

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: \*

TOWN OF HOLDEN \*

-and- \*

ARB-13-3145

HOLDEN PROFESSIONAL \*

FIREFIGHTERS ASSOCIATION, LOCAL 4557 \*

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Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Kimberly Rozak, Esq. - Representing Town of Holden  
Corey Higgins, Esq.

Michael Hand, Esq. - Representing Holden Professional  
Firefighters Association

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

**AWARD**

Timothy Fitzgerald was terminated for just cause, and the grievance is denied.

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Timothy Hatfield, Esq.  
Arbitrator  
December 29, 2014

## **INTRODUCTION**

On September 20, 2013, Holden Professional Firefighters Association (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield Esq. to act as a single neutral arbitrator with the full power of the Department.<sup>1</sup> The undersigned Arbitrator conducted a hearing at the Holden Municipal Light Department on December 5, 2013, and December 6, 2013.

The parties filed briefs on February 28, 2014.

## **THE ISSUE**

Was Timothy Fitzgerald terminated for just cause?

If not what shall be the remedy?

## **RELEVANT CONTRACT LANGUAGE**

The parties' Collective Bargaining Agreement (Agreement) contains the following pertinent provisions:

### **Article 2 – Management Rights (In Part)**

**Section 1** – The Town will not be limited in any way in the exercise of the functions of management and will have retained and reserved unto itself the right to exercise, without bargaining with the Union, all the powers, authority and prerogatives of management specified below:

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<sup>1</sup> Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations “shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the ... the board of conciliation and arbitration ... including without limitation those set forth in [chapter 23C](#), [chapter 150](#), [chapter 150A](#), and [chapter 150E of the General Laws](#).”

**h.** alcohol and drug testing; provided, however, that the Town has probable cause to conduct an alcohol or drug test ...

If a firefighter, however, voluntarily notifies the Chief that he/she is addicted to alcohol or drugs and is requesting help with his/her addiction, the Town shall place the firefighter on sick leave or, if he/she has no sick leave, on unpaid medical leave, for the duration of the firefighter's rehabilitation program not to exceed twelve (12) weeks, provided, however, it will be further extended if the rehabilitation program treatment protocol requires that the period of rehabilitation be greater than 12 weeks, subject to medical documentation. The firefighter shall not be subject to discipline because of such disclosure to the Chief and entry into a rehabilitation program. This voluntary disclosure provision shall be applicable for only one occasion. ...

**w.** the demotion, suspension, discipline or discharge of employees;

**x.** the relief of employees due to the incapacity to perform duties or for any other lawful reason; and

**y.** the making, amending, and enforcement of such rules, regulations, operating and administrative procedures from time to time as the Town deems necessary;

The Town will have the right to invoke these rights, in its sole discretion, as the Town may deem appropriate without negotiation with the Union; except to the extent expressly abridged by a specific provision of this Agreement.

**Section 2** - During an emergency, the Town will have the right to take any action necessary to meet the emergency notwithstanding any contrary provisions of this Agreement.

#### **Article 9 – Grievance Procedure (In Part)**

**Section 3** – All grievances will be handled in accordance with the grievance procedures set forth in this Article. ...

**Step 3:** In the event that the grievance is not satisfactorily resolved at Step 2, either party may submit the matter to final and binding arbitration by the State Department of Labor Relations within thirty (30) days of the Town Manager's decision, relative to any actual dispute arising as a result of the application or interpretation of one or more express terms of this written Agreement.

**Section 4** – The award of the arbitrator shall be final and binding upon all parties, subject to the following conditions:

- a. The arbitrator shall have no power to add to, subtract from or modify this Agreement, and may only interpret such items and determine such issues as may be submitted to him or her by agreement of the parties.
- b. The arbitrator shall not render a decision contrary to state or federal law.
- c. The arbitrator shall decide any disciplinary cases based upon the preponderance of the evidence standard of proof. ...

**Article 10 – Suspension / Discharge**

No firefighter holding a permanent appointment shall receive a written reprimand, or suspension, or disciplinary demotion, or discharge without just cause.

**Article 25 – Special Conditions of Employment (In Part)**

**Section 2** – Driver's License. As a condition of employment, all firefighters shall possess a valid and current Massachusetts driver's license.

**Article 25B – EMT Recertification (In Part)**

**Section 1** – As a condition of employment, all Firefighters shall possess and maintain the certification as an EMT by the Massachusetts Department of Public Health, Office of Emergency Services at the highest level they had at the time of their appointment or achieved during their employment with Town of Holden. ...

**Article 36 – Stability of Agreement (In Part)**

**Section 1** – No agreement, understanding, alteration or variation of the Agreement, terms or provisions herein contained shall bind the parties hereto unless made and executed in writing by the parties hereto, provided, however that terms and conditions of employment of the Unit not covered by a specific provision of this Agreement, shall be maintained for the duration of this Agreement. ...

**RELEVANT DEPARTMENT RULES AND REGULATIONS**

The Holden Fire Department's Rules and Regulations contain the following pertinent provisions:

**Introduction (In part)**

**1.01** – The following rules and regulation are hereby set forth to govern the Holden Fire Department. ...

**Duties and Responsibilities – All Personnel (In Part)**

**5.01-9** – Orders from a superior officer to a subordinate will be in clear and understandable language, civil tone and issued in pursuit of department business.

**5.01-10** – Failure or deliberate refusal of any officer or member to obey an order given by a superior shall be considered insubordination. ...

**5.01-13** – At all times, members will take appropriate action to protect life and property.

**5.01-14** – Members shall not display the effects of, or be under the influence of alcohol, intoxicants or illegal or illicit drugs while on duty, reporting to duty, responding to recalls off duty or while acting as a representative of the Holden Fire Department. NOTE: refer to Town and Fire Department drug and alcohol policy, SOP/SOG and Local 4557 negotiated agreement. ...

**5.01-19** – Members and officers will conduct themselves in such a manner as to avoid bringing discredit on the department of [sic] the town. ...

**5.01-29** – Any member who loses his right to operate a motor vehicle in the Commonwealth of Massachusetts will be suspended, without pay for that period of time. It shall be the member's responsibility to immediately notify the Fire Chief, in writing, of such license suspension and/or revocation. ...

**5.02 – On Duty Personnel** – Responsibilities of on-duty personnel include:

**5.02-1** – Reporting to assigned stations, on time and ready for duty in proper uniform. ...

**5.02-3** – Observing all department rules and regulations, SOGs, SOPs, department policies and completing all assignments given by the Chief, Assistant Chief or Duty Officer during each tour of duty. ...

**5.02-9** – On duty personnel are prohibited from consuming any beer or alcoholic beverages and from usage of drugs. Personnel arriving to start a tour of duty in an intoxicated condition will be relieved by the shift officer or senior firefighter and subject to any disciplinary action as per section 9.00 (Discipline). A report shall be forwarded to the Chief of the incident. Also refer to Local 4557 Drug and Alcohol Policy. ...

#### **Entrance Requirements (In Part)**

**8.07** - Shall possess and maintain a valid Massachusetts driver's license and provide a copy upon each renewal, to office administration. ...

#### **Discipline (In Part)**

**9.02-1** – Any member who violates the laws of the United States, the Commonwealth of Massachusetts, local by-laws, or provisions of the Rules and Regulations, Standard Operating Guidelines and Procedures, and/or Policies of the department, or who is incompetent to perform his or her duties is subject to appropriate disciplinary action(s). ...

#### **Driving Regulations (In Part)**

**11.02-1** – All personnel who operate a fire department vehicle must possess a valid Massachusetts driver's license. ...

### **RELEVANT DEPARTMENT PROCEDURES**

#### **Department Procedure for handling a suspicion of an employee being under the influence of alcohol or drugs.**

1. Upon commencement of a shift, the shift officer shall observe all personnel for fitness for duty.
2. If an employee suspects that another employee at work is under the influence of alcohol or drugs, the employee should contact the most senior officer on duty and convey to the officer their concerns about the employee.
3. If the shift officer or another officer observes or receives a report of an employee who may not be fit for duty, the officer will directly inspect

the employee's appearance and behavior. If the officer believes that the employee is under the influence, and when circumstances permit, another officer should also observe the employee to verify there is a reasonable basis to believe alcohol or drug impairment may be present.(1)

4. After the inspection, the officer(s) should take the employee in question into a private area and question him/her with regard to the situation.
5. When a final determination is made that an employee may be impaired because of alcohol or [sic] drug use, the employee shall be relieved of his/her duties by the shift officer.
6. The employee should be given a ride home if he/she resides within a reasonable distance of Holden. If the employee does not reside within a reasonable distance, a family member should be contacted to pick them up. If the employee refuses the ride home, the Holden Police should be contacted, advised of the situation, and asked to check on the employee. If the employee is disruptive and a danger to him/herself or others, the Holden Police should be contacted to respond to the scene immediately.
7. If the employee denies that they have been using alcohol, the officer may request that the employee go to the police station to take a breathalyzer test. If the employee voluntarily consents, the officer should drive the employee there after calling the police officer in charge and request a police officer meet them there to administer the test.
8. If the employee takes the breathalyzer test and registers a level of alcohol, the officer should require that the police record that level and offer the employee a ride home in accordance with paragraph 6 above. If the employee refuses the ride home, leave them at the police station and advise the police officer in charge of the situation.
9. If the employee denies that they have been using drugs, the officer may request that the employee submit to a drug test. If the employee voluntarily consents, the officer should arrange for transport of the employee to the testing site.
10. If the employee passes the breathalyzer or drug test, tell the employee that you regret the inconvenience but based on both your suspicions and for the safety of them and others, you had to verify the situation.
11. The officer(s) should then document the incident in writing to the Chief, including recording what signs and symptoms they saw and/or sensed,

that made them feel the employee was intoxicated or under the influence of drugs. The Chief will determine any discipline to be imposed on the employee, conferring with the Town Manager and Labor Counsel, if necessary. If the Chief is unavailable, the Senior Officer should consult with the Town Manager and Labor Counsel on the matter.

