

**CITY OF PITTSBURGH
ETHICS HEARING BOARD**

**PERMITS LICENSING AND
INSPECTIONS DIRECTOR
MAURA KENNEDY,**

Complainant

v.

**ROBERT MARSHALL,
Respondent**

Case No. 16-C-001

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL
ORDER**

APPEARANCES:

COMPLAINANT:

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

AND NOW comes THE PUBLIC HEARING SUBCOMMITTEE OF THE CITY OF PITTSBURGH ETHICS HEARING BOARD¹ (“the Board”), having considered the Complaint, the testimony and evidence presented at the two-day Hearing held on March 9, and May 10, 2018 (“the Hearing”), conducted pursuant to Pittsburgh City Code Ordinance Title I, Article XI, Chapter 197, et seq. (the “Ethics Code”), as well as the written closing arguments submitted by both parties.

The Board is limited to reviewing the claims and evidence before it. As a neutral quasi-judicial agency, the Board cannot speculate regarding the existence of facts that are not supported by the evidence presented to it during the course of the Hearing. Accordingly, having performed its best review of the claims, evidence and arguments presented, the Board issues the following Findings of Fact, Conclusions of Law and Final Order:

I. FINDINGS OF FACT

1. The Complainant, Maura Kennedy, is employed by the City of Pittsburgh as the Director of the Department of Permits, Licensing and Inspections (“PLI”).
2. The Respondent, Robert Marshall, was employed as an electrical inspector for PLI during the relevant time period giving rise to the Complainant’s Complaint.
3. The Complainant alleged the Respondent violated two sections of the Ethics Code: §197.03(a) and §197.04(d). The Complaint, Complainant’s exhibit 1, Complainant’s written closing argument.
4. The Complaint dated November 22, 2016, alleges the Respondent:
 - a. “routed his private electrical permits, on which he was the contractor, through a specific electrical inspector, Francis Wilson, who completed the permits without inspecting them”
 - b. “repeatedly visited his private electrical work sites during work hours, in a PLI uniform, and driving a PLI vehicle”
 - c. “falsified inspection records relating to a permit that Mr. Wilson obtained privately, completing the permit without actually inspecting it. In the course of doing this [the Respondent] was dishonest, used public resources for his own personal gain, and stole time” and
 - d. “completed electrical work in the City of Pittsburgh without paying for his license or providing proof of insurance.” The Complaint, Complainant’s exhibit 1.

Respondent’s Receipt and Routing of Permits for his Private Business

The Complainant alleged the Respondent improperly obtained and routed electrical permits for his private business, on which he was the contractor, through Electrical Inspector Francis Wilson, who completed the permits without inspecting them.

¹The Public Hearing Subcommittee of the Ethics Hearing Board was comprised of those members of the Ethics Hearing Board who did not serve on the probable cause panel for this case. This Subcommittee was sequestered from the probable cause panel’s work and discussions of this case.

