attachment L1 - CPA #2020021209
- Attachment M1 - CPA #2020021257

Attachment N1 - CPA #2020021499  
Attachment O1 - CPA#2020021950  
Attachment P1 - CPA #2019020530  
Attachment Q1 - CPA #2019021278  
Attachment R1 - CPA #2018022360  
Attachment S1 - CPA #2019022136  
Attachment T1 - CPA #2020021036  
Attachment U1- CPA #2018021229  
Attachment V1 - CPA #2017021815  
Attachment W1 - CPA #20180022307  
Attachment X1 - CPA # 2018022360, CPA # 2019020972  
Attachment Y1 - CPA #2017000887  
Attachment Z1 - CPA # 20180821738, CPA #2020020155,  
CPA # 2020020118  
Attachment A2 - CPA #2020021132

6. Joint Exhibit 6- Copy of Grievance snapshot COM-2021-01526-07
7. Joint Exhibit 7 - Removal Letter for Anthony Wiencek, 05.06.21

The Parties admitted the following Employer's exhibits:

1. Employer's Exhibit 1A - Ohio Building Code - Effective 2017
2. Employer's Exhibit 1B - Ohio Building Code - Effective 2018

The Parties admitted the following Union's exhibits:<sup>1</sup>

Union Exhibit # 2 - Wiencek's Evaluation 2017-2018  
Union Exhibit # 3 - DIC 05.10.21  
Union Exhibit # 4 - Ohio Building Code Section 108.1  
Union Exhibit # 7 (in its entirety) - Record Request  
Union Exhibit # 9 - 01.29.21 Records Request Follow-up  
Union Exhibit #10 - 01.29.21 Management's Response to Request  
Union Exhibit # 14 - Excerpts from Records provided by Management  
Union Exhibit # 15 - Union Survey of DIC Inspectors

The parties submitted their written closing statements at the conclusion of the hearing on March 11, 2022 at which time the record was closed.

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<sup>1</sup> Union submitted 22 Exhibits for admission into the record. Management objected to all exhibits except 2, 3, 4, 7, 7c and 14. Union voluntarily withdrew 1, 5, 6, 8, 11,12, 13, and 16 through 22. After review of the record, this Arbitrator admits Exhibits 7 in its entirety, 9, 10 and 15. The Arbitrator finds no prejudice to Employer when the exhibits were presented to the Employer prior to arbitration and discussed although not identified at the arbitration hearing.

## **RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND POLICY PROVISIONS**

### **ARTICLE 24 – DISCIPLINE**

24.01 - Standard Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.05. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

24.02 - Progressive Discipline: The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- a. One (1) or more written reprimand(s);
- b. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer. If a working suspension is grieved, and the grievance is denied or partially granted, and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.
- c. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;
- d. Termination.
- e. Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

**Discipline Policy Number 201.0** (revised January, 2013) is incorporated herein as if fully rewritten:

Purpose is to standardize the procedures used to impose disciplinary actions, and to provide a list of offenses along with the recommended corrective action.

1. Disciplinary Guidelines:

Disciplinary action is intended to correct employees behavior and will be imposed at the lowest level appropriate for the offense. This policy provides a list of offenses and the recommended corrective action associated with each violation...

II. Progressive Discipline:

The Department follows the principles of progressive discipline. Discipline will become more severe if misconduct is not corrected. Disciplinary action will progress as follows...

V. Disciplinary action shall be commensurate with the offense. The following is a list of offenses and their penalty. This list is merely illustrative and is not intended to be all inclusive. The Department reserves the right to impose lesser or greater discipline depending on the circumstances of the offense. Factors considered in applying the appropriate penalty for an infraction include, but are not limited to, the severity of the offense, the employee's disciplinary record, and mitigating circumstances, if any. Discipline does not have to be for like offenses to progress to the next level.

Disciplinary Grid:

27. Violation of ORC 124.34: Dishonesty, incompetence, inefficient, insubordination, drunkenness, immoral conduct, neglect of duty, failure of good behavior, discourteous treatment of the public, acts of malfeasance or nonfeasance.

Recommended Discipline: Depends on the severity of the offense.

**Joint Exhibit 5- Attachment Q Ohio Board of Building Standards - 2022 OBC Building Department Resource Package Index** is incorporated herein as if fully rewritten.

**Ohio Building Code Section 108.1** After construction documents have been approved, construction or work may proceed in accordance with the approved documents. Construction or work for which an approval is required shall be subject to inspection. It shall be the duty of the owner or the owner's representative to notify the building department when work is ready

for inspection. Access to and means for inspection of such work shall be provided for any inspections that are required by this code.

It shall be the duty of the owner or the owner's representative to cause the work to remain accessible and exposed for inspection purposes. Such construction or work shall remain accessible and exposed for inspection purposes until the work has been inspected to verify compliance with the approved construction documents, but failure of the inspectors to inspect the work within four days, exclusive of Saturdays, Sundays, and legal holidays, after the work is ready for inspection, allows the work to proceed.

