

In the Matter of the Arbitration

between International Association of Firefighters, Local 27
("Union")

and

The City of Seattle Fire Department ("Department").

Findings,
Discussion and
Award.

Case Numbers:	Arbitrator's PC1.
Representing the City:	Peter S. Holmes, City Attorney, by Molly Daily and Andrea Scheele, Assistant City Attorneys, 701 Fifth Avenue, Suite 2050, Seattle, WA 98104-7098.
Representing the Union:	Michael A. Duchemin, 637 NE Haugen Street, Poulsbo, WA 98370.
Arbitrator:	Howell L. Lankford, P.O. Box 22331, Milwaukie, OR 97269-0331.
Hearing held:	In the offices of the Seattle City Attorney on April 28-30 and May 3-6, 11, and 13, 2015.
Witnesses for the City:	Gregory Dean, Russ Perisho, Sean Waite, Bryant Fitzgerald, Frank D. Poblocki, Victoria Schoenberg, Gregory Arthur Roberts, James Ritter, Andrew Lofstedt, Jennifer Southworth, Kevin Stewart, Sheila Kelly, Timothy Harris, Hugh Steven Banfield, Joseph Everett
Witnesses for the Union:	Warren Powell Lisenby, Michael Petrone, Greg Showmake, and Robert Howell.
Pre-hearing argument received:	From both parties by email on July 31, 2015.
Date of this award:	August 27, 2015.

This is a discharge dispute arising from the termination of Seattle Firefighter Robert Howell who was involved in a March 15, 2014 altercation with a group of homeless individuals in Occidental Park, not far from the Seattle Fire Department headquarters. The parties stipulate that the issue presented in arbitration is: Was there just cause for the termination of Robert Howell, and if not, what is the appropriate remedy? The disagreement between the parties focuses on whether the grievant was an instigator or a victim of the altercation and, in any event, whether his termination was disproportionate and was an unreasonable disciplinary consequence in the light of the Department's response to prior similar situations. There are no preliminary issues of substantive or procedural arbitrability, and the parties agree that the burden is on the City to establish just cause for the discharge. They disagree about the proper measure of that burden, and that dispute will be addressed below. The hearing was orderly. Each party had the opportunity to present evidence, to call and to cross examine witnesses, and to argue the case. Both parties filed timely post-hearing briefs, which have been carefully considered.

FACTUAL CONTEXT

Mr. Howell has been a Seattle Firefighter for over seventeen years. The Department encompasses 233 stations and about 1,100 employees. An EMT license is a minimum qualification for Firefighter, and about 80% of the Department's responses are now emergency medical and about 24% involve advanced life support. In Seattle's downtown core, the majority of emergency medical responses involve the homeless population. That makes the Fire Department a crucial part of the support system for the homeless population; and relations between the Department and the homeless are generally quite good. Much of Mr. Howell's seventeen years with the Department has been at downtown core area stations.

Occidental Park, where the altercation took place, is a block square urban park in the Pioneer Square area of Seattle's downtown core. The park is on a major pedestrian way connecting the two large sports stadiums with the heart of downtown Seattle. The extended area has a large number of bars and restaurants, which are particularly busy just before and just after sporting events at the stadiums. The park is also frequented by tourists, and—particularly in the middle of the day—by a large population of office workers. Perhaps because of the park's proximity to Fire Department Headquarters, the park is also the site of the City's Memorial to Fallen Firefighters.

Seattle has a sizeable homeless population. The most recent overnight census was conducted on January 25, 2015, in the early morning hours between 02:00 and 03:00, and counted 3,772 sleeping outside in January in addition to the approximately 6,000 in emergency shelters. That population appears to be growing: That unsheltered census showed about a 21% increase in the unsheltered population since January 2014. Drug addiction, mental illness, and criminal history are three of the leading causes of homelessness in Seattle, along with simply having been "run over by life too many times" (quoting a long-time homeless advocate who appeared as a witness). Not surprisingly, some of the homeless commonly prey on others; but virtually all are medically uninsured and dependent on the Department's EMT services.

The area immediately around Occidental Park includes both middle and low income housing, but it also includes several homeless centers. Seattle's largest homeless center and nighttime

shelter, the Downtown Emergency Service Center (DESC), is a couple of blocks away. DESC focuses on the mentally ill street population who are particularly problematic for many other shelters. The usual policy for the “nighttime” shelters is that residents are put out about 06:00 and not allowed back in until about 18:00. Those basic policies and demographics explain the average of six to 25 homeless who may be found in Occidental Park throughout the day in addition to the flow of tourists, office workers and, sometimes, sports fans.

This case arised from events occurring on Saturday evening, March 15, 2014, in the wake of a Seattle Sounders game at Centurylink Stadium. Mr. Howell had bought a ticket for his daughter, but she turned out to be unavailable, so he called around in search of a companion for the spare ticket, and Mr. Bullene accepted the offer. Mr. Bullene and Mr. Howell had once shared a shift assignment, but were not close friends. Mr. Bullene brought along his domestic associate, Ms. Jarvinen, intending to buy her a single ticket. The three of them began the afternoon with a visit to Temple Billiards, near the stadium, where Mr. Howell had a couple IPAs and some french fries. He had not otherwise eaten that day. In the stadium, Ms. Jarvinen’s single ticket meant that the three were not seated together, so they watched the game on video in the stadium restaurant, and Mr. Howell had two more IPAs. They left before the end of the game and walked to Sluggers, another nearby establishment, and Mr. Howell had two more IPAs. Sluggers got quite crowded and noisy as the game wound down, and the three left for McCoy’s Firehouse to get something to eat. Mr. Howell was hungry and was quite feeling the effects of the alcohol by that time and needed to take steps to prepare to drive himself home.

The route from Sluggers to McCoy’s passed through Occidental Park. As they crossed Main Street, headed north to the east edge of the park, the three came across homeless people on or near the Fallen Firemen Memorial. The Memorial includes several bronze firefighter figures and a series of abstract slabs, one of which is about bench height. It is quite common for park users— tourists, office workers, or homeless—to sit on that part of the Memorial, and not at all uncommon for homeless to sleep on or under the nearly horizontal slab in order to get slightly out of the weather.

Unbeknownst to Mr. Howell and Mr. Bullene, one of the people on or near the Memorial was Mr. Cassidy, one of the area’s homeless, who had entered the nearby J&M café a couple of hours before the Sounders game and had a couple beers, a couple glasses of wine, and a great deal of food. He eventually refused to pay the \$70-\$80 check and became quite disorderly. When he began yelling things like, “I’m going to kill you,” “I’m going to stab you,” and “I’m going to kill you all,” the manager finally restrained him over the bar while waiting for the police. The police never showed up in response to the manager’s 911 call, and Mr. Cassidy was allowed to leave.

There is no dispute that Mr. Howell took sharp vocal exception to what he saw at the Memorial as he approached. Mr. Howell agrees that he yelled at the group around the Memorial to “knock the fuck off” (Tr. 1275); and he also yelled something about “my firefighting brothers;” and there is no dispute that a general altercation followed and grew after that initial outburst. That altercation was constantly vocal and sometimes physical, and neither the vocal nor the physical aspects were quite continuous but ceased and began again more than once. The first part began quite near the Memorial itself and involved primarily Mr. Howell, Mr. Bullene, and some park denizens. The second part did not significantly involve Mr. Howell but involved Mr. Bullene and

Mr. Cassidy and a walking stick. The third part involved Mr. Howell, Mr. Bullene and Ms. Jarvinen when they returned to the park after having exited it; and the final part, just outside the park, involved only Mr. Bullene, Ms. Jarvinen and Mr. Cassidy and ended with Mr. Cassidy stabbing Mr. Bullene.¹ Fairly early in these events, some of the denizens of the park stripped down to their undershirts in preparation for a fight.

There are no surveillance cameras in Occidental Park, and the details of the altercation are sharply disputed. That dispute—addressed in detail below—is the primary focus of this case. But there is no dispute that at the end of the altercation(s) Mr. Howell, Mr. Bullene, and at least three homeless people had been struck or kicked and Mr. Cassidy had stabbed Mr. Bullene. Several passersby made emergency 911 calls once the altercation was underway and several police cars eventually responded. Mr. Bullene was taken from the scene in an ambulance and he and Ms. Jarvinen were arrested at the hospital. Mr. Howell was arrested at the scene. All those arrests were for assault.

The Fire Chief was informed that a firefighter was being transferred to the emergency room. He told the Mayor that it appeared that two firefighters had been attacked. The Chief visited Mr. Bullene in the ER and learned that Mr. Howell was under arrest and that a police officer was attending Mr. Bullene.

