
In the Matter of Arbitration Between:

OPINION AND AWARD

City of Newark, Division of Fire

FMCS # 210730-08871

And

International Association of Fire
Fighters, Local No. 109

A hearing in the above matter was held on November 30, 2021 at the City of Newark Municipal Building. Both parties were provided with full opportunities to examine and cross-examine witnesses as well as explore all issues believed relevant to the proceedings. Following the hearing both parties agreed to submit post-hearing briefs by January 7, 2022. The deadline for those briefs was extended through mutual agreement of both parties and the record closed upon the Arbitrator's receipt of both briefs at the agreed upon time.

Attending for the City:

Scott De Hart, Attorney
Bill Spurgeon, HR Director
Brandon Metzger, Deputy Fire Chief
Tim Hickman, Safety Director
Patrick Conner, Fire Chief
Joseph Gundelfinger, Fire Fighter/Paramedic
Beau Daubenmeir, Fire Fighter/Paramedic

Attending for the Union:

Henry Arnett, Attorney
Colleen Arnett, Attorney

Timothy Clark, Grievant
Brian Barkett, Clinical Psychologist
Kevin Garwick, Local 109 President
Cory Coursed, Union 109 Treasurer

Issue

As agreed to by both parties the issue before the Arbitrator may be stated as “in the instance at hand was the Grievant terminated from employment for just cause? If not what shall be the remedy?”

Background

On May 18, 2021 City of Newark Fire Fighter/Para Medic (FF/P) Clark was dispatched to provide services to a victim of assault who was reported to be injured, intoxicated and uncooperative. In the process it was decided to transport the victim to Licking Memorial Hospital (LMH) for treatment. This was the normal process in cases of this type given the pick-up location and apparent injuries. Upon arrival at LMH it was discovered that the treatment room needed by the patient and fire fighter medics was not ready. While waiting FF/P Timothy Clark commented in a sarcastic fashion within the hearing of the patient and others that “this would be a nice place to build a hospital!” Apparently that comment upset the patient. As a result the patient aggressively questioned what was being said and its implications causing him to become even more agitated. FF/P Clark then left the patient’s room and commented “I’m tired of dealing with drunk people” creating additional confusion as to what was being said and its meaning for treatment of the patient.

Upon FF/P Clark leaving the patient’s room FF/P Daubinmire and FF/P Gundelfinger attempted to calm down FF/P Clark and the patient seeking to defuse the situation. In partial response to the effort FF/P Clark advised both co-workers to “fuck you” and aggressively left the area, in the process knocking over and breaking a bottle of cleaner fluid. Both FF/P Daubenmeir and Gundelfinger eventually reported the incident up the chain of command with no particular outcome suggested or identified but simply for the purpose of reporting the

events. Subsequently the Newark Fire Department initiated an investigation of what had occurred eventually moving through the normal pre-disciplinary hearing process. Ultimately on June 15, 2021 the Newark Safety Director found the offences involved and FF/P Clark's prior work related activities serious enough to justify a decision to terminate his employment. In response to this action, on June 28, 2021 the Union filed a grievance on behalf of FF/P Clark which was denied. As a result, following Collective Bargaining Agreement (CBA) provisions the Union filed a timely request for arbitration on July 29, 2021 (CBA provisions believed relevant are attached to this Award).

Contentions of the City of Newark

The City notes that there are few disagreements as to the facts of this case. The Grievant and FF/P Daubenmeir and FF/P Gundelfinger acknowledge that on May 18, 2021 FF/P Clark made unprofessional, offensive and discourteous remarks to a patient and coworkers while at the Emergency Department of LMH. This is particularly important as LMH is a critical community resource and serves as a partner for the NFD. Relations between both organizations is important given the typical nature of patient injuries treated and interdependent funding for these joint operations. The actions in this case were unusual and grievous as they occurred in the presence of a patient, hospital staff and FF/P Clark's co-workers. Statements such as "this would be a nice place to build a hospital" and "I'm tired of dealing with drunk people" are unprofessional and demeaning to the patient, his colleagues and hospital personnel. The language the Grievant used in responding to colleagues who sought to reduce tensions (i.e., saying "fuck you"), along with the anger he demonstrated by knocking over a cleaning agent as he left the premises are not acceptable for someone required to show consistency in professionalism while treating patients in need. In the process the City asserts that by his actions the Grievant violated multiple SOP's noted in the attachment.

The City believes fact that FF/P Daubenmire and FF/P Gundelfinger reported his actions to their superiors is an indication of their concern about the behavior evidenced in this case. Given that action, even if those individuals reporting the events did not intend for formal action to be taken the information

reported certainly provided a basis for further investigation by superiors in the department. The consequent pre-disciplinary hearing was consistent with provisions of the CBA and the Safety Director's decision to terminate the Grievant was based on the severity of the behavior and its real and potential effects on the patient, colleagues and professional staff of LMH. FFP's are expected to show courtesy and respect at all times in their actions and the Grievant admittedly failed to do so in this case.

