

**CITY OF DENTON, TEXAS
FIRE DEPARTMENT
CIVIL SERVICE COMMISSION
ADMINISTRATIVE APPEAL**

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|------------------------|---|------------------------------------|
| FIRE CAPTAIN SG, | | SUBJECT: APPEAL FROM AN INDEFINITE |
| APPELLANT, | - | SUSPENSION |
| ---and--- | - | |
| CITY OF DENTON, TEXAS, | - | BEFORE: DIEGO J. PEÑA |
| EMPLOYER. | - | Hearing Examiner |

APPEARANCES

FOR APPELLANT: Mr. Rafael Torres, Texas State Association of Fire Fighters, Austin, Texas

FOR EMPLOYER: Mr. Michael Cronig, Deputy City Attorney, City of Denton, Texas.

Date of Hearing: August 30, 31, September 1 and 2, 2022

Place of Hearing: Denton, Texas

Date of Award: November 18, 2022

AWARD SUMMARY

In accordance with Chapter 143 of the Texas Local Government Code, Captain SG (“Appellant”)¹ appeals the decision of the City of Denton Fire Department (“City,” “Department” or “DFD”) to suspend him indefinitely. Under the Texas Local Government Code, an indefinite suspension is equivalent to dismissal. The City indefinitely suspended the Appellant for reporting to work intoxicated and impaired on October 2, 2021. The Appellant, a 36-year firefighter, admits that he was impaired on October 2 because he suffers from post-

¹ To protect the privacy of the persons involved, throughout this award the Arbitrator will identify all witnesses and parties by their initials, except for Fire Chief Kenneth Hedges and City of Director of Civil Service Sarah Kuechler. Exhibits referenced in this award will be modified to identify individuals by their initials.

traumatic stress disorder (PTSD), but he denies being intoxicated on that day. The Department did not conduct an alcohol test. The Hearing Examiner finds the evidence was insufficient to establish the Appellant was intoxicated or under the influence of alcohol or other substances on October 2; however, the evidence does support the Department's conclusion that the Appellant was impaired and that discipline is warranted. The Hearing Examiner reduces the indefinite suspension to a 15-day unpaid suspension.

ISSUE

Did the DFD, acting through its Fire Chief, have just cause to indefinitely suspend the Appellant? If not, what is the appropriate remedy?

STATEMENT OF PROCEEDING

The evidentiary hearing occurred on August 30, 31, September 1 and 2, 2022 in Denton, Texas. The hearing was open to the public. The parties were afforded full opportunity to introduce evidence, examine and cross-examine witnesses.² After the hearing, the parties submitted post-hearing briefs.

RELEVANT DOCUMENTS

1. Texas Local Government Code Section 143.010:

(a) Except as otherwise provided by this chapter, if a fire fighter or police officer wants to appeal to the commission from an action for which an appeal or review is provided by this chapter, the fire fighter or police officer need only file an appeal with the commission within 10 days after the date the action occurred.

(b) The appeal must include the basis for the appeal and a request for a commission hearing. The appeal must also contain a statement denying the truth of the charge as made, a statement taking exception to the legal sufficiency of the charge, a statement alleging that the recommended action does not fit the offense or alleged offense, or a combination of these statements.

² Ms. Tanya Letbetter, a certified court reporter in the State of Texas transcribed the testimony. References to the court reporter's transcript will be identified as Tr. ____ There are four volumes of hearing transcripts: "1 Tr. ____" will refer to the first day of the hearing, "2 Tr. ____" will refer to the second day, "3 Tr. ____" will refer to the third day, and "4 Tr. ____" will refer to the fourth day. Exhibits offered by the City will be identified as CX-____. Exhibits offered by the Appellant will be identified as UX-____.

- (c) In each hearing, appeal, or review of any kind in which the commission performs an adjudicatory function, the affected fire fighter or police officer is entitled to be represented by counsel or a person the fire fighter or police officer chooses. Each commission proceeding shall be held in public.
- (d) The commission may issue subpoenas and subpoenas duces tecum for the attendance of witnesses and for the production of documentary material.
- (e) The affected fire fighter or police officer may request the commission to subpoena any books, records, documents, papers, accounts, or witnesses that the fire fighter or police officer considers pertinent to the case. The fire fighter or police officer must make the request before the 10th day before the date the commission hearing will be held. If the commission does not subpoena the material, the commission shall, before the third day before the date the hearing will be held, make a written report to the fire fighter or police officer stating the reason it will not subpoena the requested material. This report shall be read into the public record of the commission hearing.
- (f) Witnesses may be placed under the rule at the commission hearing.
- (g) The commission shall conduct the hearing fairly and impartially as prescribed by this chapter and shall render a just and fair decision. The commission may consider only the evidence submitted at the hearing.
- (h) The commission shall maintain a public record of each proceeding with copies available at cost.
- (i) In addition to the requirements prescribed by this section, an appeal to the commission in a municipality with a population of 1.5 million or more must meet the requirements prescribed by [Section 143.1015](#).

2. Texas Local Government Code Section 143.051 (Disciplinary Action)

Cause for Removal or Suspension. A commission rule prescribing cause for removal or suspension of a fire fighter or police officer is not valid unless it involves one or more of the following:

- (1) Conviction of a felony or other crime involving moral turpitude;
- (2) Violations of a municipal charter provision;
- (3) Acts of incompetency;
- (4) Neglect of duty;
- (5) Discourtesy to the public or a fellow employee while the fire fighter or police officer is in the line of duty;
- (6) Acts showing lack of good moral character;
- (7) Drinking intoxicants while on duty or intoxication while off duty;
- (8) Conduct prejudicial to good order;
- (9) Refusal or neglect to pay just debts;
- (10) Absence without leave;

- (11) Shirking duty or cowardice at fires, if applicable; or
- (12) Violation of an applicable fire or police department rule or special order.

3. Texas Local Government Code Section 143.052 (Disciplinary Suspensions):

- (a) This section does not apply to a municipality with a population of 1.5 million or more.
- (b) The head of the fire or police department may suspend a fire fighter or police officer under the department head's supervision or jurisdiction for the violation of a civil service rule. The suspension may be for a reasonable period not to exceed 15 calendar days or for an indefinite period. An indefinite suspension is equivalent to dismissal from the department.
- (c) If the department head suspends a fire fighter or police officer, the department head shall, within 120 hours after the hour of suspension, file a written statement with the commission giving the reasons for the suspension. The department head shall immediately deliver a copy of the statement in person to the suspended fire fighter or police officer.
- (d) The copy of the written statement must inform the suspended fire fighter or police officer that if the person wants to appeal to the commission, the person must file a written appeal with the commission within 10 days after the date the person receives the copy of the statement.
- (e) The written statement filed by the department head with the commission must point out each civil service rule alleged to have been violated by the suspended fire fighter or police officer and must describe the alleged acts of the person that the department head contends are in violation of the civil service rules. It is not sufficient for the department head merely to refer to the provisions of the rules alleged to have been violated.
- (f) If the department head does not specifically point out in the written statement the act or acts of the fire fighter or police officer that allegedly violated the civil service rules, the commission shall promptly reinstate the person.
- (g) If offered by the department head, the fire fighter or police officer may agree in writing to voluntarily accept, with no right of appeal, a suspension of 16 to 90 calendar days for the violation of a civil service rule. The fire fighter or police officer must accept the offer within five working days after the date the offer is made. If the person refuses the offer and wants to appeal to the commission, the person must file a written appeal with the commission within 15 days after the date the person receives the copy of the written statement of suspension.
- (h) In the original written statement and charges and in any hearing conducted under this chapter, the department head may not complain of an act that occurred earlier than the 180th day preceding the date the department head suspends the fire fighter or police officer. If the act is allegedly related to criminal activity including the violation of a federal, state, or local law for which the fire fighter or police officer is subject to a criminal penalty, the department head may not complain of an act that is discovered earlier than the 180th day preceding the date the department head suspends the

fire fighter or police officer. The department head must allege that the act complained of is related to criminal activity.

