BEFORE
EDWIN H. BENN
ARBITRATOR

In the Matter of the Arbitration **between** **CITY OF CHICAGO** **and** **CHICAGO FIRE FIGHTERS UNION, LOCAL #2**	**CASE NOS.:** Grv. Nos. 110812, 110906, 110911, 110914, 110916, 111001, 111003, 111109, 111118, 111224 Arb. Ref. 11.064 (Fire Prevention Bureau Discipline)

OPINION AND AWARD

APPEARANCES**:**

For the City: David Johnson, Esq.

For the Union: Robert Sugarman, Esq.

Date of Award: May 31, 2012

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I. ISSUE

Did the City of Chicago ("City") have just cause to suspend, discharge, or treat as having resigned, 50 employees ("Grievants") in the Fire Prevention Bureau of the Chicago Fire Department and, if not, what shall the remedy be?[1]

II. FACTS

As fully detailed in the endnotes to this opinion, the evidence in this record requires the following findings of material facts:[2]

1. Grievants are employees of the Chicago Fire Department ("Department") holding various ranks and working in the Department's Fire Prevention Bureau ("FPB").[3]

2. Section 16.6 of the collective bargaining agreement ("Agreement") between the City and Chicago Fire Fighters Union Local No. 2 ("Union") provides for a mileage allowance for employees in the FPB.[4] According to that provision, "[e]ffective February 1, 2009, the *maximum* reimbursement shall increase to $550.00 per month" [emphasis added].[5]

3. After conducting a thorough investigation, the Office of the Inspector General of the City of Chicago ("IGO"), recommended to Mayor Rahm Emanuel and then Fire Commissioner Robert Hoff that all Grievants should be discharged for violation of the City's Personnel Rules because "... often with the express encouragement of their supervisors, firefighters, who are sworn public safety officers, assigned as inspectors to the FPB, routinely falsified their reimbursement claims by systematically vastly overstating the number of miles they drove in their personal vehicles, when performing inspections and other FPB-related business."[6] The IGO's recommendation to discharge all Grievants was made even though the IGO found that "[m]any inspectors were assured by their supervisors that the accuracy of their mileage totals would not be challenged ...

[the Department] knew about this problem at least as far back as 2008 … [and it was a] decades-long practice … [which] extended to and was condoned by the FPB's supervisory ranks."[7] Indeed, the IGO stated the problem was not cultural, but was "… a longstanding managerial issue."[8]

4. The Department and the City disagreed with the IGO's recommendation that Grievants should all be discharged and instead issued discipline in individual cases of suspension (30, 45 and 60 days) and discharge.[9] Six individuals resigned and retired or indicated they did not desire to return to work.[10] Two of those individuals who retired effectively sought to rescind their resignations and return to work, but were not allowed to do so.[11]

5. As a result of the IGO's investigation, two exempt rank chief officers in command in the FPB were replaced after one retired of his own volition and the other was demoted to his career service rank.[12]

6. The specific disciplinary actions (or other actions) for the individual Grievants, dates the actions were taken and Grievants' lengths of service are as follows:[13]

DISCIPLINE	NAME	RANK		TIME ON JOB	
				YRS.	MOS.
Discharge			**Date**		
	Darryl Cole	FF	9/9/11	21	9
	Donnell Digby	LT	9/9/11	24	0
	LueVenia Gray	LT	9/9/11	24	6
	Mattie Rawski	LT/EMT	9/9/11	24	10
Resignation (Not Allowed to Rescind)					
	Michael Norris	CAPT/EMT	8/23/11	31	8
	John Segal	LT	8/24/11	31	6
60-Day Suspension					
	Billy Hayes	BC	9/16/11	26	7
	Silvery Mitchell	LT/EMT	9/15/11	24	1
	Sedalia Peoples	LT/EMT	10/3/11	18	10

	Noel Vasquez	CAPT	11/3/11	26	8
45-Day Suspension					
	William Adams	LT/EMT	9/13/11	26	7
	Josephine Aguilar	FF	10/19/11	20	1
	Ronald Bennett	FF	10/5/11	23	5
	Moses Cajigas	LT/EMT	9/13/11	28	7
	Raymond E. Cullar	LT/EMT	10/4/11	24	11
	Robert L. Eiland	LT/EMT	9/13/11	24	1
	Javier Gonzalez	LT	9/13/11	31	7
	Chris Hughes	LT	10/1/11	24	7
	Neal Johnson	LT/EMT	11/16/11	22	0
	Steve Johnson	LT	9/26/11	22	10
	Edward A. Lewis	LT/EMT	10/5/11	24	2
	Claudia Mabon	ENGR	10/1/11	22	11
	Richard Martinez	LT/EMT	10/5/11	26	8
	Pat McCauley	LT	10/9/11	23	10
	Derrick Nelson	FF	9/13/11	16	9
	Tommy Richardson	LT/EMT	10/3/11	29	8
	Ernesto Rivera	LT	9/13/11	21	10
	Larreace Rollins	FF	9/16/11	24	11
	Patrick Ryan	LT	9/20/11	21	11
	James Sencion	LT	9/24/11	21	5
	Michael Shives	LT/PM	10/4/11	24	7
	Steven Smith	LT	9/13/11	28	7
	Roy Turner	LT	10/4/11	21	5
30-Day Suspension					
	Larry Commings	FF	10/5/11	25	2
	Velisa Eison	FF	10/17/11	20	11
	Marlo Garner	FF/EMT	10/5/11	28	0
	Keith Gimino	FF	9/29/11	8	11
	Ronnie Herring	FF	1/5/12	23	2
	LeRoy F. Jones	FF	9/26/11	24	11
	Gregory Lee	FF	9/13/11	22	9
	Adam Maynor	FF	9/27/11	24	2
	Daniel McKernan	FF	12/28/11	11	5
	James A. Murphy, Jr.	FF	10/3/11	10	7
	Eddie Robinson	FF	9/12/11	31	7
	Robert Steffens	FF	10/3/11	15	0
	Jesse Sturdivant	FF/EMT	10/19/11	6	9
	Diane E. Suiter	ENG/EMT	11/1/11	18	11
	Clifford Sullivan, Jr.	FF	10/19/11	16	0
	Stanley Vinson	FF/EMT	10/17/11	25	3
	Al Wordlaw	FF	9/27/11	21	11

7. The Union protested the disciplinary actions under the grievance procedure in the parties' Agreement and this proceeding followed.[14]

III. DISCUSSION, FINDINGS AND CONCLUSIONS

A. The Burden

Section 16.2.B of the Agreement requires that "... employees shall be disciplined and discharged only for just cause."[15]

Because this is a discipline case, the burden is on the City to show just cause for the disciplinary actions. That burden requires the City to make two showings. First, the City must demonstrate that Grievants engaged in the charged misconduct. Second, if the City makes that showing of misconduct, the City then has to demonstrate that the actions taken against each Grievant were appropriate.[16]

B. The City's Showings

1. Has The City Shown That Grievants Engaged In Misconduct?

I find that the City has shown that Grievants engaged in the charged misconduct.

There is no real dispute that Grievants knowingly submitted inaccurate mileage reimbursement reports and obtained compensation for mileage expenses (ranging, in some cases, into the thousands of dollars) that they did not actually incur.[17] Such conduct clearly violates reasonable expectations of employees in the workplace.[18] Further, such conduct clearly violates the City's Personnel Rules and the Department's rules and orders.[19] As the IGO correctly concluded after his detailed investigation, the evidence shows that Grievants "... routinely falsified their reimbursement claims by systematically vastly overstating the number of miles they drove in their personal vehicles when performing inspections and other FPB-related business."[20]

The Union's arguments that Grievants' conduct was consistent with a decades-long practice which was condoned — indeed, encouraged (as well as

engaged in) — by their supervisors as found by the IGO, do not go to whether Grievants engaged in misconduct, but go to the question of whether the actions taken against them were appropriate.[21]

Misconduct by Grievants has been shown.