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5. During the Hearing, the Complainant claimed the Respondent received permits for his private business because he “misrepresented to an applications technician, who is the person in charge of issuing permits like this, that I had waived these [license and insurance] requirements for Mr. Marshall.” Hearing transcript page 34.
6. The application technician to which Complainant was referring was not identified or called by the Complainant to corroborate these allegations.
7. The Complainant did not present sufficient evidence to demonstrate the Respondent obtained permits for his private business by making misrepresentations to an application technician.
8. The Complainant testified that it was the internal policy of PLI for an inspector to notify his or her supervisor if he or she was assigned to a property that posed a conflict of interest and it was the responsibility of the supervisor to reassign the work. Hearing transcript page 41.
9. The Complainant identified the Respondent’s immediate supervisor to have been Brian Hill. Hearing transcript page 23.
10. The Complainant provided documentary evidence that Francis Wilson, the Respondent’s fellow inspector, inspected the Respondent’s private permits. Complainant’s exhibits 3-9, 15-16.
11. The documentary evidence submitted by the Complainant which show Wilson inspected the Respondent’s private permits appear to require supervisory approval for each permit inspection: the bottom of the page reads “COMPLETED AND APPROVED BY SUPERVISOR: _____.” The signature lines are blank and not signed by Hill. Complainant’s exhibits 5, 7, 9, 11 and 16.
12. Hill was not called by the Complainant to testify.
13. The Complainant testified, “Mr. Wilson said that Mr. Marshall approached him and asked him to sign off on this permit for him, as he did with all these permits.” Hearing transcript pages 49, 184-185.
14. Wilson was not called by the Complainant to corroborate that such a statement had been made.
15. The Complainant did not provide sufficient evidence to demonstrate the Respondent had any personal involvement in Wilson inspecting the Respondent’s permits.
16. The Respondent testified that Hill gave permission for Wilson to inspect the Respondent’s permits originally assigned to a different inspector. Hearing transcript pages 250-251.
17. The Respondent testified that the policy to inspect structures in an assigned region “did not apply to us, there were two inspectors for the whole city,” “Tommy stopped doing inspections,” and “my immediate supervisor gave me and Frank Wilson the green light to carry the weight for Tommy and Joe.” Hearing transcript pages 250 and 251.
18. The Complainant did not offer any evidence to rebut the Respondent’s testimony.
19. The Board finds the Respondent’s testimony to be credible.

Visiting Private Electrical Contracting Sites during Work Hours:

The Complainant alleged the Respondent repeatedly visited his private electrical work sites during work hours, in a PLI uniform, and driving a PLI vehicle.

20. The Complainant testified that inspectors are subject to rules defining work hours and break times. Hearing transcript pages 11, 12, 162 and 163.
21. Written policies setting forth the rules to which Complainant testified were not presented.

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22. The Respondent testified that he was not aware of policies and procedures to which Complainant testified regarding his lunchtime. The Respondent testified that it was his understanding that he was afforded a forty-five-minute lunch and two fifteen-minute break periods to take at his discretion (“...we never had a set lunchtime, ever. We went to lunch whenever we weren’t busy.”). Hearing transcript pages 247-249.
23. The Complainant provided evidence of gps records to demonstrate that the Respondent used his City vehicle to drive to certain locations during work hours. For example, on October 5, 2016, from 1:42-1:48 p.m., the Respondent’s vehicle was located at 529 East Ohio Street; and on October 12, 2018, from 11:51-11:59 a.m., the Respondent’s vehicle was located at 2544 Park Hill Dr. Hearing transcript pages 59-62, 108-110, 200-208, Complainant’s exhibits 14, 31 and 45.
24. The Complainant claimed that the Respondent was visiting his private job sites during these times.
25. The Complainant did not present any evidence to support this claim.
26. The Complainant did not present any testimony by the owners or occupants of the properties that the Respondent was at those locations and performing his private business during times when he should have been working for the City.
27. The Respondent denied performing private business during work hours. The Respondent testified he conducted personal errands during his lunchtime, including at locations on East Ohio Street. Hearing transcript pages 242-243.
28. The Board finds the Respondent’s testimony to be credible.

Falsifying Inspection Records:

The Complainant alleged the Respondent falsified inspection records relating to a permit that Mr. Wilson obtained privately, completing the permit without actually inspecting it. In the course of doing this [the Respondent] was dishonest, used public resources for his own personal gain, and stole time.

29. The Complainant alleged the Respondent signed off on the permit for 317 Eutaw Street as though he completed the inspection, without actually having performed an inspection. The Respondent’s co-worker, Inspector Wilson, is listed as the contractor on the permit for 317 Eutaw Street. Hearing transcript pages 54-58, 138-141, Complainant’s exhibits 10-14.
30. The Complainant testified that the procedure for documenting inspections involves updating a software program called Accela. Hearing transcript pages 21-22.
31. The Accela report for 317 Eutaw Street lists the issuance of the permit and the Respondent’s inspection as occurring on September 28, 2016. Complainant’s exhibit 12.
32. The Complainant testified the Respondent’s calendar did not reflect an appointment to inspect 317 Eutaw Street on September 28, 2016. Hearing transcript pages 57-58, Complainant’s exhibit 13.
33. The Respondent testified he performed the inspection at 317 Eutaw Street, though it was not reflected on his schedule. The Respondent testified the inspection for 317 Eutaw Street was not reflected on his schedule due to a technical or clerical error. Hearing transcript 253-259 (“these iPads and Toughpads, they crash everything, they don’t – I’m not a secretary, I’m not an administrative person...”), Complainant’s exhibits 10 and 13.

