

FEDERAL MEDIATION & CONCILIATION SERVICE

Before

THOMAS G. HUMPHRIES

ARBITRATOR

In the Matter of Arbitration

between

SOUTHWEST FLORIDA PROFESSIONAL
FIRE FIGHTERS & PARAMEDICS,
LOCAL 1826, 1AFF, INC.

Dale Pinheiro: Discharge
FMCE Case No. 120312-53992-3

and

LEHIGH ACRES FIRE CONTROL &
RESCUE SERVICE DISTRICT, FLORIDA

APPEARANCES:

For the Employee:

MARK W. FLOYD, ESQ,
Mierzwa & Associates, P.A.
3900 Woodlake Blvd., Suite 212
Lake Worth, FL 33463
Tel: (561) 966-1200
mfloyd@mierzwalaw.com

For the Employer:

JOHN H. HAMENT, ESQ.
NIKHIL N. JOSHI, ESQ.
Kunkel Miller & Hament
Orange Professional Centre
235 N. Orange Ave., Suite 200
Sarasota, FL 34236
Tel: (941) 365-6006
nikhil@kmhlaborlaw.com

The above captioned matter came on for hearing at the offices of the Lehigh Acres Fire Control & Rescue District, Lehigh Acres, Florida on August 1, 2012, commencing at 9:00 a.m., pursuant to notice and in accordance with applicable provisions of the Collective Bargaining Agreement (the “Agreement”) between the Southwest Florida Professional Firefighters & Paramedics, Local 1826, IAFF, Inc. (the “Union”) and the Lehigh Acres Fire Control & Rescue Service District (the “Employer,” the “District”).

The matter of the discharge of Mr. Dale Pinheiro (the “Grievant”) was properly before the undersigned Arbitrator. Each party was afforded full opportunity at hearing to present witnesses, exhibits and arguments. Audio-recorded transcript was taken and witnesses were placed under oath. The parties chose to file post-hearing briefs and the record was closed upon receipt of the briefs by the undersigned Arbitrator.

In accordance with the Agreement, the Arbitrator’s Decision and Award shall be final and binding on the parties.

INTRODUCTION

The Employer provides fire and emergency medical services in at least nineteen different districts throughout Lee County and Collier County, Florida. The Union is recognized by the Employer as the exclusive bargaining agent for a rank and file bargaining unit consisting of employees of the District employed in the classifications of Mechanic, Firefighter/EMT, Firefighter/Paramedic, Fire Training Officer, Engineer, Fire Inspector, and Lieutenant. This rank and file bargaining unit is commonly referred to as District 6. The Union also represents a supervisory bargaining unit consisting of employees employed by the District in the ranks of Captain and Battalion Chief. This bargaining unit is commonly referred to as District 19. In all, the Union represents approximately 137 employees employed by the District.

As components of its functions within its districts, the Employer provides fire suppression and emergency medical services, including transport services, to those who visit or reside within the geographical boundaries of the special taxing district amounting to a District jurisdiction covering approximately 174 square miles.

The District operates five stations which are staffed by employees represented by the Union. Those employees typically work a twenty four hour shift followed by forty eight hours off duty. The wages, hours, and terms and conditions of employment for the employees represented by the Union in District 6 are established by the Agreement.

The Grievant was hired by the District in August 1996 as a Mechanic. Approximately fifteen months after being hired by the District, the Grievant was certified and employed as a Firefighter. The Grievant was subsequently licensed as an Emergency Medical Technician (EMT) in about 1997, and over the course of his approximately fifteen year career with the District held the classifications of Mechanic, Firefighter/EMT, Move-Up Engineer, Lieutenant, and Move-Up Battalion Chief. As a Lieutenant at the time of his termination, the Grievant held certifications in pump operator, aerial operations, Fire Officer I, Fire Instructor I, Fire Inspector I, Fire Inspector II, Incident Command Systems I-VIII, as well as other certifications related to fire suppression. The Grievant had also served a term as the District Vice President of the Union, representing the members of Local 1826's District 6.

