

AMERICAN ARBITRATION ASSOCIATION

BEFORE ARBITRATOR MARY ELLEN SHEA

In the matter of the arbitration between:

IAFF, LOCAL 1693

-and-

CITY OF HOLYOKE

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01-17-0006-9591

INTRODUCTION

A demand for arbitration was filed by IAFF Local 1693 (Union), pursuant to the parties' collective bargaining agreement and in accordance with the rules of the American Arbitration Association. The parties jointly selected Mary Ellen Shea to act as single neutral arbitrator in the matter. Hearings were conducted on April 3, May 25, and June 1, 2018 at Holyoke City Hall.

The City of Holyoke (City) was represented by Attorney Paul Payer. Appearing for the City were Chief John Pond; Deputy Chief Robert Shaw; Captain Mark Bresnahan; and Fire Commissioner Jon Lumbra.

IAFF Local 1693 was represented by Attorney Terence Coles. Appearing for the Union were the Grievant, Chad Cunningham; and Captain Christopher Butler.

The parties submitted post-hearing briefs at which time the record was closed.

THE ISSUES

The parties were unable to agree on a statement of issues to be decided by the arbitrator because they did not agree whether "just cause" applies. The City proposed:

Whether the Board of Fire Commissioners had authority to administer its discipline under the terms of the parties' collective bargaining agreement
If not, what shall be the disposition?

The Union proposed:

Was the five-day suspension, demotion, and/or re-training of the Grievant without just cause?

If so, what shall be the remedy?

The City argues that the parties' collective bargaining agreement does not provide for a just cause standard and that the arbitrator does not have authority to impose a standard where the parties have not negotiated one. The City of Holyoke made the same argument in a 2013 discipline grievance decided by Arbitrator Bruce Fraser. The arbitrator wrote:

The City raises the issue of what standard should be applied to this action, arguing that since the parties' Agreement does not specify a standard, the arbitrator should not impose a just cause standard, which the parties did not negotiate. I note that the City did not suggest any other standard. In my view, the Union provided a strong argument that in the absence of a standard, the standard of just cause is implied, and should be used. I shall do so.

Union Exhibit #1

Since the 2013 decision, there is no evidence that the contract language Arbitrator Fraser relied upon has been changed in any way. The City may disagree with the *Fraser* decision, but there is no new evidence to consider and the City offered no new argument to provide a basis for reconsidering a contractual dispute that was settled in final and binding arbitration. For these reasons, the statement of the issues shall be:

Did the City and/or the Board of Fire Commissioners have just cause to suspend, demote, and/or order Chad Cunningham to undergo re-training?¹

If not, what shall be the remedy?

SUSTAINED OBJECTION

The Union objected when the City announced it would call D.C. David O'Connor as a witness during the second day of hearing (May 25). The Union objected because D.C. O'Connor had not been interviewed and did not provide a statement during the investigation or the disciplinary process. The Union's objection was sustained because an Employer has the burden

¹ The Recognition clause identifies both the City and Board.

of proving that it had sufficient evidence at the time of the disciplinary action. Evidence obtained after the making a decision to impose discipline is generally inadmissible (there are exceptions but they do not apply here). The City did not rely on evidence from or testimony by D.C. O'Connor when it decided to discipline Mr. Cunningham and the City may not buttress its case now by introducing evidence obtained well after the August 2017 decision to discipline.

RELEVANT CONTRACT PROVISIONS

The parties' July 1, 2013 through June 30, 2016 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 35 NON-DISCRIMINATION

Section 1 (b)

The Employer and the Union agree not to discriminate against any employee based on his/her status with respect to Union membership or for exercising any right under this Agreement or applicable state law.

RULES AND REGULATIONS HOLYOKE FIRE DEPARTMENT

DUTIES

...

Section 22: ...The captain of each company shall make reports of all services rendered by his company.... Said report shall be made to the chief within 24 hours from the time such services are performed, and shall be entered upon the records of the department. He shall report in writing any meritorious act by any member of his company, with particulars as to date, location, risk involved and persons concerned, which reports shall also be entered on the department records.

Section 31: Hose on apparatus will be changed every three months, or after alarms of fire where hose has been used. Company officers shall be held responsible for the proper care of all hose. No person shall drive any vehicle upon or over any hose pipe in use at any fire and placed in any street, except by the direction or with the permission of the chief or of some officer of the fire department.

GENERAL PROVISIONS

Section 159: Too much care cannot be taken of the nozzles, as a slight dent or rough surface in the nozzle at the discharge opening will prevent the delivery of a solid stream. Members are cautioned that in handling hose couplings, pipes and nozzles the utmost care must be observed, as a slight dent in either renders them valueless for the purpose intended. Nozzles and hoses

should be inspected after every use for damage. Fire Department apparatus, tools and equipment are for the purpose of saving life and extinguishing the fire, handle all such equipment with care and take the best care possible of such equipment.

...

EXHIBITS

For reference purposes, the following are excerpts of relevant exhibits.

Disciplinary Notice

August 23, 2017

Dear Mr. Cunningham:

On August 22, 2017, the Board of Fire Commissioners convened to conduct a hearing regarding your actions on January 1, 2017 at the 106 North East St. fire and violation of several Holyoke Fire Department Rules and Regulations. Please accept this letter as formal documentation of the Board's findings and decision.

FINDINGS OF FACTS

....

1. On January 1, 2017, you were assigned as the Lieutenant of Truck II.
2. At approximately 8:53 a.m., Truck II was dispatched to 106 North East Street for a structure fire. You as the Fire Lieutenant were ordered to respond to the East Dwight Street side of the building for aerial rescue operations.
3. Truck II arrived on scene at approximately 8:56 a.m., at which time Firefighter Stortz attempted to set the truck up for aerial rescue operations.
4. Firefighter Stortz was unable to operate the aerial ladder to perform aerial rescue operations.
5. You did not attempt to assist Firefighter Stortz in troubleshooting the issue with the aerial ladder.
6. You did not use ground ladders in place of the aerial to perform rescue operations.
7. At approximately 9:29 a.m., you allowed Firefighter Stortz to drive Truck II in reverse with large diameter hose still attached.
8. Sometime between 9:29 a.m. and 9:52 a.m. you received an order from Deputy Chief Przekopowski to "breakdown and move Truck II out of the collapse zone."
9. After receiving the order from Deputy Chief Przekopowski and at approximately 9:52 a.m., you allowed Firefighter Stortz to drive Truck II in reverse with large diameter hose still attached for a second time.
10. The Company Fire Officer Report you submitted on or about [January 1, 2017] directly conflicts with your actions on the day of the fire. Said report also conflicts with the written statements both you and Firefighter Stortz submitted to Captain Bresnahan.
11. Your personnel file indicates you have been employed with the Department as a firefighter for approximately ten (10) years, of those years two (2) have been in the capacity as a Lieutenant.

CONCLUSION

In viewing the totality of the evidence, we find by a preponderance of the evidence that on January 1, 2017 you failed to properly oversee your company and exhibited a lack of leadership. You also failed to obey a clear direct order from the Deputy Chief which put not only the safety

of others on the fire ground at risk but also risk damage to Truck II. Finally the Fire Company Officer Report you submitted regarding the January 1, 2017 fire was in direct conflict with both video evidence of your actions that day as well as the written summary you submitted to Captain Bresnahan. Your unacceptable judgment and unacceptable performance clearly show your inability to perform the duties of a Lieutenant.

...

After careful consideration, the Board of Fire Commissioners determined by a unanimous vote that you shall be suspended without pay for five days effective immediately beginning with the August 22, 2017 night tour. The remaining four days of suspension shall be the August 24, 2017 day/night tours and August 30, 2017 day/night tours.

You are hereby demoted to the rank of firefighter and must participate in the competitive promotional exam process and also retake the online Fire Officer I training offered by the Massachusetts Fire Academy to be considered for any future promotions....

Joint Exhibit #3

Investigative Report

May 12, 2017

By Captain Mark Bresnahan

To: Christopher Hopewell, Chairman of the Board

In response to a recent request by the Board of Fire Commissioners, I am writing this letter to provide you with information arising from my investigation of the 106 North East Street fire on January 1, 2017.

After reviewing statements from each member of Truck II, watching videos and reading the fire reports from that day, I reached a determination. Please note the written statements do not match what is found in either the video recordings or the submitted fire reports.

In the fire report it was stated by Lieutenant Cunningham that he was ordered to find a water supply for Engine 1 however; according to the video he got out of the apparatus, proceeded to walk to the back of Truck 2 to get into the bucket and assist in rescues. FF Scalia stated that the first order he received was to secure a water supply for Engine 1. FF Stortz attempted to set up Truck 2 for aerial operations, which failed due to admitted operator error in not extending an outrigger out fully which disallowed Truck 2 to be utilized in the rescue operations.

