

PUBLIC EMPLOYEES LABOR RELATIONS BOARD

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In the Matter of the Arbitration

between

KEENE FIRE DEPARTMENT SUPERVISORS  
LOCAL 3265, IAFF, AFL-CIO, CLC

and

CITY OF KEENE  
(Fire Department)

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Case No. F-0138-5

Grievance: David Gaillardetz

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BEFORE: John B. Cochran, Esq.

APPEARANCES:

For the Union: John S. Krupski, Esq.

For the Employer: Thomas M. Closson, Esq.

HEARING DETAILS:

Place of Hearing: Keene, NH

Date of Hearing: June 30, 2006

ISSUE:

The parties stipulated to the following issue:

Whether the City of Keene had just cause and acted in conformity with the parties' collective bargaining agreement in disciplining Lieutenant David Gaillardetz (Gaillardetz) with two one-day suspensions and a demotion from Lieutenant to Firefighter on October 27, 2004? If so, what shall the remedy be?

PERTINENT CONTRACT LANGUAGE:

ARTICLE II  
Management Rights

2.1 The City will continue to have, whether exercised or not, all of the rights, powers, and authority heretofore existing or which hereafter exist, including but not limited to the following: the right to . . .take disciplinary action for just cause. . .issue and enforce reasonable rules and regulations. . .

FACTS:

The City of Keene Fire Department (Department) provides emergency services for the City and the surrounding area, including fire protection and prevention, medical services, rescue operations, hazardous material emergencies, and fire inspections. The City provides these services twenty-four hours a day, seven days a week, assigning personnel to rotating shifts designated as A,B,C and D shifts. Each shift is staffed by a captain, two lieutenants, and six firefighter/emergency medical technicians. The Keene Fire Department Supervisors, Local 3265, IAFF, AFL-CIO, CLC is the bargaining representative for a unit that includes captains, lieutenants and other supervisory personnel. The firefighter/emergency medical technicians are in a separate bargaining unit.

The Rules and Regulations of the Department provide that "participating in activities not directly related to Fire Department responsibilities while on duty will be considered neglect of duty. Those rules also provide that insubordination and neglect of duty are punishable offenses for which an employee may be disciplined. In addition, the Department maintains the

following standard operating guidelines regarding curfew and quiet hours:

- A. Personnel shall maintain quiet hours in the station from 2200 hours until 0700 hours the following morning. This shall include pool games, ping pong, and any other activity that creates excessive noise.
- B. Meetings and functions shall not be planned to run beyond 2200 hours. In such cases where they do run beyond this hour, they shall be run as quietly as possible.

The City hired David Gaillardetz (Gaillardetz) as a firefighter/EMT on January 25, 1993, and, until 2002, he worked on the B shift. Gaillardetz was initially supervised by Captains Osgood and Crowley, and from 1998 to 2002, Captain Dean Ericson (Ericson) supervised him. During that period, he received positive evaluations from each of his supervisors, with ratings on each performance criteria of satisfactory and above, and he participated in additional training achieving the following training levels: FF III, EMT-I w/Meds Module, Haz Mat Technician, and NHFA Company Officer I & II. However, in January 2000, Gaillardetz received a written warning for inappropriate personal use of the City's electronic mail system.

In October 2002, Chief Bradley Payne, the fire chief at the time, recommended that Gaillardetz be promoted from the rank of firefighter to the position of shift lieutenant on the B shift at Station 2, and the city manager approved that recommendation. The City promoted Gaillardetz to the position of lieutenant on October

22, 2002, subject to a one-year probationary period pursuant to Article 21.2 of the parties' collective bargaining agreement. On September 10, 2003, while still in his probationary period, Gaillardetz received a verbal warning from Ericson. The performance concerns Ericson brought to his attention included allowing a non-department employee to use the computer at the officer's desk, the amount of time he spent on the computer, and the length of visits by family members.