BACKGROUND

The instant case dispute had its genesis in the strained relationship between the Grievant and Battalion Chief Robert Dilallo. The two had known each other since the Grievant had been hired by the District and both acknowledged at hearing that their relationship had been strained.

According to Dilallo, the relationship had soured in 2008 but the two had been able to

work together, discuss issues and work most things out. By 2011, however, the relationship between the two appears to have have fallen apart. During that year, the Grievant filed either two or three complaints against Dilallo. These complaints involved alleged discrimination as a result of his claim for veteran's preference claims retaliation as well as for his comments during a post-fire incident critique. An alleged violation of HIPAA regulations by Diallo which included information supplied by the Grievant to another employee was also cited as a contributing factor to the discord.

Subsequent to the filing of the Grievant's complaints, Dilallo filed complaints of his own against the Grievant. Dilallo filed his initial complaint on September 14, 2011, and then, on October 5, 2011, filed an addendum to the complaint and expanded the complaint to include allegations against another employee, Lieutenant Temple. An additional addendum or amendment to Diallo's complaint was then filed on October 23, 2011.

Ultimately, the filing of these complaints by both the Grievant and Dilallo gave rise to the District's personnel action against the Grievant. Among other Employer allegations, the Grievant was accused of making "bad- faith charges" against Battalion Chief Dilallo as well as having exhibited questionable leadership ability.

Ultimately, on February 22, 2012, the Grievant was provided with a letter from Fire Chief Donald R. Adams stating that the Grievant's employment was being terminated because he "filed bad-faith charges against Dilallo" and the "bad-faith charges filed against Dilallo cannot be condoned or tolerated by the District."

The Grievant, through the Union, grieved the District's decision to terminate his employment, alleging that the termination of his employment violates Article 24, Section 24.6, of the Agreement. The Grievance demands that the Grievant's employment be immediately

reinstated and that he be “made whole” for all wages and/or benefits lost as a result of the District’s actions as well as any other appropriate damages or remedies.

ISSUE

Did the District have just cause to terminate the employment of Dale Pinheiro? If not, what shall be the remedy?

RELEVANT CONTRACTUAL AND EMPLOYER POLICY PROVISIONS

COLLECTIVE BARGAINING AGREEMENT

ARTICLE 11

MANAGEMENT AND EMPLOYEE RIGHTS

- 11.1 Management rights as provided by law are hereby preserve.
- 11.2 The board hereby retains and reserves to itself and other administrative personnel of the District, without limitation, all powers, rights, authority, duties and responsibilities, and the exercise thereof, as conferred upon and vested in them by the Constitution and the laws and regulations of the United States and the State of Florida, and the policies of the Lehigh Acres Fire Control and Rescue District, according to the rights set forth by Chapter 447 of the Florida Statues.
- 11.3 Employee rights as provided by local, state and federal law are hereby preserved, including firefighters’ rights as defined in Chapter 112, Part 8, Florida Statues.

ARTICLE 24

GRIEVANCE AND ARBITRATION PROCEDURES

- 24.1 A grievance shall mean a dispute concerning the interpretation or application of this contract.

SUSPENSION AND DISCHARGE

- 24.5 In cases in which the Employer determines that the employee’s conduct or performance of work justifies suspension or discharge, the employee shall first be notified by the Chief or designee in the presence of the Union Shop Steward or District Vice-President and/or his grievance committee person (when representation is requested by the employee). The reason for the suspension or the discharge must be stated and reduced in writing within twenty-four (24) hours.

The rules or regulations allegedly violated must be stated. Upon notification, the employee shall immediately leave the premises.

- 24.6 If an employee believes his suspension or discharge is unfair or unjust, the employee may, within ten (10) calendar days after receiving notification, file a grievance in writing and request processing of such grievance at Step II of the grievance procedure.

GRIEVANCE PROCEDURE

- 24.7 SECTION III ... The decision of the arbitrator shall be final and binding on both parties.

SECTION IV The compensation and expenses of the arbitration shall be borne by the losing party as determined by the arbitrator, excluding attorney fees.