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34. The Respondent testified he signed off on the permit for 317 Eutaw Street on September 28, 2016. Hearing transcript page 255.
35. The Respondent testified he regularly inspected work that had not yet been assigned a permit “because the permit tech office is two weeks behind” on their work processing applications. Hearing transcript page 258.
36. The owners or other occupants of 317 Eutaw Street were not called by the Complainant to testify.
37. The Complainant did not present any evidence, argument or analysis to demonstrate how the Respondent’s alleged dishonesty, use of public resources for personal gain or stolen time relates to a violation(s) of the Ethics Code.
38. The Board found the Respondent’s testimony to be credible.

Completing Electrical Work without a License or Insurance

The Complainant alleged the Respondent completed electrical work in the City of Pittsburgh without paying for his license or providing proof of insurance.

39. The Respondent was issued a “dummy license” in order to complete his job duties as an inspector. Hearing transcript page 26.
40. The Respondent was notified that his license to provide electrical work was deficient due to unpaid insurance. Hearing transcript page 172.
41. The Respondent paid the balance and, as the Complainant verified, his “license as a contractor was [then] in good standing.” Hearing transcript page 172.
42. The Complainant did not present any argument or analysis to explain how the Respondent’s remedied lapse in insurance to conduct his private business relates to a violation(s) of the Ethics Code.

II. CONCLUSIONS OF LAW

1. Under the Ethics Code, “hearings shall be conducted in accordance with all of the due process rights, privileges and responsibilities of a party or witness appearing before an administrative agency of this Commonwealth.” Ethics Code §197.12(c)(1).
2. The Board follows administrative rules of evidence, which allow for “liberal introduction of testimony and documentary evidence.” Ethics Code §197.12(c)(2)(a).
3. Hearsay is admissible at a Board hearing when it is corroborated or otherwise shows indicia of reliability. 2 Pa. Stat. and Cons. Stat. Ann. § 554; *Ray v. Civil Serv. Comm'n of Borough of Darby*, 131 A.3d 1012, 1022 (Pa. Commw. Ct.) *reargument denied* (Feb. 22, 2016), *appeal denied*, 636 Pa. 681, 145 A.3d 729 (2016), *citing Unemployment Comp. Bd. of Review v. Ceja*, 493 Pa. 588, 427 A.2d 631, 640 (1981).
4. Notwithstanding the admissibility of hearsay evidence, a party must be afforded the due process of a reasonable opportunity to challenge, through confrontation and cross-examination, the reliability of adverse evidence. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Hatalski v. Com., Dep't of Transp., Bureau of Driver Licensing*, 666 A.2d 386, 390 (Pa. Commw. Ct. 1995); *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. 139 Horseshoe Corp.*, 157 Pa.Cmwlth. 283, 629 A.2d 290 (1993).

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5. The Complainant alleges the Respondent violated two sections of the Ethics Code: §197.03(a), and §197.04(d).
6. Ethics Code §197.03(a) states “[n]o public official or public employee shall exert influence with respect to property or a business with which he or his or her direct family is associated.” Ethics Code §197.03(a).
7. Influence is defined at Ethics Code §197.02 (f):