4. **Rules and Regulations of the Civil Service Commission, City of Denton, Texas: 053. Appeal of Disciplinary Suspension**

(M) ISSUES TO BE DETERMINED IN DISCIPLINARY APPEALS

- (1.) Generally, the determinative issues to be considered and determined by the disciplinary action appeal process shall be:
- (a) Did “cause” exist to support the imposing of some form of disciplinary action as to the employee;
 - (b) Did the employee received reasonable or appropriate “due process” in the department’s disciplinary process;
 - (c) Was the degree of disciplinary action imposed by the department “reasonable” under the circumstances; and
 - (d) Has the hearing process developed matters that justify or compel modification of the Department head’s disciplinary action?

5. **Rules and Regulations of the Civil Service Commission, City of Denton, Texas: 057. Hearing Examiners**

(A) APPEALS TO INDEPENDENT THIRD PARTY HEARING EXAMINERS

- (6) The Hearing Examiner is to conduct a hearing fairly, objectively and impartially under the provisions of Chapter 143 and these Rules and Regulations. The Hearing Examiner is to render a fair and just decision based solely on the evidence presented in the hearing. The scope of the evidence to be considered at the hearing shall be generally limited to matters closely relevant to the charges of misconduct as set forth in the department’s written statement and the employee’s notice of appeal as filed with the Commission as well as the appealing party’s previous work record with the department. It shall be the province of the Commission (or Hearing Examiner) to:
- (a) Resolve any factual (not legal) conflicts or ambiguities, which may exist;

- (b) Determine whether the department's disciplinary action is free from the taint of any personal animosity; and
- (c) Determine whether the disciplinary action is reasonably supported by facts, which had occurred prior to the time the disciplinary action was imposed.

The Hearing Examiner's final deliberations shall primarily focus on the overall reasonableness of the department's action as its substantial compliance with Chapter 143, these rules and regulations and the general orders and standard operations procedures of the department.

6. City of Denton Personnel Policy 108.12

An employee is prohibited from performing his or her job duties under the influence of alcohol or drugs, or if performance is impaired, while under the influence of lawfully prescribed or over-the-counter substances.

7. Denton Fire Rescue Standard Operating Manual: 102.01 - Code of Conduct

II. Members Conduct

Civil Service Members may be removed or suspended for violations of the following (See Texas Local Government Code 143.501 and Local Rules and Regulations and policies of the City of Denton and Denton Fire Department even if they may disagree with them personally).

7. Denton Fire Department Manual

1013.3: Professional Conduct

Conduct unbecoming of a member shall include that which discredits the Department or the person as a member of the Department or which impairs the operation or efficiency of the Department or its members. All membership should conduct themselves in a manner that will not impair the good order and discipline of the Department.

1013.16: Denton Fire Department Administrative Actionable Charges

- (g) Drinking or using intoxicants while on duty or public intoxication or impairment while off-duty.
 - (i) Members will not use alcoholic beverages, debilitating drugs, or any substance that could impair their physical or mental capacities while on duty and in some cases off duty.

(7) Employees, while off duty, will refrain from consuming intoxicating beverages to the extent that it result in impairment, intoxication, or obnoxious or offensive behavior in public which discredits them or the Fire Department, or renders the employee unfit to report for the next regularly scheduled shift.

(h) Conduct Prejudicial to the good order of the City of Denton or Denton Fire Department

ii. Members will not engage in activities that are detrimental to the Department or conduct themselves in a manner that brings discredit on themselves and the Department.

8. The Department's Charging Document³

DATE: February 18, 2022

TO: Sarah Kuechler, Director of Civil Service

FROM: Kenneth Hedges, Fire Chief

SUBJECT: Indefinite Suspension of Fire Captain SG

Pursuant to Chapter 143.052 of the Texas Local Government Code, and Rules .051 and .052 of the Rules and Regulations of the Civil Service Commission of the City of Denton, I have indefinitely suspended Fire Captain SG from duty as a fire fighter effective February 18, 2022.

I took this action because SG violated Civil Service Commission Rule .051, which sets forth the cause for removal or suspension of employees in the classified service, and states:

The following are declared to be ground for removal or suspension of any employee from his /her civil service position in the City of Denton:

H. Conduct Prejudicial to Good Order

O. Violation of any of the rules or regulations of the Fire Department or Police Department; of special orders, as applicable; of these rules and regulations; or of any of the City Personnel rules and regulations.

³ CX-11. The City's Local Rules require the reading of this document into the record. 1 Tr. 16-17. The document is reproduced without the specific statements of the witnesses for purposes of brevity.

The following are the specific acts committed by Captain SG in violation of Rule .051 (H) & (O):

On October 2, 2021, Captain SG was assigned as C shift commander for Fire Station 5. Operations firefighters work a 24-hour shift, from 8:00 am to 8:00 pm. On this date, Driver JM observed Captain SG's behavior, as described in detail below, and immediately contacted C Shift's Captain KH advising him that Captain SG could not be there. Driver JM typed and submitted the following statement to a Battalion Chief, which was the impetus for an administrative investigation to determine whether Captain SG reported for duty while impaired or intoxicated:

[Driver JM's statement omitted]

Because of this complaint, I requested that the Denton Police Department's Internal Affairs Division conduct the administrative investigation. Internal Affairs investigated, and their findings were delivered to me for consideration.

Internal Affairs interviewed the firefighters that were present during this incident, including Captain KH and Captain SG. The following are the relevant parts of those interviews whether Captain SG was intoxicated or impaired that day:

[Fire Fighter SA's synopsis omitted]

[Fire Fighter WM's synopsis omitted]

[Fire Fighter AJ's synopsis omitted]

[Fire Fighter CK's synopsis omitted]

[Fire Fighter LD's synopsis omitted]

[Fire Fighter JM's synopsis omitted]

[Captain KH's synopsis omitted]

[Fire Fighter XG's synopsis omitted]

[Captain SG's synopsis omitted]

As noted above, multiple firefighters believed Captain SG was intoxicated and/or impaired on October 2, 2021. Captain SG denied he was intoxicated or under the influence of alcohol. Several of these firefighters have known and/or worked with Captain SG for years so they are familiar with his behavior in the workplace and there is no evidence that any of them have an animus against him. Against based upon the evidence cited above, there is a preponderance of evidence that Captain SG was impaired while at work. Since there was no breath or blood test performed, the determination of whether this impairment was due to the consumption of alcohol comes down to the testimony of other firefighters, many of whom stated they believed he was or may have been

intoxicated. Firefighter JM appears to have been the one who had the closest contact with Captain SG in close quarter, and he stated he smelled alcohol on his person. Captain SG initially denied that he drank alcohol before he came to work, but upon further questioning by IA, admitted that he drank Scotch the night before his shift and he may have spilled alcohol on his clothing and reported for work wearing the same clothes. A preponderance of the evidence supports the finding that Captain SG reported to work under the influence of alcohol. Even if I were to find that alcohol was not a factor, he was clearly impaired for another reason(s).

What makes this incident even more egregious is that Captain SG responded to an EMS call in command of a fire apparatus while impaired and decided he was not fit for duty that day only after responding to that call (they were disregarded) and only after being confronted by Firefighter JM. Captain SG's admission that after returning to the station he and firefighter JM held a lengthy private conversation inside the Quint supports firefighter JM's observations and opinion that captain SG was at a minimum impaired, and based upon a preponderance of the evidence, intoxicated. Furthermore, while Captain SG stated he has never been on duty while impaired or intoxicated, several firefighters told Internal Affairs otherwise.

Captain SG denied having an alcohol or substance abuse problem. A preponderance of the evidence supports a contrary conclusion (he does have an alcohol problem). Captain SG stated that the firefighters could have misconstrued his behavior on October 2nd as his being emotionally distraught and suffering what he believed to be PTSD and sleep deprivation. Captain SG acknowledged that prior to October 2, 2021, he had not been diagnosed with PTSD. Furthermore, he stated he took two Benadryl prior to starting his shift on October 2nd and believed that medication may have affected his behavior since he consumed the pills at approximately 4:00 am.

After the October 2nd incident, Captain SG sought assistance with the International Association for Fire Fighters (IAFF) for PTSD and was treated at a facility out of state. Captain SG successfully completed that in-patient treatment program.