LEHIGH ACRES FIRE CONTROL AND RESCUE DISTRICT RULES AND REGULATIONS

- 4.01 All members of the Fire District shall adhere to the rules and regulations of the Fire District and any local, state and federal laws and ordinances, and will adhere to the articles of the Union contract. Failure to do so shall make members subject to disciplinary action.
- 4.08 Each employee is responsible for thorough understanding of rules, regulations, general orders and standard operating procedures/guidelines.
- 4.09 The lack of courage, honesty, motivation, emotional stability, sound judgment, alertness, decisiveness, power to observe, initiative, energy, intelligence, ability to get along with co-workers or with the public, or unsatisfactory performance of duties shall be evidence of incompetence.
- 4.10 No member shall conduct themselves in an indecent, lewd or disorderly manner; nor shall any member engage in conduct unbecoming a District employee, or acts that tend to discredit the District.
- 4.11 No member shall conduct themselves in a manner that in any way will tend to bring discredit or ill repute to the Fire District.
- 4.14 Members shall not be party to any malicious gossip, report or activity that would tend to disrupt District morale or bring discredit to the District or its members, and shall immediately report the discovery of these conditions to their superior officer.

- 4.50 Personal knowledge of any violations of the rules, regulations, or other policies or orders governing the Fire District shall immediately be reported in writing to the member's immediate supervisor.
- 11.01 (g) Be responsible for the safekeeping and proper care of District property in their charge.
- 12.00 (d) No member shall be a party of any malicious gossip, report or activity that would tend to disrupt District morale or bring discredit to the District or any member thereof.
- 12.00 (g) Inefficiency or indifference of members in the performance of their duties shall be sufficient cause for disciplinary action.

LEHIGH ACRES FIRE CONTROL AND RESCUE DISTRICT
DISCRIMINATORY WORKPLACE HARASSMENT POLICY
AND COMPLIANCE PROCEDURE POLICY

Harassment of an applicant, client, contractor, business invitee, customer, volunteer, or employee (a "worker") is explicitly in violation of state and/or federal law and will **not** be tolerated by the Lehigh Acres Fire Control and Rescue District.

Volunteers, or employees found to be participating in any form of job based harassment or retaliating against any worker shall be subject to disciplinary action up to and including termination from employment or membership.

POSITIONS OF THE PARTIES

THE EMPLOYER

The Employer states: Lt. Pinheiro's employment was justly terminated for cause.

Having a criminal background and arrest record for aggravated assault with a deadly weapon, and with a known affiliation with an outlaw motorcycle gang, Lt. Pinheiro was a serial manipulator – a puppeteer -- who used nefarious means, including threats of bodily harm, to effectively control the strings of his puppet, Battalion Chief Dilallo, over important supervisory decisions that affected the Lt. If he did not get what he wanted, Lt. Pinheiro would stoop to the lowest levels to ensure he achieved his objectives.

The conniving behavior started with Lt. Pinheiro setting up Dilallo, who was attending a fire-oriented outing and sleeping in his hotel room. Pinheiro set up a sleeping Dilallo with another woman, unbeknownst to Dilallo, and took some photographs that appeared to put Dilallo in a compromising position. Later, unrelated to that outing, after Dilallo lodged a complaint against Lt. Pinheiro in 2006 for verbal assault and harassment due to an incident on work premises in which Dilallo was threatened with bodily harm, Lt. Pinheiro made known those photographs and used them to hold Dilallo hostage for many years that followed by threatening to send those photographs to Dilallo's wife. That threat – supported by Dilallo's strongly held belief that Pinheiro could carry it out given his criminal and outlaw motorcycle gang background -- handcuffed Dilallo into not making effective employment decisions affecting Pinheiro.

In mid-2011, when Dilallo had good reason based on Lt. Pinheiro's conduct to no longer schedule Lt. Pinheiro as a move-up battalion chief, Lt. Pinheiro tried again to prevent Dilallo from making that legitimate supervisory decision by unreasonably agitating, including filing merit-less charges. Pinheiro tried whatever he could to continue his domination over Dilallo, and overturn Dilallo's move up decision. Pinheiro's own complaints evolved; he had another person, Lt. Temple, file a baseless complaint as well. Thereafter, for the first time since filing his complaint against Pinheiro in 2006 – which was before the Pinheiro-created photographs were known by Dilallo and used against him in retaliation – Dilallo decided to take a stand. After finally informing his wife about the photographs, Dilallo filed his second complaint against Pinheiro. With Dilallo no longer held hostage by those photographs, Pinheiro lost any leverage. With the finding that the complaints filed by Pinheiro were without merit and were made in bad-faith with the intention to undermine the B.C. in performing his supervisory duties, Lt. Pinheiro's employment was terminated.