- 12.** The above procedure shall also apply, if applicable, to other situations where an employee is not fit for duty, including where an employee has a suspended or revoked driver's license, or physical or mental injury or illness, or exhaustion.

**FN (1):** Any of the following alone or in combination, may constitute reasonable suspicion: (a) slurred speech; (b) irregular or unusual speech patterns; (c) impaired judgment; (d) alcohol odor on breath; (e) uncoordinated walking or movement; (f) unusual or irregular behavior such as [sic] inattentiveness, listlessness, hyperactivity, hostility or aggressiveness; (g) possession of alcohol or drugs.

### **RELEVANT STATE REGULATIONS**

#### **170.937: Reporting Obligations of EMS Personnel** (In Part)

- (A)** Each EMT or EFR shall file a written report with the service in conjunction with which he or she provides EMS, and with the Department within five days of the following:

**(1)** The EMT's or EFR's conviction of a misdemeanor or felony in Massachusetts or any other state, the United States, or a foreign country (including a guilty plea, *nolo contendere* or admission to sufficient facts), other than a minor traffic violation for which less than \$1000 was assessed. The following traffic violations are not minor and must be reported: conviction for driving under the influence, reckless driving, driving to endanger, and motor vehicle homicide;

- (1)** Loss or suspension of the EMT's or EFR's driver's license;

#### **170.940: Grounds for Suspension, Revocation of Certification, or Refusal to Renew Certification** (In Part)

The Department may suspend or revoke certification, or refuse to renew certification, of any EMT on the following grounds: ...

- (P)** Failure to meet reporting obligations in accordance with 105 CMR 170.937.

**FACTS**

The Town of Holden (Town) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. Timothy Fitzgerald (Fitzgerald) was employed as a Firefighter/EMT for ten years prior to his termination on July 5, 2013. A Firefighter/EMT in the Town of Holden must possess and maintain a valid Massachusetts Driver's License as well as, at a minimum, an EMT-Basic certification from the Massachusetts Department of Public Health.

The primary responsibility of Firefighter/EMT's in the Town of Holden is medical response calls and the staffing of two ambulances. A secondary function, based on the number of calls received, is fire suppression. The number of medical response calls outnumbers the fire suppression calls by about a 3 to 1 ratio.

The Town staffs the two ambulances with two firefighters, at least one of whom must be certified as a paramedic and the other is an EMT. Occasionally, two certified paramedics staff an ambulance, and in less than one percent of the time two EMTs will staff an ambulance. On serious medical calls, when two paramedics are needed in the back of the ambulance, the Town will assign an additional EMT to drive the ambulance to the hospital. On routine calls, the paramedic will treat the patient in the back of the ambulance as the EMT drives the ambulance.

In October 2009, the Fire Department implemented "Department Procedure for handling a suspicion of an employee being under the influence of

alcohol or drugs.” At no time did the Union object to the implementation of this procedure.

On June 21, 2010, Fire Chief John Chandler (Chief Chandler) issued a reminder to all fire department personnel that the fire department has a zero tolerance for alcohol use by its emergency medical service (EMS) personnel while working on an ambulance and responding to EMS calls. At no time did the Union object to this zero tolerance policy.

The Town of Holden Fire Department has issued a set of Rules and Regulations which were last revised in February 2012. At no time did the Union object to the implementation of the Rules and Regulations.

On May 9, 2013, Fitzgerald was assigned to Group 3 along with Firefighter/Paramedic Robert Nickerson (Nickerson), Firefighter/Paramedic Paul Pierce (Pierce), and Lieutenant/EMT David Chapin (Lt. Chapin). Group 3 was scheduled to work a 24 hour shift from 7:00 AM, May 9, 2013 until 7:00 AM, May 10, 2013. Fitzgerald arranged for a four hour swap with a co-worker from another group so he could play in his golf league. Fitzgerald left the station between 2:00 PM and 2:15 PM and was set to return by 6:30 PM to complete the remainder of his shift. Fitzgerald arrived at Quail Hollow Golf Course in Oakham, Massachusetts between 2:35 PM and 2:40 PM. Between 3:00 PM and 5:30 PM, Fitzgerald consumed three vodka and green tea alcoholic beverages before returning to work at 6:30 PM.

After his return to the station, Fitzgerald was observed by Lt. Chapin interacting with his co-workers in a manner that created suspicion in Lt. Chapin’s

opinion that Fitzgerald may be under the influence of alcohol. Later, around 7:00 PM, while at the dinner table, Lt. Chapin observed an interaction between Fitzgerald and Pierce where Fitzgerald, while quoting a movie line, slurred his words on two occasions. Based on his observations, Lt. Chapin texted Assistant Chief Russell Hall (Assistant Chief Hall) to inform him of the situation. Assistant Chief Hall instructed Lt. Chapin to inform Union President Andrew Miller (Union President Miller / Miller) of his observations, which he did via the phone about 7:15 PM. Miller advised Lt. Chapin where a copy of the collective bargaining agreement was located and suggested that he print a copy of the Department's policy for handling an employee suspected of being under the influence. Lt. Chapin reviewed these documents for about thirty minutes.

At 7:15 PM, Lt. Chapin found Fitzgerald in the bedroom and asked to speak to him in private. Lt. Chapin and Fitzgerald moved to the apparatus bay to speak in private. Lt. Chapin told Fitzgerald that he had a copy of the Department's procedures if he wanted to review them during questioning. Lt. Chapin advised Fitzgerald that if he admitted drinking he would be relieved from his shift and given a ride home if he lived close by or otherwise he would have to arrange a ride home. Fitzgerald was informed that if he denied drinking and Lt. Chapin still had suspicions then Fitzgerald would need to take a breathalyzer test at the police station. Lt. Chapin asked Fitzgerald if he had been drinking and Fitzgerald answered "no, I have not." Lt. Chapin informed Fitzgerald that he had slurred his words when answering the question. Lt. Chapin informed Fitzgerald that he suspected that he was under the influence and suggested that they go to

the Police Department where Fitzgerald could take the breathalyzer test. Lt. Chapin informed Fitzgerald that if he registered a zero on the test he would be returned to duty. Fitzgerald then requested union representation. Lt. Chapin informed Fitzgerald that he would call Union President Miller, and that he had slurred his words when requesting the union representation.

Lt. Chapin called Miller, who said he would be in in twenty minutes, and then called and updated Assistant Chief Hall on what had transpired at dinner and in the apparatus bay. After finishing with the calls, Lt. Chapin returned to tell Fitzgerald that Miller would be at the station in twenty minutes. Fitzgerald responded that "I don't need him, I'm going home sick." Lt. Chapin specifically told Fitzgerald "that is fine, but just so you know, you are not to drive." Fitzgerald responded that his girlfriend Megan was coming to pick him up. As Lt. Chapin was walking away Fitzgerald made the comment "God forbid anyone make you look bad." Lt. Chapin returned to the doorway and responded that "Tim, if you want to do this stupid shit, it's on you. But just so you know, you're not driving." Fitzgerald did not respond but gave Lt. Chapin a disgruntled look.

Lt. Chapin then went to the radio room to contact Assistant Chief Hall to inform him that Fitzgerald was going home sick and that he had advised him not to drive. While in the radio room, Lt. Chapin observed Fitzgerald putting away his gear in the apparatus bay. At approximately 8:05 PM, Lt. Chapin heard the outside door in the apparatus bay open and went up to the mezzanine to look out the window. He observed Fitzgerald get into his personal vehicle and drive away. Lt. Chapin immediately contacted the police dispatcher and relayed the

information that he believed that Fitzgerald was under the influence of alcohol and had disobeyed a direct order not to drive. The Holden Police issued a BOLO alert for Fitzgerald's green pickup truck with the information that the driver may be under the influence.