On January 21, 2004, Gaillardetz received his first and only annual evaluation as a lieutenant from Ericson. Ericson rated Gaillardetz as satisfactory or above in every performance category. Further, Ericson noted he had spoken to Gaillardetz about the need to maintain a higher standard of performance as an officer and to lead by example and concluded that Gaillardetz had "made adjustments, continues to improve in this area and is working on setting examples through his own actions."

In January 2004, the City promoted Mark Howard (Howard) to captain on the B shift, and he became Gaillardetz's immediate supervisor. At some point prior to August 2004, Gaillardetz asked for a meeting with Howard to talk about how he was doing, and Howard approached Ericson and then-acting Chief Gary Lamoureux<sup>1</sup> for some feedback about Gaillardetz. According to Howard, they informed him that they had had concerns about Gaillardetz reporting to work late and the amount of time he spent on the computer.

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<sup>1</sup> Lamoureux became Chief of the Keene Fire Department in October 2004.

Howard met with Gaillardetz on August 19 and 20, 2004 and told Gaillardetz he had some concerns including being late for duty, the time Gaillardetz spent using the computer, initiative in carrying out tasks, and leadership. At the end of the meeting, they agreed that, within the next few weeks, Gaillardetz would provide Howard with some solutions, ideas and goals for improving in the areas of concern.

Gaillardetz was on sick leave from September 4 through September 20, 2003. On or about September 14, 2004, a fire fighter informed Howard that Gaillardetz had allegedly had sexual relations with a married female in the fire station while on duty. Howard reported that information to Lamoureux the same day, and Lamoureux initiated an investigation, assisted by Corporal Teven Tenney (Tenney) of the Keene Police Department. By memorandum dated September 17, 2004, Lamoureux also placed Gaillardetz on administrative leave pending the outcome of that investigation, notifying him that he was excluded "from participating in any Fire Department functions until the investigation is complete and conclusions are founded." The same day, Howard issued a memorandum to Gaillardetz ordering him to forward his solutions, ideas, and goals to the issues they had addressed on August 19 and 20 by September 27, 2004.

On September 20, Tenney sent Lamoureux a summary of an interview with the woman with whom Gaillardetz had allegedly had the improper relationship, and Tenney reported that she told him

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she had met Gaillardetz at the fire station five or six times in the previous two years for the purpose of having sex and provided Tenney with specific details about the time and location of the alleged encounters. Tenney interviewed Gaillardetz on September 24, 2004 about the allegations against him, and he admitted meeting with the woman at the fire station late at night to discuss her work with the explorer program in another community. Although he conceded that she was married and they met at the fire station because her husband was jealous, he denied having sex with her. The police and Lamoureux re-interviewed the woman on October 14, and Lamoureux was present at that interview. The woman recanted her story and stated that she had lied during her earlier interview with Tenney because she felt Gaillardetz had led her on and she wanted to pay him back.

Lamoureux did not believe the woman's subsequent story. However, on October 19, 2004, Lamoureux met with Gaillardetz and informed him that the results of the investigation about the allegations of sexual misconduct were inconclusive, but that Gaillardetz could still face discipline based on the information obtained during that investigation<sup>2</sup>. Lamoureux also told Gaillardetz he would be placed back on his shift the following day but was not to have any contact with the shift because Lamoureux wanted to meet with the shift and let them know Gaillardetz would

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<sup>2</sup> Lamoureux recalls that, when he was a captain, he issued a verbal warning to a fire fighter who had an unauthorized visitor to the fire station late at night.

be returning.

Later that day, fire fighters on Gaillardetz's shift told Howard that Gaillardetz had approached them in the station and said words to the effect of "I'm coming back to work, and your vacation is over." According to Howard, those employees interpreted Gaillardetz's statement as a threat. Therefore, Howard related what the employees told him to Lamoureux. Neither Howard nor Lamoureux talked with Gaillardetz about what his co-workers had reported to Howard.