By these actions, Captain SG violated not only Civil Service Rule 0.51 (H), he also [sic] Civil Service Rule .051(O) by violating the following rule and regulation of the Denton Fire Department:

[Denton Fire Rescue Standard Operating Manual: 102.01 Code of Conduct, Denton Fires Rescue Standard Operating Manual, Rules and Regulations: 1013.3 Professional Conduct, and City of Denton Policy/Administrative Procedure/Administrative Directive 108.12.]⁴

In determining the appropriate discipline, I considered that Captain SG was post-incident diagnosed with PTSD and received in-patient treatment for that condition. While I cannot say with certainty that his consumption of alcohol or his behavior on October 2, 2021, was a result of his PTSD, which if true could be a mitigating factor, the fact remains that he reported for duty on October 2nd while impaired in unfit for duty. Furthermore, during his disciplinary hearing on February 11, 2022 Captain SG stated that he knew he had PTSD and had received counseling prior to the October 2nd incident on two occasion from the City's Employee Assistance Plan. Despite

⁴ See ¶ 6, *supra*.

knowing he was suffering from PTSD, Captain SG reported for duty in an impaired state and unfit for duty on October 2nd. In addition, he knew he was suffering from PTSD and did not notify his chain of command so they could make an informed decision whether allowing him to remain in an operations position created unreasonable safety concerns for himself, his crew, and the public that we are sworn to protect.

Finally, I offered Captain SG the opportunity to retain his employment by accepting 16-day agreed suspension with additional terms and conditions designed to ensure he did not report for duty in an impaired and/or intoxicated manner in the future. Captain SG rejected that offer.

By copy of this memo, Captain SG is hereby advised of this indefinite suspension and that the suspension may be appealed to the Civil Service Commission by filing with the Director of Civil Service, within ten (10) calendar days after receipt of a copy of this memo, a proper notice of appeal in accordance with Section 143.010 of the Texas Local Government Code.

By copy of this memo and as required by Section 143.057 of the Texas Local Government Code, Captain SG is hereby advised that such section and the Agreement between the City of Denton and the Denton Fire Fighters Association, Local 1291, provides for an appeal to an independent third-party hearing examiner, in accordance with the provisions of such Agreement. If appeal is made to a hearing examiner, all rights of appeal to a District Court are waived, except as provided by Subsection (j) of Section 143.057 of the Texas Local Government Code. That section states that the State District Court may hear appeals of an award of a hearing examiner only on the grounds that the arbitration panel was without jurisdiction, exceeded its jurisdiction, or that the order was procured by fraud, collusion or other unlawful means. To appeal this suspension to a hearing examiner, the original notice of appeal submitted to the Director of Civil Service must state that appeal is made to a hearing examiner.

Signed: Kenneth Hedges, Fire Chief

Date: February 18, 2022 Time: 1034

ACKNOWLEDGEMENT OF RECEIPT AND NOTICE OF APPEAL RIGHTS

I hereby acknowledge receipt of the above and foregoing memorandum of indefinite suspension on February 18, 2022 at 1037 am. I have been advised that if I desire to appeal, I have ten (10) calendar days from the date of this receipt to file written Notice of Appeal with the Director of Civil Service in accordance with the provisions of Chapter 143 of the Texas Local Government Code.

SIGNED: Fire Captain SG

DATED: February 18, 2022

FACTUAL FINDINGS

1. The DFD and its firefighters have operated under a Meet and Confer Agreement since 2006.⁵ The Appellant has been a firefighter for approximately 34 years and has worked for the DFD for 26 years. Prior to October 2, 2021, the Appellant had only received one disciplinary write-up for a minor infraction.⁶ In 2021, Captain SG supervised the Station 5 C-Shift crew. As the supervisor, he was responsible for ensuring that his crew was appropriately staffed and that all equipment was operational.⁷ His crew operated a quint and an ambulance. A quint is a special firefighting vehicle equipped with an aerial ladder and other firefighting tools.

2. The circumstances that led to Captain SG's indefinite suspension occurred at Station 5 on October 2.⁸ On that day, Captain SG's C-Shift crew consisted of:

Driver JM
Firefighter AJ
Firefighter LD
Firefighter CK
Firefighter WM

They were scheduled to go on duty at 8:00 a.m. for a 24-hour shift. Captain SG's C-Shift was relieving B-Shift, which was supervised by Captain KH. The members of B-Shift were

Firefighter AM
Firefighter KA
Firefighter XG
Firefighter VT
Firefighter SA

Captain SG arrived at Station 5 earlier than normal wearing civilian clothes.⁹ Rather than go to his assigned office area, Captain SG began conversing with firefighters from both shifts congregating in the station's kitchen. Many of these firefighters had known Captain SG for several years. On this particular morning, Captain SG was unusually talkative and animated.¹⁰ Some of the firefighters present noticed that Captain SG was acting differently. Some heard the

⁵ CX-3 ; *see also* CX-2 at p. 30.

⁶ 4 Tr. 55.

⁷ 1 Tr. 167.

⁸ Unless otherwise indicated, the relevant year was 2021.

⁹ CX-26, at pp. 7-8, 1 Tr. 204, 4 Tr. 80.

¹⁰ 1 Tr.205, CX-16, at p. 2; CX-26 at pp. 11-12. .

Appellant slur his words and saw him lose his balance, to the point of almost stumbling.¹¹ As the conversation progressed, the Appellant and Firefighter WM had a disagreement.¹² The firefighters witnessing the disagreement believed Captain SG might be intoxicated.¹³ B-Shift Firefighter SA sent a text to another firefighter telling him: “I think Captain SG might be drinking.”¹⁴ It was common knowledge among the firefighters that Captain SG drank alcohol; some believed he had a drinking problem.¹⁵ Some thought he had reported to work on prior occasions intoxicated or impaired, but these prior occasions were not reported up the DFD chain of command.¹⁶

3. C-Shift Driver JM reported to Station 5 at approximately 7:50 a.m. As he entered the station, Shift-B firefighters told him “your Captain is drunk.”¹⁷ As Driver JM continued walking inside:

I opened the door looking into the kitchen, and [Captain SG] was standing at the end of the counter, just kind of leaning over the counter. And I could—you could just—knowing him so well and knowing how he—whether he’s quiet or loud, obnoxious, whatever, the way he was being was—he wasn’t right. He was just obnoxious, running his mouth, and just being—acting off. Acting like he was drunk.¹⁸

Driver JM went directly to Shift-B Captain KH and told him he believed the Appellant was intoxicated. He asked Captain KH to speak to the Appellant.¹⁹ A few minutes later, Captain KH asked the Appellant if he was okay.²⁰ They spoke briefly. Not long after their discussion, at approximately 8:06 a.m., the station received an emergency medical (“EMS”) call, requiring the quint and ambulance to respond immediately. Because of the timing, this EMS call was the responsibility of C-Shift.

4. The C-Shift crewmembers mustered, gathering their gear and boarding their assigned spots on the quint and ambulance. Driver JM was responsible for driving the quint. He

¹¹ 1 Tr. 39, 124, 207-08, 235, 252; CX-16, WB at pp. 4-5.

¹² 1 Tr. 205-06.

¹³ 1 Tr. 208, 241.

¹⁴ 1 Tr. 253.

¹⁵ 1 Tr. 66-67, 201.

¹⁶ CX-16, LD at p. 3, CK at p. 3, JM at pp. 14-15, WM at pp. 4-5.

¹⁷ 1 Tr. 71.

¹⁸ 1 Tr. 72.

¹⁹ 1 Tr. 73.

²⁰ 4 Tr. 78-80.

observed the Appellant leaving his office walking toward the quint, wearing civilian clothes. Captain KH, although present in the bay, made no effort to prevent the Appellant from boarding the quint.²¹ Captain SG struggled to board the quint and get his gear inside.²² Driver JM felt uneasy about Captain SG boarding the quint because he believed the Appellant was not fit for duty.²³

5. The EMS call was for a medical situation at a residence in Denton. Upon arriving at the scene, the ambulance was able to pull into the residence using the driveway. The quint could not fit in the driveway, so Driver JM parked it a slight distance away. Captain SG remained in the quint throughout the call. It was not uncommon on EMS calls for Captain SG to remain inside the quint. Having seen his condition at the station and because he was not in uniform, some firefighters believed it was best for the Appellant to remain inside the quint.²⁴ At the conclusion of the call, the quint and the ambulance returned to Station 5.