Shortly thereafter Officer Christopher Meservey (Officer Meservey / Meservey), a dispatch officer and a reserve police officer spotted the vehicle, turned around and began to follow it. Meservey followed the vehicle for a mile and witnessed the truck swerve between the white line and the double yellow line. Meservey stopped the vehicle after both tires crossed the double yellow line. Meservey called in the location of the stop and Officer Jonathan Santimore (Officer Santimore / Santimore) began to head to that location. Meservey approached Fitzgerald through the driver's side window and detected a strong odor of alcohol coming from Fitzgerald. Upon his arrival Santimore approached the vehicle and had a conversation with Fitzgerald.<sup>2</sup> Santimore detected a strong odor of alcohol from Fitzgerald during his answer and noticed that he was slurring his words and his eyes were glassy and bloodshot. Based on these observations, Santimore directed him to exit the vehicle and move to the rear of the vehicle, where he began to perform a Field Sobriety Test (FST).

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<sup>2</sup> Santimore testified that when questioned, Fitzgerald admitted to having two drinks while playing golf and an additional drink on his way back to Holden. Fitzgerald testified that he had three drinks at the golf course and did not have anything to drink in his truck on the way back to Holden. Based on the record before me, including the absence of any witness observation of Fitzgerald drinking in his truck, there is not enough supporting evidence for the conclusion that Fitzgerald consumed a drink on the way back to Holden. I credit Fitzgerald's testimony that he consumed three drinks at the golf course.

The first FST was the Horizontal Gaze Nystagmus (HGN). Fitzgerald was instructed to follow Santimore's pen with his eyes only. Santimore observed that Fitzgerald lacked smooth pursuit in both eyes and that Nystagmus – an uncontrollable shaking of the eye – was present in both eyes prior to 45 degrees. In addition, Fitzgerald moved his head a couple of times to follow Santimore's pen. In Santimore's opinion, Fitzgerald failed the HGN test.

Next, Santimore administered the alphabet test, directing Fitzgerald to begin at C and end at R without singing. Fitzgerald skipped the letters J and K and then sang the rest of the alphabet. In Santimore's opinion, Fitzgerald failed the alphabet test.

Santimore next performed the walk and turn test. When Santimore asked Fitzgerald if he had any problems with his legs or knees, Fitzgerald responded that he had a back problem – spinal stenosis, but that he should be able to perform the test. In Santimore's opinion, Fitzgerald failed the walk and turn test as he stumbled off the line on two occasions. Fitzgerald then declined to perform the fourth test, the one legged stand test due to his back issues.

Santimore followed the FST by asking Fitzgerald to submit to a portable breathalyzer test which he refused, stating that "he would probably not pass."<sup>3</sup> Fitzgerald was placed under arrest for operating under the influence and marked lane violations. As a result of refusing to take the breathalyzer test, Fitzgerald's

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<sup>3</sup> Fitzgerald testified that his statement that he would probably not pass was in response to a question from Meservey about why he would not take the one leg stand test and not a response to Santimore about the breathalyzer test. Based on the record before me, including the testimony of Meservey, Santimore and Fitzgerald, I credit the testimony of Santimore that Fitzgerald's response was directed to him and his request to administer the breathalyzer test.

license was automatically suspended for 180 days. An inventory of Fitzgerald's truck found two bottles of vodka on the passenger seat; one almost empty and one almost full.

On or about May 6, 2013, prior to the Holden Police arrest, Fitzgerald was involved in a driving incident in Leominster, Massachusetts that eventually lead to him being charged with multiple vehicle offenses, including leaving the scene of an accident, causing property damage, and negligent operation of a motor vehicle. As a result of this incident, Fitzgerald's driver's license was revoked by the Registry of Motor Vehicles on the basis that he was an "Immediate Threat."

On May 14, 2013, Assistant Chief Hall was appointed by Chief Chandler to investigate the following allegations brought against Fitzgerald:

- That on the evening of Thursday May 9, 2013, Fitzgerald reported to duty under the influence of alcohol and was relieved of duty by the shift officer (Lt. Chapin);
- That Fitzgerald disobeyed a direct order of Lt. Chapin who instructed him not to drive his personal vehicle after being relieved of duty;
- That Fitzgerald was charged by the Holden Police Department with the crime of driving under the influence of alcohol;
- That Fitzgerald as charged by the Leominster Police Department with multiple offenses, including failure to stay in marked lanes, negligent operation of a motor vehicle, leaving the scene of an accident, and being an "Immediate Threat" for suspension/revocation; and
- That Fitzgerald does not currently have a valid Massachusetts Driver's License, and therefore, may not function, as an EMT pursuant to Massachusetts Department of Health Regulations, 105 CMR 170.940.

As part of his investigation, Assistant Chief Hall interviewed Lt. Chapin, Nickerson, Pierce, Firefighter Dennis Carlson (Carlson), Union President Miller, Firefighter Ryan LaPrade (LaPrade), Meservey, Santimore, and Fitzgerald.

Assistant Chief Hall in his interviews with the other firefighters on duty obtained the following facts. Nickerson noticed that Fitzgerald was quieter than usual at the dinner table. Carlson reported that Fitzgerald had undergone a “night and day” behavior change between the time he had left for golf and the time he returned, acting almost giddy upon his return to work. Pierce noted that Fitzgerald was very talkative, more so than normal and that he seemed to be talking in a run-on pattern. Finally, Pierce reported the smell of mouthwash from Fitzgerald at the dinner table. None of the firefighters interviewed reported Fitzgerald slurring his speech in the kitchen area.

On May 21, 2013, Assistant Chief Hall interviewed Fitzgerald. In this interview conducted with Union representation present, Fitzgerald admitted to consuming three vodka and green tea drinks at the golf course, with his last drink being between 5:15 PM and 5:30 PM. Fitzgerald expressed his belief that he was not intoxicated, but that he had an issue with alcohol and has sought help from the employee assistance program (EAP). Fitzgerald admitted to Lt. Chapin telling him not to drive and that he had contacted his girlfriend Megan for a ride. Fitzgerald did not feel he was relieved of duty and instead blamed mounting anxiety as the reason he went home sick. Fitzgerald admitted to driving his personal vehicle and being stopped by the Holden Police Department, and that he had pending charges in Leominster that he had not been arraigned for as of

the date of the interview. Finally, Fitzgerald admitted that he had not notified the Office of Emergency Medical Services about his license suspension.

Assistant Chief Hall concluded that there was sufficient evidence to sustain the allegations made by the Town against Fitzgerald. Specifically, he concluded that Fitzgerald:

1. Reported to duty under the influence of alcohol on Thursday May 9, 2013;
2. Disobeyed a direct order of an officer not to drive his personal vehicle after being relieved of duty;
3. Was charged by the Holden Police Department with the crime of operating under the influence of alcohol;
4. Was previously charged by the Leominster Police Department with multiple offenses, including driving to endanger, leaving the scene of an accident, a marked lanes violation, and being an "Immediate Threat" (revocation);
5. Did not have a valid Massachusetts driver's license; and
6. Could not function as an EMT without a valid driver's license, pursuant to State regulations.

Finally, Assistant Chief Hall recommended that the charges against Fitzgerald be amended to include a violation of the collective bargaining agreement, and a charge that Fitzgerald was not in compliance with his job function as a firefighter/EMT.

On June 17, 2013, Town Manager Jacquelyn Kelly (Town Manager Kelly) sent Fitzgerald an amended notice of hearing and charges for a Loudermill hearing to be held on June 20, 2013. The charges included the following:

1. You reported for duty as a firefighter/EMT under the influence of alcohol on Thursday, May 9, 2013, thereby jeopardizing the life and safety of yourself, other members of the Department and the public.

2. You were on duty as a firefighter/EMT under the influence of alcohol on Thursday, May 9, 2013 thereby jeopardizing the life and safety of yourself, other members of the Department and the public.
3. You disobeyed a direct order of a superior officer not to drive your personal vehicle after being relieved of duty on Thursday, May, 2013.
4. You were subsequently charged by the Holden Police Department with the crime of operating a motor vehicle under the influence of alcohol on Thursday, May 9, 2013.
5. You were previously charged by the Leominster Police Department with multiple motor vehicle offenses, including driving to endanger, leaving the scene of an accident, a marked lanes violation, and being an "Immediate Threat" (revocation).
6. You do not currently have a valid Massachusetts Driver's License, which is a requirement of the job.
7. You may not function as an EMT because you do not have a valid driver's license, pursuant to State regulation.
8. Your actions constitute violations of the following:
  - a) Collective Bargaining Agreement between the Town of Holden and the Professional Firefighters Association, Local 4557 (Article 25, Special Conditions of Employment; Article 25B, EMT Recertification);
  - b) Holden Fire Department Rules and Regulations ( §§ 5.01-10, 5.01-13, 5.01-14, 5.01-19, 5.01-29, 5.02-3, and 5.02-9);
  - c) State regulations regarding EMT certification (105 CMR 170.937; and 105 CMR 170.940); and
  - d) State driving statutes (M.G.L. c. 89, Law of the Road, § 4A, Driving vehicles in a single lane; M.T.L. (sic) c. 90, Motor Vehicles and Aircraft, § 24, Driving while under the influence of intoxicating liquor, etc.).
9. Your actions, as described above, constitute conduct unbecoming a Firefighter for the Town of Holden.