On October 27, 2004, Lamoureux sent Gaillardetz a memorandum informing him, effective immediately, the City was removing him from his lieutenant position and placing him in a firefighter/EMT position, placing him on leave for two days for two separate incidents of insubordination, and placing him on probation for six months. Specifically, Lamoureux's memorandum charged Gaillardetz with: 1) insubordination for failing to follow Howard's direct order to submit a performance plan; 2) insubordination for approaching shift members after Lamoureux instructed him not to do so; and 3) sneaking a woman into the fire station without her husband's knowledge, which placed department personnel at risk. That memorandum also cited a written warning Gaillardetz received in January 2000 for inappropriate use of the City's e-mail system, a written warning he received in September 2003 for allowing a non-City employee to use the City computer, washing his private vehicle while on duty, failing to follow Department policy by not responding to upgrading proper equipment at the scene, and failing

to pursue outside education since his promotion. According to Lamoureux, he decided to demote Gaillardetz because Gaillardetz failed to lead by example.

The Union filed a grievance challenging the discipline imposed on Gaillardetz, and the City Manager held a hearing on June 3, 2005. The City Manager issued a decision denying the grievance on June 7, 2005.

**POSITIONS OF THE PARTIES:**

**City**

The City's position is that it had just cause to demote Gaillardetz and to issue him two separate one-day suspensions on October 27, 2004. Therefore, it asks that I deny the Union's grievance.

Initially, the City emphasizes that the Union has not challenged the facts on which the City based its decision to demote Gaillardetz. For example, he had a record of prior discipline, poor decision making, and poor performance that included ongoing misuse of work time and City resources. Further, these performance issues continued when Howard became his supervisor, and Howard had attempted unsuccessfully to have Gaillardetz put together a plan for addressing those ongoing performance issues. The straw that broke the camel's back occurred when Gaillardetz snuck a married woman into the fire station late at night and demonstrated his continuing misuse of on-duty time and poor decision making. Because his conduct violated numerous Department rules and fell

below the standards set forth in the lieutenants' job description, the City had just cause to demote him from that position.

Similarly, the City argues that the facts support its decision to issue the two one-day suspensions. The first suspension was justified because Gaillardetz failed to comply with Howard's direct and unambiguous order to prepare solutions, ideas, and goals for Howard to incorporate into a performance plan for him. In the City's view, it is irrelevant that Gaillardetz was on paid administrative leave from early September until October 20, 2004 because he still had a week after returning from that leave to comply with Howard's directive. Finally, the City contends Gaillardetz simply ignored the Chief's direct order not to speak with the employees on his shift until the Chief had had an opportunity to let them know Gaillardetz would be returning to work, and, by ignoring that order, he caused substantial disruption on the shift.

### Union

The Union's position is that the City did not have just cause to demote Gaillardetz from the rank of lieutenant. In support of its position, the Union first argues that the City has failed to provide either Gaillardetz or the Union with clear and concise reasons for demoting him. Rather, it relies on amorphous allegations in an attempt to create the impression that Gaillardetz must have done something wrong.

Next, the Union contends that the City did not have just cause to demote Gaillardetz because it violated his fundamental due

process rights to notice of the charges against him and an opportunity to be heard. After the City's investigation of alleged sexual misconduct showed he had done nothing wrong, the City simply imposed the demotion and two suspensions without ever giving him notice and an opportunity to respond to the alleged misconduct the City relied on as a basis for disciplining him.

In the Union's view, the charges relied on by the City to demote Gaillardetz were factually incorrect, unsupported or stale. For example, the City charged him with violating the City's computer policy, but has failed to provide a copy of that policy. Further, the written warning Gaillardetz received in 2000 for inappropriately using the e-mail pre-dated his promotion to lieutenant, and the minor computer-related infraction in 2003 was addressed with a verbal warning. In addition, Howard addressed any concern he may have had about Gaillardetz's use of the City computer on August 19 and 20, 2004, and there is no evidence that it continued to be an issue.

