IN THE MATTER OF THE	**)**	
	)	**ARBITRATOR'S**
ARBITRATION	**)**	
	)	**OPINION**
BETWEEN	**)**	
	)	**AND**
CITY OF RICHLAND	**)**	
(The Employer)	**)**	**AWARD**
	)	
AND	**)**	
	)	
IAFF, LOCAL 1052	**)**	**RW Grievance**
(The Union)	**)**	

HEARING: July 19, 20, and 21, 2000

HEARING CLOSED: August 31, 2000

ARBITRATOR:

Sylvia Skratek, Ph.D.
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APPEARING AS WITNESSES FOR THE EMPLOYER:

GJ, Fire Chief
T R, Battalion Chief
SW, Firefighter
AN, Firefighter
BP, Firefighter
JW, Human Resources Analyst
LG, Firefighter

APPEARING AS WITNESSES FOR THE UNION:

JH, Captain
EM, Battalion Chief
SC, Firefighter
MN, Captain
ZG, Firefighter
RW, Grievant

BACKGROUND

The City of Richland (hereafter "the Employer" or "the City") and the International Association of Firefighters (IAFF) Local 1052 (hereafter "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Sylvia Skratek in Richland, Washington on July 19, 20 and 21, 2000. During a pre-hearing conference the parties agreed that the issue was properly before the Arbitrator and should be decided on its merits.

At the hearing the parties had full opportunity to make opening statements, examine and cross examine witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made a tape recording of the hearing and advised the parties that the recording was being made to supplement her notes and should not be considered an official record of the hearing.

The parties were provided the opportunity to submit their closing arguments in the form of post hearing briefs. The briefs were received by the Arbitrator in a timely manner and the record was closed as of August 31, 2000. The award in this case is based upon the evidence,

testimony, and arguments put forward during the hearing and the arguments presented by the parties in their post hearing briefs.

STATEMENT OF THE FACTS

RW was hired by the City of Richland as a firefighter in the Richland Fire Department in 1986. In 1987 he became a certified Paramedic and remained a certified Paramedic throughout the rest of his employment with the City. He achieved the rank of Lieutenant in 1991 and was promoted to Captain in 1997. At the time of his termination he was serving as the Department Training Officer and reporting directly to the Fire Chief. During his employment with the City, W has also served as a member of the Department's Hazardous Materials Team and as a member of the Department's Technical Rescue Team. In August of 1998, W received a favorable performance evaluation on which he was rated by his supervisors, Battalion Chief TR and Fire Chief Craig W, as being an "effective" or better employee in all areas. (Un. Ex. #4) There is no record that any discipline that is relevant to his termination was issued to W during his employment with the City.

At the time of his hire, W became a member of IAFF Local 1052. He became Vice President of the Local in 1988 and in 1990 became the President of the Local. In 1993, W was elected to be the Second District Representative for the Washington State Council of Firefighters. As the Second District Representative, W provided assistance to IAFF Locals throughout most of Eastern Washington, and assisted the State Council in carrying out its statewide political agenda. W resigned as President of Local 1052 in 1994 in order to devote his time to the State Council and in 1996 he was elected to the Vice President of the State Council which is a statewide position that he still holds.

On October 7, 1999 Firefighter SW reported to Battalion Chief TR that he had been threatened and harassed by W. R had SW write the events down and SW presented a copy of his complaints to the Union and to Chief J. (Em. Ex. #1) J interviewed SW regarding the incident. SW described the events for J and indicated that he had talked with his wife about pursuing the

matter however he was worried that if he pursued the incident, it would be harmful to his career or continued employment.

Following the interview with SW, J met with Firefighter P who eventually provided a written statement to J indicating that he believed W had a "bullying" behavior and that the behavior should be stopped. P had discussed the Union vote on W's grievance and while doing so, W "began to rant, minimizing my experience and judgment. In his eyes I couldn't possibly make a decision regarding this matter. Obviously he was angry and in my opinion, out of control". (Em. Ex. #4)

Following the discussions with SW and P, J requested that his Battalion Chiefs interview all firefighters asking whether they had been intimidated by Captain W in the past or knew of any other persons who had been. Based upon the statements from Firefighters SW and P, J prepared and initiated pre-disciplinary proceedings. (Em. Ex. #2)

During the course of the investigation, J learned of additional incidents: confrontations with Firefighter recruit TN and; requirements imposed on recruits that included the wearing of plastic badges, remaining in turnout clothing longer than regular firefighters, and bench pressing their own weight. After reviewing all of the information, J made the decision to terminate RW from his employment with the City of Richland. Captain W was notified of the decision by letter dated November 24, 1999. (Em. Ex. #8) On December 3, 1999 W filed a grievance challenging his termination. (Em. Ex. #9) The parties were unable to resolve their differences and submitted the matter to arbitration.