2. Has The City Shown That The Actions Taken Were Appropriate?

The IGO recommended the discharge of all Grievants.[22] The Department disagreed with the IGO's recommendations to discharge all Grievants, with then Fire Commissioner Hoff determining "... severe suspensions of 30 to 60 days, depending on their degree of culpability and prior work record, with intent that any further related misconduct will warrant discharge ... [and f]or those members who have already received discipline in the past for related offenses, I conclude that discharge is appropriate."[23] For its part, the Union which represented Grievants during the investigation through its Director of Contract Enforcement Marc McDermott, urged the Department that no discipline, certainly not discharge, was appropriate and that any discipline would be grieved.[24] The resulting discipline is reflected in the chart set forth above at II — six discharges (including two alleged constructive discharges for employees who were not allowed to rescind their proffered resignations), four 60-day suspensions, twenty-three 45-day suspensions, and seventeen 30-day suspensions.[25]

I find that even with the City's disagreement with the IGO's recommendation for discharge of all Grievants, the City has not shown that the actions taken against Grievants were appropriate.

First, the purpose of discipline is to send a corrective message to employees who engage in misconduct that they must conform their conduct to their

employer's rules and reasonable expectations in the workplace. Therefore, progressive discipline is typically used to accomplish that message-sending goal.[26]

Second, factors that are included in determining the appropriate level of discipline include the severity of the demonstrated misconduct (which, if severe enough allows the bypassing of lower steps on the progressive discipline ladder); existence of prior discipline; length of service and the overall record of the employee.[27]

Putting aside condonation for the moment and looking at the demonstrated misconduct and the other factors to be considered (existence of prior discipline; length of service and the overall record of the employees), the evidence shows the following:

- Grievants knowingly submitted inaccurate mileage reimbursement reports and obtained compensation for mileage expenses (ranging, in some cases, into the thousands of dollars) that they did not actually incur in clear violation of the City's and the Department's rules;

- With few exceptions, Grievants have no prior discipline and have otherwise good records;[28]

- With limited exceptions, Grievants are very long-term employees with lengths of service ranging from approximately seven to 32 years each, totaling approximately 1,150 years of service as firefighters for the citizens of the City with the following ranges of service:[29]

Years of Service	Number
6-10	2
10-15	2
15-20	5
20-25	27
25-30	10
30+	4
Total	**50**

Were it not for the supervisory condonation and encouragement of Grievants' actions, the City would have certainly been within its right to follow

the IGO's recommendations and discharge all of the Grievants and I would have upheld each discharge for just cause. The IGO found that Grievants engaged in misconduct by "... systematically vastly overstating the number of miles they drove in their personal vehicles, when performing inspections and other FPB-related business."[30] Without exceptionally strong mitigating factors, Grievants' requesting and receiving compensation for those overstated miles is certainly sufficiently serious misconduct to warrant the discharge of the employees making those claims.

However, the IGO also concluded that Grievants' actions occurred with "... the express encouragement of their supervisors ..." and "[m]any inspectors were assured by their supervisors that the accuracy of their mileage totals would not be challenged ... [the Department] knew about this problem at least as far back as 2008 ... [and it was a] decades-long practice ... [which] extended to and was condoned by the FPB's supervisory ranks."[31]

Condonation of misconduct must be considered in determining whether — or at what level — discipline should be imposed. *See How Arbitration Works*, *supra* at 933:

> Arbitrators have not hesitated to disturb penalties, assessed without clear and timely warning, where the employer over a period of time had condoned the violation of the rule in the past — lax enforcement of rules may lead employees reasonably to believe that the conduct in question is sanctioned by management. ...

And as pointed out by the Union at the hearing and as also found by the IGO, here are some examples from different participants including Grievants of the deep and pervasive "... express encouragement of their supervisors ... that the accuracy of their mileage totals would not be challenged ... [which was a] decades-long practice ... [which] extended to and was condoned by the FPB's supervisory ranks" as found by the IGO:[32]

[A.] That's the way I was told to do it when I first started in fire prevention ... I was told to max out on the mileage. It's in the budget for fire prevention. If we don't use the money in the budget, the money will be used for something else. We will lose the money so max out.

* * *

[A.] I was taught to make a guesstimation.

[Q.] And who taught you that?

[A.] That would have been Chief Muse and Commissioner Wideman.

* * *

[Q.] So basically just so I understand, however many days you worked in a month, you would take the miles that you drove during that month and divide that up?

[A.] Right, by the days I worked.

[Q.] By the days, in order to get the 350?

[A.] Correct, the maximum reimbursement.

* * *

[Q.] And where did you get that guidance from?

[A.] That was from my supervisor, Lieutenant Ramirez, the first deputy first commissioner that I was with then when I came in, Kenneth Wideman, Commander Clarence Ellison, who was his second in command and basically every single person that I have worked with at the West.

* * *

That was how everybody was turning them in. That was the culture. ...

* * *

[Q.] When you said you had — somebody told you, your Chief or your Commissioner told you there was money in the budget for mileage, that was Chief Muse?

[A.] As an incentive, yes.

[Q.] And who else?

[A.] Commissioner Oldman [Ordman], Commissioner Wideman, and that's the names ... since I've been there I've had about five, and they told us that they wouldn't scrutinize us about our mileage.

* * *

[Q.] Well, why not just write down the actual miles you drove?

[A.] Why didn't I just write the actual miles, well, I will just say this, this is what was told to me, that the mileage was something that was in our budget for the Bureau, and that we should — you know, fill out the mileage this way and that way, and I just took it for granted that's the way it was done.

[Q.] When you say fill out the mileage 'this way', what are you referring to?

[A.] Well, you know, this is what I was told by the authorities. Sometimes you know, the Chief says this, he supersedes some of the things that are written on these documents because he's the chief. If the Commissioner tells you why, you listen, the mileage here is not being scrutinized, this is part of you being here so fill out the documents this way, vice versa and that's what you do. That's pretty much what everybody's done since the Bureau's been in service.

* * *

[A.] ... FPB's timekeeper, stated "[I]f you guys don't take the mileage, they're going to take the mileage away if you don't take it. ... She just said if you guys don't take the mileage, you're going to lose it."

* * *

[Q.] And [Muse] said exactly what?

* * *

[A.] Mileage is one of the perks of the bureau.

* * *

[A.] ... "I took it upon myself and asked the deputy commissioner [Muse] is this the way we do it. He specifically said, captain, we do not scrutinize mileage reports." ...

* * *

Basically I said, 'Chief these forms, how much do you want me to do on checking this? [The response was] Captain ... we do not scrutinize mileage reports. Back down' kind of thing; and I followed his directive.

[Q.] And in turn you don't scrutinize your inspectors that you supervise as far as these reports go?

[A.] I was told not to.

* * *

[Q.] But you basically say you told them to take how many days they worked in a given month; is that right?

[A.] Yes, and divide it by the amount of money that you are supposed to get.

* * *

[Q.] So whatever the maximum was for the month that you guys could have gotten —

[A.] Right.

* * *

[Q.] Okay. And why did you train them to do it that way?

[A.] That's the way I was trained to do it.

