

**FINDINGS AND AWARD
IN A DISPUTE**

BETWEEN: **INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS LOCAL 1075**

(hereinafter called the "Union")

AND: **CITY OF ST. JOHN'S / ST. JOHN'S REGIONAL
FIRE DEPARTMENT**

(hereinafter called the "Employer")

GRIEVOR: **RANDY HAMMOND**
FOR THE UNION: **IAN PATEY, LL.B.**
FOR THE EMPLOYER: **CHRIS KING, LL.B.**
BEFORE: **GEOFFREY WILLIAMS, DONALD ASH and
W. JOHN CLARKE, C.Arb. C.Med., Chair**

PRELIMINARY MATTERS

The hearing of this matter took place at St. John's on September 5th and December 4th, 2007 at the commencement of which the parties agreed as follows:

1. The Arbitration Board was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure had been properly followed or requirements had been waived.
4. The arbitration board would remain seized of the matter in the event the parties could not agree on the interpretation of the award or in the event there



is a question of compensation arising from the award.

5. Witnesses were excluded from the hearing until called upon to testify.
6. The time limits for the filing of the award were waived.
7. There were no persons who were not parties to the proceedings who were entitled to notice of the hearing.

The following Exhibits were entered by consent and identified as follows:

- C#1 Collective Agreement between the Parties effective January 2004 to December 2006
- C#2 Policy Statement # 22 revised 1993-10-01
- C#3 Correspondence from Deputy Chief Tucker to the Grievor dated May 25, 2005
- C#4 Letter of Reprimand to the Grievor dated June 10, 2005
- C#5 Letter from Union President to Deputy Chief Tucker dated June 11, 2005
- C#6 Confirmation that Grievor was advised not to sign Letter of Reprimand
- C#7 Letter from Deputy Chief Tucker to A/ C Fire Captain Charles Nurse, President of Local Union dated June 16, 2005
- C#8 A result of internal appeal of grievance to Director M. Dwyer dated 2005-06-29
- C#9 Letter from Chief Commissioner, City of St. John's to the President of the Local dated July 21, 2005
- C#10 Letter to Director Dwyer from President Nurse dated July 23, 2005
- C#11 Letter to Director Dwyer from President Nurse dated July 7, 2005



The following persons testified under oath and entered exhibits identified as follows:

For the Employer:

Eric Haley who entered the following:

- EH#1 Memorandum to all personnel re Policy #22 dated January 25, 2002
- EH#2 Memorandum to all personnel re accidents involving department apparatus dated August 29, 2002
- EH#3 Letter to the Grievor from Deputy Chief Haley dated November 19, 2003
- EH#4 E-mail correspondence dated November 2003
- EH#5 Letter from Eric Haley to Director Dwyer dated November 26, 2003
- EH#6 Letter from Eric Haley to the Grievor dated December 3, 2003

Paul Reddy who entered the following:

- PR#1 E-mail from Paul Reddy to Stephen O'Brien dated May 2005

Peter Tucker who entered the following:

- PT#1 Letter to Director Dwyer from Peter Tucker dated June 7, 2005
- PT#2 Operational Guideline replacing Policy # 22 Backing Appliances
- PT#3 Letter from Deputy Chief Tucker to Fire Fighter John Blackwood dated March 17, 2006
- PT#4 Excerpt from Corporate and Operational Policy Manual being Policy 03-10-14 re Vehicle Reversing Policy
- PT#5 St. John's Regional Fire Department Policy and Operational Guidelines title 07-01-02 - Backing Appliances

Michael Dwyer

Greg Parsons

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John Blackwood

Randy Hammond – the Grievor, who entered the following:

- RH#1 Letter from the Grievor to Deputy Chief Tucker undated
- RH#2 Letter to T. Lawlor, Fire Chief, from the Grievor dated 94-12-16
- RH#3 Letter from Thomas A. Lawlor, Fire Chief, to the Grievor dated January 9, 1995