6. Upon arriving at the station, before exiting the quint, Driver JM spoke to Captain SG. He told the Appellant that he should not be at work, and that he was slurring his words. He told the Appellant it was obvious “he was drunk.”²⁵ Captain SG responded by telling Driver JM that he “didn’t feel right” and he felt “hungover,” but, he made it clear to Driver JM that he was not intoxicated.²⁶ As they continued talking, Captain SG became emotional and “opened up” saying he was struggling with personal and emotional issues. The Appellant told Driver JM he was thinking about family members and friends who had died recently—one having committed suicide—and that this was beginning to wear on him.²⁷ Captain SG said he might feel better if he went inside and slept for a while. Driver JM told the Appellant sleeping inside the station was not a good idea since they might have to respond to an emergency call—and that he was in no condition to respond. In an attempt to show encouragement, Driver JM hugged the

²¹ 1 Tr. 74-78.

²² *Id.*; *see also* 4 Tr. 79-80 (Captain SG explains why he had difficulty getting into the quint.).

²³ *Id.*

²⁴ CX-26, at pp. 13-15, *see also* 1 Tr. 208-11 (Firefighter WM believed Captain SG was “a complaint waiting to happen.”).

²⁵ 1 Tr. 78-80.

²⁶ *Id.*, 4 Tr. 84-85.

²⁷ 4 Tr. 95.

Appellant. As they hugged, Driver JM smelled alcohol on the Appellant.²⁸ As their conversation concluded, Driver JM insisted that the Appellant go home. Captain SG agreed.

7. Captain SG contacted Battalion Chief CS and told him he was going home sick.²⁹ He did not tell Battalion Chief CS why he was sick.³⁰ After making the call, Captain SG left the station.

8. As the day progressed, Driver JM felt extremely uncomfortable regarding the Appellant, uncertain if he had handled the situation properly. He regretted not reporting Captain SG's condition up the DFD chain of command. Several days later, Driver JM spoke to Captain KH about reporting the situation. Captain KH agreed that Driver JM should report the matter.

9. On October 8, Driver JM contacted Battalion Chief CS.³¹ He was not in Driver JM's or Captain SG's chain of command, and for this reason, Driver JM felt comfortable contacting him. He told Battalion Chief CS that he believed the Appellant had reported to work under the influence of alcohol and was not fit for duty on the morning of October 2. Battalion Chief CS asked Driver JM to put his observations in an email.³² Driver JM him the following email:

[Battalion Chief CS]

On Oct 2 2021 I came to work at station 5 after being relieved from an OT shift at station 3. I walked into the bay around 0750 and before I could get all the way through the bay I had half of the B shift crew come and say, collaboratively, that my captain was drunk. I walked to the door leading into the day room and opened it to see Captain SG leaning over the end of the kitchen counter as he was in the middle of "running his mouth" to everyone in there at the time. He looked my way and I just let the door shut. I went back into the bay and talked to Captain KH. I told him I was fed up with [Captain SG's] shit. I said, "he can't be here."

Captain KH asked if I wanted him to say something and replied "Yes, actually, that would be good coming from a captain." I put my gear on the Quint and went to the bunk room. I was walking into the laundry area and heard Captain KH ask Captain SG, "Are you okay?" At that point I turned around and walked away because I did not want to hear that conversation. I'm not sure of the time but we caught an EMS call shortly after that. This was my first close contact with Captain SG. He struggled to get in the Quint and get situated. He was slurring his words and having

²⁸ 1 Tr. 80-81.

²⁹ 4 Tr. 96;

³⁰ 1 Tr. 168.

³¹ 1 Tr. 170.

³² 1 Tr. 94.

some difficulty putting together what he needed to say. Firefighters CK and LD were our tailboards. M5 [the ambulance] cleared us and we never had to make scene. When we arrived back station 5 I stopped Captain SG in the quint after Firefighters LD and CK got out. I asked, “Are you okay” to start the conversation. He tried say he was but soon admitted that was not. We had an extensive conversation about his condition and the spot he put us in coming to work like that. He wanted to go to his office and “sleep it off” and I told him “no.” I let him know that he was slurring his words and how obvious it was that he was drunk. I scolded him for putting us all in this spot ant he has done it too many times, although, this was by far the worst time. Like I said, the conversation was extensive and it is too much to put down in an email. The conversation [moved to his office] where he tried again [to sleep it off]. I said no again, “you can’t be at work.” He broke down crying. I gave him a hug and at that point was the first and only time I smelled alcohol on him. He said, “I will make it right” and called the BC and said he was going home sick while I was sitting there. I went up front and told the guys he was going home and that we were running short. The last thing Captain SG said to me was “I won’t be here when y’all get back” as we caught a call. When we returned he was gone.³³

Battalion Chief CS forwarded Driver JM’s email to his immediate supervisor, Assistant Chief BC.³⁴

10. Driver JM’s email shocked Assistant Chief BC.³⁵ Upon receiving the email, Assistant Chief BC began gathering additional information. He checked to see who was working that day, and he reviewed the Department’s report for the October 2 EMS call.³⁶ He also notified Fire Chief Hedges of the situation.³⁷ Fire Chief Hedges told him to investigate the situation further. Assistant Chief BC reached out to the members of B-Shift asking them if someone from C-Shift reported to work impaired or unfit for duty on October 2.³⁸ Captain KH and Firefighter SA told him they believed someone may have been impaired that day.³⁹ Assistant Chief BC shared this information with Fire Chief Hedges and recommended that a formal investigation be pursued.⁴⁰ Fire Chief Hedges concurred. Believing the allegations to be serious, Fire Chief Hedges asked the Denton Police Chief for the police department’s Internal

³³ CX-5.

³⁴ 1 Tr. 174-75.

³⁵ 3 Tr. 15-16.

³⁶ CX-20.

³⁷ 3 Tr. 18-19; CX-6.

³⁸ CX-7.

³⁹ *Id.*, 3 Tr. 18-20.

⁴⁰ CX-7 at p. 2.

Affairs Division to conduct the investigation.⁴¹ The Denton Police Department assigned Detective CW to conduct the investigation.

11. On October 8, Fire Chief Hedges also notified Captain SG that he was being investigated.⁴² The notice stated:

It has come to the attention of the Fire Chief that on October 2, 2021, at approximately 7:50 am, you are alleged to have been intoxicated or otherwise impaired while on-duty at Station 5.

It is also alleged that during the shift, you responded to an EMS call while allegedly intoxicated/impaired. After being confronted by other firefighters regarding your condition, you went home sick. It has also been reported that this may not have been the first time you were intoxicated or impaired while on duty.

If true, your actions may have violated the Civil Service Rules, Fire Department Policies and Procedures, and the City of Denton's Drug and Alcohol-Free Workplace policy.

I have requested that the Denton Police Department's Internal Affairs Division conduct an administrative investigation to determine if these allegations are true, and that request has been granted.

You are required to cooperate with the Police Department's investigation as if you were dealing/speaking directly with me, and that includes that you be honest and forthright in your answers.

Once that investigation is complete, I will determine whether any policy violations will be sustained, as well as the appropriate discipline.

...

You will be receiving further information and directives from the Police Department's Internal Affairs Division regarding this investigation.

Finally, if you have an alcohol related problem or are experiencing personal issues that are affecting you in a negative way, there are numerous programs, including the City's EAP, that are available to assist you, and I encourage you to take advantage of that should there be a need.

⁴¹ 3 Tr. 167, 211, 216.

⁴² UX-2.

Effective immediately you are relieved of duty and placed on Administrative Leave. You are not allowed to be on Fire Department property unless instructed by Assistant Chief BC.

If you have any questions, you may contact Assistant Chief BC at (XXX)XXX-XXXX.⁴³

12. On October 13, Detective CW formally notified Captain SG that she would be conducting the investigation on behalf of the Denton Police.⁴⁴ Not long after being notified of the investigation, the International Fire Fighters Center of Excellence (“COE”), a treatment facility specializing in assisting firefighters with PTSD, accepted Captain SG for treatment at its facility in Marlboro, Maryland. Captain SG asked the DFD for permission to go for treatment. He needed permission because he was out on administrative leave. On October 19, Fire Chief Hedges approved Captain SG’s request. He told the Appellant that the Department would continue its investigation, and the Appellant would be interviewed upon his return.⁴⁵

13. Detective CW delayed her investigation because of other pending investigations and because the Appellant was out-of-town being treated at the COE. She began interviewing witnesses in January 2022.⁴⁶ She conducted these interviews virtually, which allowed her to record and then later transcribe their statements. She and her team interviewed six firefighters. Most of the firefighters told her they believed the Appellant was intoxicated on October 2.⁴⁷ But, one firefighter did not believe the Appellant was intoxicated or impaired on that day and another was not sure.⁴⁸ Another firefighter at first indicated he was not sure if the Appellant was intoxicated or impaired, but then concluded by saying that the Appellant might have been intoxicated or impaired.⁴⁹ Several believed he had reported to work on prior occasions either impaired or intoxicated,⁵⁰ but one said he did not recall seeing the Appellant impaired before

⁴³ *Id.* (phone number omitted)

⁴⁴ CX-8.