The Union also presented photographs of FPB personnel, including exempt rank personnel (a Deputy Bureau Commander at the time who later became a Deputy Fire Commissioner), which show a clear posting on the wall with the formula of how to compute mileage so as to be paid the maximum allowable amount under the reimbursement provisions of the Agreement:[33]

Mileage Formula
Total Miles x .44
Example = 682 x .44 = 300
795 x .44 = 350

Thus, it is fair to conclude that the condonation and supervisory encouragement for FPB employees to submit the maximum amount allowable for mileage reimbursement instead of submitting actual mileage expenses incurred was so deep, long-standing and pervasive that it went beyond condonation to rise to the level of becoming almost a work rule in the FPB. Employees who follow those kinds of instructions and practices — even in a paramilitary type organization like the Chicago Fire Department — should nevertheless be disciplined for exercising lack of good judgment in violating the rules. Just because Grievants were told, in effect, that "everyone is doing it and it's okay" is really not a defense. However, the amount of discipline imposed under these circumstances cannot be of a degree that should be imposed if condonation and encouragement at this level did not exist.

Given these circumstances and specifically the extraordinary degree of supervisory condonation and encouragement, I find that although misconduct has been demonstrated and the City recognized that all Grievants could not be discharged as recommended by the IGO, nevertheless, the City's imposition of the 30, 45 and 60 day suspensions and discharges was excessive and violated the Agreement — specifically, Section 16.2.B of the Agreement requiring that "… employees shall be disciplined and discharged only for just cause."

C. The Remedy

For purposes of formulating remedies, arbitrators have a broad degree of discretion.[34]

The City imposed discipline (30-60 day suspensions and discharges) based upon degree of culpability, prior related discipline, prior work records and rank.[35] Of the original group of employees who were recommended for discipline, six resigned and retired, but the Union contends that two (Norris and Segal) were constructively discharged.[36] The amounts of discipline and the remedies for each category of discipline shall be separately addressed as will the question of whether Norris and Segal were constructively discharged and, if so, what remedy, if any, is appropriate for those individuals.

1. The 30-Day Suspensions

These 17 Grievants are all Firefighters (three FF/EMTs) and one Engineer EMT.[37] They have no prior disciplinary records. Their respective lengths of service range from approximately seven years to over 31 years.[38] Given the degree of condonation and encouragement of the demonstrated misconduct by their supervisors and taking into account that the purpose of progressive discipline is to correct misconduct and not punish as well as these individuals' prior good records, in the exercise of my discretion to formulate remedies, these 17

Grievants shall receive 20-day suspensions and shall each be made whole for the difference between a 30-day and a 20-day suspension.

2. The 45-Day Suspensions

With the exception of an Engineer and four Firefighters, these 23 Grievants are all Lieutenants (eight EMTs and one PM).[39] The Lieutenants have no prior records. Their respective lengths of service range from approximately 17 years to over 31 years.[40] Given the degree of condonation and encouragement of the demonstrated misconduct by their supervisors and taking into account that the purpose of progressive discipline is to correct misconduct and not punish, as well as these individuals' prior records, and further taking into account their higher ranks and/or degree of culpability,[41] in the exercise of my discretion to formulate remedies, these 23 Grievants shall receive 25-day suspensions and shall each be made whole for the difference between a 45-day and a 25-day suspension.

3. The 60-Day Suspensions

Four Grievants fall into this category — two Lieutenant/EMTs, a Captain and a Battalion Chief.[42] Their respective lengths of service range from approximately 19 years to almost 27 years.[43] The two Lieutenants in this category have discipline for prior related offenses (whereas the other Lieutenants who received 25-day suspensions discussed above did not).[44] Given the degree of condonation and encouragement of the demonstrated misconduct by their supervisors and taking into account that the purpose of progressive discipline is to correct misconduct and not punish and further taking into account their higher ranks, degree of culpability and/or existence of other discipline, in the exercise of my discretion to formulate remedies, these four Grievants shall re-

ceive 40-day suspensions and shall each be made whole for the difference between a 60-day and a 40-day suspension.

4. The Discharges

a. The Alleged Constructive Discharges

Captain/EMT Michael Norris and Lieutenant John Segal were the most senior of all Grievants, with 31 years, 8 months and 31, years 6 months of service, respectively. When first presented with the charges which recommended they should be discharged, Norris and Segal resigned.[45] However, Norris and Segal subsequently changed their minds and attempted to return to work, which the City ultimately did not permit.[46] The Union argues that Norris and Segal were constructively discharged and the City argues that they resigned.[47]

Whether Norris and Segal were constructively discharged or resigned appears crucial. Under Section 9.1(C)(1) of the Agreement, "[a]n employee's continuous service and the employment relationship shall be terminated when an employee ... resigns or quits ...." Therefore, if Norris and Segal resigned, there is nothing more to be discussed for them because, as a matter of contract under Section 9.1(C)(1), their "... employment relationship shall be terminated ...."[48] However, as argued by the Union, if Norris and Segal were constructively discharged, then the just cause protections of the Agreement come into play because under Section 9.1(C)(2) of the Agreement, "[a]n employee's continuous service and the employment relationship shall be terminated when an employee ... [i]s discharged *for just cause*" [emphasis added].

I disagree with the Union that Norris and Segal were constructively discharged.

The Union is correct that a resignation can be a constructive discharge, because "... if a statement of intent to resign is involuntary or coerced, an alleged resignation will be treated as discharge for purposes of arbitral review ... [and w]hen a resignation is coerced ... such terminations are viewed as discharges rather than voluntary resignations."[49] However, "[w]hether a purported resignation is voluntary or is the result of constructive discharge is a question of fact for the arbitrator."[50]

I find nothing to factually support the Union's position that at the time Norris and Segal stated their intentions to resign that such actions were "involuntary or coerced" so as to constitute a constructive discharge of each. The fact that upon presentation of the initial charges against them, Norris and Segal may have been told by Department officials that it was in their best interests to resign so that they had clean records is not coercion.[51] Norris and Segal may have made the wrong choice because, in the end, they would not have been discharged by the City but, like most of Grievants, would have received lesser amounts of discipline than discharge. Indeed, the City concedes that had Norris and Segal not stated their intentions to resign, Norris would have received a 60-day suspension and Segal would have received a 45 day suspension.[52] However, the fact that Norris and Segal opted for a bad choice does not equate with coercive action by the City so as to make their decision to resign involuntary. The bottom line here is that there is no evidence to show that Norris and Segal were coerced into resigning. Therefore, Norris and Segal were not constructively discharged.

But, merely because an employee states an intent to resign does not always mean the employee cannot retract that stated resignation. "... [A] tender of resignation is to be considered as an offer and can be withdrawn ...."[53] To

determine if an employee effectively withdraws a previously tendered resignation, the key is whether "… such is done before the Company changes its position or if to permit such would place unreasonable loss or hardship on the Company."[54]

Allowing Norris and Segal to rescind their resignations as they requested would have caused no loss or hardship to the City. Indeed, the evidence shows the contrary.

When Norris and Segal were first presented with the charges against them recommending discharge, they thought they were going to be discharged and opted to resign instead, but the City later changed its position to treat many of the similarly situated Grievants with discipline far less than discharge (45 and 60 day suspensions).[55] Further, the evidence shows that after they indicated their intentions to resign, supervisors in the Department expected Norris and Segal to return to work. The evidence even shows that Department officials reached out to Norris and Segal about returning to work.[56] Norris and Segal even served in a consultant or volunteer capacity for the FPB (without pay) while they were waiting to be returned to work and even gave advice on fire alarm requirements and after their resignations volunteered on their own time to perform work for the FPB when critical services were needed.[57] The Union also produced an email from a District Chief to Norris dated September 21, 2011 thanking Norris for his help, with the comment "We will be elated when you return".[58] If anything, the way the Department utilized the voluntary services of Norris and Segal after they indicated their intentions to resign but while attempting to come back to work does not show prejudice to the Department by allowing them to rescind their resignations but shows prejudice to the Department by *not* allowing them to rescind their resignations.