Employer rebuttal evidence Gerard Hickey

THE FACTS

The Grievor is a Lieutenant with the St. John's Fire Department and, at the relevant time, was stationed at the Kent's Pond Fire Station in St. John's. He has been with the Department since 1981 and has been a paramedic since 1987. Among his accomplishments are that he is a competent high angle rescue person and is an instructor in this discipline. He is a member of the helicopter rescue team and an instructor for that discipline. He is a member of the cold water rescue team, is involved in confined space rescue, hazardous materials as well as an instructor in first aid, CPR, defibrillators, and oxygen usage. He is also involved in occupational health and safety. He has completed all the necessary preliminaries to qualify for the rank of captain.

He and several of his co-workers began employment with the Fire Department on exactly the same day and have exactly the same seniority. The ranking of seniority however, among these individuals was determined by a draw at the time of hiring. As a result of the incident involved in this matter, two of these individuals have passed him on the seniority list. There are promotions to the position of Captain imminent and as a result of the penalty imposed upon the Grievor in this incident; he has dropped to the bottom of the seniority list for this particular group of individuals seeking promotion to Captain. All of these individuals have otherwise qualified for promotion and the timing of who will get the promotion will be decided upon seniority of the individuals in this group. There will likely be several promotions to this group later in the year 2008

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depending upon when positions are vacated. When new individuals will be promoted is not entirely clear. What is clear, is that the Grievor will be later than he otherwise would have been in receiving the promotion and will accordingly not be paid the increased salary for the period of delay.

The incident giving rise to the subject discipline occurred on May 14, 2005 when the Grievor was backing an emergency vehicle or "Rescue Apparatus" into the Kent's Pond Fire Station.

The doorway through which the vehicle was being driven by the Grievor was situated such that the vehicle had to be turned slightly upon entering in order to avoid hitting other rescue apparatus which were in the bay at the time. The sharpness of the turn which had to be made is, to a large degree, dictated by whatever other equipment is in the garage at the time and the placement of that equipment on the garage floor. At the time of the incident the employer had policies in place with respect to the operation of its rescue apparatus, one of which was Policy #22 which read at the time in part, as follows:

"...whenever appliances are backing up, the officer and/or driver shall have a person detailed to guide the driver.

The driver shall not let the truck move until the spotter is in full view"

There have been several incidents where appliances had been operated contrary to this policy and several memoranda had been circulated to the employees. They reminded them of the policy and advised that several accidents could have been avoided had this policy been followed.

At the time of the incident the Grievor, who was acting as a paramedic at the time and returning from a call, was backing a rescue apparatus into the bay door. Fire Lieutenant Paul Reddy was in place at the left rear of the vehicle acting as spotter for the Grievor. Lieutenant Reddy is a very experienced employee who had served the employer for in excess of 30 years prior to his retirement in January 2007. The Grievor was driving

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a “box truck” apparatus at the time which is larger than a “cube van”. There are a number of “light bars” all around the perimeter of this vehicle. On the rear of the vehicle, on each side, near the top of the vehicle, are red reflective lenses.

Lieutenant Reddy, acting as spotter, motioned to the Grievor to back in and he did, as he had done hundreds of times before. The Grievor said that he glanced at the mirror on the passenger side to be sure that he was clearing the building. He looked at Lieutenant Reddy who was just putting his hand up to indicate for the Grievor to stop. The Grievor asked Lieutenant Reddy what was wrong and he was informed that he had touched the building with the truck. Two of the lenses at the top rear of the truck had touched the weather stripping on the building. The estimated cost of the lenses’ replacement was less than \$20 for materials. The Grievor did not see or feel the vehicle strike. There was no damage done to the vehicle other than the lenses. There was no damage done to the building. The Grievor stopped as soon as he was told by Lieutenant Reddy.

