

1
2
3
4
5
6 **CITY OF SEATTLE**
PUBLIC SAFETY CIVIL SERVICE COMMISSION

7 **IN RE THE APPEAL OF:**)
8)

9 **MARCIA KINDER,**)

10 **Appellant,**) **NO: 07-005**

11 **vs.**)

12 **CITY OF SEATTLE, SEATTLE FIRE**) **FINDINGS OF FACT,**
DEPARTMENT,) **CONCLUSIONS OF LAW,**

13 **Respondent.**) **AND ORDER**
14)

15
16 **I. INTRODUCTION**

17 On June 20, 2007, Captain Marcia T. Kinder (Captain Kinder) filed this appeal of her
18 June 8, 2007 termination by the Seattle Fire Department (SFD; Department). The Commission
19 held a full evidentiary hearing on December 3, 4 and 5, 2007 before Commissioners David
20 Bown, Herbert Johnson, and Joel Nark, with Commission Chair Nark acting as Presiding
21 Officer.¹ Captain Kinder represented herself and Assistant City Attorney Amy Lowen
22 represented the Department.

23 ¹ The Commission record closed on January 7, 2008, the date on which the Commission received post-hearing
briefs.

1 **A. Continuances and Captain Kinder's Decision to Represent Herself**

2 Captain Kinder requested several continuances of the pre-hearing discovery dates and of
3 the hearing dates. The Commission granted several of those requests in order to give her the
4 opportunity to obtain an attorney or other representation.² The Commission, both at the pre-
5 hearing conference and during the hearing itself, informed Captain Kinder about the pre-hearing
6 and hearing process. Captain Kinder decided to represent herself at the hearing.

7 **B. Captain Kinder's Decision Not to Testify**

8 Captain Kinder indicated before the hearing that she might not testify at the hearing.
9 Commission staff informed her that although the Commission is an administrative proceeding
10 and does not strictly apply the rules of evidence, she would nevertheless need to present
11 admissible witness testimony and exhibits in order to put her case before the Commission. The
12 Commission also explained that she would be allowed to present an opening statement and
13 submit a post-hearing brief, but that those represented an opportunity for her to argue the
14 significance of the evidence, but were not themselves evidence that the Commission could
15 consider. The Commission also gave Captain Kinder until the close of her case to decide
16 whether she was going to testify. Captain Kinder decided not to testify in her case and the
17 Department decided not to call her as an adverse witness in their case.

18 _____
19 ² On June 21, 2007, the Commission scheduled the pre-hearing conference for July 19, 2007. On July 12, 2007,
20 Captain Kinder requested by telephone that the pre-hearing conference be continued. The Commission granted a
21 continuance of the pre-hearing conference until August 16, 2007. After the August 16 pre-hearing conference, the
22 Commission set the case schedule: 1) Discovery deadline and exchange of exhibits and witness lists- September 17,
23 2007; and, 2) Hearing dates - October 22-24, 2007. On September 24, 2007, Captain Kinder requested an extension
of the already passed September 17, 2007 deadlines, and in an e-mail dated September 24, 2007 requested a
continuance of the October hearing dates. The Commission granted both requests and issued an October 18, 2007
order extending the discovery and exchange of exhibits and witness lists deadline to November 8, 2007 and the
hearing until December 3-5, 2007. On November 6, 2007, Captain Kinder requested another continuance. The
Department opposed the request. The Commission Executive Director temporarily suspended the deadlines that
were set for November 8, 2007 pending a Commission ruling on the Motion. On November 8, the Commission

1 **II. ISSUES**

2 The issues before the Commission are:

- 3 1. Did the Department have just cause to discipline Captain Kinder?
4 2. If so, did the Department have just cause to impose the discipline it chose – termination?

5 **A. BURDEN OF PROOF**

6 PSCSC Rule 6.21 provides as follows:

7 BURDEN OF PROOF. At any hearing on appeal from a demotion, suspension,
8 or termination, the disciplining authority shall have the burden of showing that its
9 action was in good faith for cause. At any other hearing, the petitioner or
10 appellant shall have the burden of proof by a preponderance of the evidence.