Subject work is allowed to proceed only to the point of the next required inspection.

**Ohio Building Code Section 108.2** At the time the certificate of plan approval is issued, the building official shall provide, to the owner or the owner's representative, a list of all required inspections for each project. The required inspection list shall be created from the applicable inspections set forth in sections 108.2.1 to 108.2.14. The building official, upon notification from the owner or the owner's representative that the work is ready for inspection, shall cause the inspections set forth in the required inspection list to be made by an appropriately certified inspector in accordance with the approved construction documents.

**Ohio Building Code Section 1704.2** Special inspections and tests. Where application is made to the building official for construction as specified in Section 105, the owner or the owner's representative, shall employ one or more special inspectors to provide special inspection and tests during construction on the types of work specified to Section 1705 and identify the approved agencies to the building official. These special inspections and tests are in addition to the inspections by the building official that are identified in Section 108.

**Ohio Building Code 1704-3rd Party Special Instruction:**

**1704.2.4** Report requirement. Special inspectors shall keep records of special inspections and tests. The special inspectors shall submit reports of special inspections and tests to the building official and to the registered design professional in charge. Reports shall indicate that work inspected or tested was or was not completed in conformance to approved construction documents. Discrepancies shall be brought to the immediate attention to the contractor for correction. If they are not corrected, the discrepancies shall be brought to the attention of the building official and to the registered design professional in responsible charge prior to the completion of that

phrase of the work. A final report documenting required special inspections and tests, and corrections of any discrepancies noted in the inspections or tests, shall be submitted at a point in time agreed upon prior to the start of work by the owner or the owner's representative to the building official prior to the issuance of the certificate of occupancy.

**Memorandum effective May 10, 2021** issued by Geoffrey D. Easton, DIC Superintendent/CBO is incorporated herein as if fully rewritten.

The purpose of this memorandum is to reinforce and clarify certain operational procedures as they relate to the BBC inspection process...

On-site inspections requires both the "MILEAGE/ODOMETER" field and the "START/END TIME" fields to be populated in the process tabs.

After inspectors sign, date, and make notations on the site logs, inspectors must take a legible screen shot of the site logs and save it in the "Attachment" tab under each inspection process. This requirement applies to each inspection which includes final inspections.

Inspectors are strictly prohibited from conducting and approving inspections by only using photographs.

In the event that a contractor may have covered work without inspections and offers photographs of the work in lieu of an inspector witnessing the work, the inspector shall fail the inspection and immediately contact the inspector's supervisor. The Superintendent or another member from senior staff will contact the contractor in an effort to obtain additional evidence that the work complied with the approved documents. While it is possible that additional evidence might be offered that supports a decision to pass the inspection, it is also possible that the evidence is either unavailable or nonexistent and an administrative adjudication order must be issued.

It is never permitted for any building, electrical, and/or plumbing inspector to sign off on site logs for inspectors related to other scopes of work unless they have specific supervisor approval and the details and circumstances are details and circumstances are clearly noted in AMANDA's "COMMENTS" field.

Last but most importantly - Communicate with one another.

This information is provided to clarify certain specific operational procedures of the Division...

## **STATEMENT OF FACTS**

Set forth in this Background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the Discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

The Department of Commerce conducts building inspections as mandated by state law. The Department functions as the building department for any county that does not have its own building department and serves in this capacity for approximately twenty-eight counties in the State. The Department does building inspections for every state owned building and has jurisdiction over all buildings built on state property, whether or not it is used by the state. The Department of Commerce uses the Ohio Building Code (hereinafter "OBC"), a performance-based code, as its guide for inspections. The OBC sets forth the general design requirements, and also takes into account hundreds of reference standards that are applicable to building systems. From all accounts, the OBC is the standard for compliance. There are no written policies regarding internal practices with the exception of post-termination memorandum issued on May 10, 2021.

The Division handles approximately 3,000 inspections per year. The Division's field staff are assigned to various counties throughout the state. The Division is understaffed and the Building Inspector Supervisor testified that she has six inspectors when she should have eleven. She also stated that the Northwestern Region does not have an inspector, and the workload is assigned amongst the other inspectors. The Building Inspector Supervisor regularly does inspections. The length of each inspection is dependent on the project and scope of the work. An inspection may last 15 minutes to several hours. The Department maintains a computerized program known as the

Amanda System for all its projects. All inspectors are required to complete the job tickets of their inspections within the system.