In addition to these actions the City notes that the Grievant has had multiple verbal and written warnings for failures of preparedness as well as two unpaid suspensions. The incident in 2018 also involved inappropriate behavior by FF/P Clark at LMH and the 2020 incident involved damage to equipment.

More specifically the City notes that there were four instances of relevance during the 18 month CBA designated "lookback" period for oral or written reprimands and five years for suspensions and demotions. To begin with in 2018 the Grievant was assessed a one day unpaid suspension for inappropriate behavior that had also occurred at LMH. That case involved transportation of a Spanish speaking patient to LMH where FF/P Clark had engaged in a tense discussion about inadequate documentation for a patient. When asked by the attending registration staff member whether he had searched the patient for needed documentation the Grievant responded "that's not my job." This led to a complaint from Brad Copley, Director of Emergency Services at LMH regarding the FF/P Clark's disrespect and unprofessional behavior in front of patients and co-workers. After review Grievant Clark was suspended for one day and referred to Anger Management training. In addition he was transferred to Station 1 where it was thought he would have more effective supervision.

In July, 2020 the Grievant was suspended for multiple shifts after review of damage done to a fire department vehicle. Soon after the vehicle had been repaired some new damage was noticed. Grievant Clark reported that he did not know anything about how that might have occurred. He admitted that while driving the truck he became aware of damage to the vehicle but assumed it was prior damage caused by others driving the truck. He also admitted that while using the vehicle he had backed over some trees or something of that nature but

that this had not resulted in any damage to the vehicle. He did see the damaged area but assumed it was part of the prior damage that the truck had experienced not something he had caused. Nevertheless, he attempted to fix the damage himself by bending pieces shrouding back into place. He clearly stated that he did not believe he had caused the damage but apologized for not saying anything sooner. He had (paraphrased) “honestly forgot about the event after all the runs that day.” Despite his testimony the NFD found his statement disingenuous and not supported by evidence. As a result FF/P Clark was suspended for 2 unpaid shifts.

The City also notes that there were two additional instances in the lookback period justifying verbal and written reprimands involving two different service runs where the Grievant had failed to wear required protective equipment and was told of that failure to follow required practices. They believe those events reflect a similar disregard for work rules and practices.

The City contends that in processing this disciplinary concern leading to termination it followed all provisions of the CBA. A pre-disciplinary hearing was held with full participation of the Grievant and Union with a focus on events in May, 2021. Safety Director Hickman then made the final decision based on the Grievant’s behavior on May 18, 2021 as well as other instances of sustained misconduct. These offenses affected patients as well as a key health system provider (LMH) essential to the community and co-workers. The termination decision was also based in part on the special role of public trust essential to public safety.

The City argues that there are two key issues in assessing the appropriateness of its actions. First, were there grounds for dismissal? The City points to the repeated evidence that the Grievant has had difficulty controlling his emotions and that characteristic has consistently and negatively affected his performance over time. There is no dispute that his behavior on May 18, 2021 was inappropriate and potentially harmful to a patient, staff at LMH, relationships between LMH and NFD as well as his colleagues. The Grievant clearly acknowledges that the events occurred as described by a number of witnesses

and in his position FF/P Clark was required to meet standards of performance established by the City - which he did not.

Second, the City has attempted to make certain that the Grievant knew that his behavior was not appropriate as it served to undermine confidence his colleagues, patients and the community could have in his abilities. Corrective discipline had been applied. In effect the sequence of offenses and then increasing penalties made termination at this point appropriate. There can be no doubt that the statements made by the Grievant on May 18, 2021 were inappropriate (i.e., "this would be a great place to build a hospital" and "I'm tired of dealing with drunk people") caused harm to the patient, staff who may have overheard the exchange and to his colleagues who noted their own discomfort with his actions. Placing this in the context of other examples in which the Grievant failed to conduct himself in a professional manner certainly justified termination. Furthermore, progressive discipline as corrective action had taken place justifying termination at this point. In support of this the City points to the fact that at the time of the City's 2020 suspension the Grievant was told in writing that "any future infractions will result in progressive discipline up to and including termination."

The City also argues that the Union has failed to provide evidence that the City has treated the Grievant in a fashion different than any other FF/P engaging in similar behaviors under similar circumstances.