Similarly, the Union challenges the City's claim that Gaillardetz created the perception of impropriety by meeting with a woman in the fire station after 10:00 p.m. It notes that the Department regulation on which the City relies does not explicitly prohibit his conduct. Further, because fire fighters work on twenty-four hour shifts, it is not uncommon for them to have late night visitors at the fire station.

The Union also dismisses the City's claim that Gaillardetz lacked leadership and initiative. It points out that the only

evaluation he received while a lieutenant ranked him satisfactory on each of the supervisory criteria, and the City has failed to provide any specific examples of how he failed to lead those under his command or that any member of his crew had acted improperly during his tenure as a lieutenant.

Finally, the Union asserts there was no just cause for the two one-day suspensions issued along with the October 27, 2004 demotion. First, it contends Gaillardetz was not insubordinate by failing to follow Howard's directive to provide an improvement plan by September 27, 2004 because he was on sick leave until September 20 and placed on administrative leave from September 17 until late October 2004, with instructions not to perform any departmental functions during that leave. Therefore, it was impossible for him to comply with Howard's order.

Second, the Union claims the City lacked just cause to suspend him for a day for allegedly failing to follow Lamoureux's October 19, 2004 order not to talk with the employees on his shift before returning to work the next day. According to the Union, the only evidence relied on by the City to show that Gaillardetz violated that order was compound hearsay, and Lamoureux never followed up with him to obtain his version of what happened. Accordingly, the City issued that one-day suspension in violation of the procedural due process rights inherent in the concept of just cause.

DISCUSSION:

The Decision To Demote Gaillardetz

At the outset, it is important to clarify the nature of the demotion at issue here. The City did not decide to remove Gaillardetz from his lieutenant position because he lacked the competence to perform the duties of that rank. To the contrary, the sole evaluation he received as a lieutenant in January 2004 reflects that his job skills, supervisory ability and work habits were all satisfactory, and his supervisor commented that, "overall Lt. Gaillardetz has done a good job in the execution of his duties and responsibilities." Rather, the decision to demote Gaillardetz was based on a series of alleged infractions of departmental rules and was imposed, along with two one-day suspensions, as a form of discipline. Therefore, because the City demoted Gaillardetz as a form of discipline, its action must be tested by the traditional principles of just cause<sup>3</sup>.

The October 27, 2004 memorandum from Lamoureux notifying Gaillardetz that he was being demoted did not point to any single infraction of department rules or policy as the overriding reason for his demotion or as the event that precipitated the demotion. Rather, it cited a potpourri of alleged misconduct occurring over a four year period. Therefore, it is necessary for me to consider whether viewed separately or in the aggregate that alleged

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<sup>3</sup> The issue stipulated to by the parties also reflects that they both believe Gaillardetz's demotion to be disciplinary and governed by the standard of just cause.

misconduct gave the City just cause to permanently remove Gaillardetz from his lieutenant position.

I begin with the charges that Gaillardetz had been misusing the City's computer system. There is no dispute that Gaillardetz's supervisors had spoken with him about spending too much time on the computer. In fact, he received a written warning in 2000 for inappropriate use of the e-mail system and a verbal warning in 2003 for allowing a non-City employee to use the City computer system. Since that time, however, Gaillardetz received a satisfactory evaluation as a lieutenant in January 2004, and his supervisor noted that he had made adjustments and was improving in that area. Further, although Howard told Gaillardetz in August 2004 that he was concerned because he had observed Gaillardetz on the computer for a long period sometime between January and August 2004, he gave no specific information about what he observed or how Gaillardetz's using the computer detracted from Gaillardetz's performance as a supervisor. Further, he did not talk with Gaillardetz's about his computer use at the time of that observation. Nor did any of the City's witnesses identify a specific City or departmental policy regarding computer use that Gaillardetz had violated. Indeed, Howard testified that personal use of the City computers is not uncommon and not prohibited by the City's internet policy, as long as it is kept to a minimum. Finally, there is simply no evidence that Gaillardetz had used the computer system improperly between the time he returned from his administrative leave and the date of his demotion. Therefore, absent evidence of a clear policy

prohibiting Gaillardetz's use of the computer system or more definitive evidence about the actual extent of his computer use and how it interfered with his duties and a lieutenant, I am not convinced that, after being disciplined in 2000 and 2003<sup>4</sup>, Gaillardetz continued to have an ongoing problem with misusing the City's computer systems that was serious enough to justify demoting him in October 2004.