11 The Department therefore bears the burden of proving by a preponderance of the
12 evidence that the termination was in good faith for cause.

13 **B. JUST CAUSE**

14 The seven factors the Commission has utilized in considering just cause are: (1) that the
15 employee had notice that his or her conduct would result in disciplinary consequences; (2) that the
16 rule violated was a reasonable rule; (3) that the employer investigated to determine whether the
17 rule was, in fact, violated; (4) that the investigation was fair; (5) that the employer's decision-
18 maker had substantial evidence that the employee violated the rule as charged; (6) that the
19 employer applies its rules even-handedly; and (7) that the discipline administered was fair in
20 relation to the nature of the offense and imposed with regard to the employee's past work record.

21
22
23 decided: 1) denying the motion for a continuance of the hearing dates; and 2) granting a one-week extension of the
November 8 deadlines.

1 **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

2 After considering the evidence in this case, including the testimony and documentary
3 evidence, and the arguments of the parties and their representatives, the Commission
4 unanimously enters the following Findings of Fact, Conclusions of Law, and Order.

5 **A. FINDINGS OF FACT**

- 6 1. Captain Kinder worked for the Seattle Fire Department for approximately twenty-three
7 years before she was terminated on June 8, 2007.
- 8 2. The Department’s allegations against Captain Kinder include:
- 9 a. Insubordination: Fit for Duty - Suspension (August 2005) (Exhibits 6, 7, 8, 10,
10 13, 14, 15, 16, 17);
- 11 b. Insubordination: Fit for Duty - Termination (June 2007) (Exhibits 14, 19, 27, 36,
12 37, 38, 40, 49);
- 13 c. Conduct Unbecoming and Insubordination: Off-Duty Accident (Exhibits 2, 22,
14 23, 25, 26, 28, 45);
- 15 d. Error In Receipt of Alarm (Exhibits 2, 20, 21-24);
- 16 e. Preventable Accident, Failure to Timely Report, Failure to Provide Accurate
17 Reports (Exhibits 2, 20, 21, 22); and,
- 18 f. Failure to Maintain EMT Certification (Exhibits 2, 3, 33, 45).
- 19 3. Captain Kinder argues that she was the victim of unfair treatment, harassment,
20 discrimination, and retaliation by the Department because, among other reasons, she had
21 filed a lawsuit against the Department early in her career complaining about sex
22 discrimination on the basis of pregnancy.
- 23 4. Captain Kinder argues that several procedural irregularities prove that the
Department did not have just cause to terminate her, including:

- a. Favorable information was inexplicably missing from her personnel file;
- b. The Department inappropriately handled a transfer memo;
- c. She was wrongfully ordered not to enter any fire stations;
- d. Her 2005 Personal Improvement Plan was inappropriately disciplinary;
- e. She was subjected to excessive “drilling”;
- f. Her June 2005 removal from duty did not follow SFD procedures;
- g. Negative and damaging rumors about her circulated within the Department;
- h. She received inadequate notice of the first Loudermill hearing; and,
- i. She applied, but was not seriously considered, for other assignments.

5. The Department hired Marcia Kinder as a firefighter in 1983. She was periodically promoted and achieved the rank of Captain in 2001.

6. On June 29, 2005 Captain Kinder was involved in a series of events that triggered an eventual order that she attend a fit for duty examination.

7. Prior to that time, Captain Kinder had a generally positive work record and did not have any significant disciplinary history. (Ex. A-1).

8. Battalion Chief Tamalyn Nigretto witnessed Captain Kinder in command on two alarms on June 29, 2005. Bat. Chief Nigretto initially went to a scene where Kinder was in command that day because Kinder’s radio communications were elevated in volume and tone, and were confusing. (Nigretto testimony.) On the scene, she observed Captain Kinder moving around the scene in an erratic way, seemingly “dazed” and not in command. (Nigretto testimony; SFD Ex. 6.)

9. During another incident on the same day, Bat. Chief Nigretto was alarmed at Kinder’s ordering of a “confined space” rescue instead of a “trench rescue;” Kinder then led her crew

1 to enter the trench without proper air monitoring or harnessing. (SFD Ex. 6).