In terms of two other concerns raised by the Union the City argues that the Union has put forth little in the way of persuasive arguments. To begin with, in regard to whether FF/P Daubenmeier or Gundelfinger intended to report the Grievant's actions for disciplinary purposes is not seen by the City as a relevant or persuasive issue. Both colleagues believed Grievant Clark's behavior on May 18, 2021 was not appropriate and of sufficient concern to inform superiors of his actions. The decision about what should be done in response to that information was rightly made by NFD administrative leaders and not members of the bargaining unit regardless of their preferences. Second, in terms of whether the Grievant's claim to be suffering from PTSD, and suggesting that this medical condition is the excusable cause for his behavior, the City argues that the Grievant

never informed any official of his PTSD condition until after disciplinary proceedings had occurred. The City also notes that even if the Grievant truly does suffer from PTSD certainly in the absence of such a demonstrated disability the City has no requirement to change work standards as an accommodation.

In light of the above the City argues that the Grievant's pattern of offenses is clear, has harmful effects both his colleagues and a key user of City services, and reflects multiple prior disciplinary actions have been insufficient in changing his behavior. Given that pattern the imposed penalty of termination is fully justified.

Contentions of the Union

The Union notes that FF/P Daubenmire and the Grievant have worked together for a number of years and PPM Daubenmire clearly testified to his enjoying being around the Grievant both on and off the job. He noted that he had no difficulty with the Grievant's overall work performance. However, Grievant Clark's testimony that his behavior had recently begun to deteriorate and he generally was behaving in an unusually more agitated fashion had been noticed by others. Even FF/P Daubenmire observed that the Grievant was behaving more "on edge" prior to the 2 incidents in question. Grievant Clark also acknowledged that the anti-depression medication he was taking did not seem to be as effective as was usually the case prior to the events at LMH on May 18, 2021. Thus any particularly aggressive behavior exhibited was clearly reflective of his medical condition and not some willful effort to create problems for others.

The Union believes it is important to note that the patient involved in the May 2021 incident was unusually aggressive and verbal in insisting that he did not want to be transported to the hospital. That resistance contributed to the tension and difficulty encountered by the Grievant during the encounter. Nevertheless a decision was made to take the patient to LMH where upon arrival it was discovered that a room assigned to house and treat the patient was not ready and available. FF/P Clark's statement that "this would be a nice place to build a hospital" was one heard often from frustrated fellow fire fighters as noted by FF/P Daubenmire, who also admitted using the phrase himself. Yet no one else

has been disciplined for such a statement. In this case the agitated patient kept demanding to know what FF/P Clark had said. In the heat of the moment this is also when FF/P Clark stated that he was “tired of dealing with drunk people.” Given the level of hostility that was building up FF/P Clark removed himself from the room clearly to de-escalate what was occurring. In the midst of this turmoil when questioned about his behavior with the patient the Grievant simply noted to FF/P Daubenmire and FFM Gundelfinger “fuck you guys” and in his hurry accidentally knocked over a container of cleaning fluid. FF/P Clark and FF/P Daubenmire mentioned that use of such language was fairly common among fire fighters who worked under stress conditions. The Union believes it is important to note that they are unaware of any other fire fighters being disciplined for the use of such language.

The day after these events FF/P Daubenmire verbally reported the incident to Lt. Antol and was asked to write an email outlining the event. FF/P Daubenmire noted in testimony that he had no intention of submitting any type of a formal or written report until Lt. Antol called and ultimately asked him to send an email report to Assistant Chief Clouse. FF/P Daubenmire stated that he assumed the issue would stay “in their unit” and be a “way to get Tim (i.e., Grievant Clark) help.” FF/P Daubenmire assumed that any report would simply insure that the Grievant would get help with his aggressiveness through EAP or by a change in station assignment. Ultimately Lt. Gundelfinger texted Chief Clouse about the events because he was not sure if the patient would lodge a complaint about his treatment. The Union argues that up to this point no one thought this was a “big issue” and that it would be resolved “in house.”

The Union believes it is important to understand that the City mistakenly asserts that the formal “complaint” driving further action came from FF/P Daubenmire. As FF/P Daubenmire clearly stated his initial report of events was not “a complaint” just an attempt to be helpful. He was ordered to develop a written report by a superior officer in the chain of command. Thus the Union argues there was never a formal “complaint” by LMH over the events but, instead, this was an effort by the City to exaggerate the scale and severity of events. In support of this position the Union notes the initial intent of fellow fire fighters Daubenmire and Gundelfinger was to create a better support

environment for Grievant Clark. It also notes the reality that in its disciplinary process the City has identified few if any or Standard Operating Procedures actually violated by the Grievant.

With a similar concern the Union observes that both FF/P Daubenmire and Gundelfinger were not present at the Pre-disciplinary hearing for this issue. Thus their views on what occurred and what might be done in response were not represented. In effect as a result the Union believes Grievant's representatives did not have an opportunity to question witnesses as required in the CBA.