THE UNION

The Union states: Lieutenant Pinheiro and Battalion Chief Dilallo have had a strained relationship. There can be no doubt that the strained relationship between these two individuals caused problems within the District in 2011. There should also, however, be no doubt that those problems were resolved when Lieutenant Pinheiro was moved off of Battalion Chief Dilallo's shift and placed on Battalion Chief Wayne's B shift.

Even though any issues between Battalion Chief Dilallo and Lieutenant Pinheiro were solved by moving Lieutenant Pinheiro to B shift, the District still saw fit to terminate Lieutenant Pinheiro's employment. The sole basis of that decision was the conclusion by the Fire Chief that Lieutenant Pinheiro asserted complaints against Battalion Chief Dilallo in bad-faith. In these proceedings, it is the burden of the District to prove the allegations against Lieutenant Pinheiro and establish that there did exist just cause to terminate Lieutenant Pinheiro's employment. The District cannot satisfy this burden of proof.

The District presented absolutely no substantial evidence or proof that Lieutenant Pinheiro has engaged in any wrongdoing or filed any complaint in bad-faith. The District's case relies entirely upon the hearsay testimony of Battalion Chief Dilallo and Lieutenant Kreft. The District made no effort whatsoever to actually determine whether Lieutenant Pinheiro ever threatened or blackmailed Battalion Chief Dilallo in any way. Instead, the District appears to be comfortable in relying on statements made by Battalion Chief Dilallo even though the District chose to ignore similar statements made by Battalion Chief Dilallo when Battalion Chief Dilallo had brought similar issues to the attention of every managerial representative of the District.

The District attempts to justify its action by claiming that Lieutenant Pinheiro's veteran's preference/retaliation claim and HIPAA complaint were asserted in bad-faith. However, the District's own actions bely these conclusions.

The Fire Chief met with Lieutenant Pinheiro regarding his veteran's preference claim on August 30 and September 2, 2011. When the Fire Chief informed Lieutenant Pinheiro that he was not suffering adverse actions as a result of having claimed a veteran's preference but because of his behavior at the fire critique, Lieutenant Pinheiro immediately withdrew the complaint. At that the time that complaint was withdrawn, the Fire Chief had not even looked at the complaint, must less commenced an investigation.

When Lieutenant Pinheiro then asserted a claim of retaliation, the Fire Chief had the District's outside labor counsel, Nikhil Joshi, conduct an investigation into the claim.

Mr. Joshi concluded that Lieutenant Pinheiro's complaint was without merit and that the Fire Chief had adequately resolved the situation by deciding to move Lieutenant Pinheiro off of Battalion Chief Dilallo's shift. Significantly, at the time Mr. Joshi reached this conclusion, on September 13, 2011, Mr. Joshi made no conclusion that the complaint had been filed in bad-faith.

We know that the complaint was not filed in bad-faith because the complaint was based on information received directly from the Fire Chief. The Fire Chief himself indicated that the adverse actions suffered by Lieutenant Pinheiro were directly related to and resulting from Lieutenant Pinheiro's comments at the fire critique. The U.S. Fire Administration makes clear that fire critiques should be conducted in an environment free from any fear of official retribution. Yet, the Fire Chief informed Lieutenant Pinheiro that he suffered retribution for his

conduct at the critique. This provides Lieutenant Pinheiro with a basis for his complaint, even if the District concludes that the complaint is without merit.