On July 5, 2013, Town Manager Kelly, in her role as appointing authority, found sufficient information as to the charges outlined in the hearing notice and terminated Fitzgerald from his employment with the Town of Holden as a firefighter/EMT. The Union filed a grievance on Fitzgerald's behalf that was denied at all steps by the Town resulting in the instant arbitration.

On October 21, 2013, Fitzgerald was acquitted of the Operating Under the Influence charge relating to the Holden Police stop. He was cited for a Marked Lanes violation and fined \$100.00. In relation to the Leominster incident, Fitzgerald was found guilty of the Leaving the Scene of Property Damage, but was acquitted of Negligent Operation of Motor Vehicle. Fitzgerald's license was suspended for sixty days to run concurrently with the one hundred and eighty day suspension for refusing the breathalyzer test in Holden.

### **POSITIONS OF THE PARTIES**

#### **THE EMPLOYER**

##### **Quantum of Proof**

Article 9, Section 4, (c) of the collective bargaining agreement states that: "[t]he arbitrator shall decide any disciplinary cases based upon the preponderance of the evidence standard of proof." Article 9, Section 4, (a) states that: "[t]he arbitrator shall have no power to add to, subtract from or modify this Agreement." Furthermore, Article 36, Section 1 states that: "[n]o agreement, understanding, alteration or variation of the Agreement, terms or provisions herein contained shall bind the parties hereto unless made and executed in writing by the parties. In this case, the parties did not agree to deviate from the

clearly negotiated preponderance of the evidence standard of proof. The arbitrator has no authority to deviate from this standard.

### Merits

The standard that an employer must meet to establish “just cause” is well known. The employer must show (1) the employee is on notice of a rule or policy, the infraction of which may result in discipline; (2) the employee committed an infraction of the rule or policy; and (3) the amount of discipline issued is in keeping with the seriousness of the offense.

In the instant case, the Town has established that it had just cause to terminate Fitzgerald as a Firefighter/EMT for the following reasons:

- Fitzgerald reported for and was on duty as a firefighter/EMT under the influence of alcohol on Thursday, May 9, 2013, thereby jeopardizing the safety of himself, other members of the Fire Department and the public;
- Fitzgerald disobeyed a direct order of a superior officer – Lt. Chapin – not to drive his personnel vehicle;
- Fitzgerald was subsequently charged by the Holden Police Department with the crime of operating a motor vehicle under the influence of alcohol on Thursday, May 9, 2013;
- Fitzgerald was previously charged by the Leominster Police Department with multiple motor vehicle offenses, including driving to endanger, leaving the scene of an accident, a marked lanes violation, and being an “Immediate Threat” (revocation);
- At all times relevant to this case, Fitzgerald did not have a valid Massachusetts Driver’s License, which is a requirement of the job;
- At all times relevant to this case, Fitzgerald could not function as an EMT because he did not have a valid driver’s license;
- Through his actions, Fitzgerald violated the following:

- a) Article 25 (Special Conditions of Employment) of the collective bargaining agreement;
  - b) Section 5.01-10, 5.01-13, 5.01-14, 5.01-19, 5.01-29, 5.02-3, and 5.02-9 of the Holden Fire Department Rules and Regulations;
  - c) 105 CMR 170.937, and 105 CMR 170.940; and
  - d) Various state driving statutes.
- Through his actions, Fitzgerald engaged in conduct unbecoming a firefighter.

#### Fitzgerald Was Under the Influence of Alcohol While on Duty on May 9, 2013

The overwhelming weight of the evidence makes it clear that Fitzgerald reported to and was under the influence of alcohol when he returned from golfing on May 9, 2013. First and foremost, Fitzgerald admitted to consuming three (3) vodka and green tea mixed drinks between 3:00 p.m. and 5:30 p.m. before returning to the Fire Department on the day in question.

Upon his return, Lt. Chapin observed him and became suspicious that he might be under the influence of alcohol. Lt. Chapin first became concerned based on Fitzgerald's hand movements and general demeanor. Lt. Chapin watched as Fitzgerald slurred his words twice while quoting a movie line to his colleagues. After consulting with Assistant Chief Hall and contacting Union President Miller, Lt. Chapin reviewed the department procedures and the collective bargaining agreement. Lt. Chapin's suspicions were confirmed when he confronted Fitzgerald. Although Fitzgerald denied drinking alcohol to Lt. Chapin, he slurred his words when he answered him. Lt. Chapin informed Fitzgerald that he suspected that he was under the influence of alcohol and suggested that they go to the police department so Fitzgerald could take a

breathalyzer test. Fitzgerald responded by slurring his speech when he requested union representation.

In addition to Fitzgerald's admission and Lt. Chapin's observations, Firefighters Carlson and Pierce also noticed that Fitzgerald's demeanor had changed and his speech patterns were unusual. Specifically, Carlson noted that after returning from Golf, Fitzgerald had undergone a "night and day" behavior change, was not acting himself, and appeared giddy. Pierce noted that Fitzgerald was more talkative than normal, his speech pattern was different than usual, and he was speaking in a run-on pattern. Additionally, Pierce also noticed the smell of mouthwash.

Taking into account Lt. Chapin's observations with those of Carlson and Pierce, it is clear that each of the following factors of the Department's Procedures existed to support the conclusion that Fitzgerald was under the influence: (1) slurred speech; (2) irregular or unusual speech patterns; and (3) unusual or irregular behavior.

Furthermore, Officers Meservey and Santimore also had occasion to independently observe Fitzgerald. After stopping Fitzgerald, and approaching his driver side window, Meservey detected a strong odor of alcohol coming from Fitzgerald. Similarly, Santimore also detected a strong odor of alcohol coming from Fitzgerald while standing beside him and also noticed that Fitzgerald was slurring his speech and that his eyes were glassy and bloodshot. Fitzgerald also admitted to Santimore that he had consumed a couple of drinks while playing golf and that he had a mixed drink on his way back to Holden. Santimore conducted

a number of field sobriety tests, which Fitzgerald failed, and Fitzgerald refused to submit to a portable breathalyzer test because he knew he would likely fail. An inventory of Fitzgerald's truck revealed two (2) liter bottles of vodka – one almost empty and the other just opened – on the passenger seat of the vehicle.

The salient facts make clear that upon his return from golf on May 9, 2013 Fitzgerald reported to and was on duty under the influence of alcohol. Additionally, Fitzgerald repeatedly refused to submit to breathalyzer tests that could have exonerated him, first in response to Lt. Chapin request, then twice when requested by the Holden Police.

By Reporting to and Being on Duty Under the Influence of Alcohol, Fitzgerald Violated Multiple Rules and Policies

The Town's zero tolerance reminder, which was distributed to all EMS personnel (including Fitzgerald) on June 21, 2010, and was never objected to by the Union, expressly prohibits EMS personnel from reporting to or being on duty with any alcohol in their system. Fitzgerald violated the Town's zero tolerance for alcohol rule by reporting to and being on duty while under the influence of alcohol.

In addition, Section 5.01-14 of the Department's Rules and Regulations prohibits members of the fire department from either displaying the effects of, or being under the influence of alcohol, intoxicants or illegal or illicit drugs while on duty, reporting to duty, responding to calls off duty or while acting as a representative of the Holden Fire Department. By reporting to and being on duty while under the influence of alcohol, Fitzgerald violated this section of the Rules and Regulations.

Section 5.02-9 of the Department's Rules and Regulations provides that:

On duty personnel are prohibited from consuming any beer or alcoholic beverages and from usage of drugs. Personnel arriving to start a tour of duty in an intoxicated condition will be relieved by the shift officer or senior firefighter and subject to any disciplinary action as per section 9.00 (Discipline).

Fitzgerald was scheduled to be on duty for 24 hours from 7:00 a.m. (May 9<sup>th</sup>) to 7:00 a.m. (May 10<sup>th</sup>). He arranged for a swap with another firefighter for 4 hours so he could go play in his golf league. Fitzgerald knew he would be returning to work and without regard for his job and the safety sensitive position it was, he nonetheless consumed three alcoholic drinks during his swap time and then returned to work.

Lastly, Fitzgerald derivatively violated Section 5.02-3 of the Rules and Regulations which require all on-duty personnel to observe all department rules and regulations, SOGs, and SOPs, department policies and completing all assignments given by the Chief, Assistant Chief or Duty Officer during each tour of duty.

To the extent the Union argues that the Town violated 5.01-29 of the Rules and Regulations by not suspending Fitzgerald without pay for the period of time that he lost his right to operate a motor vehicle, rather than terminating his employment, this argument is without merit because it fails to take into account the other violations Fitzgerald committed beyond simply losing the right to operate a motor vehicle.

Fitzgerald Was Insubordinate When He Violated a Direct Order from his Superior Officer by Driving His Personal Vehicle on May 9, 2013

Lt. Chapin credibly testified that when Fitzgerald told him that he was going home sick, he instructed him not to drive his vehicle. Although Fitzgerald claims that Lt. Chapin did not order him not to drive his personal vehicle, Fitzgerald's own testimony and his response to Lt. Chapin's directive make it clear that he understood that he was being ordered not to drive his personal vehicle. Lt. Chapin responded to Fitzgerald's announcement that he was going home sick by telling him to call Megan to come get him because Chapman was not supposed to let Fitzgerald drive home. Fitzgerald responded that he would call Megan. Fitzgerald admitted in his testimony that he knew Lt. Chapin was not supposed to let him drive home and that he did in fact call Megan for a ride home prior to changing his mind and leaving in his own vehicle. Assistant Chief Hall concluded in his investigation that Fitzgerald knew he was supposed to get a ride home, and did not comply with that directive.