I find under the circumstances of this case that Norris and Segal were not coerced into resigning so as to be constructive discharges. However, I find that Norris and Segal effectively rescinded their resignations and should be treated as employees under the Agreement.

Nevertheless, the evidence shows that Norris and Segal held higher level ranks as members of the FPB who, notwithstanding the condonation and encouragement of their supervisors, claimed significant amounts of mileage reimbursement to which they were not entitled.[59] Given the degree of condonation and encouragement of the demonstrated misconduct by their supervisors and taking into account that the purpose of progressive discipline is to correct misconduct and not punish, and further taking into account their higher ranks and degree of culpability as well as their lengths of service and good records, in the exercise of my discretion to formulate remedies, both Norris and Segal shall be reinstated to their former positions without loss of seniority. However, Norris (because he was a Captain and like the other Captain involved) shall receive a 40-day suspension and Segal (because he was a Lieutenant and like the other Lieutenants involved who had good records) shall receive a 25 day suspension. Norris and Segal shall be reinstated without loss of seniority and other benefits and each shall be made whole in all respects less the consequences of their respective suspensions.

b. The Other Discharges

Firefighter Darryl Cole, Lieutenant Donnell Digby, Lieutenant LueVenia Gray and Lieutenant/EMT Mattie Rawski were also discharged.[60] These four Grievants are not unfamiliar to me. Cole, Digby, Gray and Rawski were also discharged from positions in the FPB in 2008 for receipt of payments from private companies or buildings for performing FPB pump inspection work at

buildings on the weekends so that it would not be necessary for the buildings to shut down during the week (which would have caused a great inconvenience to the impacted businesses, tenants, workers and the public).

In *City of Chicago and Chicago Fire Fighters Union, Local #2*, Grv. No. 080707 (2008) ("*Pump Inspectors*"), I found that Cole, Digby, Gray and Rawski (and four others) engaged in misconduct:[61]

> There are two distinct activities governed by the Sections 1.19 and 2.07 of General Order 92-011: (1) the receipt of money for services performed and, (2) the obligation to report receipt of that money to the Department. Because Grievants received payments directly from private companies or buildings for the performance of week-end pump test inspection work and did not properly report those payments as required by the rules of the Department, the City has met its burden and shown that Grievants engaged in misconduct.

However, in *Pump Inspectors*, I did not uphold the discharges. As found in *Pump Inspectors*, "[t]here is *no* evidence — and the City does *not* assert — that Grievants received the compensation from the private companies or buildings to influence the outcome of their official duties, *i.e.*, to not perform inspections and report the inspections were done or to turn their heads to deficient situations. ... [s]imply put, this is not a case where the allegations are that Grievants were bribed to not perform their inspection duties."[62] And, in *Pump Inspectors*, FPB employees were compensated by the third parties because "[c]ommencing in 1988, the Department would not pay overtime for inspectors to perform weekend pump test inspections and the Deputy Fire Commissioner at the time gave instructions that if companies or buildings desired to have pump test inspections performed on weekends, then the private companies would have to pay for the inspectors' weekend overtime ... [and] for approximately 20 years ... in order to have pump test inspections performed on week-

ends, private companies or buildings directly paid the inspectors to perform the weekend pump test inspections.[63]

Thus, as similarly found by the IGO in his Summary Report in this case that there was a "… decades-long practice … [which] extended to and was condoned by the FPB's supervisory ranks"[64], that same condonation existed in *Pump Inspectors* with respect to payments from third parties to the FPB employees so that the inspections could be performed on the weekends and not during the week. In *Pump Inspectors*, I specifically found a decades-long condonation of employees' receipt of payments by the third parties to perform the inspections on the weekends and that level of condonation weighed heavily in my decision to rescinded the discharges:[65]

> The Department clearly condoned … Grievants' receipt of compensation from private companies or buildings for performing weekend pump test inspections. The evidence shows that for 20 years before these disciplinary actions, Deputy Fire Commissioners in charge of the Fire Prevention Bureau and other exempt rank officials having supervisory authority over the inspectors knew of and authorized the practice of payment by the companies or buildings to inspectors for weekend pump test inspections and no disciplinary action was taken against the inspectors for that conduct. While Grievants engaged in misconduct by not properly reporting receipt of the payments as clearly required by the Department's rules, the fact that the Department condoned the practice of *how* they were paid (*i.e.*, by payments directly from the private companies or buildings because the Department would not pay for the inspectors' weekend overtime) heavily weighs against the imposition of discharge.
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> * * *
>
> On balance, given the Department's long-held knowledge and condonation of the practice of payment by private companies or buildings to inspectors for weekend pump test inspections because the Department would not pay the inspectors' weekend overtime, the concept of progressive and corrective discipline, Grievants' long lengths of service with the Department and their good records — but most importantly, the 20 year condonation by the Department of payments by private companies or buildings to inspectors for

> weekend pump test inspections — I find that the City has not shown that Grievants' discharges were appropriate.

Although I rescinded the discharges, I imposed substantial suspensions in *Pump Inspectors* because the employees did not report receipt of the money as required by the relevant rules.[66] Further, as part of the remedy — and what the City points to for its decision to discharge Cole, Digby, Gray and Rawski rather than suspend them as they did other Grievants in this case — I imposed a condition on their continued employment with the City, specifically [emphasis added]:[67]

> 3. So that Grievants further get the message that they cannot engage in the type of misconduct demonstrated in this case, in the event Grievants engage in the *same misconduct* in the future, they shall be immediately discharged.

Again, in *Pump Inspectors*, the employees' receipt of compensation from the third parties for performing their inspection duties on weekends instead of during the week because the Department would not pay them overtime was long-condoned by the Department. The misconduct that was found which resulted in the suspensions was the failure to report receipt of the compensation from the third parties and were "… targeted for Grievants' failure to report to the Department the amounts they received for their weekend work as required by the Department's rules and those suspensions are designed to correct that omission."[68] In this case, Cole, Digby, Gray and Rawski thus did not "… engage in the *same* misconduct in the future …" as was conditioned for their continued employment in *Pump Inspectors*.[69] Their activities of maximizing the mileage allotment was, as found by the IGO, a "… decades-long practice … [which] extended to and was condoned by the FPB's supervisory ranks."[70] Cole, Digby, Gray and Rawski therefore must stand in the same shoes in this case as the other Grievants whose similar activities were condoned and en-

couraged by their supervisors. The City's discharges of Cole, Digby, Gray and Rawski in this case because of discipline imposed in *Pump Inspectors* was therefore not appropriate — their misconduct in this case was not the "same misconduct" as required by *Pump Inspectors*.