I found the safety features on the Truck were working properly because the aerial would not leave the bed, as it is not supposed to do, if the outriggers are not set up properly. As for the fire on Truck 2 the emergency hydraulic pump was turned on at some point while setting up the Truck, this pump is to be used for very short periods of time and so leaving it on causes the pump motor to overheat and caused a fire making that the only mechanical issue that occurred during this fire in relation to Truck 2.

In my investigation I spoke to the head of the vehicle repair division at the Department of Public Works and reviewed all maintenance reports going back six months prior to this event. My findings are there were no major issues with this piece of apparatus.

The Truck was not broken just simply set up incorrectly due to operator error and lack of training. Next, ladders should have been used in place of the aerial when the aerial became unusable; windows should have been checked for non-visible victims; all of which are standing orders where experience in command presence should have prevailed however; in this case failed.

Truck 2 was damaged during the fire due to again operator error and subsequently repaired thusly returned to service on 4th of January 2017. I found no documentation supporting that the apparatus was tested for use by the Captain of the truck prior to this fire at 106 North East Street on January 1, 2017. Additionally, I could not find any supporting documentation of the use of the aerial for training purposes until the 19th of January 2017.

In a non-formal discussion with Lieutenant Cunningham and DC Fortin a few days after the fire Lt. Cunningham did admit that he and his crew needed more training as a crew and there was ample time given to get this done before and after the fire.

City Exhibit #1

Fire Report Truck II

January 1, 2017

By Chad Cunningham

(submitted on pre-printed departmental Form No 3)

Sir: In compliance with the rules and regulations of the Fire Department, I respectfully submit the following report of the operations of this Company at the fire at 141 East Dwight Street from Box No. Tel/911 on the first day of January 2017.

First: The alarm was received at 8:53 AM

Second: there was no delay in reaching the place of the fire

Third: Ventilated buildings by: Fire self ventilated

Fourth: Number of feet of ladders used: no ladders, aerial ops only

Fifth: Company was on duty at the fire 4 hours 21 minutes

Sixth: Company was absent from quarters 4 hours 21 minutes

Seventh: Distance traveled 2.1 miles.

REMARKS

T II was staged at headquarters performing monthly CO calibration at time of alarm. T II arrived on scene at 141 E. Dwight St. via North Bridge St. T II was ordered to find a water supply for E1 which was on N. East St. A side. T II secured a hydrant with LD4 on North Bridge St. for E1.

T II was then ordered to perform a search of the upper divisions entering on the D side. T II was then ordered to deploy the aerial for fire suppression. T II operated it until a mechanical failure.

T II was taken out of service and removed from scene. FF J Scalia received [redacted] was examined by Alert ALS and returned to duty.

Lieutenant Chad Cunningham, FF Stortz, FF Scalia (from E3)

Union Exhibit #12

Written Statement to Investigator

April 18, 2017

By Chad Cunningham

The following account is made in response to Capt. Mark Bresnahan's April 18, 2017 letter requesting, per order of the Holyoke Board of Fire Commissioners, a detailed account of my "duties, actions and any issues that arose regarding incident #2017-3 which occurred on January 1, 2017."

Please note that the Holyoke Firefighters Association, Local 1693, has repeatedly made an information request to Chief Pond and the City of Holyoke for a copy of the audio and video recordings from the aforementioned incident. To date, Chief Pond and the City have unlawfully

failed to respond to that request and the Union has filed an unfair labor practice charge concerning this unlawful conduct. My account is limited by the City's failure to produce these recordings.

Truck 2 was at headquarters performing the required monthly service to the CO meter. I had gone upstairs to wish ARO Dziok a Happy New Year. While in the alarm room a call was received by ARO Dziok for smoke showing from a building. Immediately after dispatching the call a call was received by HPD confirming smoke. I left the alarm room and proceeded to gather my crew telling them it was confirmed smoke and we were going to make our way in that direction, in service, in anticipation of being needed on scene. While driving in that direction we were dispatched to the scene and responded in an appropriate manner.

While responding we were ordered to approach up East Dwight from Winter St. Upon our arrival Truck 2 was hindered by a police cruiser blocking access to East Dwight with no officers present. The cruiser ended up being moved by a member of Engine 3 crew. I believe this crew member was Lieutenant Pinnoneault who arrived just prior to Truck 2.

Once in position I ordered driver/operator FF Stortz to get the truck "set up". I exited the vehicle, secured my pack, grabbed my halligan, and proceeded to the back of the truck where I then entered the bucket. My jump seat man, FF Scalia, stayed back to place the plate down for the outrigger and then reported to me at the rear of the truck.

The alarm on the truck was still sounding, meaning the hydraulics were not set to operate. Despite several attempts by FF Stortz, the aerial was still not operating. I then exited the bucket. I observed DC O'Connor at the front of Truck 2 and I reported directly to him that the truck was not operating properly. DC O'Connor then ordered me to get Engine 1 a water supply. I had FF Scalia come with me and told FF Stortz to figure out why the aerial was not operating.

FF Scalia and I back dragged several hundred feet of 5" LDH from Engine 1 and Truck 2 and secured a water supply from the hydrant located on Winter Street across from East Dwight Street. We were assisted by retired Capt. Paul Gubala and retired FF Ron Deroy who had showed up at the scene. FF Stortz, at some point, also assisted.

DC O'Connor ordered Truck 2 to gain access to the fenced in area of Gene's Ford and Chevrolet garage in order to deploy the blitz gun into that area for suppression. This was accomplished using the cut off grinder as the lock was too tight to the gate for the cutters to get a "bite" on the lock shank. Upon completion of this it was learned that Captain Rex had taken the blitz and placed it elsewhere.

DC O'Connor then order Truck 2 to assist Engine 3 with getting a line into the building off Truck 2. Truck 2 added a doughnut roll to the line while Engine 3 was advancing into the building.

DC O'Connor then ordered Truck 22 enter the building and meet up with Truck 1 to assist in completion of a primary search. Truck 2 met up with Truck 1 in the stairwell. Truck 1 stated that they had completed the primary search and were exiting the building.

At this time FF Stortz had informed me that the truck was operational. I informed DC O'Connor of this. DC O'Connor ordered us to go up and deploy the water guns. This was performed with South Hadley Engine 1 supplying water to Truck 2. Initial water flow was poor, but South Hadley eventually was able to supply an adequate water flow.

Approximately 40 minutes or so of operating a water tower, Safety Officer DC Przepowski ordered Truck 2 to break down and back up out of a potential collapse zone. This was done and a water tower was resumed.

After a lengthy time performing a water tower, I was notified by FF Stortz that smoke was coming from the panel on Truck 2. The Deputy was notified and we were ordered to come down. At this time it was unknown why or where the "smoke" was coming from. While looking at the truck panel on the ground FF Ray Ortiz stated that Truck 2 did that from time to time and it was just steam from water landing on hot mechanical parts. This was discussed with DC Shaw and it was decided to attempt to go back up again. Just as we were elevating FF Stortz reported dripping flames showing under the Truck. FF Stortz extinguished whatever was burning. DC Shaw was informed and it was decided to take Truck 2 out of service. Truck 2 was moved out of position and replaced with Chicopee FD truck. FF Stortz was told to stay with the truck. Myself and FF Scalia were ordered to the DFS Rehab Truck.

After leaving the rehab truck I assisted in moving hose out of the way so vehicles could be towed from the scene.

After some time of defensive operations all water flow was shut down in order to observe the building. At this time Captain Rex and I were ordered to enter the A-side of the building in an effort to see how far we can get inside and to possibly find victims. We searched all accessible areas with no signs of victims. Upon exiting, we secured and removed what we could of the lines and nozzles that had been brought into the building.

At some point DPW arrived on scene and they, with FF Stortz, took Truck 2 to the DPW. I am unsure of the exact timing of this.

Truck 2 assisted with picking of hose and equipment until we were relieved by Truck 3 crew called in for coverage. Once relieved, we reported to headquarters and were then told to return to Station 3 with Truck 3 in service.

This is what I recall of this day. All of the actions performed by Truck 2 consisting of myself and crew were direct orders from DC O'Connor, DC Shaw, and Safety Officer DC Przekopowski.

City Exhibit #3

Fire Report: C Group

January 1, 2017

Report Completed by: FF Philip Kraus, 1/10/2017

Report Reviewed by: O'Connor, David M. 1/15/2017

Total Fatalities (civilian) 3

Total Fire Service Injuries 2

Total # of apparatus 7
Total # of personnel 20

NARRATIVE

Engine 1 arrived in front of Truck 1 and turned on to the N. East Street and made entry to the third floor and was forced to pull out when they ran out of water. Engine 5 threw a ground ladder. When Engine 5 crew was extending the latter, FF Makowsky injured [redacted]. FF Makowsky sought treatment then manned E3 pump panel.