Similarly, the Union notes that there are no formal "complaints" filed for any of the issues brought forth by the City. Certainly, there are no formal complaints on record for any of the events involving LMH. Indeed the notes of events written by FF/P Daubenmire were never intended as complaints simply information with the hope they would be helpful. They cannot be seen as complaints justifying discipline but were transformed into issues the City could use for that purpose.

The Union believes that the CBA is clear in stating that for purposes of progressive discipline "only those records of prior disciplinary action as are contained in the official personnel file may be considered." Furthermore there is a clearly defined look back period for consideration of similar disciplinary actions. Yet in this case in justifying its' actions the City refers to prior behavior which did not result in any disciplinary action.

The Union is also concerned that the Grievant is being held accountable for actions previously accepted by the City. FF/P Daubenmire and others were clear in noting that language such as "fuck you" was frequently used by fire fighters but not penalized by the City in other cases. Similarly the statement "this might be a good place for a hospital" was a phrase used by firefighters with no apparent disciplinary actions being taken. In a related fashion the Union also notes that the penalty imposed on the Grievant is not adequately related to the nature of the offense. Termination for the types of offenses noted by the City and the lack of clear evidence of guilt simply does not justify such a severe outcome.

In reference to other “offenses” identified by the City in this case, the Union again notes a sense of over reaction that they believe indicates a level of bias against the Grievant. In the March, 2018 incident noted by the City FF/P Clark was dealing with a non-English speaking patient and as a result only able to secure limited information from him. Upon arrival at LMH Grievant Clark located a registration clerk and transferred the information he had. The registration clerk then complained about the limited information and indicated that the Grievant should have searched for more information. While it is true that the Grievant informed her that this was not his job only later did she inform others of the Grievant’s alleged rudeness. Interestingly FF/P Clark did eventually comment to his partner his own frustration with being berated in the hallway by the registration clerk about the lack of full patient information.

While it may be true that in this case a complaint was eventually lodged against the Grievant by Mr. Copley the Director of Emergency Services at LMH, the Union also notes that Mr. Copley did not personally observe the events and the registration clerk involved never made an independent formal complaint. Nevertheless, the Grievant was suspended without pay for 24 hours, referred to anger management services and assigned to another Station. The Union believes such overreaction is not justified and reflective of bias against the Grievant.

In a third instance of what the Union sees as an effort to “get” the Grievant, in July, 2020 Medic 2 equipment was repaired for damages to a bumper. A few days later it was noticed that there was some damage showing after a run. Noticing damage the Grievant attempted to repair it personally. He had no knowledge of the previous damage having been repaired and simply assumed it was damage done prior to his use of the vehicle. He did admit that in his use of the vehicle he had “pushed in some tree branches to get turned around” but did not believe he hit anything solid that could have caused the damage. He did report noticing a shroud pulled out a bit and tried to bend and straighten it out. He did not believe he did anything wrong but nevertheless the City found him guilty and suspended him for two shifts. In effect, once again the Grievant was harmed by a sense that the City was out to get him particularly since the June 15, 2021 termination letter “omits any mention of prior discipline as the basis for termination”.

Perhaps most importantly, the Union argues that following the May, 2021 event the Grievant realized that he needed professional support given his difficulties with depression and anger management. He was referred to Dr. Brian Barkett a specialist in Post-Traumatic Stress Disorder (PTSD) who has and is working with fire fighters. The Grievant reached out to Dr. Barkett for assistance. Dr. Barkett's approach to treatment is to recognize that fire fighters often have trauma after trauma layered over their emotions. As a result they tend to have high threat perception, sudden outbursts of anger, overreactions to minor provocations, etc. In addressing such issues Dr. Barkett employs a particular technique (i.e. Eye Movement Desensitization and Reprocessing) or EMDR. In his work with the Grievant Dr. Barkett discovered that the Grievant had experienced 15 or more major traumas resulting from his fire-fighting experiences as well as other severe personal life events. Dr. Barkett believes that he and the Grievant have been making significant progress on addressing these issues thereby bringing the Grievant into a more stable state of mind. If nothing else the Union believes this voluntary effort to address a fundamental psychological issue should be recognized and reflected in any disciplinary action.

In light of the above the Union argues that Just Cause for termination of the Grievant does not exist and he should be made whole for any damages resulting from the City's actions.