STATEMENT OF THE ISSUE

The parties were unable to agree upon the statement of the issue and provided the Arbitrator with the authority to determine the proper issue to be decided. Based upon the language of the collective bargaining agreement and the statement of the grievance, the Arbitrator finds that the issue is as follows:

Did the Employer discharge RW for just cause?
If not, what is the appropriate remedy?

POSITION OF THE EMPLOYER

The Employer has provided the Arbitrator with a statement of the law regarding the determination of a just cause standard in employment disputes. The Employer maintains that based upon the Washington case law it is irrelevant whether the Grievant actually committed a violation of policy or did not perform his job duties. Rather it is a question of whether at the time that the Grievant was discharged did the Employer reasonably believe in good faith and based upon substantial evidence, that the Grievant had violated a work rule or failed to perform his job. The Employer provided the Arbitrator with several decisions to support this contention: *Gagliardi v. Denny's Restaurant,* 117 Wn.2d 426,438,815 P.2d 1362 (1991); *Wlasiuk v. Whirlpool Corporation,* 81 Wn.App.163, 178, 914 P.2d 102 (1996); *Baldwin v. Sisters of Providence,* 112 Wn.2d 127, 139,769 P.2d 298 (1989). Furthermore, The Employer argues that the ultimate burden is on the Grievant to prove breach of contract which is consistent with the finding in *Thompson v. St. Regis Paper Co.,* 102 Wn.2d. 219, 685 P.2d 1081 (1984) which held that "Placing the burden of persuasion on the party asserting breach will tend to maintain the balance between the employer's interest in running its business and the employee's interest in continued employment sought to be achieved by Thompson".

According to the Employer, the evidence in this case establishes that the Grievant used his position to threaten Firefighter SW's career because of the action taken by SW in a Union vote. The Grievant was well versed in labor relations matters including RCW 41.56 and the labor relations grievance and unfair labor practice process that is part of that statute. The Grievant's conduct on October 7, 1999 can only be characterized as an attempt to interfere with and coerce a public employee in the exercise of his rights under RCW 41.56. The Grievant's conduct had no legitimate professional or job related purpose and clearly violated RCW 41.56.150(1). The Grievant's position in this case precludes progressive discipline since he denies any wrongdoing and expresses no remorse for his conduct.

The evidence presented to Chief J at the time of the Grievant's discharge supports the conclusion that the decision was not arbitrary, capricious or made for illegal reasons. This entire case occurred based upon a complaint made by SW, coupled with additional evidence supporting SW's version of the incident, leading to the conclusion that termination of the Grievant was

appropriate. Supporting evidence includes Firefighter P's statement that he had a similar conversation with the Grievant as the one that occurred with SW. P's conversation with the Grievant was also based upon the Union vote. P testified that the Grievant had a "bullying behavior" which is consistent with the other evidence gathered by Chief J.

Within the letter of termination (Em. Ex. #8) at paragraphs 3, 4, and 5, there are several incidents of threats of loss of employment and hazing of new recruits. Examples of the Grievant's conduct include threatening firefighter recruits with lack of shift assignment and thereby termination of employment for failure to bench-press their own weight. The Grievant also used plastic badges or push-ups to haze recruits. The Employer argues that the Grievant threatened Battalion Chief M over a turnout clothing incident and told M not to "…ever undermine my authority again" in a loud and angered manner. The Grievant inquired of Firefighter N why he had sought employment at the City of Richland thereby implying that he had no business in the Richland Fire Department. He required recruits to remain in their turnout gear on a hot day when all other firefighters were removing theirs. The Employer stated that 29 out of 41 firefighters believe that the Grievant had threatened them or others during his tenure as an officer of the Fire Department.

The Employer maintains that the Grievant's statements and testimony were impeached by the testimony of Firefighter G. Although the Grievant has maintained his innocence from alleged threatening or coercive conduct and testified that he had never threatened a City of Richland firefighter, G's unrebutted testimony disclosed that in 1993, the Grievant threatened G in a very similar fashion to what SW brought forward in 1999.