The Seattle press—TV, radio, print, and internet—picked up the story immediately, apparently taking the arrest records and interviews with the park population as gospel, and trumpeted throughout the day Sunday as ‘drunken firefighters attack homeless.’ The Chief responded to that damaging press coverage on Monday afternoon, without having spoken to the firefighters involved, by offering an immediate broadcast apology.² The media, in turn, eliminated most of the “ifs” from the Chief’s statement—e.g., “...if it’s accurate...”—and reported that “The Chief called the firefighters’ actions egregious and said that they would be held accountable.” The Chief also called six separate homeless advocacy organizations and personally apologized. The Mayor’s office, as well as the Chief’s office, heard the resulting public outcry and decided to hire a private investigator (recommended by the City Attorney’s office). Meanwhile, the Chief and IAFF representatives appeared later in the month at Stand for Compassion, an event in Pioneer Square focusing on Seattle’s homeless population and stressing the importance of community.

¹This separation is artificial. One of the 911 callers, in his criminal trial testimony, described the timing shown in this record: “Q: *** if we call the incident at the memorial with the guy with the Sounders Jacket...number one, the incident with the stick is number two. *** Would that be something you could follow if I asked questions that way? A: Yes. I can follow it though I would, everything was happening with those first two incidents so quickly and it was all happening, as I said...it all felt like one big fight. It didn’t feel like two separate things.” [Cr. Tr. 349:16-27. Banfield.]

²Some of those broadcasts are in the record. The Chief’s words were much more carefully chosen than were the words of the broadcasters, which reflected no real doubt that Mr. Howell had been the aggressor or that the Chief was apologizing specifically for the actions of the firefighters. In a letter drafted by the Mayor’s office, the Chief apologized for “the conduct that occurred” on March 15.

There was significant adverse community reaction to the news coverage. Even support service employees of the Department had to endure verbal attacks on the way to and from work in the Occidental Park Headquarters area.

The King County Prosecutor's office investigated the criminal charges and declined to prosecute Mr. Howell, Mr. Bullene or Ms. Jarvinen for felony assault particularly involving Mr. Cassidy. That decision reflected Mr. Cassidy's disinclination to testify; and that disinclination may have had something to do with the fact that Mr. Cassidy was a convicted sex offender in Florida in 2008, released only in January, 2014; had failed to register as a sex offender; and was the subject of an active warrant in connection with a Grand Theft charge in San Diego.³ The other two most likely "homeless victims" of the altercation also had substantial criminal records—one had six prior Washington felony convictions—including a live arrest warrant for one and a recent third degree assault sentence for the other.

After the Pioneer Park incident, Mr. Howell promptly sought treatment for his apparent alcohol problem. He was admitted to an inpatient program in California, at his own expense, on March 20 and, according to his April 19 discharge letter, "attended 6 hours of psycho-educational guidance on substance abuse, addiction, co-occurring mental disorders, relapse prevention and sober living techniques; 21 hours of group therapy..., 11 weekly 12-step related meetings / panels / groups and 1.5–2 hours of individual therapy." Since his return to Seattle, he has had outpatient support.

After the County declined prosecution of the felony cases, the matter was referred to the Seattle City Attorney who proceeded against Mr. Howell, Mr. Bullene and Ms. Jarvinen on charges of misdemeanor assault and malicious harassment. A City malicious harassment ordinance creates protected classes of "*homelessness*, marital status, political ideology, age, or parental status." After eleven days of trial, ending on December 10, 2014, a jury found all three defendants not guilty.

Meanwhile, the Department had hired Russ Perisho as an independent investigator and had pressed ahead with its own investigation. He considered the several 911 recordings, the police car dashboard videos and interview recordings, the police reports, and the investigator's own interviews with many of the participants.⁴ On May 19, investigator Perisho submitted his final report with these Findings and Conclusions:

The SFD has been directly impacted by the March 15, 2014, incidents. The incidents were widely publicized in local newspaper and TV news reports, with a focus on fighting by the Fallen

³At one point during the police investigation, Mr. Cassidy seemed to want to cooperate, but when he could not be interviewed immediately that impulse faded. At one point he declared that his part of the altercation with Ms. Bullene might have been Mr. Cassidy's fault.

⁴It was not possible for the investigator to contact all of the homeless participants. Moreover, Ms. Jarvinen was under investigation for a possible felony charge during the early part of the investigation and had been actively charged with two misdemeanors during the latter part, and she declined to be interviewed.

Firefighters' Memorial between two off-duty firefighters and a group of homeless individuals. A frequent headline in the news stories was: "Two Seattle firefighters accused in attack on homeless." *** All this placed SFD in an extremely negative light. It must be concluded that the inevitable result of the March 15 incidents and related publicity was an undermining of respect for the SFD and its work with the homeless, making it more difficult for the SFD to fulfill its mission to minimize the loss of life and property resulting from fires, medical emergencies, and other disasters.

In addition, the investigation finds and concludes the following:

Robert Howell engaged in aggressive behavior – fighting – that foreseeably could have caused serious injury. He initiated harassing activity that could – and did – lead to an aggressive response. He was the aggressor in fighting – he punched, he kicked and he shoved. One of the witnesses who called 911 said in a statement to police that a homeless man lying on the ground said something that so enraged Howell that he leaned over, started swinging, and hit him. As the homeless man on the ground started to roll away, Howell kicked him. The first fighting incident was not a short-lived event. Howell and Bullene both engaged in a sustained, aggressive fight lasting eight minutes. Indeed, witnesses said that after the preliminary fighting the three (Howell, Bullene and Jarvinen) got away from the area of the fight – and then immediately returned for more involvement.

Howell made false statements to the 911 dispatcher and to police. He told the 911 dispatcher that a female had been assaulted by a black male. He told Officer Poblocki the same story. Yet, Bullene and Howell never suggested this happened in their interviews, and there are no facts to support Howell's statement. Howell told Officer Poblocki that he had been assaulted for no reason. This was not true. Howell told the investigator in his interview that he did not observe what happened to Bullene during the first fight, but he told police at the scene a different story, namely, that he could identify the individual who knocked Bullene to the ground. Further, Howell said in his interview that he did not know what Jarvinen was doing at the start of the fight. Given the various descriptions of what took place, it is not credible that Howell did not observe any aspect of Jarvinen's conduct during the first fight.

Howell's statements and conduct at the scene interfered with law enforcement activity. By making a false report about an assault, Howell caused SFD to search for an assailant who did not exist. As police officers investigated the fighting incidents, Howell refused to comply with reasonable police orders to stop talking with SFD personnel. (SFD personnel are expected to cooperate with criminal justice agencies (e.g., courts, police and prosecutors) concerning Department or City business.)

Howell misused his position as a Seattle firefighter at the scene of the incidents, effectively conveying to police that he expected to be treated with "professional courtesy." SFD employees are prohibited from using their official position for a purpose that is, or would appear to a reasonable person to be, primarily for the private benefit of themselves. (Howell had been disciplined in 2004 for similar off-duty behavior.) Howell attempted to convey to Officer Poblocki that Deputy Chief Woodbury was expecting a full investigation. Ignoring police orders

to remain quiet at the scene of the incidents while they investigated, Howell repeatedly sought to involve high-level SFD officials in his personal situation.

On July 8, almost two months after investigator Perisho had submitted his final report, the Department's Human Resources Director recommended Mr. Howell's termination on the basis of the Director's summary of the investigator's conclusions. The very next day, the Chief served Mr. Howell and Mr. Bullene with *Laudermill* notices of possible termination. Mr. Howell and his IAFF representative met with the Chief, and the Department then double checked some factual issues with investigator Perisho. The Chief then discharged Mr. Howell on August 6, effective on August 20. The charges specified in the notice of termination were the Human Resource Director's summary of the investigator's conclusions:

1. **Aggressive Fighting with Homeless Victims.** – Firefighter Howell engaged in aggressive fighting for eight minutes in Occidental Park. As the aggressor, he punched, kicked, shoved and screamed obscenities at his victims. After the initial altercation, he returned to engage in further fighting. It is unclear who initiated the second altercation, but Firefighter Howell's decision to return to Occidental Park resulted in continued aggressive fighting by Firefighter Howell with homeless citizens.
2. **Interference with Law Enforcement Investigation** – During the Seattle Police investigation, Firefighter Howell lied to Seattle Police Officer Frank Poblocki, stating that he and his companions had been attacked by a black male. This false statement led Seattle Police Officers to search the area for the assailant described by Firefighter Howell.