The Grievor testified that he had always looked in both mirrors. The first time anyone ever told him that he should not look in the passenger mirror was after the accident in a meeting that was held with Ron Penney of the City of St. John’s, Fire Department Officials Peter Tucker, Michael Dwyer, Kevin Breen and union representative Nurse.

Lieutenant Reddy’s version of these events at the hearing is similar to that of the Grievor. These were the only two people to actually be involved in or witness this incident. Lieutenant Reddy testified that he stood to the left rear side of the truck to ensure that the Grievor saw him. He glanced to the right to ensure that he would not hit the building. By that time the Grievor had hit the building with the top right of the truck. He had hit the bay entrance of the door. By the time Lieutenant Reddy said stop, the Grievor had already hit the building. He said that the Grievor was going at a very low speed.

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Lieutenant Reddy said that he saw the Grievor in the rear view mirror and had beckoned him with one hand to back up. Lieutenant Reddy had to back up himself to see if the Grievor would hit the wall. From his vantage point he could not see the lens that ultimately hit the building but could see the back of the truck. Lieutenant Reddy thought that the Grievor would clear the lens.

On May 14, 2005 at 8:02 p.m. Fire Lieutenant Reddy reported via e-mail to Stephen O'Brien who forwarded it to Peter Tucker, the following:

“Sir:

At approximately 19:30 hrs on the above date F/F Hammond while backing up the Rescue struck the side of the door. The resulting impact broke the two lenses on the top right side of the truck. Unfortunately he failed to see me as (sic.) his spotter.

Paul Reddy
Fire Lieutenant”

The employer provides no specific training in either driving these vehicles, other than what is passed on by co-workers, nor in how to be a spotter. There is, however, training provided by the employer in the operation of pumps and ladders.

The Grievor had had previous incidents recorded in his personnel file which involved backing up a vehicle. The first of these was a case in which the Grievor had not used a spotter to guide him into the station. There was a person in his rear view mirror whom the Grievor assumed was his spotter but who actually turned out not to be. That incident had happened in November 2003.

The previous incident occurred in 1994. The Grievor touched the rescue vehicle he was operating off the side of the building when backing in. There was no damage to the building. In that case the spotter had said stop but the Grievor had already been stopped when the instruction was given.

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On May 25, 2005, Deputy Chief of Operations, Peter Tucker, wrote to the Grievor in reference to the subject accident and stated in part as follows:

“It has been brought to my attention that on 2005-05-14 you may or may not have acted inappropriately when allegedly you, as operator of the Kent’s Pond Rescue, neglected to follow Departmental Policy and have a spotter in full view while backing into Kent’s Pond Station. As a result of this action, damage was caused to the Kent’s Pond Rescue.

As per Article 28:04 of the current Collective Agreement, you are hereby being notified that I am investigating the incident in question. Based upon my findings, the matter may either be disposed of without any further action or may be subject to disciplinary action under either the current Collective Agreement or the *St. John’s Fire Department by-Law*.

Upon conclusion of this investigation, you will be notified of our findings and advised of the action that the Department deems necessary. However, should you wish to discuss this matter further, please feel free to contact me at your convenience....”

On June 7, 2005 Deputy Chief of Operations Tucker wrote to Mr. Michael J. Dwyer the Director of Regional Fire Services (Fire Chief), referring to the same incident in the following terms:

“I have reviewed all of the information provided to me concerning the circumstances of the above-noted incident including interviews with Acting Fire Lieutenant Randy Hammond and Fire Lieutenant Paul Reddy, their subsequent written explanations and Accident Report. Fire Lieutenant Reddy was Officer-in-Charge of Kent’s Pond Rescue at the time of the incident.

Based upon all the information provided, I have concluded that Acting Fire Lieutenant Hammond did not act in a responsible manner during this incident and neglected to follow proper procedure as outlined in Policy #22, *Backing Appliances*, by moving the vehicle while the spotter was not in full view. As a result, Acting Fire Lieutenant Hammond did have an accident

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by hitting another object, but most important, such action under different circumstances could have the potential to cause injury to another member.