With regard to the HIPAA complaint, Lieutenant Pinheiro first shared his concerns with Lieutenant Temple. Lieutenant Temple agreed that there was a violation of the patient's privacy rights. Because Lieutenant Temple agreed, he agreed to file a complaint along with Lieutenant Pinheiro. This complaint was investigated by Captain McDowell. Captain McDowell concluded that "all persons involved needed to be familiarized to the Department's privacy policy." Captain McDowell's conclusion runs contrary to the District's later conclusion that the complaint was filed in bad faith. Further, the District's conclusion that the HIPAA complaint was filed in bad-faith is belied by the fact that the District never took any disciplinary action against Lieutenant Temple, the employee who actually filed the complaint.

Local 1826 respectfully requests that the arbitrator issue an order reinstating Dale Pinheiro's employment with the District and making him whole for all wages and/or benefits lost as a result of the District's improper actions.

DISCUSSION AND FINDINGS

A number of incidents surface from the record in the matter of the Grievant's termination. Among these are his harsh verbal indictments of the Department's handling of a major fire event, the making of allegations in a HIPPA matter and the making of complaints including one concerning a veteran's preference issue. An issue that looms the largest, however, is the abysmal relationship between the Grievant and a supervisor.

To conclude that a strained relationship existed between the Grievant and Battalion Chief Dilallo is an understatement to say the least. The goings on between the two had become so dysfunctional prior to the Grievant's termination that Dilallo's state of mind had been reduced to

that of a deeply troubled individual, impacted by what he had come to believe to be the Grievant's intolerable presence in his daily life. Underlying all of this discord was Dilallo's fear that a photo of him beside a scantily clad female would become known to his wife. While the photo in question had apparently been staged by co-workers while Dilallo had been asleep during the period of an out of town firefighter training event, Dilallo fearfulness, regardless of his proclaimed innocence in the matter, had overwhelmed him. Whether Diallo's paranoia was rooted in actual or imagined threats to his well-being from the Grievant, he had, as one co-worker put it, undergone a transformation, a changed man as it were, one whose zest and personality had fundamentally changed for the worse.

The Employer characterizes the Grievant as an "intimidating, bullying, and calculating individual." Furthermore, he is said to have a criminal background and connections with a motorcycle gang. In that backdrop, whether intended or not, the Grievant made the personal and professional life of Dilallo miserable, reaching a point that a complaint was filed against the Grievant by Dilallo in 2006, alleging that the Grievant had verbally assaulting Dilallo when the two were alone in a room. According to Dilallo, the Grievant made vulgar threats against him and kicked the door and other items in the room. Dilallo's complaint resulted in the Grievant's four (4) hour suspension for his actions and his being informed that any similar conduct thereto would lead to additional disciplinary action, up to and including possible termination of employment.

The appearance of photographs depicting Dilallo in the presence of a partially nude female occurred while employees including Dilallo and the Grievant were attending an out of town firefighters' training session in 2006.. Apparently, the photos were taken while Dilallo was sleeping and a female was posed next to him. Although the pictures were never actually sent to

Dilallo's wife, the record supports allegations that the Grievant, if not totally responsible for perpetrating a thinly veiled threat to show these to Dilallo's wife, reveled in "stirring the pot" from that point onward. I must agree with the Employer that the threat remained outstanding as the Grievant's "ace in the hole" to call upon when needed. All told, the Grievant appears to have been amused by Dilallo's discomfort.

While the record portrays Dilallo as a man who is deserving of sympathy and understanding, the record leads to questions concerning the Employer's overall assessment of the instant case matter. Supervisory response or lack thereof to the Grievant's ongoing boorish behavior is difficult to justify by the Employer's pronouncement that "[The Grievant's] trump card essentially destroyed the B.C. [Dilallo] emotionally, personally and professionally." The Employer finds Dilallo, the Grievant's supervisor, to have been, "mentally tied up and prevented from making effective decisions regarding Lt. Pinheiro [the Grievant] because of his legitimate concerns regarding the compromising pictures."

While not excusing the Grievant's actions, the failure to stop his unprofessional antics early on either through clear warning or disciplinary sanctions are seen as nothing less than an abdication of management authority and responsibility. Keeping in mind that discipline should be seen as a corrective tool, the Employer has not only the right but the duty as well to direct its employees through all legitimate means. If the Grievant's supervisor did indeed feel that threats from a subordinate were undermining his ability to perform his legitimate duties, he had an obligation to initiate corrective measures action or report the situation to his supervisor. Concerning the keeping of the photos (innocent photos according to him) from his wife, his decision to allow that possibility to override his supervisory responsibilities is not without

consequences. The result, allowing an obviously divisive state of affairs to continue unabated had a twofold negative impact on the workplace.