Firefighter Howell continued to engage Seattle Fire Department Deputy Chief Woodbury and Officer Poblocki in his false allegations. He then tried to engage Seattle Fire Department Battalion [Chiefs] Hansen and Richardson in his story until told to stop by Officer Poblocki who informed him that he was a suspect in the attack.
3. **Misuse of Position** – Firefighter Howell identified himself as a Seattle Firefighter to police and conveyed to them that he expected to be treated with "professional courtesy". SFD employees are prohibited from using their official position for their own private benefit.
4. **Negative Community Impact** – This misconduct caused a significant negative impact to the Seattle Fire Department's relationship with the community, and in particular, the relationship with the homeless community. The Fire Chief conducted a press conference to publicly apologize to the citizens of Seattle.

The Department terminated Mr. Bullene at the same time and for similar stated reasons. IAFF grieved both terminations but withdrew its grievance with respect to Mr. Bullene based on events during the period of the nine days of hearing. The Department's complaint to the Department of Health—relevant to Mr. Howell's EMT certification—was dismissed for insufficient evidence.

DISCUSSION

The discipline provision of the parties' Collective Bargaining Agreement (§13.1.1) provides:

the City has the right to discipline ... or discharge employees for just cause shown, as provided in Fire Department Policy & Procedure and/or Operation Instruction Manuals, subject to the provisions of the City Charter, Public Safety Civil Service Laws and Rules, applicable state and federal laws and the terms of this Agreement.

Many learned volumes have been written on the notion of just cause in American labor arbitration. In the end, however, just cause is simply a distillation of our shared response to some of the common, occasional shortcomings of employee discipline. Most of the issues arising under the just cause standard divide into three classes: It is not just to discipline an employee for misbehavior that he or she did not actually commit. It is not just to exact a disciplinary penalty which the employee could not have known to be a possible consequence of such misbehavior. And it is not just to administer the disciplinary process in fundamentally unfair and irregular ways.⁵ In the case at hand, the Union does not take particular issue with the second requirement (apart, possibly, from the claim that discharge was an inconsistent penalty, which is addressed below).

When the alleged misbehavior has occurred off the clock and off the employer's premises, as in the case at hand, an additional question arises under the just cause standard, i.e., what business is it of the employer what the employee did off the clock and off the premises? The traditional technical term for this additional question is, What is the *nexus* between the alleged misbehavior and the legitimate interests of the employer? In this case, however, one of the Department's allegations in support of Mr. Howell's discharge is that his actions "caused a significant negative impact to the Seattle Fire Department's relationship with the community, and in particular, the relationship with the homeless community," which, if true, would certainly supply the required nexus.

Did the Department establish that Mr. Howell actually did what he was disciplined for? The Union's primary argument is that the Department did not prove that Mr. Howell actually did what he was terminated for. "Just like Howell was not guilty of violating any criminal laws, and just like there was insufficient evidence to show that he violated any regulations established by DOH, Howell did not attack a vulnerable homeless man and therefore the Department lacked just cause to terminate his employment." (Union Post-hearing Brief at 33-34.)

General Considerations (1): The appropriate measure of proof required. The Department argues that it must prove its case by a simple preponderance of the evidence, and the Union argues (Post-hearing brief at 42) that the nature of these charges requires the Department to have at least clear and convincing evidence if not full proof beyond a reasonable doubt:

⁵The Department proposes arbitrator Daugherty's "seven tests" from *Enterprise Wire* and other reported cases (Post-hearing brief at 31). The "seven tests" have generated a very substantial body of scholarly discussion, but that approach does not represent the view of a majority—or even a very substantial minority—of current main line American labor arbitrators.

[I]n cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a “clear and convincing” evidence standard, with some arbitrators imposing the “beyond a reasonable doubt” standard. Elkouri & Elkouri, *How Arbitration Works*, (6th ed., 2003) at 950-95.⁶

The Union points out that NAA arbitrator Mike Beck wrote in 2005 in a case between SEIU 925 and King County that “...in discharge cases involving alleged...stigmatizing behavior a significant number of arbitrators impose a beyond a reasonable doubt standard.” (At 24.) But in that case arbitrator Beck honored the ‘beyond a reasonable doubt’ standard only in the breach. The cited case *did* involve stigmatizing misbehavior and what arbitrator Beck actually required was proof by clear and convincing evidence. In my first 30-odd years as a labor arbitrator, I have not yet heard or read a case in which it would have been appropriate to require proof beyond a reasonable doubt. On the other hand, I agree that a majority of main line labor arbitrators recognize that some discharge cases—those alleging misbehavior that would be criminal and would have catastrophic career implications—require proof by clear and convincing evidence. Because this is not such a factually close case that the measure of the City’s burden of proof matters to the outcome, I assume without deciding that the City must prove its case by clear and convincing evidence.⁷

General Considerations (2): The criminal exoneration. Mr. Howell was tried and found not guilty of misdemeanor assault and malicious harassment of the homeless. The Union now argues that the termination at issue here should be precluded by that prior litigation. I agree that there is considerable overlap in the issues in the two cases and essentially an identity of parties.⁸ But there is a significant difference in the burdens of proof: The City’s failure to get a conviction beyond a reasonable doubt does not show that the City failed to prove its criminal case by clear and convincing evidence. Moreover, as the Department points out, the two proceedings have importantly different standards for admissibility of evidence, and some sorts of evidence which were excluded from the criminal trial are commonly admissible in labor arbitration. Hearsay is the most obvious example; but “inflammatory” evidence is commonly kept from a criminal jury—and was kept from the jury in this case—as a matter of jury protection but is virtually never excluded from the professional factfinder in labor arbitration. The criminal verdict does preclude addressing overlapping factual disputes here and does not prohibit the City from discharging Mr. Howell for the alleged misbehavior.

⁶The cited passage continues, “But, even in cases of criminal behavior or socially stigmatizing conduct, some arbitrators require only a ‘preponderance of the evidence.’”

⁷In one particular, discussed on p. 21, below, this case involves an exercise of inherent managerial discretion which is not subject to a clear and convincing evidence requirement.

⁸“Essentially,” because although the City is a party in both proceedings, the other party in the case at hand is really IAFF, not Mr. Howell. (The standing of an individual grievant in labor arbitration falls somewhere between that of third-person beneficiary and member of a signatory organization.) Nonetheless, Mr. Howell is the other party here from a common sense point of view.

General Considerations (3): The nature of the events and of the evidence at issue. Three features of the evidence make this an unusual case. First, much of the record is of limited use because it is hearsay, sometimes third hand hearsay (what the witness told the officer, who then told the investigator, who then told me). Hearsay is admissible in labor arbitration, and the hearsay nature of such evidence “goes to its weight.” The impact of its hearsay nature on the weight of evidence, at least to me, is that the record must provide a very good reason if I am to adopt hearsay testimony over conflicting first-person testimony.

Second, given the somewhat inflammatory media coverage of the Occidental Park event, there is substantial cause for concern about whether even first-person witnesses have kept a tight grip on the difference between what they saw and heard in the park and what they saw and heard later in the media. Given that potential source of confusion, it seems to me that the only part of the record that can fulfill the Department’s burden of proof here is the evidence which was generated at the very time of the events at issue—and not after the possible intrusion of the inflammatory press coverage—and which rests entirely on personal experience: i.e., the evidence based on the eight 911 calls.⁹ I find those 911 calls—which are in the record—and the contemporaneous or almost contemporaneous interviews with the 911 callers—which are also in the record—to be the least suspect for possible influence by the media coverage and therefore by far the most dependable and by far the most convincing part of the record.

Finally, even when a person is describing current and physically present experience, both the witness’s perspective and the nature of the experience matter. The incident in Occidental Park was a group fight. At times, as one witness described it, it amounted to a scrum (Tr. 368:18), inherently confusing and difficult to describe. Witnesses came on to these events at slightly different times and from different spacial perspectives. Some of them were physically involved; some of them were near enough to the uncertain course of the developing fight to be potentially at hazard. Each witness had a slightly different—and sometimes not so slightly different—focus of attention; and a *focus* of attention carries with it the corollary of *inattention* to events outside that focus.¹⁰ There are no general surveillance cameras in Occidental Park. Police officers responded rather late, so the dash-

⁹The four 911 calls by then-current eye witnesses are summarized immediately below. Another 911 call was made by Mr. Howell after the main altercation was over, and another was made by a third party at his invitation. Those are addressed below at p 17. An additional and independent 911 call was placed by the bartender at a nearby establishment and was conclusory—‘there’s a fight’—and was based entirely on what he had been told by others. Finally, Mr. Lofstedt, another chance passerby, also made a 911 call, but the dispatcher had so many similar calls by then that there was no recorded substance to that call. There also appears to be no reasonably contemporaneous police interview with Mr. Lofstedt, and, as the Union points out (Post-hearing Brief at 21), he promptly sent an angry email and appeared on a radio show, over the phone, talking about the altercation. I therefore do not give the same weight to his eventual testimony as I do to that of the contemporaneous recordings of the other 911 callers.