Opinion

In this case it should be apparent that by provisions of the CBA we are bound by events occurring within the 18 month "look back" period noted for "oral or written reprimands" and five years for "suspensions and demotions." Certainly events within this period are relevant in this case. Thus the four instances noted by the City are clearly within the appropriate look back period - i.e., (1) 2018 issue involving a dispute over comments made about ensuring sufficient patient information prior to admission at LMH resulting in suspension for one tour of duty; (2) 2020 issue of the damaged vehicle resulting in a two day suspension; (3) May 18, 2021 issue involving outbursts in front of a patient and (4) 2021 loss of control in confronting colleagues upon their efforts to find out why the Grievant

made inappropriate statements to a patient. These are elements appropriate to consider in assessing just cause for the termination decision.

The City makes an argument that events prior to this period or where severe discipline was not applied are also relevant as they provide a “context” for what may have subsequently occurred. Thus it argues that even if it had not imposed explicit discipline for specific events believed to be relevant those actions provide a foundation for any ultimate discipline. But this is a bit of a “slippery slope”. Indeed one can make a solid argument that events for which little or no disciplinary action was taken do nothing to provide “progressive discipline” and are therefore contrary to the spirit of the CBA. Similarly, events that occurred outside the approved “look back” period may provide some useful information but they should not be used as the primary basis for disciplinary penalties imposed for actions within the “look back” period. In listening to arguments by both parties there is at least a hint of the reality that over time the City has been unhappy with Grievant Clark’s behavior because of multiple small attitude related difficulties for which there is little evidence of formally imposed discipline. But such frustration alone is certainly not on its own sufficient to support a termination decision.

Based on comments made by witnesses it is reasonably clear that part of the reason for this reliance on feelings and impressions is a fire fighter equivalent of “protecting our own”. That is to say, it may indeed be the fact that fire fighters tend not to report discipline violations out of a sense of “loyalty” to each other and “cover up” difficulties created by individual colleagues, which certainly makes issues complex for an employer. But that is something that should be addressed by development of better personal policies and discipline practices incorporated in the CBA and not by relying on past events for which clear corrective action was not taken.

Nevertheless, taking key issues in turn, it is apparent that the four instances providing the basis for the City’s decision to impose a final termination occurred. The 2018 incident involving a verbal disagreement with the LMH registration clerk did happen and the Grievant was progressively penalized for that behavior with no Union objection to the City’s ultimate decision. The events in 2020 during

which the Grievant apparently caused damage to a vehicle and attempted to hide that action clearly occurred. The progressive disciplinary suspension imposed by the City was not pursued further by the Union and thus it stands on the record within the look back period. In terms of the May, 18, 2021 events there were two connected sets of actions that both parties agree occurred. To begin with although the patient involved may have been frustrating to deal with the Grievant made a series of comments about the patient's condition and the need for him to provide service to "drunks" that were heard by the patient, co-workers and most likely other hospital staff. He also made a derogatory comment about the hospital in a public place that was overheard by others. Finally, he clearly expressed his loss of emotional control and anger by cursing at his colleagues and leaving the facility in an out of control nature sufficient to knock over some equipment.

None of these actions were appropriate or consistent with behaviors expected of Fire Fighter-Medic personnel. This is especially important given the unique interdependent nature of the relationship between LMC and the Newark fire department. The City has been clear in stressing the mutuality of economic interests between the two entities in addition to the normal and overriding commitment to patient care. The actions taken by Grievant Clark were "public" and not limited to banter between colleague fire fighters as might be the case in which fire fighters used aggressive language in non-public settings. To act the way Grievant Clark did could only do damage to relationships between LMC and NFR, raise concerns among staff of both organizations and create recuperative difficulties for the patients involved as well as possible liabilities for both organizations. The behavior was inconsistent with any normal expectations of fulfilling the duties of a FF/P. Thus it was appropriate for the City to take action to limit such outcomes for the future.

Nevertheless, the Union argues that there are a number of mitigating factors that should limit any disciplinary penalty for this series of events including the following. First, the Union believes the events were not as serious or impactful as believed by the City. For example, testimony from FF/M Daubenmeir indicated that he did not file what he thought of as a "complaint" about what occurred at LMC on May 18, 2021. Instead he simply passed along information

about what occurred in the hope that the City would make some accommodation for Grievant Clark's inappropriate behavior. Similarly FF/M Gundelfinger apparently initially thought the issue would be handled "internally" (i.e., informally). Both apparently thought the Grievant's actions did not rise to the level justifying discipline. In their view more appropriately would have been simple adjustments to Grievant Clark's work assignments and other actions to reduce any personal pressures he might be experiencing.