The first of these ramifications is the harm or potential harm to the Department and its constituents. In a high-risk fire services environment, where chain of command, teamwork and effective communications are paramount, a circumstance where interpersonal rancor and personal threats erode the aforementioned standards place the core mission of the Department at risk. A fire rescue agency deserves far better than this as does the citizenry it serves.

The second negative ramification of the instant case concerns the tenets set forth in the Agreement between the parties. The Employer has the right to direct the workforce and to correct unacceptable behavior of its employees who in turn have the right to know what is expected of them. Failure to adhere to legitimate rules subjects employees to varying levels of corrective measures. These measures, ranging from mild to severe, are conceded by labor-management practitioners including the parties to the instant case to be subject to time-tested standards.

As previously noted, The Grievant's disciplinary history consists of a four (4) hour suspension in 2006. Since that time, prior to his termination, the record discloses no significant warnings to the Grievant for any reasons, including ongoing interactions between him and Lieutenant Dilallo. When the Grievant was terminated on February 22, 2012, the basis for the termination was Chief Adams' conclusion that the Grievant had filed "bad faith charges" against Dilallo as a result of Dilallo's supervisory decisions. It was further stated that along with the filing of bad-faith charges, the Grievant's alleged harassing behavior towards Dilallo had caused Dilallo to not effectively do his job, a condition had had been going on for some time.

DECISION

While the parties references to the impact of all just cause tests on the outcome of the instant case are given weight, I find a controlling component to be embodied in the concept of progressive discipline. I must agree somewhat with the Employer's portrayal of the Grievant as a "bully," a man given to bombastic pronouncements and brusque behavior. The Grievant, no doubt, takes enjoyment from projecting himself as a big, bad, outlaw biker type of guy, an image that the Department, or at least Lieutenant Dilallo, bought into hook-line-and sinker. Granted, the Grievant is no saint, but neither is he revealed to be some treacherous criminal. For its part, however, the Department had legitimate options at its disposal to deal with the Grievant, disruptions and correct what it believed to be his unacceptable behavior.

The Grievant could have been placed on alert through counselings, suspensions or demotion during the period following his brief 2006 suspension that his behavior would not be tolerated. Instead, an uncomfortable workplace climate was allowed to continue unchecked to the point where supervisory capabilities deteriorated. Why, it must be asked, was the workplace situation allowed to reach this point before a severe personnel action was imposed? If for no reason other than the welfare of the Department, the Grievant should have been told during the period leading up to his termination that his behavior needed to change for the better.

That brings the analysis to the aforementioned notion of progressive discipline. Granted, while even the best employee can be legitimately subject to discharge for a first egregiousness offense, that is not demonstrated to have been the case in this matter. Here, the record reveals an in-your-face type of employee who was just not told in a clear and unmistakable terms that he was, over time, bit-by-bit, sliding down a career jeopardizing slope. The record reveals that supervision had the ability and every opportunity to deal, early on, with what was believed to be

a troublesome employee. To explain a resultant lack of corrective personnel action with notions of blackmail and fear of employee retribution does not excuse a departure from legitimate disciplinary standards. Competent and compelling evidence does indeed justify disciplinary action, the penalty of discharge, however, is found to be excessive.

Accordingly, the following Award is issued:

AWARD

The termination of the Grievant, Dale Pinheiro, shall be reduced to an eighty (80) hour suspension. The Grievant shall be reinstated to his former position at a shift and duty station as determined by the Employer. Back pay exclusive of overtime is awarded minus the period of suspension and all outside compensation. Seniority and benefits minus the period of suspension shall be restored.

The Grievant shall be advised that further violations of Employer rules and policies may subject him to disciplinary action up to and including termination.

December 8, 2012

Thomas G. Humphries

Thomas G. Humphries
Arbitrator
Ponte Vedra, Florida