¹⁰I took notice at hearing—without objection—that under such circumstances an observer’s attention commonly focuses narrowly, and even extraordinary events outside that focus but quite near that observer may go unnoticed. Thus it is not particularly remarkable, for example, that other 911 callers did not notice Mr. Banfield, another 911 caller, a large man walking two dogs.

board camera films of the police vehicles are not particularly useful. There are no instant replays; and memory is a creative function. Second, it is not plausible to expect even entirely honest and disinterested first-person testimony to come together into a fully coherent and consistent picture of the extended altercation.

The Union's carefully argued Post-hearing Brief (beginning at p. 11) demonstrates that it is difficult at best to establish just who struck or kicked whom, and when. It is even difficult to establish whether someone was lying *on* one of the slabs of the Memorial, or lying *against* one of them, or lying partially *under* it.¹¹ Those factual issues were part of the City's burden in the criminal trial, in order to prove its allegations beyond a reasonable doubt; but it is not necessarily a part of the Department's burden here as long as the Department establishes clearly and distinctly that Mr. Howell was the aggressor, not a victim, and "punched, kicked, shoved and screamed obscenities at" *someone*.¹²

Resolving the first charge, in general: The 911 calls and callers. The heart of the City's discharge of Mr. Howell is the allegation that he was the aggressor, and not a victim, in the Occidental Park altercation(s). Resolution of this dispute is made particularly difficult, first, by the intrusion of the somewhat inflammatory press coverage, second, by the mere passage of time since the events in question—the arbitration hearing began thirteen months later—and, finally, by the criminal proceedings between those events and the arbitration hearing.

I therefore find far the most persuasive evidence to be, first, the 911 calls made by chance eye witnesses during the altercation, and second, the interviews with those witnesses recorded either immediately after the incident or quite soon after it. Mr. Howell agreed that those 911 witnesses had no apparent bias. (Tr. 1326:17 to 1327:15.) That solid core of evidence is generally immune to doubts about whether the witness was recounting what he or she saw in the park or what he or she saw on the news. I find no substantial dispute to the conclusion that the person wearing the Sounders jacket in these 911 calls and subsequent interviews was Mr. Howell.

The first charge according to the 911 calls and callers. The earliest of the 911 calls was made by Mr. Banfield who lives in the area and was walking his two dogs through the park quite early in the development of the incident. His was the first 911 call, at 5:13 p.m.; and he was the only witness interviewed by police officers at the scene. (That interview was not a follow-up to the 911 call but simply an on-the-scene witness interview by Officer Poblocki, in which Mr. Banfield mentioned that he had called 911.) The witness interview began at 6:20 and was recorded. The recording includes this account of events witnessed by Mr. Banfield *before* he dialed 911.

As I approached the memorial I saw three people standing over a gentleman who was most likely

¹¹For example, Mr. Banfield's testimony referred to the one person whom he saw "on" the Memorial, "in and around" the Memorial, and "prone on his back on the ground" next to the Memorial.

¹²The Union's Post-hearing Brief suggests (at 43) that "The City discharged Howell in large part because, it alleged, he assaulted McDonald and/or Hicks..." but that specificity is not in the charges.

homeless or indigent, who happened to be laying on the memorial. *** So he was laying on it or under it effectively. *** And they were clearly yelling at him. They didn't like him being there. You know it is disrespectful to the firefighters that those guys do that. But so and it was clearly getting heated because I was walking close. I was probably ten or fifteen feet away. And you know a lot of times you'll see people yelling at people in the park and you know whatever. It doesn't, doesn't go anywhere. In this case the, a gentleman, there were three people. There was a gentleman who was bald wearing a Sounders jacket with green sleeves. There was another gentleman with a dark jacket... and then there was a woman with glasses *** And so, at that point the gentleman, who happened to be laying on the ground, clearly said something which I could not hear to one of the, to the gentleman who is bald with the Sounders jacket on. *** Because they were, it seemed like they were yelling at him. It was something like you know, effectively it sounded like they were telling him to get off the memorial. Like you shouldn't be laying on the memorial. *** He was disrespecting the memorial. And they, so the guy is laying down. He's on his back. And clearly he said something and that so enraged the, the bald gentleman, that he leans over and starts swinging at the guy. Starts hitting him. And the guy starts to roll away. So then the guy starts kicking him. * * * Like he was aiming for his face. He was aiming for his face. He was aiming for his head. And then as the guy rolls away and is getting away from him the guy in the Sounder jacket sort of leans back. And he starts trying to stomp the guy. And at that point, you know, the, a lot of the other, you know, homeless folks were, they see the commotion. They're starting to come around. I pull out my phone and start calling 911.

This is the relevant portion of Mr. Banfield's 911 call. <U60>:

[T]here's a fight going on in Occidental Park. *** Two guys. Some guy's complaining about somebody sleeping on the firemen's memorial. *** [T]here's a guy in a Sounders jersey swinging at all the... *** They're just fighting over – the homeless guy's hanging out on the firemen's memorial. *** [B]asically all the homeless guys are trying to protect the other homeless guy. (Dispatch: [I]s there one that's specifically an aggressor here? Or are they both...?) He's wearing a, a green and, green-blue, green and blue, like green sleeved Sounders jacket. I can't see his pants. Oh, he's got gray pants. *** They're getting knocked – no. but they're getting knocked down, getting back up. Getting knocked down, getting back up. *** All right, now they're, now they're telling the guy, you know, telling the, the, the guy in the Sounders jacket to leave. The homeless guys are sort of, you know, it's, it seems to stop. There's nobody fighting anymore...

Finally, Mr. Banfield described for the investigating officer what he saw *at the end of* the 911 call:

Some cooler heads came in and basically sort of talked everybody down a little bit. Hey, you guys should go. You should leave. Just get out of here. You know. And so they left. They went back toward Fuel, back [north] toward Washington. *** They go north up by Fuel or the firemen's bar up there. Whatever the, the forget what it's called. And they they come back. And they get in another verbal altercation with somebody else. *** And so, and then what I heard at that point was the bald guy in the Sounders jacket yelling at one guy going, you know, you guys are just moochers. You guys are living off my tax dollars. You know that kind of rant.

Like the other 911 callers (below), Mr. Banfield was a random, disinterested witness, as far as anything in this record suggests. The Union attempts to raise doubt (Post-hearing Brief at 15, fn. 20) about whether there was “a very large man...walking two large dogs” at all, given that other 911 witnesses do not recall seeing him, but admits that “It is clear that Banfield was at the scene when these events occurred, because he called 911.” For the reasons set out above, I do not find that lack of notice by other witnesses casts substantial doubt on Mr. Banfield’s presence or on the accuracy of his 911 call and subsequent police interview. I find that portion of the record compelling.¹³

Two of the other 911 callers were Pierce County Deputy Prosecutors, on their way home from the Sounders game, Ms. Johnson and Mr. Waite. Ms. Johnson’s 911 call was the second earliest, beginning at 5:14, only a minute after Mr. Banfield’s. She gave this account to the investigating officer on March 18, over the phone, of events *before* her call began.

I saw a fairly large group of people. Mostly men. Congregating, or milling about and shouting angrily at each other.*** I couldn’t hear, really hear what they were saying. But they were yelling and kind of milling angrily toward and away from each other. So half the people I’d say of the fifteen people there, half or them were saying “stop, don’t, leave it alone.” And the other half were yelling at each other. *** And then people, let’s see. There was two different guys were wearing, the guys who were harassing the guy underneath the, he was asleep, underneath the statuary, had Sounders gear on. *** Then some guys started taking off their jackets, you know, throwing off their jackets. Then walking toward other people. Then people started throwing punches. People were getting hit in the face. *** [Officer: And the guy with the Sounders jacket, did you see him assault anyone?] Yes. [Officer: And who was he assaulting?] I can’t say. *** I just saw, I saw him like throwing a punch. *** I thought both, I think both the men had Sounders gear. *** And they were really angry. They kept kinda walking away and then coming back and yelling at people. *** And people would yell at them. And they they, they felt like they were, I, my impression was that something had happened before I got there. Because there were three, those three people were so angry. *** I would call them the aggressors.

By the time Ms. Johnson made her 911 call, at about 5:14, she was focusing on the altercation between Mr. Bullene and Mr. Cassidy, so she had essentially nothing to say about Mr. Howell.