Furthermore, previous notices dated January 25, 2002 and August 29, 2002, reinforcing Policy #22 were also not adhered to during this incident.

Upon reviewing Acting Fire Lieutenant Hammond's personnel file, it was found that he had received a *Letter of Reprimand* for a similar backing accident which occurred on November 5, 2003. Given that it is Acting Fire Lieutenant Hammond's second accident of this nature, it is my recommendation that he is given a one shift suspension without pay and that a *Letter of Suspension* is placed on his file..."

On June 10, 2005 the Grievor was presented with a Letter of Reprimand signed by Deputy Chief of Operations, Peter Tucker which reads in part as follows:

"This refers to the above-referenced incident dated May 14, 2005 in which you, as Driver/Operator of Kent's Pond Rescue, did not follow Policy #22 guidelines and moved the truck when the spotter was not in full view while backing in Rescue Apparatus. The result of this action by you was damage caused to the Rescue Apparatus.

I have reviewed all of the information provided me concerning the circumstances of this incident, including a statement from your spotter, Fire Lieutenant Reddy, our conversation and your subsequent written explanation. As noted in your explanation of the incident, by checking the passenger side mirror with the vehicle still in motion you failed to keep the spotter in view through the driver's side mirror while backing into the station.

The conclusions I have drawn concerning this incident, based on the referenced information, are that:

- You did not act in a responsible manner and proceeded to back the Rescue into the station without keeping the spotter in full view.
- The fact that you did not adhere to the established guidelines of Policy #22 and the subsequent notices reinforcing this policy is not an acceptable or expected action



on your behalf.

- You acted in a negligent manner by continuing to back the Rescue into the station without having the spotter in full view at all times.

- Your personnel file contains a *Letter of Reprimand* from a similar backing accident which occurred on November 5, 2003, where your negligence as driver/operator resulted in vehicle and station damage.

Given that you failed to follow the guidelines established in Policy #22, despite having previously received a written *Letter of Reprimand* of a similar incident, you have been suspended for one shift without pay commencing at 08:00 hours June 16, 2005 to 08:00 hours June 17, 2005. A *Letter of Suspension* will be placed on your file as per Article 20 – *Discipline* of the current Collective Agreement.

You are further reminded that under the current Collective Agreement, there is a grievance procedure in place which you may avail of if you feel the matter has been dealt with inappropriately. You are further reminded that any further action by you concerning this type of matter, or any other related matter, will not be dealt with in the same manner but will be dealt with more severely....”

During the course of the Hearing the Union entered into evidence a letter addressed to Fire Fighter John Blackwood of the Mount Pearl Fire Station dated March 17, 2006 which reads in part as follows:

“...Re: Accident – 2006-02-27

Thank you for the accident report and for discussing this accident with us. However, in the future to avoid this type of accident from occurring, I would suggest that a safe distance needs to be kept between the vehicle and both sides of the door when backing into the station. Your explanation is acceptable since you had a spotter in place.

Please review the City’s Policy #03-10-14 *Vehicle Reversing Policy*, on the intranet. Your anticipated co-operation is

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appreciated.

Yours truly,

“signed”

Peter Tucker,
Deputy Chief of Operations...”

THE GRIEVANCE

On June 11, 2005 the union grieved the suspension meted out to the Grievor in the following terms:

“Please be advised that Local 1075 St. John’s Fire Fighters Association wishes to grieve on behalf of Acting Lieutenant Hammond, the above mentioned action referenced in a letter dated June 10, 2005. I refer to Article 28:01 of the Agreement and await your reply.

In light of the financial impact that this action may have on Mr. Hammond and his family the association further request that this suspension be deferred until the matter can be disposed of through grievance procedure process of the agreement.”

A letter addressed to the President of the Union dated July 21, 2005 the Chief Commissioner and City Solicitor wrote in the following terms:

“The Union has grieved the suspension given to Firefighter Randy Hammond for moving a Rescue vehicle while a spotter was not in full view. As a result, there was minor damage to the vehicle.