The Employer hired Grievant on June 16, 1997. Grievant is a Building Inspector for the Division of Industrial Compliance. Grievant engaged in a variety of activities involving building inspections and plan examination work and securing compliance with building codes and regulations. His duties as a building inspector are "to perform filed inspections with use of state approved documents in compliance with the State adopted codes for structures within the jurisdiction of Construction Compliance Section. Consults with owners, contractors, and architects concerning violations found on site. Makes reports of all violations, recommendations and reports for adjudication orders, offers advice to correct violations. Responsible for scheduling routes for daily assignments, return phone calls and emails, writes reports, attends hearings and classes as needed. May perform other duties as required." He likewise advises applicants on building permit procurement procedures and verifies completeness of building permit applications including compliance with the building codes and regulations. Grievant was expected to apply the Ohio Building Code which is utilized by the Division, pursuant to State statute to perform his duties.

On September 29, 2020, the Electrical Supervisor emailed Grievant and copied the Building Inspector Supervisor and Todd Arnold. The email indicated that Grievant gave the contractor the okay to cover the framing project by reviewing pictures on August 7th and passed the framing inspection. In his email, the electrical supervisor instructed Grievant to send the pictures to Todd "so he can review them or there will be a bigger issue." The email attached the folder information out of Amanda System, which gives the address of the project and that permit information on it and scope of project. The Building Inspector stated that the electrical supervisor was

attempting to review the photos to determine if the work could be approved. The project was identified as the Frederick's town church.

Grievant did not respond to the Electrical Supervisor's email but instead called his Building Inspector Supervisor the next day. Grievant informed his supervisor that he did not have any pictures. The Supervisor questioned the Grievant on what he approved to pass the inspection. Grievant responded that he told the guy to take some pictures. His supervisor then contacted the electrical supervisor and explained to him that Grievant did not have any pictures. His supervisor next went to the job site, and found the project to be completely covered. His supervisor also spoke to the contractor who informed her that he waited five hours for Grievant to contact him. Grievant then told the contractor that he had two hours left and he was not coming and instructed him to take pictures.

The Electrical Supervisor notified the Superintendent of the incident. The Superintendent then notified the LRO and his supervisor by email and telephone call of a potential issue at the Frederick's town church with an inspection not being conducted and passed without an inspection taking place.

The Building Inspector checked other inspections conducted by Grievant in the area. She notified the Superintendent and LRO of two other potential issues with inspections at Kenyon College and a warehouse in Morrow County that possibly passed in the same manner. Management determined that an investigation was warranted. The Superintendent explained to the LRO that the Ohio Building Code was the controlling code. The inspectors should be regularly conducting on site inspections or video inspection. In the past, photos were accepted but now they were doing video inspection. The LRO stated that the scope of his investigation was to determine if Grievant was conducting appropriate inspections.

The LRO interviewed the Grievant on October 26, 2020 and determined that three sites were passed the inspection in the system, and Grievant had not viewed the photos. His intent to view at the next inspection. Grievant did not conduct a video inspection. After the LRO completed the AI, he received an email from the Building Inspector Supervisor notifying him that she had found another inspection that Grievant passed while not on site. LRO contacted the Superintendent to discuss the possibility of other violations and agreed not to proceed with a pre-disciplinary meeting, but instead to a run report to determine if his inspections were properly conducted. The Superintendent discover thirty-four cases that the LRO narrowed down to twenty-four cases after review.

The LRO then interviewed the Grievant a second time. Employer took exception to several project inspections that management had assigned to Grievant. Specifically the Employer noted in his post submission the following project numbers to demonstrate the misconduct of Grievant, where the Grievant never completed a building inspection:

"- CPA number 2020021036 - was supposed to have been a structural footing foundation building inspection at the Wendy's on Coshocton Ave. In the AMANDA database comments section, the Grievant stated, "ok with pics and third-party report." As testified to by Mr. Eaton, there was no third-party inspection for structural footing and foundation as claimed by the Grievant in his interview.

- CPA# 2019021342 - was supposed to have been a structural framing building inspection at the Marion Hospital. In the AMANDA database comments section, the Grievant stated "Jeff to send pics." As testified to by Mr. Cutright, the Grievant admitted in his interview that he did not receive or review any such pictures prior to passing the building inspection.

- CPA # 2020020155 - was supposed to have been a structural footing foundation building inspection at the Paulding Schools observation building. In the AMANDA database comments section, the Grievant stated "ok with pics." In his interview, the Grievant claimed he had passed the inspection off a third-party company, and admitted he was not on site

himself. The Grievant claimed there had been a third-party inspection completed for structural footing foundation on this site, and this basis for him to pass the inspection, but, according to Mr. Eaton, no third-party inspection was ever conducted on this site. June 9, 2020.