2 10. Each of these errors was mitigated. However, they together created enough concern
3 for Bat. Chief Nigretto to continue on to Engine 30, where Captain Kinder was assigned, to
4 speak with her. Captain Kinder admitted that she had made mistakes during the run and
5 explained that she was distracted by a difficult personal phone conversation before the run.
6 (SFD Ex. 6). Captain Kinder informed Bat. Chief Nigretto that she was experiencing a great
7 deal of stress in her personal life. Bat. Chief Nigretto also spoke with the crew.

8 12. Bat. Chief Nigretto documented her concerns at the time. (SFD Ex. 6).

9 13. Bat. Chief Nigretto, in consultation with Chief Tipler, decided to relieve Kinder from
10 duty. Chief Tipler began researching what to do.

11 14. He asked Bat. Chief Nigretto to interview the crew, which she did. Firefighters (FF)
12 Bentz, FF Jeffrey, and FF Pretzel-White described a variety of unusual behaviors (SFD
13 Ex. 7).

14 15. After reviewing the interview statements, Chief Tipler contacted the Citywide Safety
15 Office and spoke with Bill Allen, who was in charge of fit-for-duty exams. (Tipler
16 testimony.)

17 16. Mr. Allen told Chief Tipler that he should have sent Captain Kinder for an immediate
18 fit-for-duty exam, and that he should do so immediately.

19 17. Chief Tipler ordered Captain Kinder to submit to a fit-for-duty exam. She initially
20 refused. (Tipler testimony; SFD Ex. 8.) Bill Allen told Chief Tipler that refusal to
21 submit to a fit-for-duty was grounds for termination, but Chief Tipler did not recommend
22 termination at that time. He instead ordered Captain Kinder again to submit to an
23 examination. After nearly one month, she did.

1 **Dr. Hamm's Conditions for Captain Kinder's Fitness for Duty**

2 18. Dr. Hamm evaluated Captain Kinder and recommended conditions that Captain Kinder
3 should meet before she should be considered fit for duty: 1) attend psychiatric counseling for one
4 year; and 2) undergo drug/alcohol tests for at least one year (Testimony of Czeisler, Tipler, Dean).³

5 19. Captain Kinder does not dispute that Dr. Hamm recommended those conditions as
6 necessary prior to her return to duty.

7 20. The Department informed Captain Kinder about the conditions in a letter dated August
8 18, 2005. The Department ordered her to meet those conditions in order to be declared fit for duty.
9 (SFD Ex. 14).

10 21. Captain Kinder requested and received a personal leave of absence from September 26
11 until October 26, 2005. In the letter granting the leave, the Department again informed her that she
12 would have to comply with the fit-for-duty conditions. (SFD Ex. 18.)

13 **The August 2005 Suspension (Suspension for Failure to Comply with Fitness for Duty Order:
14 Exhibits 6, 7, 8, 10, 13, 14, 15, 16, 17)**

15 22. After the exam, Kinder was ordered to meet with Chief Tipler to get the results. She
16 refused. (Tipler testimony; SFD Ex. 13) As a consequence, Chief Tipler recommended that
17 Kinder be terminated.

18 23. Chief Dean considered the recommendation but decided instead to suspend Kinder,
19 giving her another chance to comply with the Department's directives.

20 24. Chief Dean testified he wanted to send Captain Kinder a message that this was a
21 serious issue but also to give her the opportunity to succeed as a Captain in the Department.
22 (Dean Testimony).

1 25. Captain Kinder did not appeal the August 2005 suspension.

2 **Captain Kinder's Brief Return to Duty in November 2005.**

3 26. Captain Kinder briefly returned to duty on November 4, 2005. In the next few days she
4 was involved in three separate incidents for which the Department initiated new disciplinary
5 proceedings.

6 **Error In Receipt of Alarm (Exhibits 2, 20, 21-24)**

7 27. On November 4, 2005, Captain Kinder directed her crew to respond to a non-existent
8 alarm. Captain Kinder admitted that she misread a previous alarm, and that there was no current
9 alarm. (SFD Ex. 24A.)