The Employer contends that the record in this case is replete with examples where the Grievant has attempted to intimidate, coerce or threaten members of the Fire Department and in which he has been emotionally out of control. There are no circumstances which would justify and warrant a high ranking, highly paid, officer of the Fire Department to threaten a firefighter with his career because of a Union vote. The Employer maintains that the conduct of the Grievant in this circumstance would fall under the line of case law established in the State of Washington which would indicate that an employer is justified in terminating the employment of

an individual who has so breached the employment contract that remediation or progressive discipline is not appropriate. The Grievant's conduct falls under the heading of having no value in the workplace. No legitimate professional purpose was served by W's conduct and therefore discharge was justified. There are no circumstances in this case that would support setting aside or modifying the penalty imposed by the Employer in this matter. The Employer argues that Firefighter SW's courage in this matter should not be renounced by reinstating the employment of Captain W. The Employer asks that the Arbitrator deny the grievance.

POSITION OF THE UNION

The Union reminds the Arbitrator that the Grievant is a thirteen plus year employee with favorable performance evaluations. His most recent evaluation in August 1998 contained comments by Battalion Chief TR and Fire Chief W that indicated that the Grievant was an "effective" or better employee in all of the areas in which his performance was being analyzed. (Un. Ex. #4) The Grievant's termination was not based on any previous discipline nor have any previous concerns been raised regarding the Grievant. Prior to October 14, 1999, the date of the pre-disciplinary notice which the City sent to the Grievant (Em. Ex. #2), he had no reason to believe that his job performance was considered sub-standard by the City in any respect.

The Union emphasizes that Chief J assumed his position with the City of Richland in June 1999. He was the Grievant's immediate supervisor from that date until his discharge in November 1999. During that time period the Chief had never disciplined the Grievant, never criticized or counseled the Grievant, and never told the Grievant that he was performing inadequately. J met with the Grievant on a regular basis between June and October 1999 to discuss departmental matters and never raised any performance concerns during those meetings. The City had a progressive disciplinary policy (Em. Ex. #2, attachment) in effect at the time that the Grievant was terminated yet the City failed to use any form of progressive discipline prior to termination.

The Union believes that the evidence introduced at the arbitration hearing establishes that the Grievant did not engage in significant portions of the behavior which the City has attributed

to him in this case. Even if the Arbitrator determined that the Grievant had in fact engaged in most or all of the behavior, if the City had followed its own progressive disciplinary policy with respect to the portions of the allegations which are even close to being timely, the disciplinary penalty should have been no more than a three day disciplinary suspension without pay which is the penalty for a second offense of "disorderly conduct" which is defined as "fighting, threatening or otherwise abusing other employees or the general public".

The Union contends that the incident that led to the Grievant's termination was conduct that was commonplace for members of the bargaining unit. The Grievant had discussions with fellow union members in which he debated the merits of the grievance that he had pending. Engaging in on-duty discussions or debates about union-related issues was accepted conduct in the workplace and had never previously been the subject of disciplinary action by the City against any member of the bargaining unit.

The Grievant did file a grievance with the City regarding the fact that he was ordered into the Training Officer position by the City. The Union voted not to pursue his grievance to arbitration. After that vote, the Grievant discussed the vote with Firefighter SW during a meeting that SW had requested to discuss on-the-job training benefits from the Veterans Administration. The Grievant told SW that he was disappointed in the outcome of the vote and that he wished that SW had voted in favor of taking the grievance to arbitration. SW did not object to the discussion of union business and admitted that there was no physical contact during the discussion. Admittedly, voices were raised during the discussion. There is a dispute as to the actual behavior of the parties during the discussion and the Union provided the Arbitrator with a lengthy discussion to support its contention that SW's version is simply not credible.

The second significant incident cited by the City in its termination letter concerned a discussion which the Grievant had with Firefighter P, also regarding the merits of the Grievant's Training Officer grievance. Both the Grievant and P testified very similarly about the incident. P initiated the discussion which rather quickly turned into a debate between P and the Grievant. The debate became somewhat heated with the Grievant using profanity but there was no physical contact. Furthermore neither P nor the Grievant was intimidated or felt physically threatened by

the other person. P did not complain to anyone about this debate and when approached by the Chief regarding the debate told him that it was union business and of no concern to the City's administration. Only after repeated prompting by the Chief did P submit to an interview with the Chief. When the Chief's notes contained several significant inaccuracies, P submitted a written statement to correct the inaccuracies. (Em. Ex. #4) The Union submits that the incident involving the Grievant and P was not a legitimate basis for the City to take disciplinary action against the Grievant.