⁴⁵ 4 Tr. 129; *see also* CX-23, Letter dated May 16, 2022 *and* 2 Tr. 16-18; 4 Tr. 208.

⁴⁶ Tr. 107-08; CX-15.

⁴⁷ CX16. Driver JM, Firefighter SA, Firefighter LD and Firefighter CK all believed Captain SG to be impaired and/or intoxicated. Firefighter AJ observed no signs of intoxication, but believed Captain SG was impaired,

⁴⁸ *Id.*, Firefighter XG (Captain SG did not appear impaired intoxicated) and Firefighter AJ (Saw no signs Captain SG was intoxicated).

⁴⁹ *Id.*, Firefighter LD.

⁵⁰ CX-16, Driver JM, Firefighter SA and Firefighter WM.

October 2.⁵¹ Two firefighters admitted they should have reported the Appellant up the chain of command.⁵²

14. Captain KH told Detective CW that the Appellant appeared normal when he reported to work on October 2: “I didn’t see anything out of the ordinary.”⁵³ He went on to say that Captain SG did not appear intoxicated or impaired. Captain KH said he did not smell alcohol on the Appellant. Contrary to what Driver JM reported, Captain KH did not recall anyone approaching him on October 2 to discuss the Appellant’s condition.⁵⁴ When reminded that he had previously told Assistant Chief BC that the Appellant may have been impaired, Captain KH said the Appellant may have been “sick,” “sleep deprived” or “congested,” but he could not “make the leap” and say he was impaired.⁵⁵ This contradicted his statement to Assistant Chief BC.⁵⁶

15. Captain SG returned from the COE on December 3; on January 31, 2022, Detective CW and her team interviewed him.⁵⁷ The main points the Appellant made in his interview were:

- He maintained good relationships with his C-Shift crew members.
- He recalled Captain KH asking him on October 2 if everything was okay. Captain SG told him he had “a lot” going on in his life—specifically deaths among family members and friends.
- He recalled telling Driver JM he was not feeling right. He admitted telling Driver JM he felt hungover, but said he was not because he wasn’t drunk the night before. Captain SG denied drinking the morning he reported to work.
- He admitted having PTSD. He said he went to EAP four times prior to October 2, but he returned from the COE feeling “great.”
- The Appellant believed he may have been unfit for duty on October 2 due to PTSD. He told her: “That’s why I went home.”

⁵¹ *Id.*, Firefighter AJ.

⁵² *Id.*, Driver JM and Firefighter CK.

⁵³ *Id.*, Captain KH Interview, at p. 2.

⁵⁴ *Id.*, Captain KH Interview at p. 3.

⁵⁵ *Id.*, Captain KH Interview at p. 4. .

⁵⁶ CX-7.

⁵⁷ 4 Tr. 132; CX-16.

- He said the only substance he consumed on October 2 that could have impaired him was Benadryl.
- He denied having a problem with alcohol.
- In response to a question explaining his description of his symptoms as being hungover Captain SG responded: “I said I couldn’t explain it. I felt like hungover but I knew I wasn’t, because I wasn’t drinking. And that was you know, I had, I had two scotches the night before, and I don’t, days before I go to work, I do not drink anything after 8:00 pm no matter what.”⁵⁸ He clarified his response to say that while he did not drink anything on the morning of October 2, he did have two scotches the day before prior to 8:00 pm.⁵⁹

Detective CW and her investigative team believed that the Appellant was not honest during the interview. On the one hand, he insisted that he had not consumed any alcohol prior to reporting to work on October 2; but, he then said he had 2 scotches the evening before reporting to work.

16. Detective CW’s final report contained the following conclusions:

- “[Captain SG] further stated that the witnesses could have smelled the odor of an alcoholic beverage emitting from his breath because he must have spilled scotch on his clothing while consuming the two drinks the night prior...”
- “In summary, despite Captain SG’s denial of having a problem with alcohol abuse, the investigation showed otherwise. Firefighters JM, WM, CK, LD collectively stated they have observed Captain SG on October 2nd and a few other days, display behavior resembling impairment or intoxication.”
- “SA also stated on Oct. 2nd he witnessed Captain SG appear impaired while on duty whereas AJ stated he believed Captain SG ‘possibly’ could have been impaired. JM, WM, CK and LD have worked under Captain SG’s supervision ranging from 2-10 years and are familiar with Captain SG’s personality. Between all six Fire Fighters it is more than likely they are able to differentiate between a person who is sleep deprived or suffering from PTSD versus someone who is intoxicated/impaired. Unfortunately, Captain KH couldn’t remember any of his conversations with WM or JM regarding Captain SG possibly being unfit for duty.”⁶⁰

⁵⁸ CX-18, at p. 13.

⁵⁹ *Id.*, at p. 14.

⁶⁰ CX-22, at pp. 12-13.

After reviewing Detective CW's report, Fire Chief Hedges sent it to his assistant chiefs for a recommendation.

17. Assistant Chief BC and Battalion Chief TR reviewed the report and made their recommendation.⁶¹ They recommended indefinite suspension—termination. Assistant Chief BC sent the recommendation to Captain SG along with a notification for a disciplinary meeting with Fire Chief Hedges scheduled for Friday, February 11, 2022.

18. Captain SG and his Association representative, Firefighter CB, attended the disciplinary meeting on February 11, 2022. The DFD leadership presented them with Detective CW's investigation, along with the witness statements, to review prior to the meeting.⁶² Fire Chief Hedges, Assistant Chief BC and Battalion Chief TR attended for the DFD.⁶³ Fire Chief Hedges is the final decision maker in the Department regarding disciplinary matters. As he walked into the meeting, Fire Chief Hedges had not decided what level of discipline, if any, he was going to impose on the Appellant.⁶⁴ After considerable discussion, Fire Chief Hedges asked Captain SG and his representative to step out of the room so he could talk privately with his assistant chiefs. When he asked for their recommendation based on what they heard in the disciplinary meeting, they recommended indefinite suspension or demotion.⁶⁵ Fire Chief Hedges, however, wanted to keep the Appellant. When the parties reconvened, Fire Chief Hedges made an offer to Captain SG. In lieu of an indefinite suspension or demotion, he proposed:

- A 16-day unpaid suspension
- A 1-year probation during which Captain SG would be subject to random on-duty alcohol testing.

Fire Chief Hedges believed Captain SG to be a valuable and experienced firefighter that could be salvaged, but he also wanted enforceable assurances that the Appellant would not report to work impaired or under the influence of alcohol. Captain SG was given until February 18 to accept the offer.

⁶¹ CX-10.

⁶² 3 Tr. 194; 4 Tr. 208.

⁶³ 2 Tr. 121.

⁶⁴ 3 Tr. 196.

⁶⁵ 3 Tr. 48-49, 276.

19. Captain SG and his representative declined the offer. The Appellant believed that accepting the offer would be tantamount to admitting he was intoxicated on October 2.⁶⁶ The Appellant countered, stating he would accept the offer but only if all references to alcohol and mandatory alcohol testing were removed from the suspension document. Fire Chief Hedges declined and proceeded to suspend him indefinitely.

20. Fire Chief Hedges formally notified Ms. Sarah Kuechler, the City of Denton Director of Civil Service, in writing of his decision to indefinitely suspend Captain SG.⁶⁷

21. Captain SG appealed the Fire Chief's decision timely.

THE APPELLANT'S SUMMARIZED POSITION

22. The Association believes the appeal raises three questions:

1. What is the proper evidentiary standard to use in evaluating the DFD's burden of proof: clear and convincing or preponderance of the evidence?
2. Did the DFD's investigation comply with Texas Local Government Code Section 143.053(g) in establishing that (a) Captain SG engaged in "conduct prejudicial to good order" and (b) drinking or using intoxicants while on duty or intoxication or impairment off duty? If not, then the City's must be overturned and the discipline reduced.
3. Was the indefinite suspension given to Captain SG disparate in comparison to the discipline imposed on Firefighter CP?