Section 5.01-10 of the Rules and Regulations states that the failure or deliberate refusal of any officer or member to obey an order given by a superior shall be considered insubordination. By failing to comply with Lt. Chapin's order not to drive his personal vehicle on May 9, 2013, Fitzgerald engaged in insubordinate conduct in violation of Section 5.01-10 of the Rules and Regulations.

As Fitzgerald Did Not Have a Valid Driver's License, He Could Neither Function as a Firefighter/EMT in the Town of Holden Nor Could He Function as an EMT under State Law.

As a result of his refusal to submit to a breathalyzer test, his arrest for operating under the influence of alcohol, Fitzgerald's driver's license was suspended for 180 days effective May 9, 2013. Additionally, a review of his RMV driver history record shows that Fitzgerald's license was actually revoked indefinitely on May 7, 2013 the day after the Leominster incident, meaning that Fitzgerald was actually operating with a suspended license on May 9, 2013.

Article 25, Section 2 of the collective bargaining agreement makes it a requirement/condition of employment to possess and maintain a valid Massachusetts driver's license. In addition, OEMS regulations say that while an EMT's certification remains in effect during the pendency of a driver's license suspension, such an EMT may not work in an ambulance as an EMT. In light of the special requirements and conditions of employment for Firefighter/EMT and the fact that EMT's with suspended driver's licenses may not function as EMTs or work on ambulances as EMTs during the pendency of their license suspensions, it is clear that Fitzgerald was unable to perform the essential functions of the position for which he was hired.

Fitzgerald Engaged in Conduct Unbecoming a Firefighter in Violation of Section 5.01-19 of the Department Rules and Regulations

Section 5.01-19 of the Rules and Regulations states that: Members and officers will conduct themselves in such a manner as to avoid bringing discredit on the department of [sic] the town. A firefighter/EMT who engages in conduct unbecoming brings discredit on the Department and the Town. When a

firefighter/EMT reports for duty under the influence of alcohol in direct violation of multiple Department policies, he risks putting his own life, the lives of his fellow firefighters/EMTs, and the lives of the public in jeopardy. Additionally, when a firefighter/EMT refuses to submit to a breathalyzer test, is arrested for operating under the influence, and his driver's license is suspended all based on conduct undertaken in the middle of a 24-hour shift, thereby precluding him from performing the functions of his position, such conduct amounts to conduct unbecoming a firefighter and brings discredit on the Department and the Town.

The Town Was Not Required to Afford Fitzgerald the Opportunity to Undergo Treatment and Rehabilitation for a Substance Disorder

The Union contends that rather than terminate Fitzgerald, the Town should have afforded him a full opportunity to undergo treatment and rehabilitation for a substance abuse disorder. As an initial matter, Fitzgerald himself contends that he does not have a substance abuse disorder and attributes any issues he may have had with alcohol to his attempt to self-medicate alleged anxiety attacks and depressive disorders. Fitzgerald never informed Town officials or provided medical documentation that he suffered from any anxiety attacks or depressive disorders. Both the Chief and the Town Manager testified that they did not know if Fitzgerald was an alcoholic.

The Town had no obligation to excuse Fitzgerald's misconduct even if it were somehow based on a condition recognized as a disability under the Americans with Disabilities Act. Employees with a disability relating to alcohol or drug addiction who violate workplace policies may be subject to the same disciplinary action taken against other similarly situated employees who do not

have disabilities. The Town was not required to excuse Fitzgerald's misconduct based on the unsupported suggestions that he suffers from a substance abuse disorder or for any other disability.

The Union's Claim that Fitzgerald Suffered Disparate Treatment is Without Merit

Fitzgerald claims that he was treated differently by Chief Chandler and subject to unfair discipline because he is a former Union president. Fitzgerald has not been Union president since 2008, since that time, there have been three other Presidents, none of whom have complained about being picked on by Chief Chandler. Indeed, the fact that the three most recent Union presidents have not complained of similar treatment by the Chief is perhaps the strongest indicator that the prior discipline levied against Fitzgerald was not motivated by union animus but was instead, based on Fitzgerald's misconduct.

Fitzgerald also points to the discipline received by other Town employees outside of the fire department. The Town believes that each of these situations is easily distinguishable from the current situation. First, the employee of the Holden Police Department who was arrested while off duty outside of Massachusetts and charged with operating under the influence situation was different because the laws of the state he was arrested in allow for an administrative license suspension which allows for driving to work during the period of suspension and additionally he was assigned administrative duties by the Police Chief during the suspension. The fire department has no such administrative duties available to assign to Fitzgerald and there were additional factors present in Fitzgerald's situation including insubordination for disobeying a

direct order. Regarding the DPW worker who lost his license for six weeks, the situation is not analogous as he too was allowed a hardship license, and more importantly a position was available in the DPW that did not require a license and he was demoted into that position for six weeks. There is no such position available in the fire department as it is a condition of employment for all permanent fire department personnel to have a driver's license. Finally, a prior DPW employee voluntarily resigned from his position, prior to a termination pursuant to a negotiated settlement. He lost his license and was demoted into a position that did not require a license prior to the final outcome of his criminal case. Upon losing his CDL license for 1 year he was reinstated to his position for the purpose of termination, resulting in the negotiated settlement. Again, the Fitzgerald case differs in that the fire department does not contain a lower position that does not require a driver's license, and, as noted above, the Fitzgerald situation contains other extenuates circumstances based on his behavior on May 9, 2013. Fitzgerald's circumstances are readily distinguishable from these other cases involving Town (but not fire department) employees who have been arrested and charged with OUI. As a result, the Union's argument that Fitzgerald was treated more harshly than other employees is without merit.

#### Fitzgerald Lacks Credibility

In reviewing Fitzgerald's testimony two themes become apparent; first, is Fitzgerald's lack of credibility, second is his sense of entitlement. It became apparent as Fitzgerald testified, that despite the fact that what he was testifying to was, at times, illogical, he was also taking self-serving positions to try to suit

the arguments he was looking to make in his case. Issues such as stress in his life that he attempted to blame on the Chief, but were in reality caused by the breakdown of his marriage and the financial difficulties that arose from the breakup and the resulting child support issues. Similarly, Fitzgerald's explanation about Officer Santimore's testimony that Fitzgerald told him that "he probably would not pass" [the breathalyzer] is not believable. Fitzgerald claimed that Officer Santimore misheard him and that he was responding to a question posed by Officer Meservey. Fitzgerald's claim that he was responding to Officer Meservey's question about the leg test and not Officer Santimore about the breathalyzer is wholly disingenuous and self-serving.

Another example of Fitzgerald's lack of credibility was displayed in his response to why he did not take the breathalyzer test that was offered. It is inconceivable that someone who was sure he would pass a breathalyzer test and who understood that the consequences of refusing would be a 180-day license suspension would not submit to the test.

Having the ability to observe the demeanor of each witness, consider each witness' testimony, and evaluate their motivation to provide self-serving evidence, the Arbitrator should find that the Town's witnesses were credible, whereas Fitzgerald was not always honest with his responses. The Town requests that the Arbitrator uphold the Town's action and deny the grievance.

**THE UNION**Quantum of Proof

The Town endeavors to argue that their quantum of proof is a mere preponderance, “a little more one way than the other.” The contract does not state this, nor is this what arbitral standards apply in cases that involve the catastrophic economic and social impact of discharging an employee for being under the influence of alcohol. Article 10 references “written reprimand, or suspensions, or discharge” as actions requiring just cause. Each type of action is a separate element of the clause. By contrast, Article 9, Section 4(c), the “preponderance” clause that the Town relies on states “[t]he arbitrator shall decide any disciplinary cases based on a preponderance of the evidence.” By the construction of the precise wording of the contract language, “discharge” is separate and distinct from “disciplinary action”. Accordingly if the parties had meant “discipline and discharge” under the preponderance clause of Article 9 they would have said so and they did not.

When the Town operates under the color of law enforcement, a higher evidentiary standard and other protections engage. Constitutional privileges under the 4<sup>th</sup>, 5<sup>th</sup>, and 14<sup>th</sup> amendments have their origin in concerns about the abuse of government power and the need to protect individuals against the power of the state; thus they are properly invoked against the government and have no place in an industrial setting. In this case, the employer is the government and it invoked its police powers against an individual; therefore,

higher evidentiary standard and other protections fully apply. Reasonable doubt within the evidentiary burden should fully apply in the instant case.