Mr. Waite’s 911 call was placed a couple of minutes later, beginning at about 5:16. He gave this account to the investigating officer on March 18, over the phone, of events *before* he began that call:

***an hour at least after the game...there was sort of a pushing match, yelling back and forth going on near the Firefighter Memorial in Occidental Park... And at some point there was [Mr.

¹³Mr. Banfield has lived in the Pioneer Square area since 2010. He is an active blogger; and his March 16 blog was addressed to the Mayor. It included a detailed account of the Occidental Park incident, which had already been trumpeted by the media, in order to “make it clear to [the Mayor] and [his] administration that the lack of police presence in Pioneer Square before, during and for an extended period of time after sporting events is putting both residents and visitors at risk.” I have not considered the contents of that blog as evidence in this case.

Howell] kind of being pulled away by his friend. And then there was a third person, was a female, and she's kind of yelling at people. But [Mr. Howell] was screaming at several people who appeared to be homeless. While his friend was trying to pull him back and so I kinda of just observed for a while. There was a lot of back, back and forth yelling. And it didn't it looked like it was going to de-escalate. And then it didn't. And then at some point he had walked somewhat away and then charged back towards the group of homeless people. And he got, he pushed one of them and started screaming at him while his friend then tackled a guy that had a walking stick. And so at that point I ran in, thinking I could try to help the people being attacked. But there was a lot of people kind of trying to help them already. And it got pretty out of control. So I just stepped back and called 911. *** [Mr. Bullene tackled the man with the walking stick.] He seemed to be the calmer one so it was kind of surprising. And [Mr. Bullene] was pulling the bald guy away for most of the time when I first arrived. *** But then [Mr. Bullene] would get kind of triggered when the yelling would go back and forth. And he would try to help out his friend and then kind of lose it himself. *** I waited for a while. They kind of came back and forth. That's when the woman went, she came back. Well they all were kind of walking away and then walking back and walking away. She started screaming at a guy that was now lying down, kicking him and screaming about how much she pays in taxes. She then looked at me and told me that they are worthless and thankless, I guess was the word she was using. Thankless people***

Mr. Waite's 911 call reported "a bunch of drunk people trying to fight these homeless guys," but had little specifically to say about Mr. Howell, focusing primarily on Mr. Bullene and Ms. Jarvinen; but when the dispatcher asked Mr. Waite who had been the "instigator" he picked the man "in the Sounders jacket," i.e., Mr. Howell.

A fourth 911 call was placed at about the same time, 5:16, by Mr. Fitzgerald, a designer of video games, whose office is near Occidental Park. His 911 call was quite brief, simply reporting a developing fight. Here is what he told the investigating officer in a telephone interview on March 18 about what happened *before* he made that call and *after* the call ended. <C5.4@4061>:

[T]here were three individuals standing at the Firemen's Memorial. And they were facing what, they were facing a man who was laying down on one of the stones at the memorial. And they were yelling at him. I noticed when one of the individuals, a man wearing a Sounders jacket, started screaming obscenities at him. And at that point I looked, or I watched, and I watched him kick that individual on the ground. The Sounder guy, the Sounders guy had kicked the individual multiple times. I'd say, I, I witnessed him kick him twice before the, the man on the ground got up. Or was trying to get up. And then and at that point, I grabbed my phone and dialed 911.

...as soon as I got off the phone I had, I turned around to unlock my car so I could sit in the car and then there was a flurry of punches. I didn't see where they came from and who started it because I had, I'd turned back as soon as I heard you know the shouting exchange. The, let's see, there was a, a shorter Hispanic male who had taken his shirt off and he was down to a like a sleeveless t-shirt and he had, he had come in and I believe, I can't, I honestly can't tell you

where the punch was thrown or who threw it. But they were obviously fighting at that point. He was fighting with the man in the Sounders jacket. I did witness at that point the Hispanic male punched the guy with the jacket on. And then the second male aggressor, the man in the dark jacket with the cap, I, I watched him approach the Hispanic male from the side and he, I'll call it a sucker punch, he punched him on the side of the head. And the Hispanic male fell down. There was similar, a lot of pushing and shoving. And I also at that point witnessed the man in the Sounders jacket, the original aggressor, he had been struck at some point and, and went to the ground. Or went to his knees and then came back up. At that point things sort of took a break. Enough people were pushing them away. That, that sort of a big melee ended right there. *** Immediately, at that point the three indiv- . .the three original aggressors had moved, had moved to, let's see, the northeast corner of Occidental Park. And then walked across the street in the direction of, there's, there's a bar over there. Fuel. * * *I waited another, I'd say eight or nine minutes after that. And the three individuals who had left, the original aggressors, the two men and the woman, had come. They would periodically come back to that northeast corner of the park. And at one point the man in the Sounders jacket had started talking to one of the park people who had originally come to help. And they were, they weren't, I couldn't tell if they were arguing but there was some animated conversation going on. Because I was at the other end of the parking lot.

The last nearly contemporaneous record is a statement written out by Mr. Howell himself at the suggestion of his representative, probably the next day:

*** We left Sluggers to head to McCoy's for dinner, this was approx. 1715 hours. While walking through Occidental Park, we noticed a large group of individuals sitting on the Firefighter memorial. One individual was urinating on the memorial. I told him to quit urinating on the monument. Heated words were exchanged, on both sides. An individual was sleeping on the memorial. I told him not to sleep on the memorial. He told me to "Fuck off". I took a swipe at him with my leg, not connecting. He got up and ran away. At this time a Hispanic man in a white tank top punched me above my right eye, knocking me to the ground. I received a laceration above my right eye and right knee. At this time the three of us walked away, heading to McCoy's. Upon entering McCoy's I asked the bartender to call the police as I had just been assaulted. At this time Scott [Bullene] and Mia [Jarvinen] stated that they were heading home and left. I waited for the police to arrive. ***

Mr. Howell's account is substantially different from those of all the 911 callers. There is no other mention of anyone urinating on the memorial, which Mr. Howell's testimony at hearing recounted as the initial irritant eventually causing the entire altercation. There is no mention of Mr. Howell being shoved by the person urinating on the memorial, which he now claims to have been the initial physical contact of the altercation.¹⁴ The 911 callers who appeared as witnesses in the arbitration hearing—i.e. all the 911 callers except Ms. Johnson—testified that they saw no one urinating on the memorial. The 911 callers all came upon a sequence of events that had already

¹⁴The Department points out (Post-hearing Brief at 14) that in his interview with investigator Perisho, Mr. Howell neglected to mention having been shoved by the person urinating on the memorial.

gotten up enough of a head of steam to command their attention. It is possible that a urinating origin of that sequence had been concluded before their attention was captured by raising voices and tones of impending violence, although Ms. Jarvinen, who was there from the very beginning, testified in her criminal trial that she had not seen anyone urinating on the memorial.

With or without the urinating, however, this record shows clearly and convincingly that Mr. Howell was the aggressor, not the victim, of the initial verbal and of the initial physical altercation. Even his own statement agrees that he took a kick at someone on the Memorial, not in self-defense but as the first attempt at physical assault. At hearing, he agreed that if he had walked on by the Memorial none of this would have happened (Tr. 1343:12-15). All of the 911 callers agree that Mr. Howell was the initial aggressor. All of the 911 callers agree that Mr. Howell struck or attempted blows or kicks in addition to his language. None of them support the Union's claim (Post-hearing brief at 44) that Mr. Howell *initially* acted in "a reasonable belief" that he was defending himself. And they all agree there were opportunities to end the incident, and Mr. Howell and his companions actually walked away but then returned. That much I find to be established by clear and convincing evidence.

The Union points out (Post-hearing brief at 9) that Mr. Howell's hands were photographed later that evening, at the suggestion of a Battalion Chief, and those photos (Ex. U-42) do not show injuries on his hands. I agree with the Union that those photos cast doubt on any claim that Mr. Howell *successfully* landed very many punches on anyone's face or head. But they do not show that he did not try, and they do not show that he did not land blows on soft tissue areas. Mr. Howell told investigator Perisho that he tried several punches and kicks but was too inebriated to connect; and some of the 911 callers similarly noted his failed attempts.¹⁵ I agree that Mr. Howell is not a violent man and that in this physical interaction with genuinely violent men he probably sustained more injuries than he caused. Considering the criminal records of the other major participants, he may have been lucky to get off as with only minor injuries. But in light of the contemporaneous accounts of the 911 callers, I cannot agree that he did not attempt to strike blows—regardless of where or whether those blows landed—or that he was not overall an aggressor and the instigator of the fight.