The Association argues that the City failed to satisfy its burden of proof, pointing to inconsistencies in the witness statements and testimony regarding whether Captain SG was impaired or intoxicated. The Association questioned the credibility of the firefighters' statements since the Department waited 6 days before investigating the allegations and the police investigator waited weeks before issuing Garrity warnings to the witnesses. The Association challenges the credibility of the reasonable suspicion of intoxication alleged by the witnesses,

⁶⁶ 3 Tr. 322-25 ; *see also* 4 Tr. 164-66, 205, 210 (Captain SG said accepting the offer would be tantamount to "engaging in a falsehood.").

⁶⁷ CX-11; *See* "Relevant Documents," ¶7 (text of document.).

given that Captain KH allowed the Appellant to board the quint on October 2. The Association points out that without an alcohol test, there was no evidence that the Appellant was intoxicated.

23. The Association also challenges whether an indefinite suspension was the appropriate penalty, given that Captain SG had no significant discipline history prior to this incident and that every Department witness recognized him as an excellent firefighter. The Association denies the DFD's insistence that the Appellant refused to accept responsibility for his actions. It argues that the Appellant was willing to accept a 16-day suspension for impairment due to PTSD. The Association concludes by asking that Captain SG's appeal be sustained, and that the indefinite suspension be removed from his file, and that an appropriate level of discipline be imposed. The Association also asks that Captain SG be renumerated completely and made whole in all respects as required by Chapter 143 of the Texas Local Government Code.

THE CITY'S SUMMARIZED POSITION

24. The DFD believes Fire Chief Hedges had just cause to indefinitely suspend the Appellant. The evidence established that Captain SG reported to duty intoxicated on October 2 and that he responded to an EMS call unfit for duty—which endangered his crew. The City argues several firefighters credibly believed that Captain SG was drunk—Driver JM smelled alcohol on his breath. The City admits that no alcohol test was conducted, but maintains that its firefighters, who are trained paramedics, can identify intoxicated individuals. The City insists its firefighters were courageously credible in telling their supervisors and Police Detective CW that Captain SG was impaired and intoxicated on October 2. While there was evidence that Captain SG suffered from PTSD, Fire Chief Hedges and his subordinate chiefs maintain that the Appellant was not suspended because he suffered from PTSD.

25. The DFD believes that it conducted a fair and reasonable investigation of the charges. It also points to Fire Chief Hedges' offer to Captain SG of a 16-day unpaid suspension was reasonable given the facts confirmed by the investigation. Fire Chief Hedges believed it was a reasonable offer because it balanced the Department's need to keep a valuable and experienced firefighter with an enforceable commitment that he remain sober and fit for duty. The City asks that the Appellant's appeal be dismissed.

DISCUSSION & ANALYSIS

STANDARD & BURDEN OF PROOF

26. Section 143.051 of the Texas Local Government Code allows a fire department to suspend a firefighter for violating department rules, drinking intoxicants on or off duty and engaging in conduct prejudicial to good order.⁶⁸ The DFD's Civil Service Commission Rules and Regulations have incorporated Texas Local Government Code Section 143.051.⁶⁹ Reporting to work impaired is a legitimate safety concern that puts firefighters and members of the public at risk.⁷⁰ For this reason, reporting to work unfit for duty—whether intoxicated, under the influence of medication, or simply being impaired—may be considered conduct prejudicial to good order.

27. The City has the burden of establishing by a preponderance of evidence that it had just cause to indefinitely suspend the Appellant. The DFD's Civil Service Commission Rules and Regulations state:

The primary purpose of [Chapter D, "Disciplinary Action"] is to ensure that disciplinary action is imposed fairly and equitably as is reasonably possible, with the intention of correcting deficient performance and securing substantial compliance with the working rules and regulations of the Civil Service departments.⁷¹

The term "cause" shall also mean "employee misconduct" and shall necessarily include any act or omission that violates:

- (a) An applicable provision of Chapter 143, Texas Local Government Code; or
- (b) An applicable rule or regulation duly adopted by the Civil Service Commission of Denton.⁷²

For disciplinary action purposes, a determination of what constitutes "just cause" is generally made by comparison to what a reasonable person, who is mindful of the habits and customs of his/her department, who is also mindful of the responsibilities and needs of his/her department and who is also mindful of the

⁶⁸ Texas Local Government Code § 143.051 (7), (8) and (12). *Cited* in CX-1.

⁶⁹ CX-2, p. 28.

⁷⁰ 2 Tr. 122-223.

⁷¹ RULES AND REGULATIONS OF THE CIVIL SERVICE COMMISSION, CITY OF DENTON, TEXAS (adopted June 15, 2020), Chapter D, 052(A)(1), at pp. 28-29. CX-2.

⁷² *Id.*, Chapter D, 052(A)(3), at p. 29. CX-2.

standards of justice and fair dealing prevalent in the City of Denton, should have done (or should have not done) under similar circumstances.⁷³

Procedurally, the Fire Chief is required to reduce his disciplinary action to writing, identifying the rules and regulations violated, a description of the operative facts, the disciplinary action to be imposed, the effective dates, the employee's right to appeal and other relevant matters.⁷⁴

28. In his written order indefinitely suspending Captain SG, Fire Chief Hedges identified three departmental policies and directives the Appellant violated:

- A. The DFD Standard Operating Manual Code of Conduct (102.01) which states firefighters may be suspended for drinking or using alcoholic beverages, debilitating drugs or any substance that could "impair their physical or mental capacities while on duty." Employees are also required to refrain from consuming alcoholic beverages or other substances off duty that could render them unfit to report for their next duty assignment.⁷⁵
- B. The DFD Standard Operating Manual Professional Conduct (1013.3) which states Conduct unbecoming of a member shall include that which discredits the Department or the person as a member of the Department or which impairs the operation or efficiency of the Department or its members. All members shall conduct themselves in a manner that will not impair the good order and discipline of the Department.⁷⁶
- C. The City of Denton Administrative Directive, Anti-Substance Abuse and Rehabilitative Policy Statement 108.12, which states: "An employee is prohibited from performing his or her job duties while under the influence of alcohol or drugs, or if performance is impaired."⁷⁷

To satisfy its burden, the City must prove that:

- Captain SG was intoxicated or under the influence of alcohol on October 2;
- If he was not intoxicated or under the influence of some substance, Captain SG was impaired, making him unfit for duty; and
- Captain SG engaged in unbecoming conduct that brought discredit upon himself or the Department.

⁷³ *Id.*, Chapter D, 052(A)(5), at p. 29. CX-2.

⁷⁴ *Id.*, Chapter D, 052(B), at p. 29. CX-2.

⁷⁵ CX-11, at pp. 7-8.

⁷⁶ *Id.*, at pp. 7-8.

⁷⁷ *Id.*, at pp. 7-8.

The City is also required to prove that the discipline imposed was reasonably related to the infraction given Appellant's past record. After a thorough review of the evidence, the Hearing Examiner finds that the City has fallen short of satisfying its burden of proof regarding some of the charges brought against the Appellant.

INSUFFICIENT EVIDENCE SUPPORTING JUST CAUSE FOR BEING INTOXICATED OR UNDER THE INFLUENCE OF ALCOHOL

29. The Hearing Examiner finds that Fire Chief Hedges based his decision to indefinitely suspend the Appellant on the belief that he reported to work intoxicated or under the influence of alcohol on October 2. To properly evaluate the evidence supporting this belief, the Hearing Examiner is not only required to weigh and evaluate the credibility of the evidence, but also to consider the Department's policies, rules, protocols and customs regarding suspected impairment due to alcohol. The City of Denton's Anti-Substance Abuse and Rehabilitation Administrative Directive contains the following definitions:

- "*Impaired* is an employee's diminished capacity to perform duties of the job as determined by a supervisor and/or physician's statement." ⁷⁸
- "*Reasonable suspicion* is a suspicion based on some objective fact derived from the surrounding circumstances that lead a reasonable person to suspect that an employee may be under the influence of *alcohol* or prohibited substances while on duty." ⁷⁹
- "*Alcohol testing* is testing for blood alcohol content by an intoxilizer instrument device operated pursuant to state law." ⁸⁰
- "*On-Call* – Because employees with *on-call* status are potentially required to be actively working, an '*on call*' employee is prohibited from consuming alcoholic beverages or using drugs that may impair his or her performance. If an employee is taking prescription medication that may impair his or her performance when called back to work, he or she should notify his or her supervisor. The supervisor shall determine if the employee is fit to work and in what capacity." ⁸¹

⁷⁸ CX-4, p. 3 of 19.