The City points to the timing of the events in this matter in relation to *Pump Inspectors*. As pointed out by the City, *Pump Inspectors* issued December 16, 2008 reinstating the employees and the conduct at issue here involved mileage reimbursements for 2009 — the year immediately following the reinstatements ordered in *Pump Inspectors*.[71] The City makes a strong case that notwithstanding *Pump Inspectors*, because the conduct in this case occurred in 2009 on the heels of *Pump Inspectors*, FPB employees may not have clearly received the message from *Pump Inspectors* that a supervisor's sanctioning misconduct does not completely shelter an employee from discipline. However, that well-taken point is a double-edged sword. More troublesome, as the Union argues, is the fact that notwithstanding the issuance of *Pump Inspectors* which reduced discipline because of condonation of misconduct by supervisory personnel in the FPB, on the heels of that decision, condonation of a more extreme nature *continued* unabated into 2009 which, as the IGO found, amounted to a "... decades-long practice ... [which] extended to and was condoned by the FPB's supervisory ranks."[72]

However, I do agree that in light of *Pump Inspectors* and their personal involvement in that case, that Cole, Digby, Gray and Rawski should have known better and their antenna should have been up to alert them that even though condoned and encouraged by their supervisors to do so, requesting and receiving compensation for inflated mileage reimbursements was nevertheless misconduct. For that reason, and to send these long-term employees (ranging

from approximately 22 to 25 years)[73] the appropriate corrective message, Cole, Digby, Gray and Rawski shall receive the maximum amount of discipline imposed in this case — 40 day suspensions. In the exercise of my discretion to formulate remedies, these four Grievants shall be reinstated to their former positions without loss of seniority and other benefits and shall each be made whole in all respects, less the consequences of a 40-day suspension.

Further, I am cognizant that these four Grievants effectively dodged a bullet — for a second time. There will not be a third time for these Grievants. Therefore, in the event these four Grievants engage in *similar misconduct* in the future (not the more narrow "same misconduct" as in *Pump Inspectors*), they shall be immediately discharged. For purposes of enforcing that condition of prohibition against similar misconduct in the future, I will retain jurisdiction over allegations for future similar misconduct by these four individuals. In the event they engage in future similar misconduct, they will be immediately discharged and I will uphold those discharges.

5. Conclusion On The Remedy

The actions taken against Grievants shall be reduced as set forth above. Further, because remedies are designed to make employees whole less the consequences of reduced disciplinary actions, the City shall be entitled to offsets against its backpay liability due each Grievant receiving a remedy for unemployment compensation or earnings from substitute employment received by Grievants, if any, for the relevant backpay periods. I will retain jurisdiction to resolve disputes concerning the computation of backpay.

D. Other Considerations

The Illinois Supreme Court's decision in *American Federation of State County and Municipal Employees v. Department of Central Management Serv-*

ices, et al., 173 Ill.2d 299, 671 N.E.2d 668, 219 Ill.Dec. 501 (1996) ("*DuBose*"), addressed a requirement the Court placed on arbitrators when reinstating public employees:[74]

> ... [A]s long as the arbitrator makes a rational finding that the employee can be trusted to refrain from the offending conduct, the arbitrator may reinstate the employee to his or her former job, and we would be obliged to affirm the award.

In light of *DuBose*, the question now is whether I can also make a rational finding that Grievants can be trusted to not engage in the demonstrated misconduct in the future? For the following reasons, I can make that finding (which for purposes of this case, I will also apply to those Grievants whose discipline is further reduced and to those Grievants who are being reinstated).

First, I have imposed substantial disciplinary actions on all Grievants — suspensions ranging from 20 to 40 days. Given that the purpose of discipline is to send a corrective message to employees, those suspensions will, in my opinion, send a sufficient message to Grievants that they have to follow what is nothing less than a requirement that they cannot seek mileage reimbursements in excess of amounts to compensate them for *actual* mileage expense incurred — even if their supervisors tell them that requesting more is permissible. This kind of misconduct and any similar type of misconduct cannot be tolerated and, in my opinion, the suspensions imposed will send that message.

Second, Grievants are very long-term employees with service ranging from approximately seven to over 30 years and, with the exception of a few, have no prior discipline on their records.

Third, with respect to Norris and Segal who are being reinstated, the Department "... had a very high opinion of the quality of their work ... [and] their work ethic."[75] These are good employees.

Fourth, for those Grievants who were discharged and were also the subject of *Pump Inspectors* (Cole, Digby, Gray and Rawski), aside from being held in high regard by the Department for their work, two (Digby and Gray) received performance-based recommendations for consideration for promotion from their Lieutenants' positions to the rank of Captain for the 2008 Fire Captain Examination.[76] For the two Grievants who I have found are entitled to reinstatement because they effectively rescinded their resignations (Norris and Segal), aside from being highly regarded by the Department for their work, the evidence shows that they have also received commendations for their service.[77]

Fifth, for Grievants Cole, Digby, Gray and Rawski who were also the subject of *Pump Inspectors*, their reinstatement in this case is, for all purposes, on a last chance basis for *similar* misconduct in the future (not the "same" misconduct as in *Pump Inspectors*), with my retention of jurisdiction over those four individuals. Should they engage in future similar misconduct, they will be immediately discharged and I will uphold those discharges.

Given the above discussed factors, I am satisfied that all Grievants will respond to progressive discipline, will get the message designed to be sent by the discipline imposed in this case and will conform their conduct accordingly so as not to engage in this or similar misconduct in the future.

Based on the above and under the *DuBose* requirements, I can make a "… a rational finding that the employee[s] can be trusted to refrain from the offending conduct …" in the future.

E. The Union's Request For Interest

The Union has requested that interest be imposed on the City's backpay liability to Grievants.[78] Section 10.4 of the Agreement provides that "… the Arbitrator has the express authority to award interest on back pay remedies and

other monetary remedies at rates determined to be appropriate by the Arbitrator." Given that authority — and as in *Pump Inspectors* — I find this is also an appropriate case for the awarding of interest. As in *Pump Inspectors*, and as found by the IGO in this case, given that the conduct in this case was a "… decades-long practice … [which] extended to and was condoned by the FPB's supervisory ranks" and further given that even after *Pump Inspectors* issued which reduced discipline because of supervisory condonation in the FPB, the condonation and encouragement by supervisors in the FPB concerning mileage reimbursement continued and the employees were excessively disciplined for the very conduct that was condoned and encouraged.[79] Under the circumstances, I find that interest is appropriate in this case.

Therefore, in the exercise of the discretion given to me by the parties in Section 10.4 of the Agreement, interest shall be paid by the City on the back-pay amounts due all Grievants in accord with that formula required by statute to be paid to unlawfully discharged employees under the Illinois Public Labor Relations Act (seven percent).[80]

F. The IGO's Recommendations

Because the IGO is not a party to the Agreement between the City and the Union, the IGO's recommendations of mass discharge carry no weight in this proceeding under the Agreement. Only the City's ultimate actions are before me. Nevertheless, in my opinion, the City's rejections of most of the recommendations made by the IGO for discipline require discussion.

The IGO serves an important investigative function for the City. The IGO is charged by ordinance "[t]o investigate the performance of governmental officers, employees, functions and programs … in order to detect and prevent misconduct, inefficiency and waste within the programs and operations of the city

government ...."[81] The IGO is also charged by ordinance to "... report to the mayor concerning results of investigations ... with recommendations.[82] To perform these investigative and reporting functions, the IGO must command respect and be taken seriously.

But here, after conducting a very thorough investigation, the IGO recommended discharge for all Grievants even though he found that "[m]any inspectors were assured by their supervisors that the accuracy of their mileage totals would not be challenged ... [the Department] knew about this problem at least as far back as 2008 ... [and it was a] decades-long practice ... [which] extended to and was condoned by the FPB's supervisory ranks."[83] And the IGO made the recommendation of mass discharge even though Grievants have, as a group, protected the lives and property of the citizens of the City with approximately 1,150 years of service — well over a millennium — and, with few exceptions, Grievants had no prior disciplinary records.[84]

Although the City and the Department followed the IGO's discharge recommendations in a limited number of cases for specific reasons, the City and the Department did not follow the IGO's discharge recommendations for the group as a whole.