Engine 3 provided exposure coverage from the rear.

Truck 2 provided a hand line initially for search and rescue with Truck 1 and Engine 3 crew. They began to set up their tower and had mechanical issues. Engine 6 used a hand line from Engine 1 to aide Engine 1 inside.

Engine 5 and Engine 6 established a water supply for Engine 1, Truck 1 and Engine 3.

Engine 5 was flowing water from the E. Dwight/N. East street corner.

South Hadley Pumper provided exposure coverage from the rear.

Chicopee Ladder replaced Truck II to flow water from the aerial master stream on E. Dwight Street. Easthampton's Tower was used to gain access to the higher floors to search through the bricks and debris in a recovery effort.

Union Exhibit #7

Fire Report: Engine Company 1

January 1, 2017

by James Cadagan, Captain

(submitted as a word document with a format similar to departmental Form No. 1)

Sir: In compliance with the provisions of Section 34, and Rules and Regulations of the Fire Department, I respectfully submit the following report of the operations of this Company at the fire at 106 North East St. on the 1st day of January 1, 2017.

Alarm was received at 0853 via tel

Delay in leaving quarters - none

Company was first to arrive.

Reported to fire, and received orders to advance a line.

Remarks

E-1 arrived on scene and took the A side of the building. There was fire coming out of the fourth and fifth floor apartments. We advanced a hotline into the building and encountered fire on the third floor left. We initially used our tank water but when that ran out we had to wait to continue the attack until a water source was secured. We fought the fire and tried to advance to the fourth floor. The volume and intensity of the fire made it impossible to advance above the third floor. Command called all units out of the building and a defensive attack was initiated. E-1 protected the exposure on the B side of the building and fed T-1 water. We also deployed the blitz line on the A. side of the fire building.

Union Exhibit #6

Fire Report: Engine Company 5

January 1, 2017

by Lieutenant Stefan Matusko

(submitted on pre-printed departmental Form No. 2)

Sir: In compliance with the provisions of Section 34, Rules and regulations of the Fire

Department, I respectfully submit the following report of the operations of this Company at the fire at number 106 North East St. on the first day of January 2017.

First: The first alarm was received at 0853 AM from 911.

Second: There was no delay in leaving quarters and reaching fire

Third: The hydrant used was located at Center & E. Dwight, West St and East Dwight and was found to be in good condition.

Fourth: Reported to D.C. O'Connor and received orders to get ground ladders for rescues.

Union Exhibit #8

Fire Report: Engine Company 6,

January 1, 2017

by Kevin Smith AOG

(submitted as word document with format similar to departmental Form No.2)

Sir: In compliance with the provisions of Section 34, Rules and regulations of the Fire Department, I respectfully submit the following report of the operations of this Company at the fire at number 106 N East St. on the 1st day of January 2017.

Alarm was received at 0853 via TEL/911

Delay in leaving quarters: N/A

Company was fourth to arrive

Reported to D.C. O'Connor and received orders to take a hotline in and back up EN 1 crew

REMARKS

Engine 6 responded to 106 N. East for report of structure fire. Upon arrival Engine 6 crew was ordered by command to take a second line off Engine 1 and back up Engine 1 crew. Engine 6 crew advanced 1.75 line to the third floor alpha side of the building. Encountered heavy smoke and fire conditions. Short delay getting line charged due to delay in securing water supply for Engine 1. Engine 6 and Engine 1 crew attack the fire from third floor landing and hall but were unable to advance to fourth floor due to heavy fire conditions. Engine 6 completed a rapid search of third floor before being evacuated due to deteriorating conditions. Engine 6 crew exited building. Started defensive attack. Initial hydrant on Center and E. Dwight was not providing adequate water supply. Engine 6 abandoned hydrant and laid 300 ft of 5 in from hydrant on West and E Dwight into Engine 5 to reestablish adequate water supply.

Union Exhibit #9

Fire Report: Truck Company I

January 1, 2017

By FF P. Brian Kraus AOG

(submitted on pre-printed departmental Form No. 2)

Sir: In compliance with the provisions of Section 34, Rules and regulations of the Fire Department, I respectfully submit the following report of the operations of this Company at the fire at number 106 N East St. on the 1st day of January 2017.

First: The alarm was received at 0853 by Tel.

Second: There was no delay in reaching the place of the fire.

Third: Ventilated building by hydraulic.

Fourth: Number of feet of ladder used 450.

Fifth: Company was on duty at the fire 9 hours 4 minutes.

Sixth: Company was absent from quarters 9 hours 9 minutes.

Seventh: Distance travelled 1.2 miles.

REMARKS:

Truck1 responded to 106 N. East St. Truck 1 arrived on scene to find heavy smoke and fire from the third, fourth and fifth floors and residents hanging out of the windows on the third and fourth floors of the E. Dwight St. side and the third floor of the N. East St. side. We positioned the ladder truck so we had room to make both sides and ahead of the wires for clearance. We first brought the majority (4 people) down (from E. Dwight side) then went to the N. East side and brought down one person. I had a face-to-face with the Deputy for next orders which were to search all E. Dwight apartments found no one there. Our next assignment was to apply water from the rear of the building. Truck 1 crew made no other entry to the fire. FF Spafford applied water with the aerial master stream and FF Deroy applied from the rear with a 2 1/2 solid hose. Truck 3 came to relieve Truck 1 and continued applying water w/ aerial.

The following men left quarters....

FF Brian Kraus, AOG, FF Tony Deroy, FF Daniel Stafford

After fire inventory: Everything was inventoried after the fire. No items are found missing. The light on the ladder is broken and in need of repair.

Union Exhibit #10

Fire Report: Engine Company 3

January 1, 2017

By Lieutenant Alan Pinsonneault

(submitted on pre-printed departmental Form No. 2)

Sir: In compliance with the provisions of Section 34, Rules and regulations of the Fire Department, I respectfully submit the following report of the operations of this Company at the fire at number 106 North East St. on the 1 day of January 2017.

First: The first alarm was received at 8:53 AM from 911

Second: There was no delay in leaving quarters

Third: The hydrant years was located corner on Mosher and N. Bridge St.

Fourth: Reported to C-21 and received orders to supply TII located on E. Dwight St.

...

Union Exhibit #11

BACKGROUND

Chad Cunningham has worked for the Holyoke Fire Department for over ten years. He began as a Firefighter and was promoted to Lieutenant in October 2007. Mr. Cunningham has also held a number of positions in the Union. He served on the Executive Board for four years, was the Union Vice-President for four years, and was elected Union President in January, 2016.

Mr. Cunningham was the Union President when he was suspended, demoted, and ordered to undergo re-training because of his performance on January 1, 2017.

On the morning of New Year's Day in 2017, the Department fought a fire that resulted in the death of three residents, the displacement of 49 residents, and the destruction of a large apartment building. Initially, Ladder Truck I, Engine 1, and Engine 3 were dispatched to the scene (OPS audio at 085430). Three minutes later, the Commanding Officer on scene, D.C. David O'Connor, radioed an urgent message to send "all companies, not just one." The total response included two ladder trucks and four engines from Holyoke in addition to mutual aid from South Holyoke, Chicopee, and Easthampton (C Group Report, Union Exhibit #7).

At the time of the New Year's Day fire, Captain Christopher Butler was the commanding officer for the Truck II crew, which included then-Lieutenant Chad Cunningham, Firefighter J. Ramero, and Firefighter Christopher Stortz (Union Exhibits #12, #15, and #23). On January 1, 2017, however, neither Captain Butler nor Firefighter Ramero was on duty. Firefighter John Scalia, usually assigned to Engine 3, was temporarily assigned to Truck II and, in the absence of a higher-ranked official, then-Lieutenant Cunningham acted as commanding officer (Joint Exhibit #2, Sections 20 and 25).

Although Truck II is normally housed at Station 3, the truck and the crew were at headquarters early on New Year's Day, conducting a mandatory, monthly calibration of the carbon dioxide meter. Mr. Cunningham was in the dispatch area and heard the first 911 calls as they came in.