The City also cited in its termination letter a number of incidents relating to the Grievant's performance as the Department Training Officer. (Em. Ex. #8) The Union claims that any contention by the City that these incidents could form any legitimate basis for disciplining the Grievant is without merit. All of the allegations occurred at least 60 days, and in most cases several months before he was investigated by the City. No disciplinary action was taken based upon any of the allegations even though W, J, Acting Operations Chief D and/or one or more Battalion Chiefs and Captains were well aware of all of the incidents within a short period of time after they had occurred. These situations include the "bunker gear" incident; the wearing of plastic badges by new recruits; the bench press issue. None of the recruits supervised by the Grievant suffered any negative consequences as a result of any alleged rules violations by the Grievant in connection with their training. Two of the three recruits who testified at the hearing, G and C, had positive experiences while they were supervised by the Grievant. Even the one recruit who felt negatively about his interactions with the Grievant, did not indicate that he had suffered any negative consequences and he did not believe there was any reason for him to be seriously concerned that he would suffer any negative consequences because of the Grievant's actions. The Grievant had been given a lot of discretion as to how to perform his duties as the Training officer and he had not been criticized by anyone while he was performing those duties. It would be offensive to the precepts of due process for the City to come in after the fact and impose disciplinary action for behavior which superiors were or should have been aware of at the time when it was occurring several months before the Grievant was disciplined and which he was not disciplined for at the time when he was actually engaging in the behaviors in question. The Union submits that none of the activities as the Training Officer that are cited by the City in its termination letter can be legitimately used as a basis for any disciplinary action.

The only additional allegation of misconduct contained in the termination letter which the City did put on evidence about concerned a clearly private conversation between the Grievant and a member of the City's HR Department, JW. The Union contends that the evidence that was provided at the hearing established that JW and the Grievant were engaging in a private, social conversation when the Grievant made the cited remark. Such a remark cannot legitimately be used as the basis for any form of disciplinary action.

In summary of the evidence submitted at the hearing, the Union notes the following:

1. The City's shotgun approach to the Grievant's termination shows that the City was well aware that the allegations made against the Grievant do not form an appropriate basis for discharge;
2. The City's failure to interview the Grievant until the City had interviewed everyone else in an obvious "witch hunt" and after the City had issued a pre-disciplinary notice, constitutes a procedural defect since it deprived the Grievant of a fair opportunity to explain his side of the situation;
3. Although the Grievant did not threaten retaliation against SW, SW's alleged concerns are unfounded because the Grievant's role in SW's OJT program is minor;
4. The City's allegation that the Grievant's generalized supervisory training somehow excused the City from its obligation to utilize progressive discipline is unfounded.

In its argument, the Union provides the Arbitrator with several citations regarding the well-established principles of just cause and progressive discipline. Furthermore, the Union emphasizes that the City has adopted the just cause standard in the progressive disciplinary policy which the City has voluntarily promulgated in this instance. (Em. Ex. #2) The seven factor test which the City has outlined in its policy is very similar, if not identical to, the traditional just cause standard that is utilized by labor arbitrators in disciplinary arbitrations. Even an

application of the City's own progressive disciplinary policy warrants a reversal of the Grievant's summary discharge by the City.

In summary, the Union submits to the Arbitrator that the City has not sustained its burden of proof in this instance and requests that the Arbitrator sustain the grievance and order the City to immediately reinstate the Grievant and to make the Grievant whole, monetarily and otherwise.

ANALYSIS

The Employer contends that the Grievant's termination was for just cause and was based upon facts supported by substantial evidence and reasonably believed by the Employer to be true. The Union argues to the contrary.

In making a final determination in this case the Arbitrator must review the facts of the case against the applicable cited provision of the Agreement.

ARTICLE 9—EMPLOYER RIGHTS AND RESPONSIBILITIES

9.1.2.2

To suspend, demote, discharge, or take other disciplinary actions against members for just cause,

The City of Richland's *Progressive Discipline Policy* (Em. Ex. #2) provides guidance in the determination of just cause:

> ***JUST CAUSE CRITERIA***
>
> Prior to the initiation of disciplinary proceedings, Management must decide whether or not there is "just cause" to take disciplinary action. The following criteria is to be followed when utilizing the disciplinary process:
>
> 1. Did the employee have reason to know what the rules or standards were, and what would happen if the rules or standards were broken?
> 2. Were the rules or standards reasonable?
> 3. Did the supervisor conduct a fair investigation?
> 4. Did the supervisor gather adequate facts before taking disciplinary action?
> 5. Did the supervisor have enough evidence at the time of the action to find the employee guilty of alleged misconduct?