- CPA # 2020021950 - was supposed to have been a structural footing foundation at Kelley's Island. In the AMANDA database comments section, the Grievant stated "ok viewed pictures VIR wouldn't work." In his administrative interview, the Grievant claimed he was sent jobsite photos to his personal phone, but he could not provide the photos in the interview to the investigator. October 1, 2020. Don't save any thing to my personal phone.
- CPA# 2019020530 - was supposed to have been a structural framing at CCC Corporate College East. In the AMANDA database comments, the Grievant stated "OK with pics." Again, during his interview, the Grievant admitted he had passed the building inspection prior to viewing any pictures.
- CPA# 2019021278 - was supposed to have been a structural building inspection at the Sandusky County Courthouse. In the AMANDA database comments, the Grievant had stated "ok with pictures." However, during his interview the Grievant had claimed that he passed the inspection based upon a third-party inspection. However, Mr. Eaton reviewed the records and testified that there had been no third-party inspection for structural footing and foundation at this jobsite as the Grievant claimed.
- CPA# 2018022360 - was supposed to have been a structural floor slab building inspection at the Cuyahoga Community College East Education Center. In the AMANDA database comments, the Grievant stated "ok to pour with pics." In his interview, the Grievant claimed he passed this inspection based upon third-party inspectors. However, Mr. Eaton reviewed the records and testified that the structural floor slab was not in the scope of work for a the third-party inspectors on-site, that the third party inspectors conducted inspections of other limited portions of the site, that they could not inspect the structural floor slab as they were not approved to do so for this site, and therefore the floor slab was not inspected by a third party inspector as claimed by the Grievant.
- CPA# 2019020972 - was supposed to have been a sprinkler limited area inspection at the Bank of America. No comments were entered into the

AMANDA database for this inspection, but logged in at 3:14 pm as his start time onsite and logged at 3:15 pm as his time leaving the site. During his interview, the Grievant claimed that "it was probably a test hood, we don't test them, we go off the fire Marshall's findings." However, the Grievant was still responsible to verify the type of cooking appliances and the respective types of fire suppression nozzles required to pass the inspection. According to Mr. Eaton's testimony, a Fire Marshall does not test these, and the Grievant was still required to test these devices in person.

- CPA# 2017000887 - was supposed to have been a structural footing foundation at the Chagrin Falls Elementary School. At his interview, the Grievant stated that he passed the inspection based upon the third-party inspection and reports. Again, Mr. Eaton testified that he reviewed the records of the jobsite and determined that third-party inspectors did not, and cannot, inspect the structural footing foundation.
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- CPA# 2018021738 - was supposed to have been a mechanical above ceiling inspection at the Fremont storage building and offices. In the AMANDA database comments section, the Grievant stated "no paperwork." During his interview, the Grievant admitted to the investigator that he should have entered "failed" for this jobsite if he had no paperwork. The Grievant stated this was probably "my error, but I should have hit fail." The Grievant also stated "I shouldn't have passed it without paperwork, that was my bad."
- CPA# 2020021332 - was supposed to have been a structural floor slab inspection at the Irwin Prairie State Nature Preserve cold storage building. In the AMANDA database comments section, the Grievant stated, "ok pics." The Grievant told the investigator that he used third-party inspection reports to pass the inspection. However, Mr. Eaton again testified that he reviewed the records of the jobsite and determined that there was no third-party inspection for the structural floor slab.
- CPA# 2017021815 - was supposed to have been a structural final inspection at the Cleveland ODOT material storage building. No comments were entered into the AMANDA database, but the Grievant logged his start time at the jobsite as 7:30 am and entered 7:31 am for his end time at the jobsite. When questioned at his interview, the Grievant claimed he was probably onsite the day before and passed it while waiting for additional information, or stated that another inspector might have signed off on it. As testified at arbitration, upon review by Mr. Eaton, it was determined

that no third-party inspection was done on this site for structural final inspection.

- CPA# 2018000736 - was supposed to have been a structural footing building inspection at the warehouse and ASRS addition. In the AMANDA database comments section, the Grievant stated "ok pics." In his interview, the Grievant claimed he had used a third-party inspection to pass his inspection. However, as testified to by Mr. Eaton, upon review of the jobsite's records, there was no third-party inspection for structural footing.
- claimed no mileage and only one minute spent on site. When asked about this in his interview, the Grievant claimed he did not remember this inspection. However, the Grievant did state "if it was one minute and no mileage entered it would have been approved via phone call without visiting the site." In addition, the third-party inspection report indicated that no third-party inspections had been done for this site.
- CPA# 2020020983 - was supposed to have been a structural framing building inspection at the Mount Vernon Plaza Five and Below. In the AMANDA database comments section, the Grievant stated "ok w pics." The Grievant was not on site for this building inspection and told the investigatory he was probably busy that day. He stated this was a circumstance similar to the first three occurrences back at Kenyon College, the Fredericktown church, and the Morrow County warehouse where he would approve the inspection, then view the pictures the next time he was out at the jobsite. But he was not onsite to pass the inspection.
- CPA# 2020020954 - was supposed to have been a structural framing building inspection at the ODOT District two building. In the AMANDA database comments section, the Grievant stated "ok w pics." During his interview, the Grievant stated he approved the building inspection off "third-party agency." As with the other sites on which the Grievant made such a claim, Mr. Eaton review the record, and the issue remains that there was no third-party inspection for the structural framing inspection.
- CPA# 2020020837 - was supposed to have been a structural floor slab inspection at the storage park LLC. In the AMANDA database comments section, the Grievant stated "ok w pics." In his interview, the Grievant stated he approved this inspection based off of a third party report. The Grievant admitted that if no mileage was entered into the AMANDA database, and the inspection was for a short period of time he would have passed the inspection by a phone call. The Grievant stated that in several