Policy #22 states: *‘Whenever appliances are backing up, the Officer and/or driver shall have a person detailed to guide the driver. The driver shall not let the truck move until the spotter is in full view’*

Firefighter Hammond’s statement confirms that he lost sight of the spotter when he checked his passenger side rearview mirror. At that point he ought to have stopped.



There is a similar incident noted in his file.

As a result, I uphold the suspension.”

THE EMPLOYER’S POSITION

The employer argued that, in accordance with Article 5 of the Collective Agreement, management had the right to make and enforce reasonable rules and regulations to be observed by the employees, provided that such rules and regulations are not contrary to the terms of the Collective Agreement. It was the employer’s view that the policy in this case does not conflict with any provisions of the Collective Agreement.

The employer noted that there was nothing objectionable in Policy #22 and the fact that it was revised does not necessarily imply that the old rule was unclear.

The Policy which management had instituted was in line with other policies of the City of St. John’s and not at all objectionable.

The employer stressed that when safety was a concern, as it is in this case, any policy which increases the level of safety must, as a matter of fact, be a reasonable one. In this case an employer was driven by safety concerns and its policy in that regard should be upheld.

The employer cited the case of Re Lumber & Saw Mill Workers’ Union Loc. 2537 and KVP Co. Ltd., (1965), 16 L.A.C. 73 and highlighted the similarities between the principles involved in this case and the principles enunciated in that case.

The employer also stressed the deterrent value of this case so as to set an example for all the work force that these policies respecting safety must be adhered to at the risk of severe penalties for disobedience.

The employer requested that the grievance be denied.

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THE UNION'S POSITION

The union argued that it disagreed completely with the suspension because in its view the Grievor did not do anything wrong. The union noted that the burden is upon the employer to justify the discipline which it has taken and the witnesses put forth by the employer did not establish a case that the Grievor had done anything wrong.

A review of the evidence was that Lieutenant Reddy said that by the time he told the Grievor to stop the Grievor had already struck the building. He therefore did not tell the Grievor to stop in time to avoid the damage.

The union noted, citing Canadian Labour Arbitration by Messrs. Brown & Beatty, that the burden of proof is squarely with the employer to establish firstly, whether or not anything has been done, secondly, whether what has been done warrants discipline and, thirdly, whether the discipline imposed is excessive in all the circumstances. In this particular case, what happened was an accident that did not come about as a result of any breach of policy by the Grievor. If the Grievor can not be found to be responsible for what happened, then it is improper to impose discipline upon him.

The employer's witnesses implied that by checking the passenger mirror the Grievor took his eyes off the spotter. There is no provision in Policy #22 dealing with such an issue. The employer's Notices which had been sent to all employees dealt with the issue of backing up with no spotter in place. Here it is clear that the Grievor did indeed have a spotter in place.

In a similar case involving Firefighter Blackwood he was referred to City Policy #03-10-14 dealing with vehicle reversing policy. That Policy was not violated by the Grievor. In fact, that Policy stipulates that both rear view mirrors are to be used as the vehicle is being reversed.

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In the event that the board accepts that a policy has been breached by the Grievor, reference should then be made to the KVP case for a review of the six items required for a unilateral policy of the employer to be upheld. One of these items is the consistency of enforcement. When one looks at the treatment given to Fire Fighter Blackwood, it is clear that the employer has treated this Grievor differently.

The union pointed out that the new Policy is clear on certain issues which are unclear in the previous Policy #22 which was in effect at the time when the subject incident occurred. The union pointed out that the revision is what the employer meant to say originally not what they did say.

A close reading of the old policy would lead one to the conclusion that it was neither clear nor unequivocal. Policy #22 is about having a spotter in place. The Grievor had complied with that requirement. The union concluded that there was no basis for a discipline under the criteria set forth in the KVP case. This was a pure accident which should not have attracted any discipline.