Some of the finer details of the first charge are sufficiently supported in the record and some are not. The alleged eight minute duration of the altercation is well supported. There is about six minutes from the beginning of the earliest 911 call to the end of the latest one. The 911 calls did not begin at the beginning of the altercation and did not end at its very end; and Mr. Waite estimated that the encounter he witnessed lasted about ten minutes. (Tr. 542:10-15.) On the other hand, the "very end" culminated in the stabbing of Mr. Bullene by Mr. Cassidy and had little to do with Mr. Howell. More importantly, the charge alleges, "After the initial altercation, [Mr. Howell] returned to engage in further fighting. It is unclear who initiated the second altercation, but Firefighter Howell's decision to return to Occidental Park resulted in continued aggressive fighting by Firefighter Howell

¹⁵Mr. Howell now denies having said so. But, as the Department points out (Post-hearing Brief at 35n), when Mr. Howell talked to Mr. Perisho he was accompanied by a Union representative. That individual appeared as a witness at hearing but was not asked to confirm Mr. Howell's denial.

with homeless citizens.”¹⁶ The record does not support the claim that after the “return to Occidental Park” there was “aggressive fighting by Firefighter Howell with homeless citizens.” As far as the record shows, after Mr. Howell finally got completely out of the park and then returned, words were exchanged but he was not involved in further physical contact. Mr. Banfield referred only to yelling and Mr. Fitzgerald recounted “animated conversation.” But the heart of the first charge, that Mr. Howell was an instigator of a physical altercation rather than a victim, is established unanimously, by clear and convincing evidence.

The Union points out, essentially, that Mr. Howell was not the *only* instigator of the altercation. Witnesses recounted Ms. Jarvinen kicking a man on the ground at the memorial or kicking his possessions; and it was Mr. Bullene, not Mr. Howell, who later took the walking stick away from Mr. Cassidy and struck him with it. But clear and convincing evidence establishes that Mr. Howell initiated the altercation, escalated it by both word and deed, and returned when he had the opportunity to disengage. He very well may have acted in self-defense during the middle of the altercation, but no recognized traditional doctrine of self-defense allows that as an excuse once an individual has initiated an extended violent encounter.

Factual disputes arising under the second charge. The heart of the second charge is that “Firefighter Howell lied to Seattle Police Officer Frank Poblocki, stating that he and his companions had been attacked by a black male. This false statement led Seattle Police Officers to search the area for the assailant described by Firefighter Howell.”

Mr. Howell’s 911 call is in the record. The call was brief because the dispatcher already had multiple calls about the altercation in the park. This is the heart of Mr. Howell’s call:

I’m looking at, I’m at Occidental and South Washington. There’s a white girl being assaulted by a black gentleman in the park there. *** [Dispatcher: The female though, can you tell what color clothing she’s wearing?] Uh, looks like jeans and a black top. *** [Dispatcher: And what race is the female?] Uh, she looks like about thirty. [Dispatcher repeats.] White, white, Caucasian.

Mr. Howell testified at hearing that he now has no memory of making the call or of just why he made it.

At Mr. Howell’s request, the owner of McCoy’s called 911 to report that (quoting the 911 recording) “a couple of customers were on their way over to the restaurant and they were in Occidental Park and apparently got jumped and beat up pretty good. So they’re just hanging out at the restaurant. They’re kinda afraid to go outside.”

¹⁶This detail is a conclusion drawn only by the Department’s Human Resources Director, not by the investigator, who concluded there was “more involvement,” not more “aggressive fighting” after Mr. Howell’s return from outside the Park.

Officer Poblocki was the first police responder to McCoy's. Mr. Howell met him outside. This was the beginning of their exchange (from the officer's lapel mike recording):

[Officer Poblocki:] So who is the victim here. [Howell:] Me. [Officer Poblocki:] Is there, there was something about a female, too. [Howell:] Oh, she's in there too. I'm SFD.

[Officer Poblocki to Ms. Jarvinen:] Did you get assaulted? [Ms. Jarvinen.] Pretty much. [Officer Poblocki:] You want to do anything? [Ms. Jarvinen] No. [Officer Poblocki:] OK. Let me move on to the next guy then.

[Officer Poblocki to Mr. Howell:] So, fill me in on what happened. [Mr. Howell:] So we were walking ... [northbound through the park] and this dude came up and next thing I know, I'm--- right here, right there [apparently gesturing to injuries]. [Officer Poblocki:] So how'd did all that happen? Did you know this person who did it? [Mr. Howell:] I have no idea who'd do this. [Officer Poblocki:] Ok. Well, was there an argument? [Mr. Howell:] Absolutely nothing. I got assaulted, all right? By an individual who lives in the park. I used to work at 2, all right? [Officer Poblocki:] So, you want to press charges against this person? [Mr. Howell:] Yes. I would love to. [Officer Poblocki:] Tell me how the assault happened. Do you know this person by name? You said you see him in the park, right? [Mr. Howell:] I saw him in the park. I haven't been here for five years. *** [Officer Poblocki:] So you're walking through the park with those two? And this guy just attacks you for no reason? [Mr. Howell:] Yes. [Officer Poblocki:] OK, you had no conversation with him at all? [Mr. Howell:] No. [Officer Poblocki:] Ok, can you describe him? Is he a white guy, a black guy, a Mexican guy? [Mr. Howell:] [Inaudible.] *** Thirtyish. Five foot eight, Im going to guess 140. *** I did not fight back.

Officer Poblocki then circulated a search for a black male, 5'8", 140 pounds, thirtyish, in a black hoodie and jeans.¹⁷

With respect to this part of the second charge, therefore, the record includes recordings which show by clear and convincing evidence that Mr. Howell lied to Officer Poblocki. Even on Mr. Howell's current version of the preceding events in the park, it was simply false that there had been no prior conversation, no argument, "Absolutely nothing," as Mr. Howell told Officer Poblocki. Mr. Howell testified at hearing that at the beginning of the events around the memorial, "I yelled at him...I told him to knock the fuck off..." Tr. 1275.

The specific allegation in the second charge is that Mr. Howell lied to the police when he said "that he *and his companions* had been attacked by a black male." There is no evidence that Mr. Howell told Officer Poblocki that *Mr. Bullene* had been attacked by a black male; but Mr. Howell

¹⁷Officers followed up on the description provided by Mr. Howell. Officer Hoffmann, in a separate marked car, also responded to McCoy's. His incident report notes that "Officer Poblocki stated s/Howell provided a description of the male suspect who assaulted him, and told me the suspect was black male, black jacket, unknown direction. I conducted an area check for the suspect, but could not locate that suspect."

made a 911 report that Ms. Jarvinen had been attacked by a black male, and he told Officer Poblocki that *he* himself had been attacked by a black male. The question is whether or not the City established that he lied when he did so. The only support for the claim in the 911 call is that call itself, because Mr. Howell now claims to have no memory of having made it. Ms. Jarvinen essentially contradicted Mr. Howell's 911 call as a witness in her criminal trial: She was asked "Why did you answer...pretty much?" and she replied, "In my mind at that point, um, I had no clear opinion that I had been assaulted during this incident..." (Cr. Tr. 838:19-21.) On cross, she explained, "[‘Pretty much’] was the choice of words I used. I mean to me it wasn't yes at that time. *The answer and I think Poblocki would agree with me, he took it as no.*" (Cr. Tr. 909:10-12.)¹⁸ The record shows, by clear and convincing evidence, that Mr. Howell's 911 report of Ms. Jarvinen's assault by a black male was a lie.

The Union suggests (Post-hearing brief at 24-25) that "it is possible that Howell witnessed the interaction between Jarvinen and the African-American man and interpreted that as Jarvinen being assaulted by a black male." But the recording of Officer Poblocki's later interview with Mr. Howell at the scene apparently includes Mr. Howell's specific denial that *he* was assaulted by that individual, without any mention that *she* might have been assaulted by him. From the entire record, and particularly from the transcript of the criminal trial, it is clear that the Union's supposition has the facts reversed: Ms. Jarvinen testified that she grabbed the collar of the man in question. There is nothing to suggest that he assaulted her or that an observer could reasonably have taken him to have assaulted her.

Turning Mr. Howell's report to Officer Poblocki that he, himself had been assaulted by a black male, the 911 call about Ms. Jarvinen's alleged assault made no mention of Mr. Howell himself having been assaulted by anyone, and it is difficult to see how the newly reported assault on Mr. Howell could have come between his 911 call and the entry into the safe haven of McCoy's. Mr. Howell's statement to Officer Poblocki that there had been "absolutely nothing" said before his alleged attack by a black male was certainly a lie. So, too, was his statement to Officer Poblocki that he did not "fight back, being a City of Seattle employee." The Union's description of these remarks (Post-hearing Brief at 26) as "not fully accurate" is artful but insufficient; these were lies. Finally, Mr. Howell's claim that his injuries had been caused by an attack by a black male was inconsistent with his own voluntary statement, written out the next day, that "*a Hispanic man in a white tank top punched me above my right eye, knocking me to the ground.*"¹⁹ I received a laceration above my right eye and right knee. At this time the three of us walked away, heading to McCoy's. Upon entering McCoy's, I asked the bartender to call the police as I had just been assaulted." In light of that weight of contrary evidence, the record shows clearly and convincingly that Mr. Howell lied when he told

¹⁸Ms. Jarvinen did not testify in the arbitration hearing, but the Union introduced the transcript of the criminal trial. She testified that she did not ask Mr. Howell to make his 911 call and was unaware that he had done so. (Cr. Tr. 886: 18-22.)