But it is important to note that neither individual had the right to determine how the NFD would handle the matter. The assignment of work is one determined by the City per Article 2, Section 2.1 (Management Rights). That is to say by more senior NFD officials who placed the events in a disciplinary trail and believed it was more serious than bargaining unit members might. Other fire fighters might have opinions about events involved in this case but the determination of facts and appropriate responses was an administrative decision with decision rights residing with the City as long as actions were consistent with the CBA. Fire Fighters might have opinions on best actions and administrative leaders might well be open to such input. But within constraints identified in the CBA, disciplinary decisions are clearly in the hands of NFD administrative officials. The feelings of FF/P Daubenmeir and FFP Gundelfinger were important but their responsibility was to report events and not to make any final binding disciplinary recommendation. The Union argues there was never a complaint filed apparently referring to some form of formal complaint from a third party such as LMH. But the filing of a "complaint" occurred when events became known to NFD and charges clarified. This occurred in both the LMH registration clerk difficulty and 2021 LMH events. In terms of the truck damage a complaint was filed by the City once the incident was identified. There was no requirement that a written third party complaint be made prior to any disciplinary action although the presence or absence of such information might well affect ultimate disposition of the issue.

In effect, it is clear from testimony that there was a series of events on which the City based its progressive disciplinary actions. There is some reason to believe that as far as the NFD was concerned there was a sense that the Grievant had pushed the limits of appropriateness in behavior in other instances and the City was therefore suspicious of his behaviors. However, in this case evidence

about the accuracy, appropriateness and implications of these four events for future behavior was clearly the justifiable basis for the City's actions.

The Union does note that it is important to consider the Grievant's recognition of his behavioral problems. He had initially undertaken only limited unsuccessful efforts to address his excessive aggressiveness, overreactions, outbursts, etc. But after the LMH events of 2021 he apparently did on his own seek additional support by seeking out Dr. Brian Barkett. In his testimony Dr. Barkett was explicit about the different approach to dealing with aggression he was using. His approach more fully recognized the impact of PTSD throughout lives and careers, particularly for those in highly traumatic professions such as firefighting. This intensive and analytical approach was very different from Grievant Clark's original efforts to deal with his aggressiveness and depression issues in 2018. Certainly the difference in approach described by Dr. Barkett appears promising but there was also an admission that the types of severely stressful incidents faced by fire fighters, including the Grievant, might well be cumulative. While Dr. Barkett expressed belief that the Grievant is on the road to recovery and in the future should be better able to handle the extreme stresses faced by fire fighters as these occur he also acknowledged that further treatment would be helpful.

The Union raised the issue of whether there was an adequate "just cause" for termination. That issue has been addressed in the CBA and Ohio Supreme Court decisions and, as noted by the Union, in numerous arbitration decisions. In summary form the following are issues most often considered in such a determination as well as this Arbitrator's assessment of the fit between those determinative issues and the facts in this case:

1. Was there reason for the employee to know that his conduct was unacceptable and would have serious consequences? In this case the Grievant's behavior was clearly inappropriate for its impact on patients, colleagues, other health professionals and relationships with a key institutional partner (LMH). This was recognized by colleagues as well as administrative superiors.

2. Were the work rules reasonably related to business requirements of the firm? Given the nature of services rendered where life and death are possible outcomes of services provided overt disagreement and disparagement between health-care providers is clearly is not appropriate. In this regard the Grievant's actions were contrary to reasonable expectations about appropriate behavior over multiple events.
3. Was any investigation of events made prior to the discipline? In alignment with provisions of the CBA that process clearly occurred in this instance over multiple events.
4. Was the investigation conducted fairly and objectively? Despite Union claims of bias based on an assertion of the NFD's dislike of the Grievant there was little consistent evidence of such a bias while there was a clear pattern of progressive discipline based on the Grievant's behavior.
5. Was the Grievant guilty as charged? In each of the events legitimately within the "look back period" there is little or no doubt of the Grievant's guilt (i.e., he committed the acts alleged).
6. Has the employer applied discipline for similar violations with consistency? From testimony it appears accurate to state that it is not unusual for fire fighters to use foul language with each other or, as in this case, speak with sarcasm about annoyances found in normal work. But in this case such comments occurred within the clear presence of patients, nurses and LMH staff all of whom depend on the decision making and emotional skills of first responders. While the Union suggested that foul and/or sarcastic language often occurred between fire fighters it did not provide any evidence that such behavior was common, appropriate or tolerated in these hospital settings.
7. Is the penalty related to the offense and the Grievant's past work record? Yes. There is a clear trail of progressive discipline where the Grievant was

increasingly disciplined for violations of work expectations and alerted to the reality that any further violations could result in termination.

In effect, in applying the lens of traditional approaches to supporting just cause for termination there is sufficient evidence of the Grievant's inability to consistently behave in accordance with the Employer's reasonable work expectations.