Recordings of calls to the Fire Department as well as radio transmissions between/among Fire and Police personnel were submitted into evidence (City Exhibit #9). Video recordings of the incident were also submitted into evidence but it should be noted that the internal clocks of

the various systems were not synchronized. This means that an audio recording (time stamped “8:50 a.m.”, for example) does not correspond to video images with the same time stamp. That said, the elapsed time between any two events in a single audio or video recording - are assumed to be accurate. Some of the initial calls about the fire follow:

8:49:56 A civilian calls to report smoke coming from building at E. Dwight and N. East
8:50:29 Police Department alerts FD of a report of smoke from same location
8:51:36 Frantic 911 call (multiple voices screaming for help)
8:51:55 A civilian calls to report people are trapped in the building

The dispatcher ordered Engine 1, Engine 3 and Truck 1 to respond to the scene and each truck can be heard acknowledging the order with, “Responding” (8:54:30 - 8:55:44, OPS-1 audio, City Exhibit #9). Mr. Cunningham overheard a call from the Police Department (at 8:52:01) reporting that an officer visually confirmed this was an “active fire with people trapped inside”. Mr. Cunningham immediately ordered the Truck II crew to leave and head to the scene. Mr. Cunningham testified that he assumed Truck II would be dispatched and decided not to wait for the order.

At 9:57:37, D.C. O’Connor can be heard describing the size of the fire and urgently ordering, “All groups, not just one! All groups!” (OPS-1 audio). While on route, Truck II also received a specific order to respond to the East Dwight Street side of the building:

8:59:38 Truck II is directed to go to E. Dwight Street and to approach via Winter Street
9:00:31 [Truck II responds] “Received. In route. Received. In route”

Engine 1 was the first apparatus to arrive on scene (Union Exhibit #6) moments before Truck 1 arrived at 8:53 a.m. (video evidence, City Exhibit #9). Engine 3 was “the second pump on the scene (Union Exhibit #11); and Engine 6 ”was fourth to arrive” (Union Exhibit #9). Truck II arrived at 8:56:12 a.m. (video evidence, City Exhibit #9). It is not clear when Engine 5 arrived but video evidence establishes that Engine 3 was on scene before 8:59 a.m..

When Truck I arrived at 8:53, the crew first worked to deploy the aerial ladder. Then the fully deployed aerial ladder can be seen at 8:55 as it approaches a third floor window on the E. Dwight Street side of the building. In the background, Truck II can be seen turning onto E. Dwight Street and coming to a stop at 8:56:13. Mr. Cunningham can be seen jumping out before the truck comes to a full stop.

The Truck II crew immediately got into position (Cunningham in the bucket) so the Operator (Firefighter Stortz) could deploy the aerial ladder. Before the aerial ladder can be raised, the outriggers and stabilizers must be set up. Until they are properly set, loud alarms sound and the hydraulics will not work to raise the aerial ladder. According to Captain Bresnahan, it should take 1½-2 minutes, on average, to set up and deploy the aerial ladder. As the crew of Truck II worked to deploy its aerial ladder, Truck I can be seen performing aerial rescues:

- 8:56:30 Two residents are rescued from upper window onto and they climb down the ladder as it pulls away from the building and lowers out of sight.
- 8:57:20 Truck I aerial ladder extends again and moves back up to the window
- 8:57:45 Two more residents can be seen climbing down the aerial ladder assisted by a firefighter.
- 8:57:50. The last rescues on the E. Dwight Street side are completed and the ladder is lowered.
- 8:58:44 The aerial ladder is repositioned to the N. East St. side of the building and extended toward an upper floor window.
- 8:59:07 The picture is poor, but one resident can be seen coming down the ladder past a firefighter.
- 8:59:13 The last aerial rescue is completed at 8:59:13

In the meantime, Truck II's aerial ladder had not deployed. When it failed to deploy, Mr. Cunningham exited the bucket to report the problem to the Commanding Officer. Mr. Cunningham said he could see D.C. O'Connor standing immediately in front of Truck II. As he left the bucket, Mr. Cunningham told Firefighter Stortz to keep working on the aerial ladder. Based on the video evidence, Mr. Cunningham was out of the bucket and walking toward the

front of Truck II at 8:58:09. Mr. Cunningham can be seen walking toward the front of the truck but his image disappears from view because the camera had not captured the front end of the truck or any area in front of the truck.

Mr. Cunningham testified that, when he reported the problem with the aerial ladder to D.C. O'Connor, he was ordered to set up a water supply for Engine 1. Mr. Cunningham instructed Firefighter Scalia to assist him and told Firefighter Stortz to keep working on the aerial ladder. Once he completed that task, D.C. O'Connor then gave Mr. Cunningham a series of other direct orders, including orders to gain access to a fenced-in area, to assist Engine 3 get a line from Truck II, and to enter the building to assist Truck I in a search.

According to his written statement (City Exhibit #5), Firefighter Stortz' efforts to deploy the aerial ladder were interrupted when he was given orders (by superior officer(s), not Cunningham). By about 9:30, Stortz had successfully deployed the aerial ladder and alerted Mr. Cunningham. Mr. Cunningham reported this development to D.C. O'Connor, who ordered the Truck II crew to set up a water tower for aerial fire suppression. According to the video, the Truck II aerial ladder was raised at 9:32:55 a.m. with Mr. Cunningham and Firefighter Scalia in the bucket. A South Hadley engine provided water via a large diameter hose that ran from the South Hadley Engine and connected to Truck II.

About 15 minutes later, Safety Officer D.C. Przekopowski ordered Truck II to "break down" and move out of the collapse zone. (Board member Jon Lumbra testified that he spoke to D.C. Przekopowski about this but D.C. Przekopowski did not provide a written statement and he did not appear or testify at hearing.) Truck II could not be moved anywhere until the outriggers and stabilizers were stored and the aerial ladder was lowered and bedded. The crew also needed to deal with the charged hose connecting the South Hadley engine to Truck II. Mr. Cunningham

testified that he decided to empty the hose, but leave it attached since the crew had to re-establish the water tower once the truck was moved out of the collapse zone.

The only place Truck II could be moved to was a narrow stretch of road directly behind it. This meant that Truck II had to be driven, in reverse, between the South Hadley engine (several feet from its passenger side) while keeping clear of parked cars on its driver side. Beginning at 9:49 and for the next few minutes, firefighters can be seen moving the hose (no longer charged) so that it was not behind Truck II or in the path of its wheels. The truck began to move at 9:52:34 and travelled slowly in reverse about the length of the truck (40'-50') and came to a stop at 9:53:16, between the South Hadley engine and the parked cars. At all times, the attached hose remained clear of all the tires as Truck II was moved.

By 9:55:55, Truck II raised its aerial ladder again and Mr. Cunningham and Firefighter Scalia re-established the water tower for aerial fire suppression. About a half hour later, Firefighter Stortz observed smoke coming from the control panel and D.C. Shaw ordered the ladder down, which can be seen lowering at 10:26:33. Several officers inspected the panel and concluded it was merely giving off steam. D.C. Shaw ordered the crew to resume the aerial water tower. As the ladder began to rise a third time (10:36:33) however, flames erupted from the control panel and D.C. Shaw ordered the ladder be brought down and that Truck II be taken out of service. Thereafter, the crew of Truck II performed a variety of tasks ordered by D.C. O'Connor until they returned to the station about 1:15 p.m. (Union Exhibit #12).

The fire resulted in three deaths and left 49 people homeless. In the immediate aftermath, the State Police initiated an investigation² and the fire was the subject of regional and local news. Concerns about the department's response and statements by the President of the Union (Mr. Cunningham) were reported in the press:

² Results of the State Police investigation were not entered into evidence.

“Holyoke Firefighters Union: Outcome of deadly fire could have been different”;
“Questions of response to Holyoke fire arise following brownout of engine”;
“In wake of fatal blaze, state firefighters union calls on Holyoke mayor to reinstate
“browned out” fire engine”; and
“Head of Holyoke firefighter union suggests the chief should step down”
(Union Exhibits #19 and #20)

According to Chief John Pond, he received video tapes from the State Police within a “couple weeks” of the fire and reviewed them with the Deputy Chiefs. The Chief testified there were concerns about Truck II’s apparent failure to deploy the aerial ladder “while Truck I did all the rescues” but he decided not to impose or recommend discipline for Mr. Cunningham.

On February 24, 2017, Chief Pond ordered the transfers of fifteen employees, including the transfer of Mr. Cunningham from a ladder truck (Truck II) to an engine (Engine I). The Chief testified that Mr. Cunningham was not under investigation at the time and was not transferred for disciplinary reasons. The Union grieved the transfer alleging the action was in retaliation for protected Union activity. The Chief testified, “Then [the] grievance went to the Board at Step 2, which the Board denied on March 27, 2017. The Chief testified, “That’s when the Board decided to [investigate] the incident.”