¹⁹Mr. Fitzgerald saw a "Hispanic man" punch Mr. Howell. Nobody saw him attacked by a black man, and when asked by Officer Poblocki, he did not identify any likely participant at the scene, black or Hispanic, as his attacker.

Officer Poblocki that he had been attacked by a black male in a hoodie.²⁰ The police actually went looking for the fictitious black male, so that lie, and the lie about Ms. Jarvinen's being similarly attacked, had the probable and actual result of interfering with the police investigation.

The second paragraph of the second charge is a puzzle. Several uniformed SFD managers responded to the scene, and Mr. Howell reached out to familiar figures of authority and attempted to engage three chiefs with his version of the facts. The record does not show that those attempts had any effect on the police investigation,²¹ but I find this paragraph to be an unimportant makeweight claim, not significant in light of the record's clear and distinct demonstration that Mr. Howell lied about Ms. Jarvinen's being attacked by a black male and about his being attacked by a black male, and that he did so in order to mislead the police investigation.

Factual disputes arising under the third charge. The third charge, although only a sentence long, has two parts: "Firefighter Howell identified himself as a Seattle Firefighter to police ..." He certainly did. As the recording of his initial encounter with Officer Poblocki (set out on p. 18, above) shows, "I'm SFD" was very nearly the first thing he had to say. But the allegation goes on, "... and conveyed to them that he expected to be treated with 'professional courtesy.'" Both Officer Poblocki and investigator Perisho testified that Mr. Howell never *asked for* professional courtesy during this incident. Nor does a firefighter's identification of himself or herself as a firefighter inherently constitute a request for special treatment.²² As Officer Poblocki observed to Mr. Howell (on tape) at the scene, Mr. Howell "ke[pt] bringing it up" that he was a Seattle firefighter by his initial, immediate and explicit "I'm SFD," by his repeated attempts to "help" the medics attending Mr. Bullene, and by his repeatedly calling out to the Department managers by name. But the last two of those were reasonable reactions to Mr. Bullene's quite serious injuries. It is not clear that Mr. Howell would not have tried to help the EMTs and would not have tried to talk to the Department managers on the scene even if Officer Poblocki had not been around. Considering that Officer Poblocki *was* around and that Mr. Howell was in custody, that behavior may have been ill-advised, but even on a mere preponderance standard, the record does not show that Mr. Howell "conveyed to [the police] that he expected to be treated with 'professional courtesy.'"

Factual disputes arising under the fourth charge. The final charge is that Mr. Howell's "misconduct caused a significant negative impact to the Seattle Fire Department's relationship with the community, and in particular, the relationship with the homeless community." The Union argues, essentially, that a significant part of the responsibility for the "negative impact" should fall on

²⁰According to the Chief, Mr. Howell admitted at the *Laudermill* hearing that he had made misleading statements to the police officer about being attacked by an black male.

²¹I cannot find even an *allegation* of misbehavior in the investigator's conclusion that "Howell attempted to convey to Officer Poblocki that Deputy Chief Woodbury was expecting a full investigation."

²²Mr. Howell explained that police officers had frequently told the firefighters to identify themselves in professional encounters, and I agree that it would be poor policy to prohibit firefighters from offering that information on a blanket basis. It is only when a firefighter goes the additional step and asks for special consideration based on his or her position that the existing policy is violated.

the Chief's news conference and on the Department's apparent acceptance of Mr. Howell's guilt without even having gotten his side of the facts.

The Union argues (Post-hearing Brief at 28ff) that "Chief Dean and the City Mayor set off a media firestorm by apologizing for Howell's actions..." But the record shows conclusively that the Chief's decision to make a public statement was a response to the already rather spectacular news coverage: The media firestorm ignited before the Chief's apology. The Occidental Park events occurred in the early evening of Saturday, March 15, 2014. The record contains recordings of the initial reports on the major TV stations. KING 5's report includes, "It happened last night," dating the KING 5 report on Sunday, March 16. KIRO's was published at 2:00 a.m. Sunday morning, March 16. And KOMO's report refers the events that happened "yesterday," which also dates KOMO's initial coverage on Sunday, March 16. The adverse responses to Department employees downtown began on Monday morning, March 17. And the Chief's news conference was held that afternoon in response not to the Occidental Park events themselves but to the firestorm of media coverage of those events and the public reaction to that coverage. The Union's argument reverses this order of events: the events which Mr. Howell instigated in Occidental Park, and not Chief Dean and the Mayor, set off the media firestorm.

The Chief made a substantial attempt to avoid endorsing the conclusion that his firefighters had instigated the altercation. E.g., "*From the information I have been given...*," "*...the violence that occurred this weekend...*," etc. (The Mayor's office was not so careful: "We hold Seattle firefighters to high standards: whether they are on duty or off. Seattle firefighters are expected to treat every member of the community with care and respect. *Regrettably, that did not happen in this case...*") That reservation of judgment hardly came through at all in the media coverage of the Chief's apology.

Considering the entire record before me, it shows clearly and distinctly that there was a significant impact on the Department's relationship with the community. The question is whether the Department's public response to Sunday's media firestorm stoked the press "firestorm" or dampered it. There is no serious doubt that the *intent* of the Department's early response was to mitigate the damage being done to its reputation and to its relationship with the downtown homeless community. Because the initial *press coverage* was instigated by the actions of Mr. Howell, it would be inappropriate to require the Department to show by clear and convincing evidence that its attempts to mitigate the damages caused by that press coverage were careful and effective. The Department's choice to respond on Monday afternoon was certainly reasonable. The response it made could, perhaps, have been more careful to expressly reserve judgment; but too much of such a "careful," non-judgmental approach might have blunted the usefulness of the response in mitigating the damage to the Department. It seems to me that an arbitrator should not second guess an employer's responses in such a situation unless those responses were so ham-handed as to suggest a lack of a genuine interest in protecting the employer's reputation or a solid prejudgment of the employee's guilt. The Department's responses in this case fell well short of those limits on its exercise of discretion. Given that necessary recognition of the Department's discretion in attempting to mitigate the damages caused by the initial press response to the Occidental Park incident, the record shows by clear and convincing evidence that Mr. Howell's misconduct caused a significant negative impact to the Seattle Fire Department's relationship with the community, and in particular, the relationship with the homeless community.

Did the Department administer the disciplinary process in fundamentally unfair and irregular ways? The Union offers three different arguments that fall under this heading. First, it argues (Post-hearing Brief at 46) that “Within hours of the beginning of the first business day after the March 15th incident both the Fire Chief and the Mayor condemned Howell in multiple public forums. They did so by issuing unqualified public apologies for what Howell was alleged to have done.” The Union also argues (at 47) that the investigation by Mr. Perisho “came after the Chief and the Mayor had already made up their minds that Howell was at fault for the physical fighting that ensued after his verbal confrontation...”

The altercation in Occidental Park happened early on Saturday evening; then, on Sunday, came the initial spectacular media coverage; then, on Monday afternoon, came the Chief’s news conference and apology in an attempt to manage the impact of Sunday’s press coverage. As indicated in the discussion just above, I cannot conclude that the Department was unreasonable in its attempts to mitigate the damage to its reputation and to its relations with the homeless community. The Chief’s public statements were somewhat careful in referring to the need for investigation. The Department initiated an independent investigation, and that investigation was thorough and provided Mr. Howell and Mr. Bullene an opportunity to tell their stories. There is no substantial support in the record for the suggestion that the investigator was influenced by the intervening press coverage or by the political hot potato he had been handed. There is no reason to believe the Department would not have been delighted if the investigator had concluded that its firefighters had been the innocent victims and that the initial police evaluation and the initial news coverage had gotten it all wrong. The record does not show that the “unqualified public apologies,” in the Union’s words, adversely impacted the administration of the disciplinary process.