The Town Has Failed To Prove That Fitzgerald Was Under The Influence Of Alcohol On May 9, 2013 And Has Failed to Establish Just Cause For Discharge

It has long been established that in discharge cases just cause requires that the employer must supply convincing evidence that the employee committed the offense for which he was discharged. It is up to the employer to prove employee guilt and not the employee who must prove himself not guilty. A discharge cannot be based on conjecture, surmise, suspicion, or anything but hard material and known facts. Suspicion is no substitute for proof. Lt. Chapin testified that he observed Fitzgerald slur his words at the dinner table after Fitzgerald returned to work from a four hour shift so he could play in his golf league. Four other firefighters were in close proximity to Fitzgerald at the dinner table, and none of them heard the slurred speech. Lt. Chapin testified that he was the only one to hear the slurred speech. There is no corroboration of slurred speech in the statements of four other firefighters who were in direct contact and close proximity to Fitzgerald during the time frame applicable to the allegations made by the Town that he was under the influence of alcohol. In addition Lt. Chapin testified that he considered no other possibility as to why Fitzgerald could have been perceived as slurring his speech and that he had no formal training in proper handling of drug or alcohol situations in the work place.

After Lt. Chapin studied the Town's Procedure for Handling a Suspicion of an Employee Being Under the Influence of Alcohol or Drugs, he confronted Fitzgerald with his perception of him slurring his words. Fitzgerald denied

drinking and was offered the opportunity to take a breathalyzer test. Fitzgerald asked for Union representation, and then decided to go home sick without taking the breathalyzer test. Lt. Chapin then told Fitzgerald that could do that, but that he could not let him drive home. Fitzgerald informed Lt. Chapin that his girlfriend was going to pick him up. Of significant import is the fact that Fitzgerald removed himself from the confrontational situation by invoking sick time which Lt. Chapin approved. After Fitzgerald had removed himself from the control and direction of the employer, Lt. Chapin advised him that he could not drive his vehicle home. Fitzgerald subsequently drove away in his vehicle, and Lt. Chapin informed the Holden police of the situation and his suspicions that Fitzgerald was under the influence of alcohol. A BOLO was immediately issued for Fitzgerald's truck. At this point, fire department officials and subsequently Town officials concluded that Fitzgerald was under the influence of alcohol. The supervisor's judgment as to whether an employee is under the influence will normally be admitted and given considerable weight by an arbitrator, but only if formed on the basis of specific, complete and credible observations of the employee's behavior.

It was noted to Town officials during their investigation and at the Loudermill hearing that the Town's procedure itemized seven commonly recognized symptoms of intoxication and that they had only acted on one of these symptoms. The Town's response was that they only needed one symptom per the procedure. It should be noted that just because the Town says they only need one, it does not make it so. Here, we have an alleged single symptom of intoxication, uncorroborated or contradicted by four co-workers in close proximity

to Fitzgerald at the dinner table and nothing else. This is hardly the specific, complete, and credible observations required by the standard noted above.

Based on the BOLO, Officer Meservey located Fitzgerald's truck and followed him for one mile before identifying cause to affect the stop. The pertinent reality is that as soon as the BOLO was issued by the police dispatcher, the Holden Police were going to affect a pretext motor vehicle stop if they could locate Fitzgerald's truck. Officer Santimore joined the traffic stop and administered a summary field sobriety test (FST). Officer Santimore administered four elements of the FST of which Fitzgerald was unable to do one due to a physical limitation. Both officers in the narratives of the stop, FST and arrest claimed to smell a strong odor of alcohol being within four feet of Fitzgerald. However, neither officer could explain why they made that observation when none of the five Holden firefighters smelt alcohol when in the same proximity to Fitzgerald at the dinner table.

Fitzgerald was acquitted of the Holden Driving Under the Influence of Alcohol charges after a bench trial. The judge did find Fitzgerald guilty of leaving the scene of an accident (property damage only) in another motor vehicle matter occurring in Leominster. Of significant importance is that Fitzgerald was convicted of no alcohol related driving offenses associated with any of the litany of charges alleged by the Town when the matters were tried before an objective jurist. Fitzgerald's driver's license was suspended for 180 days for refusing the breathalyzer in Holden and a concurrent 60 days for the property damage only leaving the scene in Leominster.

Nowhere is there proof that Fitzgerald was under the influence of alcohol on the evening of May 9, 2013. Fitzgerald admits to consuming three mixed drinks while playing golf between 2:15 p.m. and 5:30 p.m. while he was off duty. The Holden Fire Department has no rule prohibiting employees from consuming alcohol when off duty, and consuming three drinks over the period of three hours does not automatically bridge to the factual conclusion that a person is under the influence of alcohol. The only factual information the Town produces to justify the discharge of a ten year employee is an uncorroborated suspicion that Fitzgerald was slurring his words from Lt. Chapin and Fitzgerald's admission of consuming three drinks over a period of three hours on his own time.

In examining the just cause standard of requiring "forewarning" and "foreknowledge" of work place standards of conduct and consequences for their violation, we submit the matrix of intertwined rules, procedures, email memo and notices that demonstrate that the Town of Holden is substantively deficient in meeting this standard. These rules and standards issued by the Town through the fire department produce a matrix that clouds a common sense work place standard of sobriety. This general recognition does not relieve an employer of standards applicable to rule making in the collective bargaining process, nor does it dissolve the requirements of just cause standard. The Town produced no testimony that the employees, union or supervisors were informed of trained, or adequately advised as to these rules and procedures, particularly the procedure for handling a suspicion of an employee being under the influence of alcohol.

The Town's "zero tolerance" directive also contributes to the haze created by the undefined matrix of rules, policies, and contract provisions. What does "zero tolerance" mean? Both Assistant Chief Hall and Chief Chandler stated that it means zero alcohol levels in an employee's system. When asked if it meant the offending employee would be terminated both officials responded no. However, in the Step I grievance answer, Chief Chandler states that as a basis for discharge, that "[a]s Firefighter Fitzgerald well knows, the Department has a zero tolerance for any firefighter reporting to work or being on duty under the influence of alcohol." When department officials are not clear on what "zero tolerance" means, how does a rank and file employee know what it means? The email presented in exhibit U-1 was sent out to all members with the push of a button, no discussion with the Union and no explanation to employees. "Zero tolerance" fails on both reasonableness and notification grounds.

The matrix of rules and procedures conclusively leaves the employee with no idea of what "drunk" is or means. "Displaying the effects of, or being under the influence of alcohol", as stated in rule 5.01-14 are two different things. What does it mean in the context of the Town of Holden rules? What exactly is "being under the influence of alcohol"?

The Procedure unilaterally issued by the Town takes a quantum and fatal leap from a breathalyzer test showing any alcohol to the conclusion that someone is under the influence of alcohol. This conclusion is erroneous, particularly when the allegations attach to career firefighters who will lose their ability to work in their chosen profession if the erroneous conclusion is applied as

it has been done to Fitzgerald. Nowhere in the documents or testimony of the Town officials is there any reference as to how the employee was forewarned or provided foreknowledge of the consequences of violating any of the unclear or unspecified standards of the rules matrix. Clearly the contract, the standards of just cause, and the canons of labor arbitration do not embrace such arbitrary and capricious exercises of management prerogatives where discharge is involved, and particularly where the discharge of a long service employee carries negative social stigma and career crippling impact.

Moving to the just cause standard requirements that an objective and fair investigation discover a factual basis for a rule violation before administering discipline, the Town's investigation of the alleged May 9, 2013 incident solely consisted of taking witnesses statements and collecting police reports. The investigation began with an assumption of intoxication and completely focused on concluding with a finding of intoxication. The investigation was nothing more than a "fait accompli." The investigation, unsurprisingly, did not develop pertinent information about the bearing of reasonable doubt on the conclusions that were being reached. At a minimum, the Town either has, or should have, the expertise available to analyze an alcohol related incident and the failure to do so makes the investigation materially insufficient even though it comfortably buttresses the erroneous conclusion that having a drink makes one under the influence of alcohol.

Of major significance, is the testimony of Town Manager Kelley, who stated that the Town did not go back and revisit their conclusions that Fitzgerald

was under the influence of alcohol when he was acquitted in District Court. Where a key element of the discharge was predicated on the Holden arrest, the Town's investigation contained a material omission in not reconsidering that conclusion when the employee was acquitted of the charges. The answer as to whether the Town's investigation met the requirements of just cause in fairly and objectively establishing pertinent facts must be a resounding no. The Town's investigation is most remarkable for its omissions rather than the fair and objective establishment of facts.

The Town of Holden Unjustifiably Endeavors to Use Off Duty Conduct to Justify the Discharge of Fitzgerald

Exhibit J-3 states: You were previously charged by Leominster Police Department with multiple motor vehicle offenses, including driving to endanger, leaving the scene of an accident, a marked lane violation, and being an "Immediate Threat" (revocation).

The Fitchburg District Court acquitted Fitzgerald of the bulk of these charges, except for leaving the scene of an accident and a marked lane violation. Fitzgerald's license was suspended for sixty days which ran concurrently with the one hundred and eighty day license suspension that he received for refusing the breathalyzer test in Holden. Of substantial import to the allegations that Fitzgerald's employment is terminable based on his driver's license status, and subsidiary claims as to his EMT status, is Department Rule 5.01-29 which states:

Any member who loses his right to operate a motor vehicle in the Commonwealth of Massachusetts will be suspended, without pay for that period of time. It shall be the member's responsibility to immediately notify the Fire Chief, in writing, of such license suspension and/or revocation.