By early April 2017, the Board of Fire Commissioners assigned Captain Mark Bresnahan of the Training Division, to conduct an investigation. The testimony and evidence do not establish clearly what Mr. Bresnahan was told to investigate, but there is no dispute that he only investigated the Truck II crew. Captain Bresnahan reviewed fire reports on file, video and audio records, and repair records for Truck II. On April 18, 2017, Captain Bresnahan asked Mr. Cunningham and Firefighters Stortz, and Scalia to submit written statements about the incident (City Exhibits #3, #4, #5). Captain Bresnahan then interviewed each man individually. He did not record the interviews or take any notes. On May 17, 2017, Captain Bresnahan met with the

Board of Fire Commissioners and reported his findings (See City Exhibit #1, Investigative Report and City Exhibit #2, Executive Session notes).

After receiving Captain Bresnahan's report, the Board of Fire Commissioners decided that Mr. Cunningham's performance warranted discipline. The Board first issued a Notice of Contemplated Action on August 17, 2017. A disciplinary hearing was conducted on August 22, 2017. On August 23, 2017, the Board issued its decision to suspend and demote Mr. Cunningham and to order him to undergo a minimum of 40 hours of training (Joint Exhibit #3).

On August 24, 2017, the Union grieved the Board's decision alleging the discipline was not for just cause and was in retaliation for protected activity contrary to Article 35. The parties were unable to resolve the grievance, which subsequently was submitted to arbitration.

POSITIONS OF THE PARTIES

THE CITY

The City argued there was just cause to suspend, demote, and/or re-train Chad Cunningham, based on the evidence, its investigation, and the credible testimony of witnesses at arbitration.

The City rejects any assertion that the investigation was inadequate. The Board may not have had established or formal procedures for conducting disciplinary or IA investigations, but the Board acted appropriately and within its authority when it selected Captain Bresnahan to conduct the investigation because he had decades of experience and was the Captain of Training. Captain Bresnahan provided a comprehensive, impartial and expert assessment of Mr. Cunningham's fire scene conduct. The Board of Fire Commissioners' reliance on the investigation was an appropriate exercise of its authority to impose discipline. The City urges the

arbitrator to defer to the Board's reliance on the investigation when its decision to discipline Mr. Cunningham.

The City urges the arbitrator credit Captain Bresnahan's findings that Mr. Cunningham failed to follow proper procedures for deploying the aerial ladder and failed to follow a "standing order" to erect ground ladders, "a conclusion that such actions are standing orders where experience and command presence should have prevailed, however, in this case failed." According to Captain Bresnahan, the crew should have re-started the set-up procedure when the aerial ladder did not deploy initially. Captain Bresnahan established that, after the fire, mechanics were able to deploy the aerial ladder without any problem and there was no indication of a problem in the repair records for the prior 6 months.

Captain Bresnahan testified that Truck II's first priority was to conduct rescue operations and when the aerial ladder did not deploy, they should have followed the "standing order" to erect ground ladders. Instead, Mr. Cunningham could be seen on video exiting the bucket and speaking into his shoulder radio. Captain Bresnahan reviewed audio recordings and found a transmission he assumed corresponded with that video image and Mr. Cunningham can be heard asking, "This is Truck II. What do you want...." while alarms could be heard in the background. Captain Bresnahan testified that Mr. Cunningham's decision to contact the Commanding Officer violated the standing order to erect ground ladders. On cross-examination, Captain Bresnahan conceded that Mr. Cunningham was required to obey D.C. O'Connor once he received the direct order to secure a water supply for Engine 1 (rather than carry out a "standing order" to erect ground ladders).

The City rejects the Union claim that mechanical failure was the reason Truck II's aerial ladder did not deploy upon arrival at the scene. Captain Bresnahan established that operator

error, not mechanical problems, was the reason the first attempt to deploy the aerial ladder failed. The aerial ladder was eventually deployed and no mechanical problems were found during the post-incident inspection of the equipment.

According to the City, Mr. Cunningham deliberately omitted information from his fire report to conceal the failure to deploy the aerial ladder and his failure to comply with the standing order to erect ground ladders. The City asks the arbitrator find that Mr. Cunningham submitted a false report based on the inaccurate statement that when he “arrived on scene at 141 E. Dwight Street via North Bridge Street [Truck II] was ordered to find a water supply for Engine 1”.

Captain Bresnahan testified that Mr. Cunningham’s fire report (Union Exhibit #12) conflicted with video evidence. When Truck II arrived on the scene, the crew first attempted – and failed - to deploy the aerial ladder, but Mr. Cunningham’s report stated, “T-II was ordered to get a water supply for E-I” and omitted information about the failure to deploy the aerial ladder upon arrival. Captain Bresnahan also testified that, based on rules and regulations about the care of nozzles and couplings (Joint Exhibit 2), Truck II should not have been moved while a hose was still attached.

The City rejects the Union’s assertion that the imposition of discipline was pretextual. As Captain Bresnahan testified, a post-incident analysis is conducted after every fire and, in this case, the City had a duty to closely scrutinize fire scene performance because the New Year’s Day fire was one of the largest, most significant fires in Department history.

The City concludes that credible testimony and evidence establish the Board had adequate reasons to discipline Mr. Cunningham for his “[failure] to properly oversee his company...[exhibiting] a lack of leadership [and submitting a report] in direct conflict with both

video evidence of [his] actions that day as well as written statement.” The City asks that the arbitrator uphold the discipline and deny the grievance in its entirety.

THE UNION

The Union argues that the City did not have just cause to suspend, demote, and/or re-train Chad Cunningham for several reasons.

The Union rejects the assertion that Mr. Cunningham violated standing orders to assist in troubleshooting the aerial ladder and to erect ground ladders when that failed. According to unrebutted testimony, Mr. Cunningham directed Firefighter Stortz to continue working on the aerial ladder and reported the problem to D.C. O’Connor, the Commanding Officer on scene. D.C. O’Connor then gave a direct order that Mr. Cunningham was required to obey. Thereafter, the Commanding Officer issued a series of direct orders, which Mr. Cunningham obeyed. Mr. Cunningham was not ordered to troubleshoot the aerial ladder or to erect ground ladders. The Union points out that D.C. O’Connor was not interviewed by the investigator or the Board of Fire Commissioners before Mr. Cunningham was disciplined.

The Union contends there was no basis for the charge that Mr. Cunningham allowed Firefighter Stortz to drive Truck II with a hose still attached at 9:29 a.m., because there is no evidence that Mr. Cunningham was in the vicinity, gave an order that the truck be moved, or that Firefighter Stortz was driving the truck at that time.

The Union denies that Mr. Cunningham violated any rule or regulation when he told Firefighter Stortz to drive Truck II in reverse with a hose still attached at 9:52 a.m.. The Union points out that department rules impose a duty to exercise care when handling hoses and nozzles, but there was no rule against moving a truck with a hose attached.

The Union argues that the City did not have just cause to discipline Mr. Cunningham for any alleged omissions or conflicts in his fire report. It is undisputed that the City has several different report formats and that employees are not given training on how to complete the forms or what information must be included. There is no evidence that any omission was intentional or meant to conceal information in violation of any order, rule or regulation.

The Union urges the arbitrator find that Mr. Cunningham was disciplined in retaliation for legal, protected activity. The investigation targeted Truck II only, the crew that was led that day by the Union President, Chad Cunningham.

In conclusion, the Union asks that the arbitrator uphold the grievance and order the City to rescind the suspension and the demotion, restore Mr. Cunningham to his position of Lieutenant, cease engaging in discrimination and/or retaliation against him, order the discipline and any reference to it be removed from his personnel file, and make him whole for everything lost, including lost wages.

DISCUSSION

The question before me is whether there was just cause to suspend, demote, and/or re-train Chad Cunningham. The City first has the burden of proving that Mr. Cunningham is guilty of the charges against him and must then demonstrate that the discipline imposed was appropriate for the proven charges. The evidence and testimony have been thoroughly reviewed and I find they do not support the charges against Mr. Cunningham.

The City argued that the arbitrator should defer to the investigator's report and to the Board's decision to discipline Mr. Cunningham. An arbitrator may accept an investigative report on its face when there is no challenge to its adequacy or fairness, which is not the case here. The investigation failed to address important questions of fact that should have been addressed (and

might have been resolved) prior to imposing discipline. For example, written statements by Mr. Cunningham and Firefighters Stortz and Scalia consistently reported they had been given direct orders by Commanding Officer D.C. O'Connor, D.C. Shaw, and D.C. Przekopowski to perform specific tasks during the time period in question. The crew's assertions were discredited and discounted without interviewing or questioning the superior officers during the investigation or the disciplinary process.

Mr. Lumbra stated that D.C. Shaw appeared as a "witness" when the Board was deciding whether to discipline Mr. Cunningham and D.C. Shaw did testify for the City at arbitration. However, D.C. Shaw did not arrive at the New Year's Day fire until 9:30 a.m. and could not address many questions about Mr. Cunningham's actions that day. He did not witness Truck II's arrival on scene, did not witness the initial failed attempt to deploy the aerial ladder, did not know whether Mr. Cunningham spoke to the Commanding Officer about the problem; did not witness Truck II being driven in reverse (either time); and did not know where Mr. Cunningham was or who was driving when Truck II was driven in reverse.