6. Did the supervisor apply the same rules and penalties to everyone in similar circumstances?
7. Did the amount of discipline administered fit the seriousness of the offense and past record of the employee?

The City has adopted a matrix of progressive discipline ranging from verbal or oral warning to termination. The disciplinary action depends on the misconduct and its occurrence.

It is well established that there are two areas of proof involved in the arbitration of discharge and discipline cases. The first such area concerns proof of wrongdoing; a responsibility that is allocated to the employer. The second such area of proof concerns the issue of whether the penalty assessed by management should be upheld or modified. The discharge of Captain W will be discussed within this analytical framework.

Proof of Wrongdoing

The official notification of termination (Em. Ex. #8) outlines the Chief's findings regarding the events that led to the Grievant's discharge. Those findings can be summarized as follows:

1. The use of foul language to Firefighter SW and multiple threats of retaliation against SW which constitutes conduct unbecoming an officer and a violation of Richland Municipal Code 2.28.530, Sections 7 and 17;
2. The use of foul language and derogatory statements toward Firefighter P which was viewed by P as an attempt at intimidation and possibly heading towards a physical confrontation which is conduct unbecoming an officer and a violation of Richland Municipal Code 2.28.530,Sections 7 and 17;
3. Repeatedly advising Firefighter K that he would be fired if he could not meet the Grievant's unsanctioned requirements of recruit training. Additionally, the Grievant told Firefighter N that he would not be recommended for assignment if he could not bench press his own weight which would effectively result in the termination of N. The Chief found that the Grievant improperly threatened multiple firefighters with termination and intimidated firefighters in this way and attempted to impose a personal unsanctioned standard on them as a requirement of continued employment. This is conduct unbecoming an officer and a violation of Richland Municipal Code 2.28.530, Sections 7 and 17;
4. The harassment and hazing of recruit firefighters through the use of plastic child's toy badges that the Grievant required them to wear at all times including in public. The requirement that recruits pass the weekly quizzes with scores of 90% or better instead of the Department standard of 80% or better. The requirement of pushups by the lower scoring recruits as a form of hazing. The requirement of firefighters to wear turnout clothing while reloading hose after live fire drills on a hot summer day contrary to

reasonable safety concepts. This is conduct unbecoming an officer and a violation of Richland Municipal Code 2.28.530, Sections 7 and 17;

5. Statements by M and S reveal that the Grievant told M in a loud and angry manner to never undermine his authority again. The Chief found this behavior to be conduct unbecoming an officer and a violation of Richland Municipal Code 2.28.530, Sections 7 and 17;

The Chief concluded that these findings were egregious in nature and sufficient basis to terminate the Grievant's employment. He supported his conclusion with a review of incidents that support a pattern of conduct unbecoming an officer. Those incidents are listed on page 4 of the notification of termination (Em. Ex. #8) The Chief further concluded that there is fear among department employees of intimidation and retaliation toward employees who do not follow what is "apparently your agenda". Based on these findings the Chief concluded that progressive discipline would be inappropriate and the Employer discharged Captain W for conduct unbecoming an officer.

The Arbitrator reviewed each of the findings that served as the basis for the Grievant's discharge and concluded that the evidence and testimony provided at the hearing supported some, but not all, of the findings.

The testimony of Firefighter SW and Captain W regarding the meeting on October 7, 1999 is contradictory. The Arbitrator has no doubt that there was a heated discussion regarding SW's vote on W's grievance. She also has no doubt that profanity was used by both parties. The testimony of R however indicates that at the time that he observed the interaction between W and SW, W was not behaving in what could be considered a physically threatening manner toward SW. Specifically R testified that he overheard loud voices coming from the training officers room. He entered the room and observed that both W and SW were red faced and agitated and were seated on either side of the training officers desk. R did not believe that anyone was in danger and while he was in the office SW did not request assistance or bring the matter to his attention. SW's testimony that W had verbally threatened him is credible and the Arbitrator believes that W did tell SW that he would get even for the way that SW had voted on W's grievance. The Arbitrator has reviewed the Union's analysis of the credibility of W and SW and recognizes that there are some discrepancies in the versions of the incident provided by SW