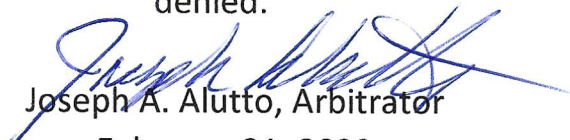
Given the above the only issue remaining is whether there are sufficient mitigating issues to suggest the penalty is clearly excessive. In the absence of such a judgement most arbitrators are loath to modify an imposed discipline.

In this case we have a progression of increasingly harmful actions by the Grievant related to poor judgement, over reaction to unexpected events and internal psychological processes, all potentially generated by the effects of PTSD. He is now taking steps to address these issues but he clearly did not do so in a timely fashion. Indeed, despite warning that termination was a possible outcome for continuation of his behavior there is evidence that it was only after the Grievant was aware that severe disciplinary action was being undertaken that he sought out and engaged in treatment with Dr. Barkett. As indicated by Dr. Barkett progress in addressing past work related traumas is being made and will be invaluable to the Grievant in the future. But that does not justify an Arbitrator's altering work expectations or the employer's just cause for termination.

As duly designated Arbitrator, in light of the above I make the following:

AWARD

The Grievant's employment was terminated for just cause. The grievance is denied.


Joseph A. Alutto, Arbitrator
February 21, 2022

Relevant Contract Provisions

The relevant provisions of the Collective Bargaining Agreement (Joint Ex. I), effective January 1, 2020 through July 31, 2022, include the following:

Article 2 MANAGEMENT RIGHTS

Section 2.1 Management Rights

Nothing herein shall be construed to restrict any constitutional, statutory, or inherent exclusive appointing authority rights with respect to matters of general managerial policy. The Employer retains the right and the authority to administer the business of the City, and in addition, all other functions and responsibilities, which are not specifically modified by this Agreement. The Union shall recognize the Employer has and will retain the full right and responsibility to direct the operations of the City, to promulgate rules and regulations and to otherwise exercise the prerogatives of management, and more particularly, including but not limited to, the following:

B. To manage and direct its employees, including the right to select, hire, promote, demote, transfer, assign, evaluate, layoff, recall, reprimand, suspend, discharge, or discipline for just cause, and to maintain discipline among employees;

Article 37 CORRECTIVE ACTION AND PERSONNEL RECORDS

Section 37.1 Corrective Action

The employment of every bargaining unit employee shall be during good behavior and efficient service and no such employee shall be reduced in pay or position, suspended, removed or otherwise disciplined except as provided in this section and for incompetency, inefficiency, dishonesty, insubordination, discourteous treatment of the public, neglect of duty, violation of work rules, or any acts of misfeasance, malfeasance, or nonfeasance in office, provided that an employee may be disciplined for off duty conduct only if such conduct has an adverse effect on the City or the employee's ability to do his/her job. Newly hired employees still in their probationary period may file a grievance under Article 6 of this agreement if they are removed during their probationary period provided, however, that the removal of a probationary employee is not subject to arbitration.

Section 37.2 Employee Records

Records of disciplinary action shall be maintained in an employee's personnel file.

Any employee or his/her authorized representative may inspect the employee's personnel file at reasonable business hours. An employee may obtain copies of materials in his/her personnel file. The City may establish a reasonable copying charge for the materials.

An employee may dispute any information in his/her file by placing a letter in his/her file setting forth the basis of his/her objection. The objection may challenge the accuracy, timeliness, relevance, or completeness of the information in the employee's file.

The provisions of this section shall apply to the official personnel file maintained by the Human Resources Director for each employee of the bargaining unit. Only one official file shall be maintained.

An employee shall be notified of any request to review the employee's personnel file or to obtain copies of any documents from the employee's personnel file.

If progressive disciplinary action is taken against an employee, only those records of prior disciplinary action as are contained in the official personnel file may be considered (such as records of reprimands and suspensions but not including evidence supporting disciplinary action). Oral reprimands and any documentation of oral reprimands shall not be used for any purpose, including progressive disciplinary action, 18 months after such was given provided that no further disciplinary action of the same or similar nature has occurred. A written reprimand shall not be used for any purpose, including progressive disciplinary action, 18 months after such was given if no further disciplinary action of the same or similar nature has occurred. Any suspension or demotion shall not be used for any purpose, including progressive disciplinary action, five (5) years after such was given provided that no further discipline resulting in a suspension or demotion has occurred.

Section 37.3 Internal Investigation

A. The Fire Chief or his/her designee may conduct an investigation of alleged misconduct by an employee, and require oral or written statements from that employee. The employee under investigation of misconduct will be provided a copy of those allegations against him/her, including the name of the person(s) making the allegations, prior to being questioned or required to provide a statement involving alleged misconduct. Upon request, the employee will be provided an opportunity for representation and to review documents to refresh the employee's memory prior to providing a statement.