Next, the memorandum demoting Gaillardetz included a litany of deficiencies that are not supported by the record before me. For example, it charges Gaillardetz with washing his private vehicle on duty, failing to upgrade proper equipment at the scene of emergency calls, and failing to pursue further education since his promotion. However, neither Howard nor Lamoureux offered any testimony about these alleged deficiencies. There is also no evidence that Howard discussed these alleged deficiencies with him or put him on notice that he faced potential discipline for them. Therefore, the City did not have just cause to demote Gaillardetz based on these unsupported charges.

By far, the most serious charge against Gaillardetz and the one the City describes as "the straw that broke the camel's back" was allowing a married woman into the fire house after 10:00 p.m.

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<sup>4</sup> It is not clear from Lamoureux's October 27, 2004 memorandum whether the City based the decision to demote Gaillardetz, in part, on claims that he had misused the computer system in 2000 and 2003. However, because the City had already issued him verbal and written warnings for his prior use of the City's computers, the City cannot rely also on that conduct as the basis for demoting him without subjecting him to discipline twice for the same conduct.

to discuss non-departmental business. The woman had initially reported that she and Gaillardetz had had an inappropriate sexual relationship in the fire house, but she subsequently recanted that story, which led Lamoureux to conclude that the investigation into alleged sexual misconduct by Gaillardetz was "inconclusive." Nevertheless, he determined that merely allowing a married woman into the fire house after 10:00 p.m. was serious enough to be the final straw that justified a demotion. However, I am not persuaded that that conduct provided sufficient just cause for the City to demote Gaillardetz for two reasons. First, the departmental rules cited by the City do not explicitly and unequivocally prohibit employees from having visitors who are not interfering with quiet hours in the fire station after 10:00 p.m. Second, Lamoureux testified that, when he was a captain, he issued only a verbal warning to a fire fighter who had an unauthorized visitor in the fire station late at night, which reflects that demoting Gaillardetz for similar conduct was an unreasonably harsh and disparate discipline.

Even when the totality of Gaillardetz's conduct is considered, I am not persuaded that the City had just cause to demote him. Admittedly, the department had some concerns about his performance in certain areas, and he needed to improve in those areas. However, in August 2004, he asked to meet with Howard, and the two of them discussed those concerns and talked about Gaillardetz putting together a plan to address those concerns. There is no evidence that discipline was ever discussed, or even contemplated

at that time. Rather, it was not until after the allegations of sexual misconduct at the fire station were recanted that Lamoureux began to focus on Gaillardetz's overall performance as a basis for discipline. Therefore, I am convinced that the City resurrected prior concerns and unsupported performance deficiencies to justify demoting Gaillardetz after the late night female visitor recanted her initial report of sexual misconduct. Further, with the exception of the late night visit, it does not appear that Lamoureux or any other Department official notified Gaillardetz of the charges against him or permitted him to respond before he was demoted, which is inconsistent with the basis tenet of industrial due process inherent in just cause. Therefore, I find that the enumerated concerns about Gaillardetz's prior performance and the after-hours visit, without more, do not provide sufficient evidence of misconduct or poor performance to justify demoting a lieutenant who was otherwise performing at a satisfactory level.