The Town failed to respond or rebut the Union's position that the suspension of Fitzgerald's driver's license does not support just cause for

discharge per the specific standard contained in the Department rules. Suspension without pay, not discharge, was the designated and appropriate response to the allegations put forth by the Town if appropriately substantiated and proved.

Fitzgerald Retained Emergency Medical Technician Status on a Restricted Basis During a Period of Driver's License Suspension

The Town's allegation that "you may not function as an EMT because you do not have a valid driver's license, pursuant to state regulations" is untrue as Fitzgerald's EMT certification remains in effect during his license suspension. However, an EMT is restricted from working an ambulance as a member of a two person crew. Fitzgerald would be off restricted status upon the reinstatement of his driver's license, so under Department rule 5.01-29 his status as EMT would be unrestricted at the same time as his reinstatement under the Department's rule. Using this as a basis for a termination is simply a "red herring."

The Town's Allegation of Insubordination Constitutes an Overreaching That Exceeds the Employers Scope and Control Over the Employee

Upon Fitzgerald's statement that "I am going home sick" he left the dominion and control of the employer. Lt. Chapin may request that Fitzgerald not drive home, however, he cannot order him to not drive his personal vehicle on his own time. If Lt. Chapin truly believes that Fitzgerald is under the influence of alcohol he may notify the police of the situation but he may not legitimately order him not to drive. Absent a legitimate order, there is no insubordination.

As brought to the Town's attention in the Loudermill hearing and during the grievance procedure, Fitzgerald suffers from an anxiety disorder and

associated panic attacks. Here, the facts illustrate an employee, with no previous record of alcohol related misconduct, being accused of being under the influence of alcohol at work after consuming three standard drinks on his own time over a four hour period. The situation becomes compounded by the supervisor's calls to involve law enforcement in a matter that seriously threatens to destroy the employee's personal integrity, livelihood, and career. Little wonder that Fitzgerald, with a diagnosed anxiety disorder, states that he left after being approved for sick time because he panicked. Fitzgerald was not given a legitimate order from which he could be insubordinate and given the sincere feelings that such an order would seriously and immediately jeopardize his personal integrity, he was excused from compliance.

The Concept of Conduct Unbecoming a Firefighter is Overly Broad and Unreasonable

The Town attempts to interject into their discharge decision rule 5.01-19 stating: "Members and officers will conduct themselves in such a manner as to avoid bringing discredit on the department of [sic] the town." Arbitrators have sometimes embraced these conduct unbecoming rules to protect the integrity of public agencies. This embrace does not, however, relieve the employer of just cause requirements as to the content and application of the rule. The forewarning and foreknowledge requirement is completely absent. Conduct unbecoming is essentially anything the Town wants it to be and the work force has no idea of what is expected or the consequences of violating the undefined standard of behavior. Only after charges are alleged in a specific case is the employee informed of what actually constitutes conduct unbecoming.

In the instant case, the Town alleges that reporting to work under the influence (a charge never proved), and being stopped and arrested for DUI by the Holden Police (a charge of which he was acquitted) brought discredit to the Town. How can unproven charges and an acquittal of motor vehicle violations bring discredit to the Town? This claim is exactly why conduct unbecoming is an invalid rule that by its very nature lacks just cause for disciplinary action taken against Fitzgerald.

The Town Has Differentially Applied Its Standards, Rules and Regulations To Fitzgerald In a Manner That Violates the Labor Agreement and the American's With Disabilities Act

Just cause requires an inquiry into whether the Town has applied its rules, orders, and penalties evenhandedly and without discrimination to all employees. In discharging Fitzgerald, the Town has violated both this standard of just cause and the American's with Disability Act (ADA).

Despite testimony to the contrary, Fitzgerald is perceived by the officials of the Town and the Fire Department to be an alcoholic and as such he has been subject to differential treatment in application of rules and regulations. As the arbitrator is aware, an employer is entitled to deal with the effects of excess alcohol consumption; however the employer is not permitted to discriminate against a person because they are an alcoholic or perceived as an alcoholic.

The Town has endeavored to invoke the claims that alcohol adversely affects Fitzgerald's job performance and conduct. This claim fails as a response to allegations of disability discrimination as the employee's record is completely devoid of any discipline for alcohol related misconduct in the workplace.

Additionally, the allegations from the incident of May 9, 2013 are a pretext to mask true discrimination against a person perceived to be an alcoholic.

Even though all department officials testified they did not perceive Fitzgerald as an alcoholic, their actions infer otherwise. In 2008, Chief Chandler and the Union helped locate a bed in a local rehabilitation facility after Chief Chandler received a phone call of concern about Fitzgerald and his drinking. Chief Chandler told two fellow firefighters who were attempting to convince Fitzgerald to enter the program that they should tell him that he would be fired if he did not enter the program. Chief Chandler claims that he was attempting to help Fitzgerald. The help however was a treat to discharge Fitzgerald solely based on off duty conduct that had no basis in the effects of alcohol consumption on his job performance.

In the Loudermill hearing, the Town was put on notice of Fitzgerald's affliction with an anxiety disorder and the possible associated problem of self-medication with alcohol. This notice engaged the Town's legal obligation to investigate and develop this matter as a possible mitigating factor under the labor agreement and as their legal obligation under the ADA. This notice came before the decision to discharge Fitzgerald and was disregarded and swept aside with the conclusions reached in the Appointing Authority decision.

As the contract incorporates the ADA, the inference arises that the only difference motivating how Fitzgerald was treated compared to the other similarly situated employees referenced earlier is that he is perceived as an alcoholic. This clearly meets the but for standard of proof and the synergy between the

contract and the ADA makes these employee comparisons not only relevant to the instant grievance, but a mandatory consideration under differential treatment standards.

### Conclusion

As demonstrated by the facts of the instant case as related through the recognized standards of just cause, the Town has failed to meet its burden in all major areas: foreknowledge and forewarning; fair and objective investigation; impartial management judge; equal and non-discriminatory application of disciplinary penalties. Additionally, the Town has furthered a continuing pattern of disability discrimination directed at Fitzgerald. Accordingly, the Union requests the flowing remedy be imposed:

### Remedy

The Union requests reinstatement of Fitzgerald with back pay from the time of his driver's license reinstatement pursuant to Rule 5.01-19. In the alternative, the Union requests that Fitzgerald be reinstated with the following conditions:

#### Conditional Reinstatement

- a) Within thirty (30) days of the award Fitzgerald will undergo professional diagnosis for alcohol abuse and a certified rehabilitation program will be established by an appropriately credentialed professional.

- b) Within one hundred and twenty (120) days, or one (1) medically certified extension thereof, Fitzgerald will successfully complete the rehabilitation program stipulated by the appropriately credentialed professional.
- c) Both items are conditions precedent to reinstatement and if for any reason Fitzgerald does not complete these requirements within the designated time frames he will not be reinstated to his position as a Firefighter for the Town of Holden.

#### Conditional Employment

- a) During the remainder of his employment, Fitzgerald will abide by the rules of the Holden Fire Department regarding alcohol and or drug (sic) during work hours.
- b) During work hours and with probable cause as required by the collective bargaining agreement, a properly designated Fire Department official may require Fitzgerald to take a breathalyzer test administered by a certified person or clinic, independent of the Town of Holden, who is not a law enforcement officer, or, involved or affiliated with law enforcement.

If the breathalyzer test registers a reading above that permitted for all Fire Department personnel, Fitzgerald may request a confirmatory blood sample be analyzed at the Town's expense. If Fitzgerald registers alcohol readings above the permissible limits it will be a violation of his conditional employment and he will be

subject to disciplinary action up to and including discharge at the discretion of the employer.

- c) If Fitzgerald refuses to take a breathalyzer test when requested as specified above, his employment may be terminated at the discretion of the employer. If Fitzgerald wishes to dispute probable cause for the test, he may do so through the grievance procedure after complying with the request. The Town will not abuse this testing provision to distinguish, discriminate against or harass Fitzgerald.
- d) The Town will follow generally recognized, legally required, and best practices standards and protocols in implementing testing procedures if ever required.

### **OPINION**

The issue before me is: Was Timothy Fitzgerald terminated for just cause?  
If not what shall be the remedy?

For all the reasons stated below, Timothy Fitzgerald was terminated for just cause and the grievance is denied.

#### **Quantum of Proof**

The Town argues that the correct quantum of proof is the preponderance of the evidence standard as outlined in Article 9 of the collective bargaining agreement. The Union argues that the language of Article 10 differentiates discharge from discipline and allows for a standard of proof higher than the preponderance of the evidence standard to be used in this matter.