10 28. Kinder's supervisors recommended discipline ranging from an official reprimand to a
11 one-shift suspension for the alarm incident standing alone. (SFD Ex. 24.)

12 **Preventable Accident, Failure to Timely Report, Failure To Provide Accurate Reports**
13 **(Exhibits 2, 20, 21, 22)**

14 29. Later the same day (November 4, 2005), Captain Kinder backed the Fire Engine into a
15 sink at the station, damaging the sink. (SFD Ex. 20A, 20D) She violated SFD backing procedures,
16 which require that guides be in place prior to backing the rigs. (SFD Ex. 2, Operating Guideline
17 6001-3.)

18 30. She initially claimed that she had a backer (compare SFD Ex. 20B and Ex. 20A;
19 Nigretto testimony), and later stated that the accident was caused by a "blind spot."⁴ (SFD Ex.
20 20F.)

21 ³ The Department did not offer Dr. Hamm's letter into evidence because it contained information that is not relevant
22 to this proceeding. The relevant information in the letter is the contents of the conditions Dr. Hamm found
23 necessary for her to be fit for duty. Those conditions are summarized in Ex. SFD 14.

⁴ Kinder changed her story again during the hearing, insinuating (without submitting to any oath to be truthful) that
she had no backer because everyone was asleep. It is difficult to believe that her crew was asleep at 5pm, when she
claimed the accident occurred. (SFD Ex. 20E, 20F.)

1 31. Captain Kinder also failed to report the accident for several hours. SFD Policy 2.4
2 requires immediate reporting of accident (SFD Ex. 2). It is somewhat unclear how long she waited
3 to report the accident. She claimed it happened at 5pm (SFD Ex. 20E, 20F). Other testimony
4 indicated that the accident occurred *after* the error in receipt of alarm incident, which occurred at
5 approximately 5:30pm (SFD Exs. 21; 24A). Chief Nigretto investigated and found that Captain
6 Kinder waited at least 3 ½ hours to report the incident. (SFD Exs. 20B, 21.)

7 32. Captain Kinder's supervisors recommended discipline ranging from an official
8 reprimand to a four-shift suspension. (SFD Ex. 24.) The recommendations noted multiple
9 violations and mitigating circumstances, including negligence in operating the apparatus by a
10 supervisor, violating policy by lacking a guide, lack of good judgment, failure to timely report the
11 incident, and failure to properly fill out the accident report.

12 **November 2005 Off-Duty Accident: Conduct Unbecoming and Insubordination: (Exhibits 2,**
13 **22, 23, 25, 26, 28, 45)**

14 33. On November 8, 2005, Captain Kinder was involved in a car accident near her station
15 while she was off-duty. A Seattle police officer was called to the scene, and he interviewed both
16 Captain Kinder and the young woman who was driving the other car. Engine 30⁵ personnel
17 responded to the scene. (Frediani testimony; SFD Ex. 25A.) Captain Kinder was attended to by FF
18 Michael Frediani, as well as other members of his team.

19 34. FF Frediani's uncontested testimony established that Captain Kinder repeatedly made
20 it clear to the other driver she was a SFD captain. The young driver expressed concern that no one
21 would believe her account of the accident when contradicted by a captain with the fire department.

22 35. After FF Frediani returned to the station, Captain Kinder called him. With an elevated
23 voice, she screamed and cursed at FF Frediani, and then abruptly hung up on him. (SFD Ex. 25A.)

1 36. The Department was notified of the accident when the young driver's lawyer attempted
2 to hold the Department liable for it, based on Captain Kinder's repeated representations regarding
3 her association with the Department. (SFD Ex. 26; Czeisler testimony.)

4 37. Captain Kinder received a Form-25 Statement of Formal Charges for the incident
5 (based on disorderly conduct and misuse of her official position). (SFD Ex. 25.) She refused to
6 sign the charges (SFD Ex. 25C). She was ordered to write a letter to the Fire Chief explaining
7 what occurred (SFD Ex. 28). She refused. (SFD Exs. 22, 23, 45.) SFD's standard practice is to
8 require explanation letters as parts of their investigative process (Testimony of Nigretto, Tipler,
9 and Czeisler.) Captain Kinder never provided the letter, claiming her off-duty conduct was no
10 business of the Department.