The union pointed out that, in the previous incidents, the Grievor was disciplined for not having used a spotter. He freely acknowledged that that was the case and accepted the discipline meted out. Such incidents can be removed from an employees file within one year. The Grievor was unaware of this provision. In order to have it removed the employee must request same. If he had so requested, there would be no previous record of discipline on his file and there therefore would have been no progressive discipline as his file would show this as his first incident.

The union pointed out the severity of this particular discipline on the Grievor in that there is a potential loss of six to seven thousand dollars and a blemish on his record for a very minor fraction. As a result, the grievance must be upheld.

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FINDINGS AND CONSIDERATIONS

The starting point in assessing whether these facts justify the actions taken by the employer in this case is as set forth in Wm. Scott & Co. Ltd. and Cdn. Food & Allied Workers Union, Loc. P – 162 [1977] 1 Can. L.R.B.R. 1 (Weiler) where, at page 5 is stated:

“...arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer’s decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?”

It should be noted that the quotation cited above deals with a case involving discharge. However, the principles involved are the same in any matter of discipline. The initial stage of the inquiry is whether or not the individual to whom discipline has been applied has actually done the acts for which they have been accused.

At the outset, it is important to determine exactly what it is that the Grievor has been disciplined for allegedly doing. For that we look to the Letter of Reprimand which reads in the summary portion:

“I have reviewed all of the information provided me concerning the circumstances of this incident, including a statement from your spotter, Fire Lieutenant Reddy, our conversation and your subsequent written explanation. As noted in your explanation of the incident, by checking the passenger side mirror with the vehicle still in motion you failed to keep the spotter in view through the driver’s side mirror while backing into the station.”

The Letter of Reprimand outlines a number of individual items which comprise the totality of this allegation. There is no real dispute about whether most of these



individual items actually occurred. There is no doubt that the Grievor did have a spotter in place; that he did back up; that he did look at his passenger side mirror and that he did hit the top of the vehicle on the building and break a couple of lenses. The value of the damages is not in dispute. In one sense of the Wm. Scott case therefore there is no disagreement that the events did happen. It should be borne in mind, however, that it is the breach of the Policy #22 for which the discipline was dispensed. The allegation is, in its essence, that looking in the passenger side rear-view mirror amounts to letting the truck move while the spotter was not in full view.

In this case there is somewhat of a contradiction in the factual situation. As noted above, only two individuals were present and either witnessed or experienced the events giving rise to the discipline. Those individuals are the Grievor and Fire Lieutenant Reddy. On May 14, 2005, Fire Lieutenant Reddy explained in his e-mail to Stephen O'Brien that the Grievor did indeed while backing up the rescue truck strike the side of the door and that two lenses were broken as a result. He then goes on to say "unfortunately he failed to see me as his spotter".

This is somewhat different than the evidence which Fire Lieutenant Reddy gave at the hearing of the grievance. At that hearing Mr. Reddy stated that he was the spotter at the left rear side of the truck in order to ensure that the Grievor saw him. Fire Lieutenant Reddy then said that he glanced to his right to ensure that the Grievor would not hit the building. He continued "by that time he had hit the building on the right top of the truck. He hit the bay entrance of the door." He goes on further to say "by the time I said stop, he'd already hit."

The report given to Deputy Chief Tucker by the Grievor reads in part:

"...On May 14th / 2005 at approx. 19:30 hrs when returning from an emergency call I stopped on the ramp and waited for the door to go fully up and my spotter, F/L Paul Reddy, to be in full view before proceeding to back in the station. While backing up I was checking my passenger side rearview mirror when I rechecked my drivers side mirror I saw my spotter indicating for me to stop.



Upon stopping I got out and Lt. Reddy pointed out that I had touched the passenger side upper rear emergency lens off the side of the door opening resulting in damage to these lens (sic.)....”