Even though D.C. O'Connor and D.C. Przekopowski may have had direct knowledge of Mr. Cunningham's actions during the times he allegedly violated standing orders, rules or regulations, neither was interviewed or asked to provide a report or written statement during the investigation and disciplinary process.³

According to the City, the Board relied on the investigative report when it decided to discipline Mr. Cunningham but the City did not explain how the Board decided to charge Mr. Cunningham, twice, with "allowing" the truck to be moved while a hose was still attached. The investigative report contained no information about either alleged violation and there is no

³ Mr. Lumbra's testimony that he spoke with D.C. Przekopowski about the order to move Truck II was not supported by a written statement or direct testimony and cannot be considered as evidence.

evidence Captain Bresnahan investigated the apparent factual dispute between the video evidence and the written reports and statements. Mr. Cunningham and Firefighter Stortz both reported how and why Truck II was moved at 9:52, but neither report mentioned moving the truck earlier (at 9:29). There is no evidence that there was any effort to resolve this factual dispute.

Captain Bresnahan testified that his report to the Board excluded other, relevant information that might have had an impact on their deliberations. For example, Captain Bresnahan testified at length about a “design flaw” that was known to interfere with the deployment of the aerial ladder on both Truck I and Truck II. He explained that a switch to deploy the aerial ladder would sometimes get clogged with dirt, making it inoperable. Captain Bresnahan was adamant that Mr. Cunningham and Firefighter Stortz were not allowed to “troubleshoot” or try to fix a clogged switch. He acknowledged that, if the switch was clogged with dirt on January 1, 2017, Stortz’ repeated efforts to deploy the aerial ladder could eventually loosen the dirt so the switch might become operable sometime later, leaving no evidence of the problem. Captain Bresnahan was confident that this was not a factor on January 1, 2017, but acknowledged it could not be ruled out. In any event, Captain Bresnahan did not tell the Board of Fire Commissioners about the design flaw or that this had been a problem with Truck II on prior occasions.

Captain Bresnahan also testified that he did not give the Board information he obtained during an interview with Firefighter Stortz who admitted making errors as the Truck II Operator. Firefighter Stortz’ admitted his errors caused the initial failure of the aerial ladder and caused the control panel fire. These admitted errors related directly to the charges against Mr. Cunningham. In addition, the admitted errors established that Firefighter Stortz’ written statements “conflicted

with his actions” and may have constituted “false reports” in violation of departmental rules and regulations. Captain Bresnahan testified that he did not give any of this information to the Board of Fire Commissioners even though he obtained the information during an investigatory interview. Captain Bresnahan said that he did not keep notes, record the interview, or ask for the admissions in writing because Firefighter Stortz revealed the mistakes to him privately, personally, and “man to man.” There is no evidence, however, that the investigatory interview was confidential or that Firefighter Stortz had a protected expectation of privacy.

In the absence of contractual language establishing specific investigatory procedures, there is no requirement that an employer assign an experienced or specially-trained investigator and there is no requirement that an employer follow a particular procedure when conducting an investigation. That said, the evidence demonstrates that this investigative procedure and this investigative report (City Exhibit #1) were not adequate or sufficiently complete to prove the allegations against Mr. Cunningham.

The Charges:

The City alleged that Mr. Cunningham violated direct and/or standing orders and/or departmental rules, exhibited a lack of leadership and risked the safety of the public and other personnel, and risked damage to departmental apparatus. The specific charges listed in the City’s notice of discipline (Joint Exhibit #3) will be addressed:

- Failure to assist Firefighter Stortz in troubleshooting the aerial ladder
- Failure to use ground ladders in place of aerial ladder
- Allowing Firefighter Stortz to drive in reverse with hose still attached at 9:52
- Allowing Firefighter Stortz to drive in reverse with hose still attached at 9:29
- Providing a Company Fire Officer Report that conflicts with actions and conflicts with written statements provided to Captain Bresnahan

Failure to assist Firefighter Stortz in troubleshooting deployment of the aerial ladder

The testimony and evidence do not establish that Mr. Cunningham violated a rule, regulation or policy when he did not “troubleshoot” the aerial ladder or assist Firefighter Stortz in the performance of a duty assigned only to the Operator of Tuck II (Stortz). There is no dispute that, as the Operator, Firefighter Stortz, was responsible for leading the aerial ladder set-up and for actually operating the controls or switches to deploy the aerial ladder.

Captain Bresnahan testified that neither Mr. Cunningham nor Firefighter Stortz was allowed to “troubleshoot” the equipment if that meant “touching” the equipment or attempting to adjust or repair any equipment. Captain Bresnahan was insistent that only the DPW is authorized to “troubleshoot” or perform repairs. Rather, when the initial set-up failed, Captain Bresnahan said they should have re-started the set-up procedure. When asked who was responsible for re-starting the procedure, Captain Bresnahan said, “[technically] the Lieutenant but to be honest, the Operator [Stortz] should just know to do it. He should not have to be told: it’s a “standing order”, not written down.” D.C. Shaw also testified that the Operator had the lead and the responsibility for deploying the aerial ladder and for re-starting the process if the first attempt failed.

According to Captain Bresnahan’s testimony, Mr. Cunningham’s obligation to “assist FF Stortz” did not mean he should have been on the ground assisting the Operator with the physical tasks or by taking over the controls. Rather, Captain Bresnahan said that Mr. Cunningham should have instructed Firefighter Stortz to re-start the process (even though Stortz “should just know to do it”). According to his written statement (City Exhibit #3) and his testimony at hearing, however, Mr. Cunningham did instruct Firefighter Stortz to keep working on the aerial ladder after the initial effort failed. Instead of waiting in the bucket while Stortz tried again to deploy the aerial ladder, Mr. Cunningham alerted D.C. O’Connor about the equipment problem, which was keeping the crew from performing their primary task: aerial rescues.

At hearing, Captain Bresnahan revealed that Firefighter Stortz admitted he had not put the outriggers all the way out, which was the reason the alarms continued to sound and the aerial ladder would not deploy. (Stortz also admitted that he had switched the hydraulic pump on while Mr. Cunningham and Firefighter Scalia were operating the water tower and then forgot to switch it off, which led to the control panel fire.) Firefighter Stortz made these admissions to Captain Bresnahan but they were not included in either written report he submitted during the investigation (City Exhibits #5 and #6). Captain Bresnahan did not ask Stortz to correct his written statements and he did not make a record of the admissions. More significantly, Captain Bresnahan did not tell the Board of Fire Commissioners, because “[Stortz] told me: man to man; it was not in writing.” Stortz’ admissions should have been reported to the Board of Fire Commissioners before it decided to issue discipline because it was evidence that related directly to the charges against Mr. Cunningham.

The evidence and testimony do not establish that Mr. Cunningham failed to assist Firefighter Stortz or otherwise failed to properly supervise Firefighter Stortz as he tried to deploy the aerial ladders.

Failure to use ground ladders in place of aerial ladder

The testimony and evidence do not establish that Mr. Cunningham violated an order to use ground ladders when the aerial ladder failed to deploy. First, there is no evidence that Mr. Cunningham defied a direct order to use ground ladders. According to Jon Lumbrá, it was the Board’s understanding that D.C. O’Connor repeatedly issued direct orders to “throw ground ladders” but this is not supported by evidence. The audio record establishes that D.C. O’Connor directly ordered Engine 5 to put up ground ladders. D.C. O’Connor can be heard at 9:01:58 in an urgent and loud voice:

“Engine 5 crew, get up here! Get up here! Ground ladders, ground ladders – Engine 5!”

“Five – get down here right now! We need rescues [unintelligible]; we need rescues!”

(City Exhibit #9)

There is no evidence that D.C. O’Connor issued the same order to all companies, generally, or to Truck II, specifically. Mr. Lumbra testified that the Board was concerned when it watched video of Mr. Cunningham “doing nothing for 4½ minutes” when he should have been helping deploy the aerial ladder or putting up ground ladders. According to Captain Bresnahan, the “standing order” to perform ladder rescues should have been followed when the aerial ladder failed to deploy.

The video evidence and fire reports from the other companies establish that no crew put up ground ladders (except Engine 5, which had received direct orders to do so). When asked why no company had complied with the “standing order” to put up ground ladders, Captain Bresnahan responded, “I have no idea.” There is no evidence that Captain Bresnahan gave the Board this information when he reported that Mr. Cunningham failed to comply with a “standing order” to erect ground ladders.