#### The Suspensions

In addition to demoting Gaillardetz, the City issued him two separate one-day suspensions on October 27, 2004. The first suspension charged him with insubordination for failing to submit ideas for a proposed performance plan to Howard after they met on August 19 and 20, 2004. Gaillardetz agreed at that meeting to submit a written plan of solutions, ideas, and goals to address the concerns Howard had raised at the meeting within a few weeks. However, it is undisputed that Gaillardetz was on sick leave from September 4 through September 20, 2004. On September 17, while he

was on sick leave, Howard issued him a memorandum ordering him to submit a performance plan by September 27. The same day, however, Lamoureux placed Gaillardetz on paid administrative leave pending the investigation of alleged sexual misconduct at the fire station and specifically excluded him "from participating in any Fire Department functions until the investigation is complete." On October 19, 2004, Lamoureux met with Gaillardetz and informed him the investigation of sexual misconduct charges were inconclusive and that he could return to work the following day. Therefore, from September 4 through October 20, 2004, Gaillardetz was not at work either due to illness or administrative leave. Therefore, it was unreasonable for the City to expect him to submit a proposed performance plan during the period that he was being investigated for alleged sexual misconduct and unsure of whether or when he might be returning to work.

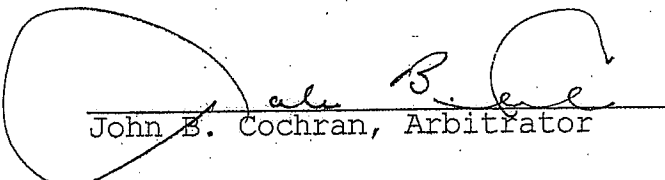
Nevertheless, the City argues that Lamoureux instructed Gaillardetz at the October 19, 2004 meeting to submit the plan as soon as possible and he failed to do so prior to October 27, 2004, the date Lamoureux imposed the one-day suspension. However, it does not appear that Lamoureux gave him a specific deadline after his return to work or informed him there would be any particular consequences if he delayed submitting the plan. Further, it is not unreasonable that an employee returning to work after being absent for more than two months would need an opportunity to readjust to the workplace and would not necessarily be focusing immediately on a performance plan. Finally, it is significant that Lamoureux

imposed that suspension a week after Gaillardetz returned to work without ever inquiring where the plan was or giving him an opportunity to explain why he had not yet submitted it. On these facts, therefore, I cannot say that the City had just cause to suspend Gaillardetz because he had not submitted a performance plan within a week after returning from his leave.

The second suspension is a different story. When they met on October 19, 2004, Lamoureux explicitly ordered Gaillardetz not to speak with any members of his shift until Lamoureux had had an opportunity to inform them that he would be returning to duty as their supervisor the following day. Despite this directive, Gaillardetz left the meeting and proceeded to tell the employees on the shift he would be returning. Although the Union attempts to minimize his action that day by arguing that the City based its decision to suspend him for disobeying that order on totem pole hearsay. However, regardless of what he specifically said to the members of his shift, it is undisputed that some of them reported to Howard that Gaillardetz had stopped by to talk with them after meeting with Lamoureux on October 19, and he does not deny speaking with the members of his shift that day. Therefore, despite his motive in doing so, he did violate Lamoureux's order not to talk with them until he returned to work the following day, and I find the City had just cause to suspend him for one day for ignoring that directive.

AWARD:

1. The City did not have just cause to demote David Gaillardetz from the position of lieutenant to the position of fire fighter on October 27, 2004. Therefore, the City shall restore him to the rank of lieutenant and make him whole for all lost wages and other contract benefits resulting from that demotion.
2. The City did not have just cause to issue David Gaillardetz a one-day suspension on October 27, 2004 for failing to comply with an order to submit ideas for a performance plan. Therefore, the City shall rescind that suspension and make him whole for all lost wages and contract benefits resulting from that suspension.
3. The City did have just cause to issue David Gaillardetz a one-day suspension on October 27, 2004 for failing to comply with an order not to have contact with the members of his shift before he returned to active duty on October 20, 2004. Therefore, that portion of the grievance is denied.

  
John B. Cochran, Arbitrator

December 13, 2006  
Newton, MA