Given what the IGO found in this case — the pervasive supervisory condonation and encouragement of the conduct which elevated the long-standing practice concerning mileage reimbursements in the FPB almost to the status of a work rule, as well as the long and often unblemished service of these employees — anyone with any labor relations experience can only wince when reading the IGO's recommendations that *all* Grievants should be discharged. Whether intended or not, the IGO's draconian disciplinary recommendations in this case demean and denigrate the Department and *all* of its members from the highest

supervisors to the lowest ranks. The members of the Department — all ranks and supervisors, exempt and non-exempt personnel — are too often required to make life and death decisions and put themselves or those under their command in harm's way as they perform their jobs of protecting the lives and property of the citizens of the City (as well as people coming to the City). Far too often these public employees are injured or die in the performance of those duties for the public. The message sent by the IGO's recommendations of mass discharge of all Grievants without taking into consideration *any* mitigating factors is that the IGO places little value on the type of work and sacrifices the Department and all of its members routinely perform.

Discharge from a job is "industrial capital punishment".[85] By ignoring the IGO's own findings of the decades-long condonation and encouragement by supervisory personnel of the mileage reimbursement practice, with the IGO's draconian disciplinary recommendations for mass discharge of all of the involved FPB employees, then, like the Queen of Hearts in Lewis Carroll's "Alice's Adventures in Wonderland" whose only response to any perceived misconduct was the overly cruel mandate of "Off with their heads!", in the end, those bellicose commandments which are not followed ultimately make that individual a powerless figure who is not to be taken seriously.

In Chapter IX of "Alice's Adventures in Wonderland" (The Mock Turtle's Story), the Queen of Hearts walks away from Alice and the Gryphon stating that "I must go back and see after some executions I have ordered." Then, after the Queen departs, the Gryphon explains the Queen's lack of power to Alice:

> The Gryphon sat up and rubbed its eyes: then it watched the Queen till she was out of sight: then it chuckled. "What fun! said the Gryphon, half to itself, half to Alice.

> "What is the fun?" said Alice.
>
> "Why, she," said the Gryphon. "It's all her fancy, that: they never executes nobody, you know."

The point here is that not only do the IGO's draconian recommendations of discharge for all Grievants demean and denigrate the Department and all its members as a whole, the IGO's recommendations — which ignore the extraordinary mitigating factors in this case of condonation and supervisory encouragement of the conduct — also demean and denigrate the IGO as those recommendations exhibit an utter lack of knowledge of basic labor relations principles and the core purpose of discipline, which is that discipline is meant to correct and not punish. Given the extraordinary mitigating factors of the level of supervisory condonation and encouragement of the long-standing mileage reimbursement practice presented in this case, the IGO's recommendations of "Off with their heads" were borderline ludicrous and may well make the IGO — like the Queen of Hearts — into a powerless entity which is not to be taken seriously.

IV. CONCLUSION

The City has shown that Grievants engaged in misconduct. As found by the Inspector General, Grievants engaged in misconduct by "… systematically vastly overstating the number of miles they drove in their personal vehicles, when performing inspections and other FPB-related business."[86] However, the City has not shown that the amounts of discipline imposed or the actions taken against Grievants were appropriate. Again, as found by the Inspector General, "[m]any inspectors were assured by their supervisors that the accuracy of their mileage totals would not be challenged … [the Department] knew about this problem at least as far back as 2008 … [and it was a] decades-long practice … [which] extended to and was condoned by the FPB's supervisory ranks."[87]

Given that Grievants' actions were condoned and encouraged by their supervisors as "a decades-long practice"; their long lengths of service (from approximately seven to over 30 years); with few exceptions, Grievants having no prior discipline on their records; and the high regard that the Department had for Grievants for their work performance, it is found that the discipline imposed by the City and actions taken (suspensions in individual cases of 30, 45 and 60 days, discharge, or not allowing the rescinding of proffered resignations) were excessive and without just cause and in violation of the parties' collective bargaining agreement. As more fully set forth above, in the exercise of my authority to formulate remedies, the suspensions shall be reduced to 20, 25 and 40 days; the four Grievants who were discharged shall be reinstated to their former positions with 40-day suspensions, with the further condition that if they engage in similar misconduct in the future they will be immediately discharged; and the two Grievants who resigned but were not allowed to rescind their resignations shall be allowed to rescind their resignations and shall be reinstated to their former positions with 40-day suspensions. All reinstatements shall be without loss of seniority. All Grievants shall be made whole, with interest as specified, less the consequences of the discipline imposed, with the City entitled to offsets for unemployment compensation and earnings from substitute employment during the relevant backpay periods, if any.

V. AWARD

The grievances are sustained in part. The disciplinary actions shall be reduced and imposed as set forth in III(C) and Grievants shall be made whole with interest less the consequences of the suspensions imposed, with the City entitled to offsets for unemployment compensation and earnings from substitute employment during the relevant backpay periods, if any. As set forth

above, I will retain jurisdiction to resolve disputes concerning the remedy in this matter or other aspects of conditions placed on reinstatement of certain Grievants.[88]

Edwin H. Benn
Arbitrator

Dated: May 31, 2012

ENDNOTES

[1] The parties were not in complete agreement of the statement of the issue. Tr. 4. In light of the parties' positions, my statement of the issue fairly frames the dispute.

[2] The hearing commenced on April 26, 2012. Consistent with my earlier direction of April 2, 2012 and in order to properly manage this case, I required the parties to pre-mark exhibits and agree to stipulations. Joint Exh. 3. I also required a procedure to be followed whereby the exhibits and stipulations were entered into the record and the parties made opening statements. *Id*. That procedure was followed at the April 26, 2012 hearing.

Extensive exhibits and stipulations were presented at the April 26, 2012 hearing. Joint Exhs. 1-12; Union Exhs. 1-21; City Exhs. 1-12 — many with subparts. The parties also made extensive opening statements going through the exhibits and explaining in detail the evidence and their positions. Tr. 9-120. Upon completion of their opening statements and with the record of exhibits and stipulations, it was apparent to me that because there were no real disputes of the underlying material facts and because of the well-developed record made by the parties, further witness testimony, argument and briefs would be redundant. On that basis, I then ordered the hearing closed. Tr. 120-122.

[3] Joint Exh. 11. The ranks held by Grievants are Firefighter ("FF"), Lieutenant ("LT"), Emergency Medical Technician ("EMT"), Battalion Chief ("BC"), Engineer ("ENGR"), Captain ("CAPT") and Paramedic ("PM").

[4] Joint Exh. 1.

[5] *Id*.

[6] City Exh. 2, IGO Summary Report dated July 14, 2011 ("Summary Report") at 1, 137.

[7] *Id*.

[8] City Exh. 4 at 3.

[9] City Exh. 3; Joint Exh. 11.

[10] Tr. 8, 42-43. Two Grievants involved in this case (Michael Norris and John Segal) submitted resignations after the first disciplinary officer's report but before the second disciplinary officer's report. *Id*.

[11] Tr. 116-117. *See also*, discussion at III(C)(4)(a) regarding Norris and Segal.

[12] City Exh. 3 at 3.

[13] Joint Exh. 11.

[14] Ten grievances were filed by the Union protesting the disciplinary actions which were consolidated for hearing. Joint Exhs. 3-4. At the hearing, the Union withdrew its protests over the discharges of Antoinette Barrett, Cornell Dantzler, Scott Przislicki and Thomas Tentler who resigned and retired and indicated no desire to return to work. Joint Exh. 4A; Tr. 8. The Union continued to maintain its position that although they resigned, Grievants Norris and Segal were constructively discharged. *Id*.

[15] Joint Exh. 1.