at the time of the incident and at the time of the hearing. She finds however that the written comments by SW (Em. Ex. # 1), although prepared a few days after the incident, provide SW's best review of the confrontation between himself and W. From that written statement, it is clear that SW perceived that W was verbally threatening him. W is in a position of authority within the Department and it is not surprising that a statement toward a Firefighter who had not yet completed his OJT that implied that "he would get even" could be viewed as a threat. SW's written statement indicates a concern that "RW is a training officer who I need to sign off on my OJT packet. After these statements he made how can I be assured that he will deal with me fairly." The Arbitrator recognizes that W does not have primary responsibility for the OJT that SW needed to complete however it is not unreasonable for a junior Firefighter to believe that in some manner W could "get even" with him for the vote. She therefore concludes that SW had reason to believe that W did verbally threaten him with retaliation for the manner in which he voted on W's grievance. There is insufficient evidence however to support multiple threats of retaliation. While the Employer attempted to claim that previous incidents between W and SW had occurred, the testimony did not support that claim. SW provided limited and vague testimony regarding "taking their badges off and going outside" to settle some matter. He also testified that he overheard W yelling at someone he assumed was W's ex-wife on the telephone. Neither incident was accompanied by any specifics as to the time or date of the occurrence. There is also the incident regarding the "nuts and bolts". Supposedly W threatened SW with discharge if he could not put them together. While that incident may have occurred, there is not sufficient evidence to conclude that W threatened SW with termination. Finally, foul language, while not encouraged at the Department, is used by the Firefighters without fear of being disciplined. The Arbitrator therefore concludes that SW had legitimate reason to perceive that Captain W had threatened him on one occasion with retaliation but the remainder of the Chief's first finding is not supported by the testimony or the evidence.

P testified that he also had a discussion with W regarding the vote on W's grievance however at no time did he feel threatened or intimidated by the actions of W. He viewed the discussion between himself and W as being strictly Union business and of no concern to the Chief. In fact, he did not have any intention of reporting the incident until he was forced to prepare a written statement (Em. Ex. #4) to correct the inaccuracies in Chief J's report (Em. Ex

#15). There is no evidence or testimony to support the second finding that "the use of foul language and derogatory statements toward Firefighter P.... were an attempt at intimidation and possibly heading towards a physical confrontation...". The Arbitrator therefore concludes that this finding is without merit.

In the third finding, the Chief summarizes statements made by Firefighters K and N that focus upon the unsanctioned requirement that W placed upon the recruits that consisted of being able to bench-press one's own weight. K and N were both advised by W that they could be terminated if they could not bench-press their own weight. N testified that he knew that this was not a credible threat by W; K did not testify at the hearing. This requirement was apparently part of the training during the summer of 1999. W testified that he believed it is important for firefighters to maintain their physical condition. There are times when a firefighter may have to lift and carry individuals or objects that are the equivalent of an individual's weight. The ability to bench-press one's own weight is something that W believes should be accomplished by all firefighters. Neither recruit complained at the time and while that does not imply that W's requirement was appropriate, it certainly makes the Arbitrator question the severity of the intimidation alleged by J in this finding. W testified that he did not threaten or intimidate the Firefighters. N testified that he was not concerned about the requirement and K did not testify at all. The Arbitrator understands the importance of the physical fitness of firefighters and recognizes that W was attempting to establish what he considered to be a reasonable standard. It was not however a requirement established by the Department and W could not unilaterally impose it upon the recruits. It is important to note however that it was also not viewed by the recruits as being a legitimate requirement. Although the Chief claims in his finding that W improperly threatened multiple firefighters with termination and intimidated firefighters, the Arbitrator concludes that there is no testimony or evidence to support this finding. W's requirement may have been unsanctioned and inappropriate, but none of the recruits felt threatened or intimidated by the requirement. Furthermore, Captain JS made Acting Operations Chief D aware of the bench press requirement in mid-August of 1999. (Em. Ex. # 14) Although the City claimed that it had not received S's written notification until December 1999, the verbal notification to D in August indicates that the Department was aware of the bench press requirement at that time and did not discuss it with W in a timely manner. Additionally, W

testified that he made comments about the recruits and their ability to bench press their own weight at the graduation ceremony that he had instituted at the conclusion of their training. The Chiefs were present at that ceremony and certainly had knowledge of the activity as early as July of 1999.