11 38. Captain Kinder was out on an occupational disability beginning approximately
12 December 3, 2005 due to a back injury.

13 **Failure to Maintain EMT Certification (Exhibits 2, 3, 33, 45)**

14 39. All SFD employees are required to maintain EMT as a condition of employment. This
15 policy was implemented in 1998 (SFD Ex. 2, Operating Guideline 8004) and adopted into the
16 Department's union contract in 2002 (SFD Ex. 3).

17 40. Kinder was out of compliance as of late 2005. (SFD Ex. 33.) The Department was able
18 to obtain a one-year extension to her certification in 2006, but the state of Washington would not re-
19 extend her certification beyond the one-year period. (Czeisler testimony; Tipler testimony; Dean
20 testimony).

21 41. The Department sent Captain Kinder EMT paperwork on November 17, 2005, when she
22 was still on active duty. (Nigretto testimony; Tipler testimony.)

23 ⁵ Engine 30 was the station overseen by Captain Kinder.

1 42. Captain Kinder argues that a state employee informed her she did not need to renew the
2 certification until she returned from disability leave, but she did not offer evidence in support of that
3 argument.

4 43. In the nearly ten years that the Department's required EMT certification as a condition
5 of employment, no other member's certification lapsed for more than one year. (Dean testimony.)

6 **Insubordination: Fit-for-Duty Termination: (Exhibits 14, 19, 27, 36, 37, 38, 40, 49)**

7 44. As noted above, Captain Kinder had been ordered to submit to psychiatric treatment and
8 to provide documentation of compliance.

9 45. Upon her return to duty in November 2005, Captain Kinder was reminded of her need
10 to "provide written confirmation of having been seen by a psychiatrist," and that failure to comply
11 with directives "will result in your termination." (SFD Ex. 19.)

12 46. The Department attempted to aid Captain Kinder in complying. Ms. Czeisler supplied
13 the names of psychiatrists who previously worked with SFD members (SFD Ex. 27; Czeisler
14 testimony), discussed the issue with her repeatedly (SFD Ex. 37A, Czeisler testimony; Tipler
15 testimony), and corresponded with her repeatedly (see, e.g., SFD 37C).

16 47. In late January 2006 the Department scheduled a psychiatric appointment for Captain
17 Kinder (SFD Ex. 36; Czeisler testimony; Tipler testimony). She cancelled the appointment. (SFD
18 Exs. 37A, 38; Czeisler testimony).

19 48. The Department chain of command recommended her termination in early 2006. The
20 Department took no action at that time because Kinder remained on disability leave at that time due
21 to a back injury.

22 49. When Kinder notified SFD in 2007 that she was again ready to return to work, the
23 Department scheduled a "Loudermill" hearing in order to discuss with her the insubordination

1 regarding the order to attend counseling and provide documentation, along with the other pending
2 disciplinary issues. (SFD Exs. 45, 46.)

3 50. The hearing was delayed for approximately one month at Captain Kinder's request.
4 (Dean testimony; Czeisler testimony.) The hearing took place on May 15, 2007.

5 51. She responded to the charges and proposed discipline at the Loudermill hearing. She
6 provided a response to each of the November 2005 incidents, except she continued to refuse to
7 discuss the off-duty car accident.

8 52. Captain Kinder did not provide any additional documentation at the Loudermill hearing
9 that she had attended psychiatric treatment for the required year-long period. Captain Kinder
10 claimed at the Loudermill that she had documents showing she attended counseling for one year and
11 would provide them immediately.⁶

12 53. Chief Dean decided to give Captain Kinder another chance to show that she was in
13 compliance. He told her to provide the documentation. When he did not receive it, he called
14 Captain Kinder's union, telling them that she had not provided the documentation. (Dean
15 Testimony).

16 54. On or around June 8, nearly three weeks after the May 15 Loudermill, Captain Kinder
17 provided the Department with a group of her telephone records. (Dean Testimony). Those records
18 did not document that she had received any psychiatric counseling. She did not provide any
19 additional records from her psychiatrist.