⁷⁹ CX-4, p. 4 of 19.

⁸⁰ CX-4, p. 2 of 19.

⁸¹ CX-4, p. 6 of 19.

The City of Denton's Anti-Substance Abuse and Rehabilitation Administrative Directive also contains a detailed process on what steps should be taken if employees or supervisors reasonably suspect that a coworker may be under the influence of alcohol or drugs.⁸² Determination of whether to conduct a reasonable suspicion test is governed on a case by case basis.⁸³ If a supervisor has reasonable suspicion an employee may be impaired due to alcohol, the supervisor is required to notify the Human Resources Department and/or report his suspicion to his chain of command.⁸⁴ Arrangements are then made to transport the suspected employee for an alcohol detection test as quickly as possible.⁸⁵ If an employee's alcohol test is negative, a drug test is then performed. The suspected employee is not allowed to return to work until the test results are confirmed negative.⁸⁶ Assistant Chief BC confirmed that this is the DFD process and stated that test results are typically turned around quickly.⁸⁷ If a suspected employee's alcohol test result falls between .001 and .019, the DFD removes the employee immediately from his position until there is no detectable level of alcohol.⁸⁸ If an employee's confirmed test result falls between .02 and .039, the employee will be removed from his position for a minimum period of 24 hours.⁸⁹ Employees whose test results fall between .001 and .04 are subject to disciplinary action, up to and including dismissal.⁹⁰ Employees with a test result greater than .04 will be dismissed.⁹¹

30. The evidence established that several firefighters believed that Captain SG was intoxicated when he reported to work on October 2. Driver JM testified that he believed that Captain SG was intoxicated and that he smelled alcohol on him.⁹² In reviewing the testimony of Driver JM and the other firefighters who believed the Appellant was intoxicated, the Hearing Examiner finds no evidence of bias, animus or collusion. These witnesses truly believed that Captain SG was intoxicated or under the influence of alcohol on the day in question. Their

⁸² CX-4, pp. 8-10 of 19.

⁸³ *Id.*, at p. 8.

⁸⁴ *Id.*, at p. 9 of 19.

⁸⁵ *Id.*, at p. 10 of 19.

⁸⁶ *Id.*

⁸⁷ 3 Tr. 152-54.

⁸⁸ CX-4, at p. 17 of 19.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 1 Tr. 58.

observations, however, no matter how credible and sincere, are not actual proof that Captain SG was intoxicated on October 2. Their observations qualify as reasonable suspicion as defined in the City's Anti-Substance Abuse and Rehabilitation Administrative Directive.⁹³

31. Captain SG adamantly denies he was intoxicated or under the influence of alcohol on the day in question.⁹⁴ In fairness to the Department, there was reasonable suspicion that Captain SG may have been under the influence of either alcohol or medication on October 2. The Appellant testified that he took Benadryl hours before reporting to work. He believed that Benadryl may have affected him on the day in question. Captain SG also told investigators he had two scotches on the evening of October 1 and that he might have spilled some on the civilian clothes he wore when he reported to work on October 2.

32. There was also evidence that the Appellant may not have been intoxicated or under the influence of alcohol on October 2. There was no direct evidence that the Appellant consumed any alcohol on October 2. Two firefighters stated they did not believe Captain SG was intoxicated.⁹⁵ When asked by Detective CW, Captain KH reported that the Appellant appeared normal and that he did not smell alcohol on him.⁹⁶ While this evidence does not acquit the Appellant of the accusations he was impaired due to alcohol, it counters the reasonable suspicion observed by the other firefighters. Captain KH's allowing Captain SG to ride the quint on October 2 and not call for an alcohol test supports the Appellant's assertion that he was not intoxicated or under the influence of alcohol.⁹⁷ Like the other firefighters, Captain KH and the two dissenting firefighters are also experienced paramedics who regularly deal with intoxicated and impaired individuals. Their beliefs are just as credible and sincere as the firefighters who reasonably suspected Captain SG was intoxicated.

33. In his suspension report, Fire Chief Hedges states:

Since there was no breath or blood alcohol test performed, the determination of whether this impairment was due to the consumption of alcohol comes down to the

⁹³ CX-4, p. 4 of 19.

⁹⁴ 4 Tr. 177. .

⁹⁵ CX-16. Firefighter XG (Captain SG did not appear impaired intoxicated) and Firefighter AJ (Saw no signs Captain SG was intoxicated).

⁹⁶ CX-16, Captain KH's statement, p. 2.

⁹⁷ See 1 Tr. 176 (Battalion Chief CS states that Captain KH should have contacted his battalion chief and said "I have problems with this individual. I think he might be intoxicated.").

*testimony of other firefighters, many of whom stated they **believed** he was or may have been intoxicated.*”⁹⁸ [Emphasis added.]

This statement highlights the crux of the Department’s entire case against the Appellant being intoxicated or under the influence of alcohol. The Department’s case is based completely upon **belief**—i.e., reasonable suspicion. There is no provision in the City’s policies that allows an employee to be disciplined for being intoxicated or under the influence of alcohol based solely on reasonable suspicion. To be disciplined under the City’s policies for intoxication or being under the influence of alcohol, an alcohol test must positively confirm the presence of alcohol in the employee.⁹⁹ This is consistent with the notion that because an employee’s job may be on the line, definitive proof of intoxication is required. Without a positive alcohol test, the Department lacked justification under its rules, regulations and policies to indefinitely suspend the Appellant for being intoxicated or under the influence of alcohol on October 2.¹⁰⁰

34. Nonetheless, the City maintains that because its firefighters are taught to recognize intoxication, it believes their educated and experienced observations should be sufficient to support a conclusion that Captain SG was intoxicated or under the influence of alcohol on October 2. The Hearing Examiner respectfully disagrees. Generally, firefighters and paramedics are taught to recognize signs of intoxication to formulate strategic and tactical responses for rescue and treatment. Their trained observations qualify as reasonable suspicion of intoxication, but not legal or conclusive proof of intoxication. Reasonable suspicion along with the results of an alcohol test constitute proof of intoxication under the City’s rules.¹⁰¹ To determine if the employee is intoxicated on the job, an alcohol test is required.

35. Consistent with the conclusions above, Detective CW’s findings and Assistant Chief BC’s recommendation are not evidence that Captain SG was intoxicated on October 2. Their conclusions are based entirely on the reasonable suspicion of the firefighters interviewed. There is no positive alcohol test that supports their recommendations.

⁹⁸ CX-11, p. 6.

⁹⁹ CX-4, p. 17 of 19.

¹⁰⁰ Detective CW’s final investigative report did not contain any definitive evidence that Captain SG was intoxicated on October 2. Her report summarized the witness’ collective reasonable suspicion. Her report contained no diagnostic or definitive evidence or proof that Captain SG was intoxicated or under the influence of alcohol on October 2.

¹⁰¹ CX-4, p. 17 of 19.

36. In his suspension report, Fire Chief Hedges indicated that some firefighters believed that Captain SG had previously reported to work intoxicated or under the influence of alcohol. These witnesses did not provide dates or details for these alleged prior occurrences. Even if they had provided dates or circumstances, these observations are not proof that he was impaired on those occasions or on October 2. No testing was done at the time these firefighters alleged the Appellant reported to work impaired. For this reason, these alleged incidents are not probative.

37. Arguably, if the Department had conducted an alcohol test on October 2, the test results would confirm or deny the presence of alcohol in Captain SG. If the alcohol test had been negative, based on the reasonable suspicion of the reporting firefighters and the City's policies, a follow-up drug test would have been conducted and either confirmed or denied the presence of other substances or medications possibly affecting the Appellant. Since the Department conducted no alcohol test, there is no evidence that the Appellant was intoxicated or under the influence of any other substances or medications that day. For this reason, there is insufficient evidence supporting the City's belief that Captain SG was intoxicated or was under the influence of alcohol or other substances on October 2.