The e-mail would seem to suggest that the Grievor had been negligent in not seeing Fire Lieutenant Reddy at the rear of his vehicle but, the viva voce evidence at the hearing is different. He acknowledges that the Grievor did see him. He also acknowledges that Fire Lieutenant Reddy, as spotter, took his eyes off the Grievor and looked at the right hand side of the vehicle to see if it would clear the door. This is exactly the same operation as the Grievor reported to have done when he looked in his passenger side mirror to determine his proximity to the door. It was around the time that the Grievor was doing this that the vehicle did hit the door and shortly after that Fire Lieutenant Reddy signalled to the Grievor to stop. When the Grievor was signalled to stop by his spotter he did. However, by that time, the damage had been done.

As noted above, the Grievor did indeed have a person detailed to guide him as spotter, Fire Lieutenant Reddy. Was the spotter in full view at the time of the incident, notwithstanding that the Grievor may have momentarily averted his eyes to the passenger side mirror to determine proximity to the building?

With due respect to the conclusion drawn by Deputy Chief Tucker, the Policy #22 does not say that the operator must “keep the spotter in view through the driver’s side mirror while backing into the station.” It says “the driver shall not let the vehicle move *until the spotter is in full view.*” (Italics added). The policy implies that there should be a spotter behind the vehicle prior to it being moved. This is the common sense meaning of the words “until the spotter is in full view”. The spotter in this case was in full view. Firefighter Hammond testified that it was his experience that he always checked his passenger side mirror as a safety feature. It would seem that if the Grievor had stopped the vehicle prior to checking the rear view passenger mirror, the accident may have been avoided. This however, cannot be said with certainty because it is not clear from the evidence whether the vehicle hit the building while the Grievor was looking in the passenger side mirror or before he looked. The Grievor testified that he did not feel the truck hit the building. It is not clear whether Lieutenant Reddy actually saw the vehicle

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hit the building or whether it had hit by the time he looked.

As well, the employer's response in a similar incident involving Firefighter John Blackwood which was close in time to the subject incident is curious.

Firefighter Blackwood, in March, 2006, was involved in an accident which was similar to that of the Grievor in the subject case. The letter which was sent to Firefighter Blackwood and signed by Deputy Chief Tucker reads as follows:

“Thank you for the accident report and for discussing this accident with us. However, in the future to avoid this type of accident from occurring, I would suggest that a safe distance needs to be kept between the vehicle and both sides of the door when backing in to the Station. Your explanation is acceptable since you had a spotter in place.

Please review the City's Policy # 03-10-14, *Vehicle Reversing Policy*, on the intranet. Your anticipated cooperation is appreciated...”

Reference to the Vehicle Reversing Policy referred to in that letter to Firefighter Blackwood states under Part B of “Rules for Reversing” the following:

“5. Check both sides as you reverse (use both rearview mirrors as you reverse to see if something has moved into your blind spot)”.

It would seem that the operations employed by the Grievor in this case are exactly as those stipulated in the policy statement on the rules for reversing by the City and as suggested to Firefighter Blackwood.

Based upon the foregoing, we are of the view that it has not been proven that the Grievor was in breach of the Policy #22 of the employer. The accident, although unfortunate, has not been proven to have been caused by the breach of any policy. It may well be that in this situation two spotters were required. The spotter who is directly behind the driver's side mirror was not in a position to see the upper right hand side of the vehicle as it approached the garage entrance. A spotter on that side who could



communicate with the spotter on the driver side may have prevented the accident from happening. The Grievor stopping while looking in the passenger mirror may have had the same effect although there is no requirement in the wording of the policy which would require it nor has it been established conclusively that the accident happened at that exact time. In any event, the Grievor responded appropriately to the signals of his spotter and no liability for breach of such policy can therefore be assigned to him.