inspection he was going off the third-party inspection and the third-party inspection reports. Again, as with several other inspections, upon review by Mr. Eaton, there was no third-party inspection for the structural floor slab on this job site.

- Four other inspections were also reviewed by Mr. Eaton during the investigation where the Grievant had entered no mileage and a short time for the inspection in the AMANDA database. This is because the Grievant had admitted that these inspections would have been approved based upon the jobsites' third-party inspection reports. However, despite the Grievant's claims, upon review by Mr. Eaton, it was determined that there was no such third-party inspections for any of the building inspections for the following jobsites: Pierce Broadband cell tower, Sandusky County Board of Developmental Disabilities, Care Staff, LLC and the Sandusky County Sheriff Office and Jail."

The LRO conducted each administrative interview via Zoom. The LRO and the union president participated via camera. The Grievant participated by telephone with audio. The LRO questioned Grievant regarding questionable inspections over this look-back period. Grievant did not view any documents or the Amanda System during these interviews. The LRO did not share his screen over the zoom platform to provide the Grievant with the opportunity to review the reference documents but rather continued to question him about his comments in the Amanda System. Grievant admitted on one occasion that he should have failed one inspection, and another he should had conducted a virtual inspection. Otherwise, Grievant asserted common practices at the workplace.

The evidence established the standard to be that the building inspectors must do onsite or video inspections of the work prior to approval. Prior to video inspections, it was a common practice to use photos but an inspector had to have pictures in hand before approval. Yet, other practices developed in the workplace. During the pandemic, there was also an exception made to video inspections when there was no cell coverage to use photos. There was no written pandemic policy.

Grievant maintained during the second investigatory interview that contractors frequently had third party inspectors on site due to the nature of the job in order to protect the interest of the finance and insurance companies. He utilized these inspectors to make his determination to pass the inspection. Grievant stated that other investigators also utilized these other third party inspectors to pass their inspections. His supervisor acknowledged that a third party inspector may be on site without being required by the Department. However, his supervisor and the Superintendent both testified that third party inspectors have to submit their credentials to the examiner for approval which would be on site. If the third party has not been approved by the examiner, there is no third party inspector to rely upon and the inspector must do the inspection.

Employer held a pre-disciplinary meeting on March 11, 2021 regarding the alleged misconduct. Employer held a supplemental pre-disciplinary hearing on May 4, 2021. On May 6, 2021, Employer terminated Grievant with violation of the Departmental Work Rules, Rule 27, as set forth in 201.0 of the Department's Policy and Procedures Manual. Rule 27 reads violations of O.R.C. 124.34: Dishonesty, Incompetence, inefficiency, insubordination, drunkenness, immoral conduct, neglect, failure of good behavior, discourteous treatment of the public, acts of misfeasance, malfeasance or nonfeasance.

On May 13, 2021, Grievant filed his Grievance No. COM-2021-01526-07. Grievant requested reinstatement with backpay, missed overtime opportunities, all benefits, including leave balances, OPERS, union dues, and for the Grievant to be made whole. Employer denied the Grievance at the Step 2 Response. The parties were unable to resolve this matter, and the parties properly advanced this grievance to arbitration.

## **POSITION OF THE PARTIES**

### **POSITION OF EMPLOYER**

Employer contends there is just cause for the termination of Grievant. Employer argues that the evidence establishes that Grievant failed to conduct the onsite inspection of the Fredericktown church, the Kenyon College, and the Morrow County warehouse job sites. Employer argues that inspectors are only permitted to pass a job site for inspection based upon photos in rare and limited circumstances. If so, they must receive the photographs in advance of the site's passing for inspection. The Employer suggests that the record supports that Grievant had not received any photographs for the Fredericktown church, the Kenyon College job site, or the warehouse in Morrow County before passing them for inspection based upon photographs. Employer states that the issue was not that the Grievant had passed building inspections by viewing pictures but that the Grievant had never even viewed the photos when he passed the inspections. Employer concludes that Grievant's misconduct violates Work Rule 27.