Mr. Cunningham arrived on scene at 8:56:13. The video evidence establishes that the crew did not waste any time getting into position to deploy the aerial ladder. Several attempts to raise the aerial ladder were made but Mr. Cunningham did not stand in the bucket and “do nothing for 4½ minutes.” At 8:58:09 (less than 2 minutes after Truck II arrived on scene), Mr. Cunningham was out of the bucket and walking toward the Commanding Officer to report the problem with the aerial ladder.

The only evidence the City offered to support the charge that Mr. Cunningham violated the standing order to erect ground ladders is the fact that he alerted the Commanding Officer

about the problem with the aerial ladder. There is no evidence that Mr. Cunningham, or any other Lieutenant, was/is prohibited from reporting an equipment problem to a Commanding Officer, even if a “standing order” is in effect, and particularly when the Lieutenant is reporting a problem that prevents his crew from performing its primary task.

When he was told the aerial ladder failed to deploy, D.C. O’Connor did not order Truck II to set up ground ladders. In the absence of an explanation from D.C. O’Connor, one can only speculate why he did not order ground ladders. The City’s witnesses all agreed that D.C. O’Connor’s decision to order Mr. Cunningham to get a water supply to Engine I (rather than to put up ground ladders) was not improper and had to be obeyed. It may be that D.C. O’Connor decided that using ground ladders was not the best option at that time.

Mr. Cunningham left the back of Truck II at 8:58:09 to walk toward D.C. O’Connor. At 8:58:20 (11 seconds later), Truck 1 completed the last aerial rescue on the E. Dwight St. side and then re-positioned its aerial ladder to the N. East Street side to perform the last of the aerial rescues. The Commanding Officer for Truck I knew the last residents to be rescued were there because, within minutes of arriving on scene, he determined there were a total of 6 people who needed to be rescued with the aerial ladder:

I communicated to all the people waiting for help to stay at the window and hang on. I told the male and female on N. East Street side that we were coming to them second and to hang on. There was a woman leaning far out the window and the man with her was holding her from falling. We reached them first. I got the two onto the ladder and FF Deroy aided them down. We went immediately to the third floor and helped a male and female onto the ladder. We then went to N. East side where there was now only a man waiting to be helped...

Union Exhibit #7

The last aerial rescue was captured on video at 8:59:13 (less than one minute after Mr. Cunningham left the truck to report the equipment problem to D.C. O’Connor). The Truck I aerial ladder can be seen moving away from the building and being lowered with the last resident

rescued from the N. East St. side (video, City Exhibit #9). In the meantime, Captain Bresnahan, said that Truck II should have repeated the aerial set-up procedure (a procedure he estimated takes 1-1½ minutes to complete) and when that failed, the crew should have put up ground ladders. The City did not explain how Truck II could have repeated the set-up procedure and then erected ground ladders in time to assist before the last rescue was completed exactly three minutes after Truck II first arrived on scene.

The City offered no evidence or testimony to explain why D.C. O'Connor did not order Truck II to perform rescues with ground ladders. There was no testimony or evidence that D.C. O'Connor erred or gave an improper order when he told Mr. Cunningham to get a water supply to Engine 1 rather than set up ground ladders. The City's witnesses agreed that, once Mr. Cunningham received the order to get water to Engine 1, he was required to comply with that order.

The City has not established that Mr. Cunningham violated an order, rule or regulation when he reported a problem to the Commanding Officer, received a direct order, and complied with the specific and direct order rather than comply with a general "standing" order.

Allowing Firefighter Stortz to drive in reverse with hose still attached at 9:52

The testimony and evidence do not establish that Mr. Cunningham violated any rule, regulation or order when he allowed Firefighter Stortz to drive Truck II in reverse with a hose still attached at 9:52. D.C. Shaw credibly testified that, when a truck needs to be moved, the usual protocol is to disconnect any hose unless there is "imminent danger to people or equipment". In that case, D.C. Shaw said, "you go ahead and move it and hope for the best."

Other than the "usual protocol", there is no evidence of a rule, regulation or standing order that a truck may not be moved while a hose is attached. There is a rule that a truck may not

be driven over a hose but there is no evidence of a rule that hoses must be disconnected when a truck is being moved:

Section 31: Hose on apparatus will be changed every three months, or after alarms of fire where hose has been used. Company officers shall be held responsible for the proper care of all hose. No person shall drive any vehicle upon or over any hose pipe in use at any fire and placed in any street, except by the direction or with the permission of the chief or of some officer of the fire department.

Joint Exhibit #2

The City also cited Section 159, about the care of nozzles and couplings, but nothing in this section requires hoses be disconnected when a truck is being moved:

Section 159: Too much care cannot be taken of the nozzles, as a slight dent or rough surface in the nozzle at the discharge opening will prevent the delivery of a solid stream. Members are cautioned that in handling hose couplings, pipes and nozzles the utmost care must be observed, as a slight dent in either renders them valueless for the purpose intended....

Joint Exhibit #2

About 9:50, D.C. Przekopowski issued an order that Truck II be moved out of the “collapse zone.” D.C. Przekopowski did not provide a statement and did not appear or testify at hearing. In the absence of any explanation or clarification, the order to move out of the “collapse zone” is taken at face value: it suggests there was potential for injury to personnel or damage to equipment.

To get out of the collapse zone, Truck II had to be driven in reverse about 40’-50’.

According to video evidence, the aerial ladder was brought down, the outriggers stored, and several firefighters can be seen moving and re-arranging the (now-empty) hose so that it would be clear of the moving truck. Truck II was driven in reverse a short distance at a speed of 1-2 mph.⁴ It is clear from the video evidence that the connected hose remained clear of the moving wheels as the truck travelled in reverse. The evidence also indicates that Mr. Cunningham and

⁴ Truck II began to move at 9:52:40, travelled 40’-50’, and stopped at 9:53:02.

his crew exercised “utmost care” to protect the hose while Truck II was moved. In fact, there is no evidence that the hose or couplings suffered any damage in the process.

The City has not established that Mr. Cunningham violated a rule, regulation or order when he allowed Firefighter Stortz to drive in reverse at 9:52.

Allowing Firefighter Stortz to drive in reverse with hose still attached at 9:29

The video shows Truck II moving in reverse from 9:29:08 to 9:29:25. It appears the truck moved 15’-20’. None of the reports filed by Truck II crew members (City Exhibits #3, #4, #5 or Union Exhibit #12) mention this move and there is no evidence the conflicting information was investigated. Mr. Cunningham’s testimony about this charge (that he was not in the vicinity and did not know that Truck II was being moved at 9:29) was not rebutted. City witnesses acknowledged that it was not possible to discern (from the video) who was driving the truck.

The City has not established that Mr. Cunningham allowed Firefighter Stortz to drive Truck II in reverse with a hose still attached at 9:29.

Providing a Company Fire Officer Report that conflicts with actions and conflicts with written statements provided to Captain Bresnahan

The City correctly argues that Mr. Cunningham’s fire report (Union Exhibit #12) did not mention the initial, failed attempt to deploy the aerial ladder and, for this reason, does not match the written statement he provided during the investigation (City Exhibit #3). Captain Bresnahan testified that Mr. Cunningham should have included that information in the Remarks section of the fire report.

There is no evidence that Mr. Cunningham made false statements or attempted to conceal information that was not known. When the aerial ladder failed to deploy, Mr. Cunningham promptly notified D.C. O’Connor about the problem. In fact, the same information was omitted from the comprehensive, all-company fire report dated January 10, 2017 (Union Exhibit #7). The

comprehensive report summarizes the response for the entire C Group and does not mention the failed attempt to deploy the aerial ladder, even though the report was reviewed and approved by the Commanding Officer, D.C. O'Connor, on January 15, 2017.

The Department has several different report formats and does not provide training on how to complete them. Some of the forms include instructions for completing the "Remarks" section but these vary depending on the form. For example, one form has the following instructions for completing the "Remarks" section:

Under this head state under whose command the Company operated, how long, and duty performed, accidents, if any, and their cause, together with such other information as may be of interest to the Department.

Another form has different instructions for completing the Remarks section: "Under this head, state where and how long the pipe was located at fire, etc."

Section 22 of the Rules and Regulations, spells out instructions that are different than the others:

Section 22: Said report shall be made to the chief within 24 hours.... He shall report in writing any meritorious act by any member of his company, with particulars as to date, location, risk involved and person is concerned, which reports shall also be entered on the department records.

Joint Exhibit #2

Even though the printed forms and their instructions vary, Mr. Cunningham's report is similar to other fire reports in that he described when the crew arrived on scene followed by a description of the first order received from the commanding officer:

Engine 1: "Reported to fire and received orders to advance a line"

Engine 5: "Reported to D.C. O'Connor and received orders to get ground ladders..."