20
21
22 ⁶ Captain Kinder had provided no documentation that she was seeing a psychiatrist until February 2006. At that time,
23 she provided a document dated February 3, 2006, indicating that Captain Kinder "is seeing me for psychiatric treatment
on a weekly basis" and that Dr. Roys "will be providing weekly documentation that she is attending her sessions...."
(SFD Ex. 40, p. 10).

1 55. Captain Kinder argues that she resubmitted documentation of her psychiatric treatment.
2 (Ex. A-26). That exhibit contains three notes from Dr. Roys, indicating that he saw her on three
3 occasions – January 13, 2006, January 25, 2006, and February 5, 2006. It does not establish that she
4 had been in treatment for the required year.

5 56. Several Department witnesses testified that Kinder failed to provide documentation that
6 she complied with the Department’s Order that she attend counseling for at least one year.

7 57. Testimony at the Commission hearing also established that Captain Kinder failed to
8 timely provide the required documentation. Dr. Roys, Kinder’s psychiatrist, testified that he
9 wrote three letters confirming Kinder’s attendance: one each in February 2006, March 2006, and
10 July 2007. The July 2007 letter came after Captain Kinder was terminated and nearly two
11 months after the May “Loudermill” hearing. Dr. Roys also testified that Captain Kinder
12 underwent counseling for approximately one year over an eighteen month period.⁷

13 58. Chief Dean concluded that Captain Kinder had lied to him when she told him she had
14 such documentation and would provide it within a week of the Loudermill.

15 59. Chief Dean met with advisors to discuss the proposed discipline. He met with Travis
16 Taylor, EEO Advisor, Chief Hepburn (then Assistant Chief of Safety and Employee Development,
17 Chief Tipler’s former position), and Linda Czeisler. The purpose of the meeting was to discuss
18 whether the allegations should be sustained and what the appropriate level of discipline, if any,
19 should be. (Dean testimony.) They considered the separate instances of misconduct together, the
20 repeated insubordination, the EMT certification-related failure, along with the seriousness of the
21 offenses, Kinder’s disciplinary history, her length of service, and comparable instances where
22 similarly situated employees were disciplined for engaging in similar misconduct. (Dean
23

1 testimony.)

2 60. No one involved in the decision knew of any SFD officer who had as many violations
3 as Captain Kinder. Everyone consulted determined there was substantial evidence to support the
4 allegations and impose termination. Chief Dean decided to terminate Captain Kinder.

5 **B. CONCLUSIONS OF LAW**

6 The August 2005 Suspension

7 1. The role of prior discipline in a civil service hearing is limited. Prior misconduct is
8 not relevant to prove the current misconduct occurred. However, it may be relevant to prove, for
9 example, that the employee had notice that the present misconduct might result in discipline or
10 that the degree of discipline for the present misconduct is justified in light of the employee's
11 work record, including prior discipline.

12 2. The Commission analyzes the 2005 suspension in that light. Captain Kinder was
13 suspended for thirty days in August 2005. She did not appeal that suspension at the time (to
14 either the Commission or under a collective bargaining agreement), so the issue of whether the
15 suspension was for just cause is not now before the Commission.

16 3. The Commission concludes that the issue of whether the Department had just cause to
17 require Captain Kinder to comply with Dr. Hamm's recommended fit-for-duty conditions in August
18 2005 is also not an issue in this appeal.

19 4. However, the Commission also concludes that if it were an issue, the Department did
20 have just cause, based on Captain Kinder's conduct prior to August 2005, to require her to submit to
21 a fitness-for-duty exam and to require her to comply with the resulting fit-for-duty conditions
22 recommended by Dr. Hamm.

23 ⁷ The Commission admitted Dr. Roys' testimony not to show that he had treated Captain Kinder, but rather whether

1 5. The 2005 suspension is relevant to show that Captain Kinder had notice that she was
2 required to comply with the fit-for-duty conditions and that the Department engaged in
3 progressive discipline. Chief Dean imposed the suspension despite the fact that termination was
4 recommended, in order to give Kinder an opportunity to get her life together and be a productive
5 member of the Department. (SFD Ex. 17.)