The Grievant does not deny that he required recruit firefighters to wear plastic child's toy badges however the testimony indicated that both Chief W and Chief J were aware of this requirement. In fact, according to the testimony of C and G, the Chiefs would joke with the recruits while they were wearing them. Furthermore, the Chiefs would remove the plastic badges at the graduation ceremony and replace them with the official badges of the Department. It would be inappropriate to allow discipline for behavior that has been sanctioned by the Chiefs. The requirement that recruits pass weekly quizzes with scores of 90% rather than 80% may have been inappropriate but the Arbitrator believes that notification to W to modify his practice would have been sufficient to change this requirement. The Chief's finding of "hazing" carries some serious implications. To require a recruit to do pushups if s/he receives a lower score on a quiz or to require recruits to remain in turnout clothing while reloading hose after fire drills on a hot summer day may not be appropriate. The Arbitrator notes however that M testified that he had informed Chief W at the time of the occurrence that W had required the recruits to remain in their turnout gear. No action was taken nor was any discussion held with W regarding his behavior. As indicated in her discussion regarding finding 3, the Arbitrator recognizes the importance of a Firefighter remaining physically fit, however that does not permit one individual to determine to what standards and under what conditions, a firefighter will maintain his/her fitness. There is no indication that W's requirement for pushups was continuing a practice that had been instituted by previous training officers but rather he had instituted this practice on his own initiative. It is a practice that is not condoned by the Department and as such W should have been advised to cease utilizing this requirement. It is important to note however that N testified that the pushups were done in full view of Captains and Battalion Chiefs, none of whom reported it to anyone who could have taken corrective action against W.

The statements by M and S that W told M in a loud and angry manner to never undermine his authority again support the fact that W was unhappy with M overruling of his

authority at the training facility. Perhaps it could have been handled in a better manner and a discussion to this effect with W would have been appropriate.

The incidents that Chief J uses on Page 4, item B. of the Disciplinary Action (Em. Ex. #8) to support his findings are either not timely or not supported by the testimony and evidence. The first one occurred in 1997 and was not brought to the attention of W at the time that it occurred. The second one appears to be in the context of a private conversation. It is not clear as to why it was reported three weeks after the occurrence and not brought to W's attention at the time that it occurred. The third incident is actually a compilation of alleged individual complaints that finds that "a vast majority of the current fire department personnel believes that you use intimidation and retaliation as a standard method of operation". There are no specifics accompanying this allegation and therefore the Arbitrator does not find it compelling. While individuals make think that W is a "bully" and that his behavior needs to change, the Arbitrator cannot use anonymous complaints to support the discharge of a thirteen-year employee.

After reviewing all of the evidence and testimony, the Arbitrator concludes that Captain W did engage in some behaviors that need modification however she cannot support all of the findings put forward as the reasons for his termination. Specifically she does concur that SW did perceive that W threatened him in a manner that a reasonable person could conclude might lead to retaliation at some point in the future. She further concludes that W did place requirements on the recruits that could be considered a form of hazing specifically the requirements that recruits obtain better than 80% on the quizzes; that the lower scoring recruit do pushups regardless of whether or not s/he had passed. The fact that he required recruits wear their turnout gear while reloading hose after fire drills on a hot summer day may be inappropriate but the City was aware of this requirement in August of 1999 and took no corrective action at that time. The City was also aware that W required that recruits be able to bench-press their own weight but took no timely corrective action She therefore concludes that the Employer has met its burden of proof of wrongdoing regarding only the first finding and that the only timely action that may be taken must be consistent with the City of Richland's Progressive Discipline Policy.

Penalty

Having found that the Employer has partially met its burden of proof of wrongdoing, the Arbitrator reviewed the penalty assessed by the Employer. She also reviewed the arguments put forward by the Employer regarding the standards utilized in the determination of just cause by the Washington courts. The Employer would have the Arbitrator find that the discharge of Captain W was based upon facts that are supported by substantial evidence and reasonably believed by the Employer to be true. The implication behind the Employer's argument is that the Arbitrator would uphold the discharge of the Grievant provided the Employer could show that it acted in good faith. In this matter the Arbitrator believes that Chief J was doing his best to make a difficult decision in good faith. However, there is not substantial evidence to support a discharge. This is not to say that she is supporting the Employer's argument regarding the determination of just cause but that even if she were to concur with that argument she would not rule any differently.

