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In the Matter of the Grievance of

DAN FEITER

Under the Grievance Procedure of

CITY OF HARTFORD

Case 63

No. 71767

DECISION NO. 37457

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**Appearances:**

**Lee Gierke**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 727, Thiensville, Wisconsin, 53092-0727, for Dan Feiter.

**Karen M. Christianson**, O'Meara Law Firm, LLP, 124 East Sumner Street, P.O. Box 270468, Hartford, Wisconsin, 53027-0468, for the City of Hartford.

**DECISION OF THE IMPARTIAL HEARING OFFICER**

Pursuant to the terms of its Discipline and Grievance Procedure, the City of Hartford asked the Wisconsin Employment Relations Commission to provide an impartial hearing officer as to the termination grievance of Dan Feiter. I was assigned to the matter.

The parties agreed that a hearing was not needed and that they would instead file evidence and argument for my consideration. That process was completed upon my November 30, 2012 receipt of the parties' reply briefs. The evidence was supplemented on December 12, 2012 by my receipt of the document which advised Feiter that he was terminated.

The City's Discipline and Grievance Procedure provides in pertinent part:

**Discipline.** Discipline may result when an employee's actions do not conform with the generally accepted standards of good behavior, when an employee violates a policy or rule, when an employee's performance is not acceptable, or when an employee's conduct is detrimental to the interests of the City. Disciplinary action may call for any of four steps-verbal warning, written warning, suspension (with or without pay) or termination of employment-depending on the problem and the number of occurrences. There may be circumstances when one or more steps are bypassed. Certain types of employee problems are serious enough to justify either a suspension or termination of employment without going through progressive discipline steps. The City reserves the right, in its sole discretion, to impose disciplinary action as may be appropriate to the particular circumstances.

**Grievances.**

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**2. Step 2-Impartial Hearing Officer.**

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The impartial hearing officer will determine whether the City acted in an arbitrary and capricious manner.

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Having reviewed the evidence and argument, I conclude that the City did not act in an arbitrary and capricious manner when it terminated Feiter's employment on August 29, 2012.

Feiter worked for the City's Water Department and, in addition to his regular duties, was assigned to be on-call on a compensated rotating basis to respond to Department emergencies. Feiter also volunteered as a firefighter/EMT with the City's Fire Department. Despite advance knowledge of his on-call Water Department schedule and his understanding that the Water Department was to be his first priority and that he was not to "double book", Feiter nonetheless sometimes scheduled himself as being available to respond to Fire Department calls while he was also on-call for the Water Department. Feiter's personnel file documents two prior instances (the most recent being in June 2012) where he was unable to respond to a Water Department emergency because he was on an emergency call for the Fire Department. In each instance, Feiter was warned not to "double book".

On August 20, 2012, Feiter had again "double booked" himself and was unable to timely respond to a Water Department emergency because he was on a Fire Department call at the time. In response, the City terminated Feiter's employment effective August 29, 2012 and advised him by letter in pertinent part as follows:

This action is being taken because of your repeated violation of being scheduled "on call" from the Water Utility at the same time you were scheduled as an Emergency Medical Technician for the City. On August 20, 2012 you failed to respond for Water Utility emergency work because you were on an ambulance call.

As a result of this clear violation your Water Utility employment is terminated.

Feiter admits he engaged in misconduct but argues that the penalty of discharge is too severe-particularly where, as here, there is reference to progressive discipline in the City's Discipline Procedure and the City had not previously warned him that he might be terminated

for future violations. In support of his argument, Feiter cites decisions by arbitrators issued under a “just cause” disciplinary standard. However, the Discipline Procedure I am to apply does not establish “just cause” as the applicable standard but rather directs me to determine whether the City was “arbitrary and capricious”—a standard that is less stringent than “just cause” and in effect asks whether the City could reasonably decide that termination was the appropriate level of discipline. Here, Feiter was clearly aware that he was not to “double-book” and had been previously disciplined on two occasions for such conduct. Nonetheless he “double-booked” again. As a consequence of the “double-book” in question, response to an emergency was delayed. Fortunately, there was no resulting loss of life or significant property damage. However, in such circumstances, I am satisfied that one of the disciplinary responses the City could reasonably impose under an “arbitrary and capricious” standard was termination.<sup>1</sup>

Dated at Madison, Wisconsin, this 29th day of January, 2013.

Peter G. Davis /s/

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Peter G. Davis  
Impartial Hearing Officer

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<sup>1</sup> In making this determination, I have considered the progressive discipline language in the Discipline Procedure and the fact that the City in effect proceeded from a June 2012 written warning to the August 2012 termination for the same type of misconduct. However, as the City notes, the Procedure also provides that “The City reserves the right, in its sole discretion, to impose disciplinary action as may be appropriate to the particular circumstances.” and that “There may be circumstances when one or more steps are bypassed.” Thus, particularly in the context of an “arbitrary and capricious” standard, I conclude that the progressive discipline language did not obligate the City to suspend rather than terminate Feiter.