We find therefore, that on the first branch of the test posed by arbitrator Weiler in the Wm. Scott and Co. Ltd. case, *supra.*, the employer was not justified in its discipline of the Grievor. In the event that this board is found to be wrong in its finding on the first question we will review the second issue as to the excessiveness of the discipline meted out to the Grievor.

The extent of damage to the vehicle in this instance was relatively minor with a cost of replacement for the lenses which were broken to be somewhat less than \$20 with attendant labour cost for replacement; by all accounts, a rather insignificant amount. That however, should not diminish the seriousness of events such as this. This incident involves only a minor breakage of a lens. The backing up of a motor vehicle is always a dangerous exercise and should be carried out with the utmost care and attention. In spite of the best efforts on occasion, accidents do happen and it would seem that that in fact is the case in this situation.

The penalty which was imposed upon the Grievor was particularly harsh on the Grievor in light of the relative seniority of him and his fellow workers who were in line for upcoming promotions. As noted, this could amount to several thousand dollars in addition to the one shift penalty which the Grievor was already assessed. Given that the Fire Department employees have extended hours per shift this is indeed a punitive penalty in itself.

The Grievor's situation was exacerbated by his previous record which showed two events which were somewhat similar in nature to the current event. It was noted,

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however, these incidents had happened quite some time ago and provision is made in the collective agreement for the removal of these items from the personnel file upon a request being made in writing by the Grievor. (See Article 28.05 (4) of the collective agreement). In this case, the Grievor was unaware of that process and as a result the two incidents remained on his file and were not removed. No mention was made in the Letter of Discipline of the older incident however, the November 2003 incident was used as a source of rather harsher discipline than would otherwise have been the case. It may well explain the difference in treatment given to the Grievor in this particular case as compared to Firefighter Blackwood who was involved in an incident which, on the face of it at least, seemed similar to that of the Grievor. In this regard the situation is somewhat similar to Re. Smoky Lake No. 13 (County) and C.U.P.E.. Loc. 1461 (1989), 7 L.A.C. (4th) 353 (Power, Malthouse & Asbell). In that case the Grievor's employment was terminated for not having maintained his equipment in proper repair and having no regard or respect for the equipment. That collective agreement did not contain a "forgiveness" clause whereby the employees' files could be purged of disciplinary action after a stipulated period of time. The arbitration board at page 358 stated as follows:

"On the facts before us, termination was not an appropriate penalty. If for the sake of argument we view this as being strong disciplinary action taken because this was the grievor's third infraction and was considered by management to constitute a culminating incident - - an assumption which of itself is subject to question, given Mr. Sadoway's frank testimony that although management knew it was his third offence, no review of the nature and magnitude of his prior offences was undertaken when the decision to issue the "third notice" was made - - 21 months elapsed between the time he was given letters of warning for his prior sins and the date of his discharge. The collective agreement does not contain a forgiveness clause which would cause employee's files to be vetted of disciplinary action after the passage of a stipulated period of time, but offences which occurred of just shy of two years prior to the subject offence are rather stale-dated..."


In light of all of the foregoing, it is our view that the penalty given to Lieutenant Hammond in this case was too severe in all the circumstances. If we had been satisfied that the Grievor was at fault for this incident as a result of a breach of Policy #22 we would have recommended the placing of a letter of discipline in his file with a warning

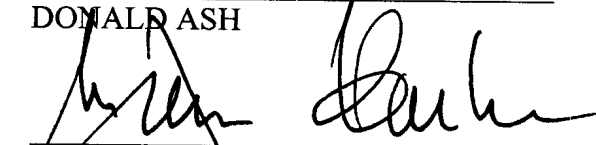


that future transgressions of departmental policy would lead to more severe discipline. As we could not reach that conclusion we must uphold the grievance and agree that the Grievor be reinstated to his previous position on the seniority list without loss of pay or benefits.

DATED at St. John's, Newfoundland and Labrador this ^{6th} day of February, 2008.

Mr. Williams Dissents
GEOFFREY WILLIAMS


DONALD ASH


W. JOHN CLARKE