SUFFICIENT EVIDENCE SUPPORTS CONCLUSION THAT CAPTAIN SG WAS IMPAIRED ON OCTOBER 2

38. While the evidence was insufficient to establish that Captain SG was intoxicated on October 2, there is sufficient evidence establishing that he was impaired and unfit for duty that day.

39. City policy defines impairment as an employee's diminished capacity to perform the duties of the job as determined by a supervisor and/or a physician's statement.¹⁰² To be impaired, is not necessary to be intoxicated or under the influence of alcohol or other substances.¹⁰³ Any firefighter who suspects a co-worker is impaired has an obligation to report that co-worker to a supervisor. Captain SG knew and understood this.

¹⁰² CX-4, p. 3 of 19.

¹⁰³ *Id.*

40. Several firefighters who observed Captain SG on October 2 believed him to be impaired when he reported to work. Driver JM believed Captain SG was impaired; he said the Appellant did not look “right” that morning.¹⁰⁴ He saw Captain SG struggle to board the quint.¹⁰⁵ After returning from the EMS call that morning, the Appellant broke down emotionally when Driver JM told him he was not fit for duty.¹⁰⁶ Several other firefighters also suspected the Appellant was impaired and unfit for duty that morning.¹⁰⁷ When asked a few days later, Captain KH told Assistant Chief BC the Appellant may have been impaired.¹⁰⁸

41. The Appellant believed he was not impaired when he initially reported to work on October 2 but realized after his conversation with Driver JM that he might be. He admitted knowing he suffered from PTSD prior to October 2.¹⁰⁹ He told Driver JM he “didn’t feel right” and felt “hungover.”¹¹⁰ The Appellant told Battalion Chief CS that he was going home sick. While not certain what, how or when his PTSD manifested that morning, he admitted being under considerable emotional stress that day: remembering the anniversary of a 4-year old car accident victim; dealing with the deaths of various family members and co-workers—one of those deaths being a suicide.¹¹¹ When asked by Detective CW, the Appellant told her he was impaired on October 2 because of PTSD.¹¹²

42. Fire Chief Hedges, after reviewing all the evidence, concluded that the Appellant was impaired on October 2.¹¹³ During the February 11, 2022 disciplinary hearing, Captain SG repeatedly told Fire Chief Hedges that he was impaired due to PTSD.¹¹⁴ Fire Chief Hedges believed that the Appellant was a danger to himself and others and should have alerted his chain

¹⁰⁴ 1 Tr. 72, 83-84, 110.

¹⁰⁵ 1 Tr. 75; CX-16, Driver JM’s Statement, pp. 8-10.

¹⁰⁶ 1 Tr. 78-83.

¹⁰⁷ See 1 Tr. 205-06, 208, 241 (Firefighter WM), CX-26, p. 5, 16-17 (Fighter CK reported something not right about Captain SG and he appeared to be impaired.) and CX-16 (Firefighters SA, LD, CK and AJ believed the Appellant was impaired.).

¹⁰⁸ CX-7.

¹⁰⁹ 4 Tr. 64-65.

¹¹⁰ 1 Tr. 79-80., 4 Tr. 84-85.

¹¹¹ 4 Tr. 57, 183 and 197.

¹¹² CX-14, at pp. 6-8 of 22.

¹¹³ 3 Tr. 172, 181.

¹¹⁴ 2 Tr. 238-39.

of command about his PTSD prior to October 2.¹¹⁵ In his report to the City's Director of HR services, Fire Chief Hedges stated:

In determining the appropriate discipline, I considered that Captain SG was post-incident diagnosed with PTSD and received in-patient treatment for that condition. ***While I cannot say with certainty that his consumption of alcohol or his behavior on October 2, 2021, was a result of his PTSD, which if true could be a mitigating factor, the fact remains that he reported for duty on October 2nd while impaired and unfit for duty.*** Furthermore, during his disciplinary hearing on February 11, 2022 Captain SG stated that he knew he had PTSD and had received counseling prior to the October 2nd incident on two occasion from the City's Employee Assistance Plan. Despite knowing he was suffering from PTSD, Captain SG reported for duty in an impaired state and unfit for duty on October 2nd. In addition, he knew he was suffering from PTSD and did not notify his chain of command so they could make an informed decision whether allowing him to remain in an operations position created unreasonable safety concerns for himself, his crew, and the public that we are sworn to protect.¹¹⁶ [Emphasis added.]

43. After reviewing all the evidence, the Hearing Examiner finds sufficient evidence supporting the Department's determination that the Appellant was impaired and unfit for duty on October 2. The preponderance of the evidence establishes that he was likely impaired due to PTSD. The Hearing Examiner believes that a firefighter with the Appellant's experience should have excused himself from duty that day. By going out on the EMS call that morning, Captain SG jeopardized his safety and that of his crew. The Hearing Examiner finds the Department had just cause to discipline the Appellant for being impaired and unfit for duty on October 2. The Hearing Examiner also finds that by going on the EMS call impaired, Captain SG engaged in conduct that brought discredit upon himself and the Department and engaged in conduct prejudicial to good order.

44. Because the Department based its decision to indefinitely suspend Captain SG on a violation that was not supported by the evidence—i.e., alcohol intoxication—the Hearing Examiner must determine a level of discipline supported by the evidence for being impaired and

¹¹⁵ 3 Tr. 191.

¹¹⁶ CX-11, at p. 103.

unfit for duty. Under Chapter 143 of the Texas Local Government Code, the Hearing Examiner can:

- A. Sustain the discipline imposed—in this case, the indefinite suspension;
- B. Impose no discipline;
- C. Reduce the discipline imposed to a written reprimand; or
- D. Reduce the discipline imposed to a suspension of 1-15 days.¹¹⁷

Based on the evidence presented at the hearing and for the reasons described above, the Hearing Examiner finds that the evidence supports an imposition of a serious level of discipline for being impaired on October 2. The fact that the Appellant has only had one write-up for a minor infraction over his 26 year career with the Department is a mitigating circumstance. He is also respected by his chain of command, peers and firefighters as an excellent firefighter and valued member of the DFD. For these reasons, the Hearing Examiner finds that an indefinite suspension—i.e., termination—is too harsh a penalty for the Appellant on the facts of this case. Rather, the evidence supports an unpaid suspension of 15 days. This is the highest level of discipline that can be imposed short of termination.

AWARD

45. The Hearing Examiner sustains Captain SG's appeal in part and denies it in part. The Hearing Examiner finds that the DFD lacked just cause to discipline Captain SG for being intoxicated and reporting to work under the influence of alcohol on October 2. The Hearing Examiner finds that the DFD had just cause to discipline Captain SG for being impaired and unfit for duty on October 2. The Hearing Examiner finds that while the DFD had just cause to discipline the Appellant for being impaired and unfit for duty on October 2, the evidence does not support the imposition of an indefinite suspension. Rather, the evidence supports the imposition of a 15-day unpaid suspension.

¹¹⁷ *City of Waco v. Kelly*, 309 S.W.3d 536 (Tex.2010).

46. This award requires that the DFD reinstate Captain SG. The DFD is ordered to reinstate him, subject to the terms of a 15-day unpaid suspension. The Department is to reinstate the Appellant effective February 18, 2022, with the 15-day suspension immediately following his reinstatement. The Department is ordered to make the Appellant whole, subject to the 15-day unpaid suspension, with restoration of all backpay, benefits and seniority, subject to any offsets or credits that may be applicable. He is to be brought back to work within a reasonable time from the issuance of this award. This reasonable period should not exceed 30 days from the issuance of this award. This reasonable period should allow for the processing of the Appellant's actual reinstatement, which includes calculation and determination of his compensation, benefits and seniority. To the extent permitted by Chapter 143 of the Texas Local Government Code, the City of Denton's Civil Service Rules and the Meet and Confer Agreement, the Hearing Examiner retains jurisdiction to review any issues or concerns regarding the implementation of this Award.

47. The Hearing Examiner reviewed and considered all the arguments raised by both parties at the evidentiary hearing and in their post-hearing briefs and addressed only those issues and matters deemed determinative. All other claims, appeals and arguments not specifically addressed in this Award are denied.

Respectfully,

A handwritten signature in black ink, appearing to read 'DJP', with a horizontal line extending to the right from the end of the signature.

Diego J. Peña
Hearing Examiner

Date Issued: November 18, 2022