B. If the investigation is not completed within thirty (30) days of the employee submitting to an interview or giving a statement involving the alleged

misconduct, the Fire Chief shall forward to the employee a status report regarding the investigation, including the estimated time of completion. This report will not be used in any criminal proceedings against the employee, but may be used by the City in taking action, and defending such action, with respect to discharge or discipline of the employee.

C. An employee shall be provided a copy of any reprimand issued within seven (7) days.

Section 37.4 Disciplinary Procedure

Disciplinary action shall be imposed by the Fire Chief, except that any reductions in pay or position, suspensions, or removals shall be imposed by the Safety Director. Before such disciplinary action is imposed, the employee must be provided with written notice of the specific charges against the employee, a summary of the evidence supporting those charges, and the opportunity for a hearing before the Safety Director

Any employee who has allegedly committed a violation of a minor nature relating to his/her performance may be interviewed by his/her immediate supervisor prior to the supervisor issuing an oral or written reprimand. The employee shall have a right to representation during such interview, except that an on the spot interview during or practically contemporaneous with the events in questions does not require the presence of a third party. Any statement made by the employee in connection with such an interview by his or her immediate supervisor, in which the employee was not represented, may not be used by the City against the employee in connection with any other disciplinary action.

Upon receipt of a written request, the city will permit the employee or his/her representative at his/her own expense, to inspect and copy or photograph any of the following which are available to or within the possession, custody or control of the city and the existence of which is known or by the exercise of due diligence may become known to the city.

- A. Relevant written or recorded statements;
- B. Books, pages, documents, photographs, tangible objects, building or places, or copies or portions thereof, available to or within the possession, custody or control of the city and which are intended for use by the City as evidence at the hearing;
- C. Any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof;
- D. Written lists of the names and addresses of all witnesses;

- E. All evidence known or which may become known to the city either favorable or detrimental to the employee and material either to the truth of the allegations or the punishment.

Documents which are privileged or otherwise prohibited from disclosure by state or federal law are protected from discovery under this article. The employee may be represented by the union president or president's designee or an attorney at the hearing. The employee or the employee's representative shall be allowed to call witnesses and/or question adverse witnesses at the hearing.

Discipline may be imposed after the hearing. The employee at his/her option may waive the hearing. The Fire Chief or his designee may place a member on administrative leave with pay pending the outcome of the hearing set forth in this section.

Section 37.5 Appeal of Discipline

Discipline is subject to the grievance procedure set forth in Article 6, Section 4.

In addition to the Collective Bargaining Agreement, the Newark Fire Department has a number of policies and procedures. The relevant portions of the policies and procedures include the following:

Mission Statement, SOP 100.00 (City Ex. 5) Section II:
Division Values

- A. Professional Excellence
- B. Outstanding Customer Service
- D. Interagency Cooperation

Vision Statement, SOP 100.01 (Id.)

Section I: "Our vision is to provide excellence in our service to our community (customers)..."

Code of Conduct, SOP 102.01 (Id.)

Section I D: Conduct all dealings with the public, county and city employees, and other organizations in a manner that presents a courteous, professional and service-oriented image of the department"

Section II D: "Members will treat one another with due courtesy and shall refrain from disrespectful conduct while on duty"

Obedience to Orders, SOP 102.02 (Id.)

Section II: "Members shall read and become familiar with the department's rules, regulations, policies and procedures. No pleas of ignorance of the rules and regulations will be accepted as an excuse for any violations"

Section IV: "Members shall abide by the department's general orders and rules of conduct"

Ethics and Professional Relations, SOP 102.03 (Id.)

Section I A: "Demonstrate integrity, honesty and ethical behavior in the conduct of all department business"

Section I B: "Treat the public and other employees fairly and equitably, without regard to age, color, disability, ethnicity, national origin, political affiliation, race, religion, gender, sexual orientation or any factor unrelated to the department's business"

Section II A: "Behave in a manner that positively reflects upon themselves as individuals, the fire department and the City of Newark"

Section II B: "Members shall treat one another with due courtesy and shall refrain from disrespectful conduct while on duty"

Section II E: "Members should avoid situations that would adversely affect the credibility or public perception of the fire department"

Section II G: "Members shall exhibit courtesy and respect to members of the public and other county or city employees"

Physical and Mental Fitness, SOP 102.05 (Id.)

Section I: "Each member shall remain mentally and physically fit and shall be able to perform their job duties in accordance with NFPA 1001 Standard for Firefighter Professional Qualifications 2002 Edition, NFPA 1582, Standard on Comprehensive Medical Program for Fire Departments 2003 Edition, and NFPA 1583, Standard on Health-Related Fitness Programs for Firefighters 2000 Edition"

Section II: "When appropriate, members are encouraged to take advantage of the city's Employee Assistance Program"