“INFLUENCE. The proposal of, the voting on or the participation in any legislative discussion of or attempt to influence the course of any proposed legislation of the city; the participation in the selection, award or administration, other than of a ministerial nature, of any contract, benefit or award to which the City is a party or which is supported by any public funds administered by the city; participation in any matter involving, other than on a ministerial basis, the inspection, regulation, licensing or auditing of an entity by or as required by the city.” Ethics Code §197.02 (f).
8. Ethics Code §197.04(d). states “[n]o public official or City employee shall use or allow to be used any City facilities, property, staff or information obtained in the course of his or her employment for personal use other than would be generally available to the public at large.” Ethics Code §197.04(d).
9. The burden of proof in an administrative tribunal in the Commonwealth of Pennsylvania is met when a Complainant provides substantial and legally credible evidence of the violation(s). “Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established.” *Pennsylvania Labor Relations Bd. v. Kaufmann Dep’t Stores*, 345 Pa. 398, 400, 29 A.2d 90, 92 (1942) quoting *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, (1939).
10. Here, the Board finds the Complainant did not meet her burden of proof to demonstrate a violation of the Ethics Code with substantial and legally credible evidence.
11. The Board did not find the Complainant’s evidence to be credible.
12. A finding for the Complainant would require the Board to speculate as to the weight and credibility of testimonial and documentary evidence not presented, including but not limited to written policies and procedures, and testimony by Hill, Wilson and the application technician.
13. As detailed in the Findings of Fact above, the Complainant provided hearsay testimony without corroborating evidence.
14. The Board considers that the testimony of Supervisor Brian Hill, Inspector Francis Wilson, the application technician, and the relevant permit holders would have been instructive.
15. The Board is unaware of any reason why Hill, Wilson and others were not present and available for questioning at the Hearing.
16. Based on the particular circumstances in this case, the Board finds the hearsay testimony presented to be unreliable.
17. Further, the Respondent was not afforded an opportunity to cross-examine or confront alleged adverse evidence from Hill, Wilson or the application technician.
18. The Board deems the Respondent’s explanations to be credible particularly in light of the Complainant’s failure to introduce any evidence challenging the truthfulness of the Respondent’s explanation as to what happened.

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19. The Board finds the Complainant did not submit sufficient evidence to meet her burden of proof of demonstrating that the Respondent exerted influence or used any City facilities, property, staff or information in the course of obtaining permits.
20. The Board finds the Complainant did not submit sufficient evidence to meet her burden of proof of demonstrating that the Respondent exerted influence or used any City facilities, property, staff or information to have his private electrical permits assigned to or inspected by Francis Wilson.
21. The Board finds the Complainant did not submit sufficient evidence to meet her burden of proof of demonstrating that Francis Wilson did not actually inspect Respondent's electrical work on the permits Francis Wilson completed.
22. The Board finds the Complainant did not submit sufficient evidence to meet her burden of proof of demonstrating that Respondent repeatedly visited his private electrical work sites during work hours. The Complainant did not submit any evidence to demonstrate what the Respondent was doing when gps readings indicated that he was in the vicinity of a site where he was performing private electrical work. The Board finds the Respondent's explanation to be credible.
23. The Board finds the Complaint did not submit sufficient evidence to meet her burden of proof of demonstrating that the Respondent exerted influence or used any City facilities, property, staff or information when he allegedly falsified inspection records.
24. The Board finds the Complaint did not submit sufficient evidence to meet her burden of proof of demonstrating that the Respondent exerted influence, illicitly used any City facilities, property, staff or information, or otherwise violated the Ethics Act in regard to the allegations of dishonesty, use of public resources for personal gain, or stolen time.
25. The Board finds the Complainant did not submit sufficient evidence to meet her burden of demonstrating that the Respondent exerted influence or used any City facilities, property, staff or information when he allegedly completed electrical work in the City of Pittsburgh without paying for his license or providing proof of insurance

III. FINAL ORDER

Following consideration by the Board of the Complaint, the sworn testimony heard and evidence admitted during the Hearings convened on March 9, and May 10, 2018, as well as the closing arguments, the Board deliberated on June 8, August 2 and 15, 2018, to examine whether the Respondent had violated §197.03(a) or §197.04(d) of the Ethics Code. The Board unanimously finds in favor of the Respondent and no violations of the Ethics Code have been established.

Respectfully submitted,

CITY OF PITTSBURGH
ETHICS HEARING BOARD

9/6/18
Dated _____


By: Jeanette H. Ho, Chair