Engine 6: "Reported to DC O'Connor and received orders to take a hotline..."

Engine 3: "Reported to C-21 and received orders to supply TII located on E. Dwight St."

Mr. Lumbra testified that Mr. Cunningham's claim that he only walked a short distance to where D.C. O'Connor was standing "conflicted" with video evidence. According to Mr. Lumbra, the video clearly showed 20' of the road in front of Truck II and D.C. O'Connor could not be seen anywhere in the area. Mr. Lumbra testified that D.C. O'Connor "must have been further away, closer to the intersection" and that Mr. Cunningham wasted time when he walked away from his truck to find the Commanding Officer. This is not supported by the video evidence. When Truck II had arrived on scene, the video shows it coming to a full stop at 8:56:13. At that time, however, the front end of the truck was out of camera range and was not captured on video. The front of the truck (and anyone near the front end) was still out of view when Mr. Cunningham got out of the bucket and walked toward the front of the truck at 8:58:09. The front end of the truck remained out of view until 9:29, when Truck II was driven in reverse for about 20'. As a result, the entire front end of the truck and a 20' stretch of the road came into view. Significantly, no one asked D.C. O'Connor where he was when Mr. Cunningham reported the problem with the aerial ladder to him.

The City has not established that Mr. Cunningham filed a false report or that any omissions from his written report and statement otherwise violated any order, rule or regulation.

Other allegations:

The City offered testimony and evidence about other alleged failings. These were not mentioned in the notice of discipline but they will be addressed here. Captain Bresnahan reported:

I found no documentation supporting that the apparatus was tested for use by the Captain of the truck prior to this fire at 106 North East Street on January 1, 2017. Additionally, I could not find any supporting documentation of the use of the aerial for training purposes until the 19th of January 2017.

City Exhibit #1

Captain Bresnahan also testified at some length about the requirements to perform daily (sometimes twice daily) drills for training purposes and to make sure all equipment is functioning properly. The evidence and testimony do not establish that the failure to conduct tests or to perform drills were duties Mr. Cunningham was required to (or could have) performed at the time of the fire.

Captain Butler was the regular commanding officer for Truck II and the men regularly assigned to him were Mr. Cunningham, Firefighter Stortz, and Firefighter Ramero. On January 1, 2017, however, Captain Butler was out and, in his absence, Mr. Cunningham was next in line to act as commanding officer. Captain Butler testified that the crew had a standing order to take the truck to the lot behind the station every Wednesday to practice deploying the aerial ladder (since the New Year's Day fire, the drill must be performed on a daily basis). Captain Butler's testimony was not rebutted. In addition, the City did not establish that the Truck II crew had an opportunity to practice or perform any other drills before leaving that morning for the mandatory, monthly calibration of the carbon monoxide meter at headquarters or before being dispatched to the fire from there.

The investigative report stated, "Lt. Cunningham did admit that he and his crew needed more training as a crew and there was ample time to get this done before and after the fire." Captain Bresnahan testified, however, that Mr. Cunningham did not "admit" the crew needed more training, but that Firefighter Stortz, Firefighter Scalia and he could have used more time together as a team. On the day of the fire, two members of the regular team were absent and a firefighter from a different apparatus and a different group was temporarily assigned. There was no evidence the men had "ample time [to work as a team] to get this done" as Captain Bresnahan stated in his report to the Board.

In summary, the City has not established that Chad Cunningham was guilty of the charges against him. In the absence of proof that Mr. Cunningham failed to follow direct and/or standing orders, violated any rule or regulation, or otherwise engaged in misconduct, the City did not have just cause to impose discipline, including the decision to suspend and demote Me. Cunningham and to require that he undergo re-training.

ARTICLE 35
NON-DISCRIMINATION

The Union argued that Mr. Cunningham’s public criticism of the Chief and the Mayor, the timing of the Board’s investigation, and the nature of the Board’s investigation violated Article 35, which states the employer will not discriminate against an employee for exercising any right under the agreement or the law.

The City argued that it demonstrated legitimate, non-pretextual reasons to impose discipline. According to the City, the Board’s decision to “closely scrutinize” the fire scene performance at one of the largest, most significant fires in recent Department history was appropriate and not a pretext. According to the City, it was “routine” to conduct a post-incident analysis to review performance in order “to assess, identify, and correct deficiencies or mistakes in the field.”

The evidence does not support the City’s claim that the investigation was part of a “routine” post-incident analysis. According to his own testimony, Captain Bresnahan had already conducted post-incident analysis sessions with every company in the days immediately following the fire and three months before he was ordered to conduct a investigation.

Two months before the Board’s decision to discipline Mr. Cunningham, the Chief reviewed and discussed the video tapes with his Deputy Chiefs within a couple weeks of the fire. Afterward, the Chief decided not to impose or recommend discipline for Mr. Cunningham.

According to the Chief, the Board was prompted to look into the matter in late March when it received Mr. Cunningham's grievance alleging he was transferred in retaliation for protected activity. The Board denied the grievance on March 27, 2017. The Chief testified, "That's when the Board decided to [investigate] the incident."

The Board of Fire Commissioners assigned Captain Bresnahan to conduct an investigation, but the evidence contradicts the City's assertion that the investigation was appropriate and not pretextual. Despite the fact that the New Year's Day fire was "one of the largest, most significant fires in recent Department history," the investigation focused on only one of seven crews that responded to the fire. The investigation focused on the Truck II crew headed on that particular day by Mr. Cunningham, President of the Firefighters Union. This contradicts the City's claim that the investigation was a "routine" post-incident analysis. There are other contradictions suggesting the investigation and discipline procedure were pretextual and not meant to "assess, identify, and correct deficiencies or mistakes in the field."

For example, Mr. Cunningham was disciplined for allowing Truck II to be moved with a hose attached even though there is no rule prohibiting the action and even though he had been ordered to move the truck out of a "collapse zone", indicating danger to personnel and equipment. The video evidence indicates his crew acted with "utmost care" and there was no evidence or testimony that any hose, nozzle or coupling was harmed or damaged in any way during the process. In contrast, no one assigned to Engine 1 was disciplined for irretrievably damaging an expensive flip tip nozzle. Captain Bresnahan testified that, "no one 'fessed up and I didn't know who to blame." In contrast, the City argued that, as the commanding officer, Mr. Cunningham responsible for Truck II being moved with a hose attached (at 9:29) even when he was not directly involved.

Mr. Cunningham was charged with filing reports that conflicted with video evidence and/or with other reports, even though there was no evidence that Mr. Cunningham concealed information or made any false statements. In contrast, Captain Bresnahan testified that Firefighter Stortz admitted during his interview that he had failed to fully extend the outriggers, which prevented the aerial ladder from deploying and that he forgot to shut off a switch, causing the control panel fire. Firefighter Stortz did not include these admissions in either of his written statements. Despite the knowledge that Firefighter Stortz' written statements omitted relevant information and "conflicted" with actual events, and despite the knowledge that Firefighter Stortz concealed information that explained both the aerial ladder failure and the control panel fire, he was not charged with providing a "conflicting" report, concealing information, or with making a false report.

Finally, the City did not interview D.C. O'Connor who was the Commanding Officer at the scene and who was directly involved in a number of the charges against Mr. Cunningham. The City sought to remedy this by calling D.C. O'Connor as a witness at arbitration. As discussed above, the Union's objection was sustained because the City had the burden of proving it had sufficient evidence of the charges against Mr. Cunningham when it imposed the discipline. Assuming D.C. O'Connor could provide testimonial evidence to confirm (or deny) allegations against Mr. Cunningham, that testimony should have been obtained and considered during the disciplinary process. The failure to interview the Commanding Officer for "one of the largest, most significant fires in recent Department history" discredits the assertion that the investigative and disciplinary processes were proper and not pretext. In summary, I find the City violated Article 35, Non-Discrimination.

AWARD

The City and/or the Board of Fire Commissioners did not have just cause to suspend, demote, and/or order Chad Cunningham to undergo re-training.

The City and/or the Board of Fire Commissioners is hereby ordered to immediately rescind the five day suspension and the demotion and to restore Mr. Cunningham to his position of Lieutenant.

The City and/or the Board of Fire Commissioners is hereby ordered to immediately expunge any reference to the discipline from Mr. Cunningham's personnel file.

The City and/or the Board of Fire Commissioners is hereby ordered to immediately make Mr. Cunningham whole for all lost wages and benefits he would have earned but for the unjust discipline.

The City and/or the Board of Fire Commissioners is hereby ordered to immediately cease and desist from violations of Article 35, Non-Discrimination.



Mary Ellen Shea, Arbitrator
August 22, 2018