Employer also contends that the initial investigation uncovered a two-year history of twenty-seven other improper investigations. Employer asserts that Grievant admitted passing several building inspections without conducting the appropriate physical, onsite building inspections. Instead, on several inspections, the Grievant admitted he had passed the inspection with the intent to view pictures the next time he was on the job site. Employer also asserts that although the Grievant claimed that he passed several building inspections based upon third-party inspections and reports during the administrative interview, the evidence established that there were no third-party inspectors onsite. Employer states that the Grievant had made multiple claims that he had passed building inspections based upon third-party inspection reports when no such inspections had ever taken place. Employer maintains that these were not proper inspections under the Ohio Building Code, and his actions constitute a violation of Work Rule 27.

Employer further contends there was no disparate treatment. Employer argues that the testimony of the Superintendent stated that no information presented to him gave him the reason to believe that other inspections had similar

issues where inspectors were not completing their inspections, and further, the other inspections gave no direct accusations or evidence of inspectors fraudulently passing inspections to investigate. Further, the Director explained that two other building inspectors were investigated for similar infractions, but resigned during the investigations before the Department of Commerce could take disciplinary action against them. Employer was prepared to prosecute these employees, who had similar misconduct to Grievant.

Moreover, Employer contends the Union failed to meet its burden to establish an affirmative defense of disparate treatment. Employer opines that "It is not enough to show that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantially like those of individuals who received more moderate penalties." Employer suggests that the Union failed to provide enough details regarding the employees, job positions, length of service, and discipline record, whom they claimed had been disparately treated, to show they were in similar circumstances as the Grievant. Employer concludes that the Union failed to meet either of these standards and failed to prove disparate treatment.

In addition, Employer contends that the penalty of termination is commensurate with Grievant's misconduct. Employer argues that the Grievant's failure to perform his necessary work duties put Ohioans at grievous risk. Employer asserts that his misconduct constitutes a serious offense. The Superintendent testified to the importance of building inspections and what could happen in situations where these inspections were not taking place properly, resulting in catastrophic failure, loss of life, and property loss. Employer also reminded this Arbitrator of the Superintendent's testimony regarding how fraudulent records kept by a third-party out-of-state inspector, claiming they had been onsite when they had not been, led to the 2006 Bowling Green incident. It is the position of the Employer that termination is appropriate given these facts and circumstances.

Given the above, the Employer respectfully asks you to sustain the imposed discipline and deny the grievance in its entirety.

## **POSITION OF UNION**

Union contends that Employer failed to meet its burden of proof to establish just cause for the termination. Union points out that the evidence of record shows that third-party inspectors or photos were commonly referred to in the log and passed without violation per the pictures or third-party inspectors. Union argues that the Employer failed to conduct a thorough investigation to determine if there was a third party onsite. The Union argues that the record is void of testimony stating the Employer spoke with the general contractor or reviewed the logs and reports to confirm whether there was a third-party inspector onsite. The Union complains that the Employer had seven months to go out to any of the sites in question, review the logs or inspection reports, and/or talk to the general contractor to ascertain whether they had a third party onsite for those projects. Union opines there was no just cause to discipline.

Union contends that Employer failed to provide adequate notice to the Grievant of the Department's rules, procedures, and regulations. Union asserts that the ongoing practice of the building inspectors to request that the general contractors or a third-party inspector onsite take photos of the area to be inspected, and the building inspector would then review the photos or reports via email, or when onsite for the next inspections if they were unable to make it to that scheduled inspection. The Union points out that it was only three (3) days after the termination of Grievant on May 10, 2021, that the Employer issued a memorandum to all inspectors that the inspectors were not allowed to conduct and pass inspections only by photographs. Union also argues that management subsequently held a meeting on these inspection processes/procedures with all the inspectors. The Union further highlights the testimony of the Superintendent of Compliance that he could not recall a written policy before the May 10, 2021, Memorandum issued. The Union concludes there was no just cause to discipline due to a lack of notice of the rules and procedures.

Union contends that the number of inspections makes it impossible to do onsite inspections and complete them. Union reminds this Arbitrator that the Superintendent testified that there are approximately 30,000 inspections to complete annually. The Superintendent further explained that when

inspectors are scheduled off from work, other inspectors must temporarily cover their territory until they return to work. Union also reminds the Arbitrator that Grievant testified that the Division is currently down five (5) out of eleven (11) inspectors. Grievant explained that due to the shortage of inspectors, his territory was enlarged, and he traveled 200 to 400 miles per day for inspections. Union also asserts that management failed to address the survey polling the inspectors of the Division on inspections and provided to management on March 23, 2021. Specifically, Question #10, "Does your section have a clear written policy regarding the performance of your duties?" 63.6% responded "I don't know," and 27.3% responded "No."