[16] *The Common Law of the Workplace* (BNA, 2nd ed., 2005), 54-55, 190:

> In a discipline case the employer best knows why it penalized an employee, often with grave repercussions for the individual. For these reasons the burden of proof in such cases traditionally has been placed on the employer.
>
> * * *

> The employer bears the burden of proving just cause for discipline. That includes proof that the level of discipline imposed was appropriate.

See also, Elkouri and Elkouri, How Arbitration Works (BNA, 5th ed.), 905 [footnote omitted]:

> There are two areas of proof in the arbitration of discharge and discipline cases. The first involves proof of wrongdoing; the second, assuming the guilt of wrongdoing is established and the arbitrator is empowered to modify penalties, concerns the question of whether the punishment assessed by management should be upheld or modified.

[17] IGO Summary Report (City Exh. 2) at 23-137. The Union's arguments throughout — as they must — effectively concede that the mileage reports submitted by Grievants were inaccurate. Using Grievants' submitted reports for 2009 and comparing the activity sheets (although many Grievants did not submit activity sheets), distances claimed and actual mileage based on Google Maps and allowing for a 10% error factor, the evidence shows as found by the IGO that Grievants submitted mileage reimbursement claims and were paid in amounts ranging up into the thousands of dollars above what Grievants should have received. *Id*. *See also*, City Exh. 9.

[18] *See Lockheed Aircraft Corp.*, 28 LA 829, 831 (Hepburn, 1957) ("Just cause requires that employees be informed of a rule, infraction of which may result in suspension or discharge, unless conduct is so clearly wrong that specific reference is not necessary.").

[19] *See e.g.*, Personnel Rule XVIII, Section 1, Rules 11, 17, 39, 48 and 50 (prohibiting falsification of records, misappropriating funds, inefficiency of performance of duties, violation of Department rules and conduct unbecoming); General Order 92-011 (Department Code of Professional Conduct) at Sections 2.16 and 2.30 (prohibiting action taken for personal gain and making a false report). City Exh. 5; Joint Exh. 7. *See also*, Department General Order 98-010 (in effect at the time) addressing requirements of mileage reimbursement reports "… confirming the accuracy of the mileage figures being claimed." Joint Exh. 8. Further, *see* Section 16.6 of the Agreement allowing for a "… maximum reimbursement …." Claiming mileage reimbursements for mileage not incurred is clearly misconduct.

[20] IGO Summary Report (City Exh. 2) at 1.

[21] The fact that the misconduct in this case was condoned, encouraged and engaged in by Grievants' supervisors cannot negate a finding that Grievants were also engaging in misconduct by knowingly submitting inaccurate mileage reimbursement claims. Taken to its logical extent, under the Union's argument, a firefighter who is told by his supervisor that it is permissible to engage in arson (or worse) could successfully claim that he should not be held accountable even though the employee on his own volition spread the accelerant and lit the match.

[22] IGO Summary Report (City Exh. 2) at 2.

[23] City Exh. 3 at 2.

[24] Tr. 81-82, 116.

[25] Joint Exh. 11.

[26] *See Armco Steel Corp.*, 52 LA 101, 104 (Duff, 1969):

> The principle of progressive discipline requires that for the first minor infractions, verbal warning be given to an employee. If the verbal warnings do not lead an errant employee to reform, and a repetition of the offense, or a similar infraction occurs, then more severe punishment should be imposed. Written reprimands place an employee on notice that heavier penalties will be imposed for future acts of misconduct. Where written reprimands do not produce the desired reform, then the Company should impose layoffs of increasing degree so that an employee will know that Management will not tolerate improper conduct.

The parties have recognized the concept of progressive and corrective discipline in Section 16.2 of the Agreement:

> Section 16.2 - Discipline and Discharge
>
> A. Disciplinary actions instituted by the Employer shall be for reasons based upon the employee's failure to fulfill his responsibilities as an employee. Where the Employer believes just cause exists to institute disciplinary action it shall have the option to assess the following penalties:
>
> Oral Reprimand
> Written Reprimand
> Suspension
> Discharge
>
> * * *

[27] *TRW Metals Div.*, 52 LA 538, 544 (Bradley, 1969):

> As a general principle in the matter of employer-employee discipline it is not always necessary to complete all of the progressive disciplinary steps prior to discharge. The severity of the offense determines the action to be taken, whether it be a layoff or discharge, even though the particular employee has not previously been disciplined.

Fairweather's Practice and Procedure in Labor Arbitration, (BNA, 3rd ed.), 258:

> ... [A]rbitrators usually consider the entire disciplinary record relevant to an evaluation of the reasonableness of the amount of discipline to be imposed, particularly when the grievant has been discharged.

How Arbitration Works, supra at 929:

> Long service with the company, particularly if unblemished, is a definite factor in favor of the employee whose discharge is reviewed through arbitration.").

The Common Law of the Workplace, supra at 184:

> ... The level of discipline permitted by the just cause principle will depend on many factors, including ... the ... quality of the employee's work record ....

The Union argues that Grievants have been treated in a disparate fashion asserting that employees in the Office of Emergency Management and Communications and the Department engaged in similar misconduct (without evidence of condonation) and were treated differently from Grievants. Tr. 57-61, 88-90; Union Exhs. 1, 2, 9, 10. The also Union points to the lesser discipline of Grievants Peoples and Mitchell for each of their prior related offenses of falsification of an official report. Union Exhs. 9, 10; Tr. 89-90 (Peoples); and a post-hearing stipulation (Mitchell).

The Union is correct that employees who engage similar misconduct should be treated in a similar fashion. *See How Arbitration Works*, *supra* at 934:

> It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault or mitigating or aggravating circumstances affecting some but not all of the employees).

In a disparate treatment case, the Union has the burden to make a showing that ".... employees similarly situated are treated differently ...." *Sprague Devices, Inc.*, 79 LA 543, 547 (Mulhall, 1982). The mere showing that there were some past instances where employees were treated differently is not, by itself, enough to show disparate treatment because "[a]bsolute consistency in the handling of rule violations is, of course, an impossibility...." Aaron, "The Uses of the Past in Arbitration," *Proceedings of the 8th Annual Meeting of the National Academy of Arbitrators*, 10 (BNA, 1955). And, these cases (as they must be) have to looked at on an individual basis. *See* Hill and Sinicropi, *Management Rights* (BNA, 1986), 76:

> Each case will depend upon its own facts. Isolated instances of uneven treatment may not result in the reversal of discipline by an arbitrator, but a party

> that continually treats similarly situated employees differently, can look forward to having its penalties set aside.

The City has pointed to several arbitration awards where employees who engaged in acts amounting to theft have been discharged and those discharges were upheld in arbitration. *See my award in City of Chicago and Chicago Firefighters Union Local No. 2 (R. Brown),* Grv. No. 950111 (1996); *City of Chicago and Chicago Firefighters Union Local No. 2 (T. Brown),* Grv. No. 950839 (Meyers, 1996); *City of Chicago and Chicago Firefighters Union Local No. 2 (Donofrio),* AAA 51 39 0763 83 B (Nathan, 1984). City Exh. 10.

Because of the other bases of my opinion, I need not determine that Grievants were treated in a disparate fashion.

[28] Those with prior discipline will be discussed below.

[29] Joint Exh. 11.

[30] IGO Summary Report (City Exh. 2) at 1, 137.

[31] *Id*. Prior to the instant disciplinary actions taken after the IGO's investigation, at no time did exempt rank Chiefs initiate any disciplinary action against Grievants alleging any rules violations regarding mileage reimbursements. Joint Exh. 5 (Stipulations) at 2.