The determination of just cause in labor arbitration is well established and places the burden of proof of wrongdoing on the employer. In this case, the Employer's own document entitled *City of Richland Progressive Discipline Policy* (Em. Ex. #2) provides that "...disciplinary action should be viewed as a corrective measure to aid someone's job performance... The administration of disciplinary action is intended to be remedial in nature. In most instances, disciplinary action should be progressive..." This language is consistent with the most traditional and long held applications of progressive discipline within a labor-management relationship. The just cause criteria contained within the Employer's document and reviewed earlier within this decision are identical to the criteria put forward by Arbitrator Carroll Daugherty in *Enterprise Wire Co.*, 46 LA 359 (1966). Clearly the City of Richland intends to treat its employees fairly and has even adopted a matrix of progressive discipline which when viewed in conjunction with the policy is intended to act as a guide for a level playing field. The Arbitrator has therefore reviewed the discipline administered to Captain W utilizing the Employer's own documents and finds that discharge is too harsh of a penalty for the proven wrongdoing.

Captain W engaged in conduct unbecoming an officer in October 1999 when he had a conversation with Firefighter SW that was perceived by SW as being threatening. There is no evidence to indicate that W's behavior could not be corrected. W has no previous discipline in similar matters. He is a thirteen-year employee with good performance reviews. He has steadily progressed within the Department to positions with more responsibility and authority. The Employer's claim that it is justified in terminating W's employment is unfounded. The Employer should not condone W's misconduct but according to the matrix contained within the Progressive Discipline Policy, a first offense for "threatening or otherwise abusing other employees" is a one-day suspension. The policy also contains language that mandates "…active counseling sessions" at each step of progressive discipline. Clearly, the Department anticipates providing its employees with the opportunity to change their behavior. The Arbitrator recognizes that the Chief considers W's behavior as being egregious but she cannot agree. Egregious behavior that warrants summary discharge includes extremely serious behavior such as stealing, striking a foreman, persistent refusal to obey a legitimate order. Less serious infractions of plant rules or of proper conduct such as insolence, call for some milder penalty aimed at correction. *Huntington Chair Corp.,* 24 LA 490, 491 (1955).

An arbitrator should not substitute his/her judgment for that of an employer unless the employer has acted unfairly given the circumstances of the case. Where that has happened, the Arbitrator has an obligation to modify the decision unless prohibited by the collective bargaining agreement from doing so. Failure to modify the decision would exempt all employer disciplinary decisions from review once all procedural requirements have been met.

The principle of progressive discipline requires that the discipline be administered in a manner that is intended to correct the employee's behavior. It is the goal of progressive discipline to stop the behavior. In all progressive discipline matters, there is an understanding that employees will be allowed to rehabilitate themselves. The City of Richland's own policy in this case clearly provides for a one-day suspension as the first step of progressive discipline for a first offense of "Disorderly Conduct: Fighting, threatening or otherwise abusing other employees…". W is a 13-year employee with a clean work record. His evaluations have been good and he has progressed steadily within the Department. There was no reason to believe that

he would not change his behavior if provided the opportunity. The Arbitrator finds that the degree of discipline administered was not reasonably related to the seriousness of the employee's proven offense.

In conclusion, the Arbitrator finds that the Employer did not discharge RW for just cause. The Arbitrator will enter an award consistent with the above analysis and conclusions.

IN THE MATTER OF THE	**)**	
	)	
ARBITRATION	**)**	
	)	
BETWEEN	**)**	
	)	**ARBITRATOR'S**
CITY OF RICHLAND	**)**	
(The Employer)	**)**	**AWARD**
	)	
AND	**)**	
	)	
IAFF, LOCAL 1052	**)**	**RW Grievance**
(The Union)	**)**	

After careful consideration of all testimony, evidence and arguments, and for the reasons set forth in the opinion that accompanies this award, it is awarded that:

1. The Employer did not discharge RW for just cause;
2. The Employer had just cause for disciplining Captain RW consistent with the City of Richland's *Progressive Discipline Policy;*
3. The Employer shall convert Captain W's discharge to a one-day suspension without pay. All records, computer and/or paper, related to this matter shall be modified to reflect this change in his employment status. All references to his discharge shall be purged from all files;
4. Within five days of the receipt of this award, the Employer shall reinstate Captain W to the position that he held at the time of his discharge. W shall be made whole for any and all lost wages and benefits that would have been afforded to him with the exception of the time period encompassed by the one-day suspension without pay.

The Arbitrator retains jurisdiction of this matter for ninety calendar days for the sole purpose of resolving any dispute which may arise regarding implementation of this award.

Respectfully submitted on this 30th day of September, 2000 by

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Sylvia P. Skratek, Arbitrator