Union contends that Employer failed to follow progressive discipline. Union explains that discipline should be reasonable, corrective, and commensurate with the offense. Union asserts that Grievant did not have any active discipline on his record and was not on a performance improvement plan, and because of this investigation, the Employer issued the Memorandum of May 10, 2021, for this incident providing notice to other coworkers. Yet, the Employer terminated Grievant without the opportunity to correct his behavior. Union argues that following the discussion with the LRO regarding the common practice among all of the inspectors to rely on photos to pass inspections if they were unable to make it out to the worksite, the scope of the investigation morphed from the Grievant's use of photos to focus on the use of third-party inspectors. Employer charged the Grievant with the additional violation of Work Rule 27, which is a "catch-all charge" under Ohio Revised Code 124.34, to attempt to justify the termination of Grievant. Union argues that Grievant had 23 years of service at the time of his termination. Union maintains that the penalty of termination, given these facts and circumstances, is excessive.

Union contends that Employer treated Grievant disparately. Union argues that the LRO testified that he had reviewed other inspectors' comments to see the trends. When questioned as to whether he had reviewed the database for similar comments, the LRO had responded "yes", and that he had found similar evidence but was not asked to investigate someone else. Union also argues that the LRO was questioned if he had investigated others based on the comments in the reports and responded that he had not to the

extent of Grievant. Union opines that Employer failed to discipline others and therefore Grievant should not have been disciplined.

It is the position of the Union that the grievance should be sustained in its entirety. Union requests that Grievant be returned to his position, full back pay and benefits, reimbursement of any medical or hospital expenses incurred during the period from the date of the removal to the date of reinstatement, restoration of his seniority credits, and leave balances that he had at the time of the removal and those he would have accrued since his removal, reimbursement of Union for any dues incurred during that period, and otherwise made whole.

## **DISCUSSION**

The parties have posed these questions for this Arbitrator to decide:

Was the Grievant, Anthony Wiencek, removed from his position as a Building Inspector for Just Cause? If not, what shall the remedy be?

In any arbitration proceedings, the Arbitrator is guided by the provisions of the parties collective bargaining agreement to answer these questions. Here, Article 24 of the parties' Agreement states that the standard for disciplinary action is just cause. The Just Cause Standard is a term of art which incorporates several principles of arbitral jurisprudence. An arbitrator must decide whether the Employer has met the quantum of proof necessary to establish that Grievant committed the the misconduct of dereliction of duty on which the discipline was based. If it is established, whether the penalty imposed is commensurate with the offense in consideration of the seriousness of the offense, clarity of the rules, consistency of treatment, adherence to progressive discipline procedures and the quality of Grievant's work record.

The Employer charged Grievant with violation of Rule 27, violation of O.R.C. 124.34, for alleged misconduct stemming from Grievant passing inspections without conducting onsite or virtual inspections in accordance with the Ohio Building Code provisions.

There was ample evidence introduced at hearing that Grievant passed inspections "with pics" without conducting onsite or virtual inspections. Grievant explained that the practice of requiring contractors to take pictures of the site project to be reviewed at the next inspection was common amongst the inspectors who were trying to complete a workload over an assigned territory with a staff shortage. The hearing officer correctly recommended that the Department take no disciplinary action against the Grievant related to the photos and that the Department should "reset" its expectation regarding their procedures for photos prior to enforcement of the code mandates. It is a basic arbitration principle that non-enforcement or lax enforcement of a company rule will neutralize its enforceability, unless there is advance warning that the rule will be enforced in the future. It is also noted that the Step 2 response acknowledges Employer's recommendation not to charge Grievant for the inspections where pictures were to be viewed to pass inspection.

The removal letter limits the basis of the discipline to the third-party inspections, and reads:

"Specifically, you passed numerous inspections based on third party inspections where there were no third-party inspections conducted or the third party inspections were not for the type of inspections required of and passed by you; you approved building inspections based on testing conducted by the office of the State Fire Marshal when in fact the testing conducted did not include the inspections required of and passed by you, you approved a building inspection with no paperwork."

This Arbitrator inquiry is thus limited to the passing inspection by use of third party inspectors and reports. The record is replete with incidences

that the third party inspection did not occur or the scope of the work was not within the authority of the third-party inspector on the job site to approve. More importantly, Grievant offered insufficient evidence to refute the allegations that the third party inspections did not occur or where there was a qualified third party inspector. Grievant did not dispute that the inspections were not in compliance with the code, but argued that his noncompliance was due to staff shortage, workload, and common practices within his department known to his supervisor. This Arbitrator finds that Grievant violated Work Rule 27.

This Arbitrator is persuaded that Grievant's proven conduct appropriately justifies discipline. However, the just cause standard does not stop with a finding of a violation. One of the most elementary principles of just cause standard is a fair investigation. During the administrative interviews, the investigator conducted a cold interview where Grievant was not provided the ability to review documents to have a meaningful opportunity to participate or to give an informed response. In several instances, the Grievant's responses were not to the particulars of the incident, but rather an off-the-cuff explanation of the general meaning of his notations in the Amanda System. This Arbitrator finds in several instances his comments related to the notations and not the actual projects.