[32] Union Exh. 7 at 32-33, 38, 86, 89, 96-97, 127, 131; IGO Summary Report (City Exh. 2) (same pages) and at 136. *See also*, Tr. 61-71.

[33] Union Exhs. 8(a)-(d); Tr. 71-74; Joint Exh. 5 and the list of exhibits (showing that at the time of the photographs were taken on December 21, 2006, Larry Muse who appears in the photographs was a Deputy Bureau Commander who later rose to the rank of Deputy Fire Commissioner).

Union Exh. 8(a) is a photograph taken December 12, 2007. Union Exh. 8(b) is a copy of that photograph with the posted formula written on the copy. Index to Exhibits at ii. Union Exhs. 8(c) and (d) are photographs taken December 21, 2006. *Id*. Under the parties' predecessor Agreements (of which I take note), Section 16.6 provided for a $300 per month maximum reimbursement effective January 1, 2003 and $350 per month maximum reimbursement effective January 1, 2006. Clearly, the formula of how to perform the calculation to obtain the maximum mileage allowed for reimbursement under Section 16.6 was posted for years prior to 2009.

[34] *See United Steelworkers of America v. Enterprise Wheel & Car Corp*., 363 U.S. 593, 597 (1960):

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

See also, Local 369 Bakery and Confectionery Workers International Union of America v. Cotton Baking Company, Inc., 514 F.2d 1235, 1237, *reh. denied*, 520 F.2d 943 (5th Cir. 1975), *cert. denied*, 423 U.S. 1055 and cases cited therein:

> In view of the variety and novelty of many labor-management disputes, reviewing courts must not unduly restrain an arbitrator's flexibility.

Additionally, *see Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57, 62, 67 (2000) [citations omitted]:

> ... [C]ourts will set aside the arbitrator's interpretation of what their agreement means only in rare instances. ....
>
> * * *
>
> We recognize that reasonable people can differ as to whether reinstatement or discharge is the more appropriate remedy here. But both employer and union have agreed to entrust this remedial decision to an arbitrator. ....

Finally, *see* Hill and Sinicropi, *Remedies in Arbitration* (BNA, 2nd ed.), 62 ("... [M]ost arbitrators take the view that broad remedy power is implied ....").

[35] City Exh. 3 at 2; Joint Exh. 11.

[36] *Id*. *See also*, Tr. 8-9.

[37] Joint Exh. 11.

[38] *Id*.

[39] *Id*. In a post-hearing stipulation, the parties agreed that the Engineer and four Firefighters were acting in a higher rank.

[40] Joint Exh. 11.

[41] *See* IGO Summary Report (City Exh. 2) at 25-26, 32-34, 72-74, 136-137.

[42] Joint Exh. 11.

[43] *Id*.

[44] *See* Union Exhs. 9, 10 (Peoples). As earlier noted, in a post-hearing stipulation, the parties agreed that Mitchell, like Peoples, also has other discipline for a prior related offense.

[45] City Exhs. 1(E) and (F); Tr. 42-43.

[46] As stated by the City, "... Mr. Norris and Mr. Segal were throughout this relevant period of time attempting to come back ...." Tr. 116-117.

[47] Tr. 8, 91-107.

[48] *See How Arbitration Works, supra* at 894 ("[w]hen an employee voluntarily resigns, concepts associated with discharge are not generally applicable.").

[49] *Id*. at 895-896.

[50] *The Common Law of the Workplace, supra* at 176.

[51] Tr. 94-99.

[52] Tr. 42-44.

[53] *Davis Cabinet Co*., 45 LA 1030, 1033 (Tatum, 1965).

[54] *Id*. *See also*, *Renaissance Center Partnership*, 76 LA 379, 383 (Daniel, 1981) ("Nor is it unusual for an employee, once he has an opportunity to evaluate all the facts and circumstances, to change his mind ... [and w]here such is done in a short time after the resignation and there is no showing of any detriment to the employer there is no good reason for denying the right of rescission and thereby access to all the rights of the grievance procedure"); *Muter Co*., 47 LA 332, 336 (Di Leone, 1966) ("Here, there was no reliance by the Company on said notice [of resignation] and until there is, the employee is presumed to be a bona fide employee of the Company"); *Vickers, Inc*., 41 LA 918, 921 (Seitz, 1963) ("... there is nothing in the labor agreement or in the law to prevent the retraction of a resignation not executed by the employee or acted upon, by the employer, by a change of position to its detriment ... [and i]t is salutary doctrine, I believe, that permits persons to retract improvident statements before the time for action has arrived, provided no loss or damage has been occasioned."); *Ingalls Shipbuilding Corp*., 38 LA 84, 88 (Hebert, 1961) ("... there is, at least, substantial authority for the proposition that a resignation or voluntary quit may under some circumstances be withdrawn if action is taken promptly and the employer has not been seriously prejudiced").

[55] Tr. 44.

[56] Tr. 98-101, 111-117.

[57] Tr. 118.

[58] Union Exh. 17.

[59] IGO Summary Report (City Exh. 2) at 90-92, 109-112.

[60] Joint Exh. 11.

[61] *Pump Inspectors* at 7; Joint Exh. 6.

[62] *Id*. at 2 [endnote omitted, emphasis in original].

[63] *Id*. at 5 [endnotes omitted].

[64] IGO Summary Report (City Exh. 2) at 137.

[65] *Pump Inspectors* at 8-10.

[66] *Id*. at 10-11.

[67] *Id*. at 12 [emphasis added]. *See also,* Tr. 32-33, 42.

[68] *Id*. at 11.

[69] *Id*. at 12.

[70] IGO Summary Report (City Exh. 2) at 137.

[71] Tr. 33.

[72] IGO Summary Report (City Exh. 2) at 137.

[73] Joint Exh. 11.

[74] 173 Ill.2d at 322, 671 N.E.2d at 680, 219 Ill.Dec. at 513.

[75] Tr. 118.

[76] *Pump Inspectors* at 9, 14.

[77] A Chicago Sun-Times article produced by the Union ("Firefighters save 2 in high-rise blaze") reports that Norris and another Firefighter "... climbed a rear stairwell to the sixth floor ... crawled on their hands and knees and found the woman collapsed on the kitchen floor ... gave her oxygen [and] then brought her down in the basket." Union Exh. 20.

Segal received an Honorable Mention and a Unit Performance Award. Union Exh. 21. The Union also presented a letter from the Executive Director of the Coordinated Advice and Referral Program for Legal Services to the FPB Chief concerning the evacuation of a building due to a carbon monoxide leak, with the remark of "I was impressed by the work of John Segal ... [and o]n behalf of my staff, please thank Mr. Segal for his thoroughness in dealing with this potentially dangerous situation." *Id*.

[78] Tr. 110.

[79] IGO Summary Report (City Exh. 2) at 137; *Pump Inspectors* at 12-13.

[80] *See* Section 11(c) of the Illinois Public Labor Relations Act, 5 ILCS 315/11.

[81] Chicago Municipal Code, Section 2-56-030(b); Joint Exh. 12.

[82] *Id*. at Section 2-56-030(d).

[83] IGO Summary Report (City Exh. 2) at 1, 137.

[84] Joint Exh. 11. *See also*, III(A) discussing the various categories of suspensions imposed.

[85] *County Line Cheese Co.*, 80 LA 717, 720 (Grohsmeyer, 1983).

[86] City Exh. 2, IGO Summary Report dated July 14, 2011 at 1, 137.

[87] *Id*.

[88] Section 10.5 of the Agreement provides that "[t]he Arbitrator, in the event of a decision not wholly sustaining the position of either party, shall determine the appropriate allocation of his fees and expenses." Neither side has fully prevailed. In this case, arbitral fees shall be shared.