In my role as Arbitrator, my authority is determined by the clear and unambiguous language in the parties' collective bargaining agreement. The language of article 10 delineates just cause as the disciplinary standard to be used for a written reprimand, suspension, disciplinary demotion, or discharge. The language in Article 9, however, delineates the correct standard of proof to be used in all disciplinary matters, including discharge. Article 9, Section 4 states that:

The award of the arbitrator shall be final and binding upon all parties, subject to the following conditions:

- a. The arbitrator shall have no power to add to, subtract from or modify this Agreement, and may only interpret such items and determine such issues as may be submitted to him or her by agreement of the parties.
- b. The arbitrator shall not render a decision contrary to state or federal law.
- c. The arbitrator shall decide any disciplinary cases based upon the preponderance of the evidence standard of proof. ...

A review of the cited language clearly establishes that the quantum of proof that must be used in determining this matter is a preponderance of the evidence. Furthermore, to ensure the parameters under which I must decide this matter are clear, the parties have decided that the arbitrator shall have no power to add to, subtract from or modify this Agreement. To use any other quantum of proof would clearly be an unauthorized modification of the Agreement.

### Merits

It is undisputed that on May 9, 2013, Fitzgerald was scheduled to work a twenty four hour shift as a firefighter/EMT, and that he had arranged a four hour

mid-shift swap to allow him to play in his golf league. Fitzgerald's swap was scheduled to end at 6:30 PM, when he was required to return to work and complete his shift, which was not scheduled to end until 7:00 AM the next morning. Fitzgerald admits that during this time away from his shift he consumed three vodka and green tea drinks at the golf course while being aware of his responsibility to return to work by 6:30 PM. This decision set off a series of events that ultimately led to his arrest by the Holden Police and his subsequent termination.

### Counts 1 and 2

In Fitzgerald's termination letter, the Town outlines its findings that led to the decision to terminate him. Specifically, the Town, in counts 1 & 2 states that:

- You reported for duty as a firefighter/EMT under the influence of alcohol on Thursday, May 9, 2013, thereby jeopardizing the life and safety of yourself, other members of the Department and the public.
- You were on duty as a firefighter/EMT under the influence of alcohol on Thursday, May 9, 2013 thereby jeopardizing the life and safety of yourself, other members of the Department and the public.

The Town bases these findings on both the admission of Fitzgerald that he consumed three drinks at the golf course, and the results of an investigation by Assistant Chief Hall. This systematic investigation included interviews with Lt. Chapin, the officer in charge on May 9, 2013, all of the firefighters on shift, the two Holden police officers involved in the vehicle stop, and arrest of Fitzgerald, and Fitzgerald.

Upon his return to work, Fitzgerald was in the kitchen with his co-workers when Lt. Chapin first became aware of a potential issue. Lt. Chapin testified that Fitzgerald was slurring his words during a conversation at the table. While no other firefighter at the table acknowledged Fitzgerald slurring his words in their reports, it was noted that, according to his co-workers, Fitzgerald was quieter than usual, had a behavior change since earlier in the shift and seemed almost giddy while talking in a run-on pattern. Lt. Chapin's reasonable concerns certainly justified the implementation of the Department's procedure for handling a suspicion of an employee being under the influence of alcohol or drugs.

Lt. Chapin, after contacting Assistant Chief Hall and Union President Miller and reviewing the procedure and the appropriate contract provisions, confronted Fitzgerald at 7:15 PM. After moving to the apparatus bay for privacy, Lt. Chapin told Fitzgerald of his suspicions that he was under the influence. According to Lt. Chapin's unrebutted testimony, Fitzgerald slurred his words while denying that he had been drinking. Lt. Chapin informed Fitzgerald that he was still concerned that he was under the influence of alcohol and requested that Fitzgerald take a breathalyzer test. In response, Fitzgerald requested union representation. In so doing, Lt. Chapin's unrebutted testimony was that Fitzgerald again slurred his words. After Lt. Chapin contacted Union President Miller, he returned to inform Fitzgerald of the estimated time of Miller's arrival, when Fitzgerald responded that "he didn't need him, I'm going home sick."

Fitzgerald's decision to forego the opportunity to take the breathalyzer test to conclusively prove that he wasn't under the influence of alcohol was certainly

related to the fact that he had lied to Lt. Chapin about drinking during the day. Lt. Chapin's observations of Fitzgerald, including his un rebutted observations of Fitzgerald slurring his words in response to his questions in the apparatus bay, and when requesting union representation, the statements of Fitzgerald's co-workers about Fitzgerald's behavior in his return to work, Fitzgerald's decision to forego breathalyzer test, and his decision to drive away from the station after being ordered not to drive (as discussed further below), provide sufficient support for the appointing authority to conclude that Fitzgerald reported to duty and was on duty under the influence of alcohol.<sup>4</sup> In so doing, Fitzgerald was in violation of the provisions of the Rules and Regulations of the Holden Fire Department.

Specifically, Fitzgerald was in violation of:

- **5.01-14** – Members shall not display the effects of, or be under the influence of alcohol, intoxicants or illegal or illicit drugs while on duty, reporting to duty, responding to recalls off duty or while acting as a representative of the Holden Fire Department. NOTE: refer to Town and Fire Department drug and alcohol policy, SOP/SOG and Local 4557 negotiated agreement; and
- **5.02-9** – On duty personnel are prohibited from consuming any beer or alcoholic beverages and from usage of drugs. Personnel arriving to start a tour of duty in an intoxicated condition will be relieved by the shift officer or senior firefighter and subject to any disciplinary action as per section 9.00 (Discipline). A report shall be forwarded to the Chief of the incident. Also refer to Local 4557 Drug and Alcohol Policy.

### Count 3

Count three of Fitzgerald's termination letter states that:

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<sup>4</sup> As I have found that Fitzgerald reported to duty and was on duty under the influence of alcohol, I need not reach the Union's challenges to the Department's zero tolerance policy for Emergency Medical Personnel.

- You disobeyed a direct order of a superior officer not to drive your personal vehicle after being relieved of duty on Thursday, May, 2013.

Fitzgerald admitted that he was instructed by Lt. Chapin not to drive his personal vehicle home on May 9, 2013, after he declined to take the breathalyzer test and decided to go home sick. Fitzgerald's actions in calling his girlfriend Megan for a ride also support the contention that Fitzgerald was aware that he was ordered by Lt. Chapin not to drive before he changed his mind and exited the station and drove away in his truck, which put his health and safety and the health and safety of the public in general in jeopardy. Fitzgerald testified that he panicked when he decided to disobey the order given by Lt. Chapin. The Union attempts to claim that the order was unenforceable because Fitzgerald was no longer under the Town's control once he said he was going home sick. There is no basis to support this claim however, as Lt. Chapin's order not to drive was given simultaneously with his approval of Fitzgerald's request for sick leave. The timing of the order combined with the fact that Fitzgerald continued to work after his request was granted, by going to the apparatus bay and organizing and putting away his equipment, supports the Town's conclusion that Fitzgerald was insubordinate when he disobeyed a direct order from a superior officer and got into his truck and drove away. This insubordination by Fitzgerald placed him in violation of the Rules and Regulations. Specifically, Fitzgerald's actions placed him in violation of:

- **5.01-10** – Failure or deliberate refusal of any officer or member to obey an order given by a superior shall be considered insubordination.

The Union points to the fact that Fitzgerald was acquitted of the charge of driving under the influence in District Court in an attempt to show that the Town was completely misguided in its conclusions, that Fitzgerald could not have possibly been under the influence of alcohol, and that his termination lacked just cause. While the acquittal weakens this specific allegation against Fitzgerald, it does not stand for the proposition that the remainder of the allegations must, by definition, be suspect. First, the standard of proof used by the District Court in a criminal proceeding is vastly different than the standard of proof dictated by the collective bargaining agreement for disciplinary actions. Second, there are multiple other infractions committed by Fitzgerald in violation of the collective bargaining agreement, and the Rules and Regulations of the Holden Fire Department that contributed to his termination. If Fitzgerald had been terminated solely for being arrested for Driving Under the Influence, then there might be more merit to the Union's claims. Unfortunately for the Union's case, the facts on the record before me contain numerous allegations of wrong doing that are independent of Fitzgerald's acquittal. The observations of Lt. Chapin, the other firefighters on duty, Officers Meservey and Officer Santimore, about Fitzgerald's actions between his arrival back at work and his arrest, support, under the preponderance of the evidence standard, the Town's conclusions that Fitzgerald was under the influence of alcohol when he reported to work and while he was on duty. In addition, Fitzgerald's blatant insubordination in driving his truck after being ordered not to, provides sufficient support to conclude that the Town possessed just cause to terminate Fitzgerald. Therefore, I find that the Town has

provided sufficient evidence to show that by a preponderance of the evidence, it possessed sufficient just cause to terminate Fitzgerald based on his actions as outlined in counts I, II and III.

Having found that the Town possessed the requisite just cause, it is unnecessary to decide on the validity of the remaining allegations against Fitzgerald and the Union's defenses to those allegations. For all the reasons stated above, the termination of Fitzgerald was for just cause and the grievance is denied.

**AWARD**

Timothy Fitzgerald was terminated for just cause, and the grievance is denied.

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Timothy Hatfield, Esq.  
Arbitrator  
December 29, 2014