Further, the Arbitrator is troubled by a performance evaluation for July 1, 2017 through June 30, 2018, which covers a portion of the look back period. The Building Inspector Supervisor testified that she had the ability to run a report on each inspector to review the inspector's work for any given period of time. The performance evaluation indicates that Grievant met expectations for all areas. In particular, his supervisor noted in the Document/Record Information Section of the evaluation that Grievant "completes his electronic job tickets each day. He keeps track of the projects in his area, he does fail to complete "all the finals" on each job, but has

improved.” In the “Inspecting” Section, his supervisor indicated that Grievant “has the skills and knowledge to be a great inspector. He has become somewhat complaisant. I am working on how to get him to engage again.” His supervisor testified that her comments also indicated that Grievant was too friendly with the contractors. In reviewing his performance, his supervisor did not find that Grievant’s performance fell below the level of expectation except for his friendly interaction with the contractors regarding compliance. Based on this performance review Grievant had reason to believe that he was meeting the exceptions in place at that time in the manner he performed his assignment at that time.

The evidence clearly establishes that the Department’s staff and Grievant were overwhelmed due to the shortage of staff, the pandemic, and the ongoing need to provide timely inspection services. As a result, certain standards of the building code appeared to have been eased in order to permit projects to move forward. The Study indicated that staff were unclear on office procedures and policies. Employer acknowledged that prior to Grievant’s termination, there were no written procedures other than the OBC itself. The Employer also took remedial measures to set clear policy on inspections following the Grievant’s termination.

Grievant’s misconduct is a serious offense. The failure to conduct inspections could result in serious injury and property damage. The Union’s assertion that the contractor can move forward if no inspection occurred pursuant to Rule 108.1 is not equivalent to the inspector’s approval of that work. Rule 108.1 does not mitigate Grievant’s responsibilities in these instances to conduct the inspections either onsite or virtually. Grievant should have rescheduled or cancelled the inspections.

According to the Employer’s policy grid, there is a range of penalties that can be assessed. The Director explained that when she was presented with the recommendations for discipline, she considered the conduct of

passing inspections without conducting a virtual or on-site inspection, the frequency of the occurrence, Grievant's tenure of 23 years, and his explanations given, and determined that termination is warranted.

Mitigating circumstances is an integral element of just cause. It requires that the penalty imposed fit the seriousness of the offense and take into consideration the totality of the circumstances. Just cause, therefore, requires that the Employer give adequate consideration to all of the relevant factors in assessing the appropriate level of penalty. A review of the Employer's actions and explanations, however, leads this Arbitrator to conclude that Employer's deliberations did not adequately consider the internal practices within this Department. The LRO testified that he saw trends in behaviors in his investigation but limited his investigation only to the Grievant. The Union introduced ample evidence regarding similar behaviors of the other inspectors including his supervisor. Even though the Supervisor clarified her response to a reliance on a qualified third-party inspector, the job ticket indicates that she approved the structural work in reliance with a third party inspector without doing a physical inspection. Her statement that the third party inspector was a qualified inspector is not persuasive when she did not have the opportunity to view the Amanda folder prior to her testimony given the testimony presented at the arbitration. Further, the supervisor is regularly performing inspections, as she must, due to the staff shortage. Said evidence is persuasive and supports mitigation. The Arbitrator thus finds the Employer did not give appropriate consideration to mitigating circumstances in the instant case.

The Discipline Policy Grid does not state that discharge is the only possible result of a violation of the listed conduct. Rather, the language states depending on the severity of the offense. The language clearly assumes the possibility of disciplinary action less severe than termination. If the standard is onsite or virtual inspection conducted prior to approval, then

the data depicted in Union Exhibit 14 suggests other practices have developed within this Department. This Arbitrator is not persuaded that just cause exists to support the termination. This Arbitrator finds that penalty of termination is excessive for the above-stated reasons, and a time-served suspension is commensurate with the offense.

**AWARD**

After careful considerations of the evidence, arguments of the Advocates, Grievant is hereby reinstated to his position as a Building Code Inspector with full seniority and benefits but no back pay. The Employer shall provide Grievant with training on all policies, procedures and the Ohio Building Code.

Dated: June 6, 2022

          /s/ *Meeta A. Bass*  
Arbitrator Meeta A. Bass  
Reynoldsburg, Ohio

**Certificate of Service**

I certify that a true and accurate copy of the foregoing Opinion and Award was served upon the following individuals via electronic mail this 6th day of June 2022:

Keith Cutright, Labor Relations Officer  
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/s/ *Meeta A. Bass* \_\_\_\_\_

Arbitrator Meeta A. Bass  
Reynoldsburg, Ohio