Nor does the record show that the discharge decision was made in advance. Human Resources Director Roberts informed Mr. Howell that he was terminated immediately when Mr. Roberts presented him with the termination recommendation on June 9, 2014. That was before the *Laudermill* hearing; and a discharge decision made before the *Laudermill* hearing would be unwise at best and potentially a violation of a public employee’s right to due process.²³ But, as the Department points out, the HRD’s astonishing oral directions were accompanied by the written recommendations that expressly notified Mr. Howell that he had “the opportunity to meet with [the Chief] and explain your side of the story so that I have full and complete information before finalizing my decision;” and the Chief promptly rescinded the HRD’s oral directive. The HRD’s directions do not show that the Chief had made the discharge decision in advance. The Union also argues that the Chief seemed not to pay close attention at the *Laudermill* hearing. But the Department points out that after that hearing, the Department returned to its investigator with questions Mr. Howell had raised. That fact contradicts the Union’s argument that the Department paid no attention in the *Laudermill* hearing and simply released a decision already made.

²³Only “potentially a violation,” in this case because Mr. Howell had already been given an opportunity to tell his side of the story to investigator Perisho. Because the Department promptly corrected the HRD and did give Mr. Howell an opportunity to make his case to the Chief before the disciplinary decision, it is not necessary to address the question of whether talking to the investigator was enough under *Laudermill*.

The Union's second argument here is that the Department's choice of dismissal was inconsistent with its prior disciplinary choices in similar cases. The just cause standard's prohibition against administering "the disciplinary process in unfair and irregular ways" forbids substantial, unexplained inconsistencies in assessing disciplinary consequences. Moreover, this particular CBA and the documents it incorporates make it clear that disciplinary consistency is part of the Department's obligation. Section 31.1 requires "just cause shown, as provided in Fire Department Policy & Procedure and/or Operation Instruction Manuals...", and the Department's Operating Guideline 3311 requires that discipline "shall be administered in a just, equal, consistent and timely fashion across the Department." We therefore turn to the Union's argument (Post-hearing Brief at 34) that "Other employees have not been terminated for misconduct that was more serious than what is alleged in Howell's case." The Union points to three firefighters who were not discharged for involvement in violent fights.

First, in 2013 Firefighter Karthausser was arrested for DUI—his third since 2005—and told the officer (quoting the officer's incident report) that he "was not [arrested], disbelieving, again telling me he was a [Seattle] firefighter," refused to take a breath test, returned to the bar, was refused service, fought with the bouncer, and was finally arrested for disorderly conduct. The arresting officer had to threaten him with a taser. (He had previously entered a DUI deferred prosecution agreement and failed to fulfill its conditions.) Despite Mr. Karthausser's fight with the bouncer, defiance of the arresting officer, and repeated explicit appeals for special treatment, the Department's response can hardly be characterized as disciplinary at all: The Department discontinued his driving while his license was revoked, and forbade him to work while wearing an electronic monitoring device.²⁴ The usual "future similar misbehavior" part of Mr. Karthausser's disciplinary notice referred to criminal convictions and DUIs but did not even mention requests for special treatment.

The Union's second example is Firefighter Mike Duncan who was DUI on a boat. According to the police incident report he "made it very clear that he was a Seattle Fire Fighter and stated that he had been a firefighter for fifteen years, he also continually asked for professional courtesy." Moreover, according to the incident report, he was "loud and obnoxious" while in custody to the extent that a State Police Sergeant told him that "another derogatory remark toward another police officer [and] he would just go straight to jail;" and said to an officer, "If you had a bullet in your chest along side the road, lets see if you're smiling then." He was arrested for 'felony harassment, threatening to kill a police officer.' The police declined to press the threat charge; Mr. Duncan apologized for his actions and sought treatment for his alcohol problem; and the Department took no disciplinary action at all.

²⁴The recommended discipline would have been even less because it would have included an agreement in advance that Karthausser would be allowed to use "his available accrued leave while serving jail time." Such permission is far from automatic, at least for most public employers, and, if granted at all, usually does not extend beyond accrued *vacation* leave. That part of the recommendation does not appear in the final "discipline."

The third example is firefighter Dawson who was arrested at a casino in Auburn in 2010. According to the police incident report, he was intoxicated, unruly, and abusive to other patrons and was cut off from the bar by casino security. When he continued to drink he was ejected and placed in a cab. He returned less than an hour later and was arrested. The incident report notes, “He stated I better not take him to jail because he had to work in the morning. He stated he was a Seattle Fire Fighter. He was very vulgar and verbally abusive.... He told me again to ‘fuck off’ and informed me how much he didn’t like police officers.” The only disciplinary consequence was an “Official Reprimand.”

The Department responds (Post-hearing Brief at 41) that “The firefighters to whom Howell compares himself did not actively engage in fighting; they did not threaten a vulnerable population; they did not show animus toward a protected class; and their actions were not broadcast on the nightly news and did not generate the negative publicity for the Fire Department that Howell’s did.” According to the police incident reports, Mr. Karthauser did engage in physical fighting with a bouncer, and Mr. Duncan threatened—at least hypothetically—to withhold lifesaving professional services from a police officer. But the Department is certainly correct that none of the Union’s proposed comparables involved a verbal and physical attack on a group which the City has declared by ordinance to be a vulnerable population, and none of them dragged the Department’s reputation through the nightly news.

The Occidental Park incident certainly resulted in a blow to the Department’s reputation, and particularly to its reputation as a dependable source of caring aid for Seattle’s downtown homeless population. A long-time advocate for Seattle’s homeless population testified compellingly that there is very little actual violence toward that population, and what little there is is mostly perpetrated in the dark of night by seventeen to nineteen year old males. This incident—as broadcast in the media and through the rumor mill—was particularly chilling because it occurred in broad daylight and was instigated not only by responsible adults but by professional firefighters. That certainly sets Mr. Howell’s misbehavior apart from the prior records of Karthauser, Duncan and Dawson.

If Mr. Howell was not primarily the innocent victim of an attack in Occidental Park—as the Department has shown he was not—was he the victim of a chance attack by the media? No employee should be dismissed, it seems to me, simply because his or her activities happen to have drawn unexpected adverse media coverage. If Mr. Duncan had had the bad luck to encounter a film crew doing a piece on drunken boating, for example, or if Mr. Dawson had encountered a film crew investigating intoxication in nearby casinos, that certainly could have magnified the adverse effect of their behavior on the reputation of the Department, but it is not clear that the Department would have had just cause to increase the disciplinary consequences on the basis of such chance encounters. Mr. Howell’s situation is not similar in that regard. His instigation of a fight with Seattle’s homeless could hardly have been chosen to be more certain of media attention: at the Fallen Firefighters Memorial in Occidental Park on a Saturday evening following a Sounders game. The adverse media attention here cannot be assigned to mere bad luck, and it is not possible to shift onto the messenger the burden of the resulting damage to the Department’s reputation.

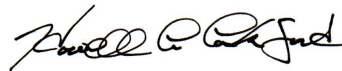
In short, Mr. Howell did what he was disciplined for: He was the instigator, not merely the victim, of a verbal and physical fight in Occidental Park. He did not take advantage of early opportunities to disengage, and he returned to carry on verbally even after he had completely exited the park. He attempted to avoid the consequences of those actions by making a false 911 report and by falsely reporting to the police that he had been a passive victim. Those actions caused substantial damage to the Department's reputation generally and to its reputation within the homeless community in particular. As far as the record shows, no prior incident of Seattle Firefighter misbehavior or discipline is comparable to this one, so the Department's choice to discharge Mr. Howell was not inconsistent with its choices in the past.

Finally, Mr. Howell promptly submitted to treatment for alcohol and psychological problems. The Chief knew of Mr. Howell's treatment both through investigator Perisho's report and directly from Mr. Howell in the *Laudermill* hearing. In the past, as in the case of Mr. Duncan, the Department has given some firefighters a second chance in light of such a voluntary submission to treatment. If I were the Department, I might extend that same discretion to Mr. Howell, but that is the Department's discretion, not an arbitrator's.²⁵ The Department established just cause for his discharge by clear and convincing evidence, and the Union's grievance must be dismissed.

AWARD

There was just cause for the termination of Robert Howell. The grievance is dismissed.

Respectfully submitted,



Howell L. Lankford,
Arbitrator.

²⁵The Department quotes the renowned arbitrator Whitney McCoy, from the very first volume of BNA's collection of labor arbitration awards: "The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved—in other words, where there has been an abuse of discretion." *Stoakham Pipe Fittings Co.*, 1 LA 160, 162 (1945). One part of arbitrator Daugherty's *Enterprise Wire* discussion that remains valid almost 50 years after its publication is his observation that "leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion." 46 LA 359, n4 (1966). In this instance, I cannot find a basis for concluding that the Department's decision to discharge Mr. Howell was an abuse of its discretion.