6 **Did the Department Have Just Cause to Discipline Captain Kinder?**

7 Captain Kinder Had Notice

8 6. Captain Kinder had notice that her conduct would result in disciplinary consequences.
9 She was repeatedly informed in writing that failing to comply with the fit-for-duty conditions, and
10 to document that compliance, would result in discipline up to and including termination. As a
11 twenty-three-year veteran of the Department, she should know that failure to comply with
12 commands may lead to discipline. Captain Kinder was also previously suspended for prior
13 insubordination regarding those same fit-for-duty conditions.

14 7. Captain Kinder was certainly aware that the Fire Department is a paramilitary
15 organization. As such, orders must be obeyed for the basic structure of the organization to work.
16 Orders are not to be ignored, and subordinate officers simply do not have authority to cherry pick
17 which orders they will follow and which they will ignore.

18 8. The policy manual clearly requires members to be up to date on their EMT certification.
19 (SFD Ex. 2, Operating Guideline 8004.) All of those who testified on this point said that they
20 understood their obligation to maintain EMT certification.

21 The Rules Are Reasonable

22 9. All of the rules Captain Kinder is charged with violating are reasonable. It is reasonable

23 _____
she or he had submitted documentation of that treatment to the Department and, if so, when.

1 for the Department to require its command staff to follow legitimate orders from the Chief of the
2 Department, the Chief of Safety, and the Director of Human Resources. It was also reasonable for
3 the Department to adopt Dr. Hamm's recommended conditions and to require Captain Kinder to
4 document she was in compliance with those conditions.

5 10. It is also reasonable for the Department to enforce its rules regarding driving policies, to
6 require employees to explain even off-duty incidents that relate to their employment, and to be
7 truthful and candid with law enforcement officials investigating such incidents. Finally, it is
8 reasonable for the Department to require its employees to maintain EMT certification required by
9 both state law and the Department's union contract.

10 The Department Investigated

11 11. There is no dispute that the Department conducted investigations of each alleged
12 violation to determine whether the violations had, in fact, occurred. The investigations were
13 conducted in accordance with customary practices and procedures. These included interviewing
14 both Captain Kinder and other appropriate witnesses.

15 The Investigation was Fair

16 12. The investigations were fair and unbiased. The investigators were dispassionate and
17 objective. Captain Kinder argued that the Department was biased against women who made prior
18 complaints against the Department. However, she did not offer any evidence connecting such
19 alleged bias with her investigation or discipline.

20 13. Captain Kinder also argues that Linda Czeisler, SFD's Human Resources Director, did
21 not provide to Chief Dean documents that Captain Kinder and Dr. Roys had provided to her. The
22 Commission concludes there is no evidence to support that argument. Dr. Roys testified that the
23 only pre-termination letters he wrote were identical to those that Director Czeisler had received and

1 had provided to Chief Dean. (Roys testimony)

2 14. The Department's investigations were fair and unbiased, in accordance with the
3 requirements of just cause.

4 Chief Dean Had Substantial Evidence that Captain Kinder Violated the Rules

5 15. The Commission concludes that the Department had substantial reasons to conclude
6 that Captain Kinder lied to the Seattle Police Officer about the off-duty accident. (SFD Ex.
7 25B, Agate testimony.) She appeared to have invented a witness to the accident, claiming a
8 friend of hers witnessed the accident to hide own her responsibility for the accident. They also
9 had substantial evidence to conclude that she verbally abused a firefighter under her command.

10 16. Captain Kinder acknowledges that the Department ordered her to provide a letter of
11 explanation and that she refused to do so. She argues that she was not insubordinate in failing to
12 explain the accident because it occurred while she was off-duty. However, the evidence establishes
13 that Captain Kinder repeatedly represented herself at the scene as a captain in the Seattle Fire
14 Department. Captain Kinder's phone call to FF Frediani, who was under her supervision, was
15 inappropriate and abusive.

16 17. The Department also had substantial evidence that Captain Kinder was not truthful
17 with them about the how the backing accident occurred, initially stating that she had the
18 Department-required "backer" and later dropping that contention and instead stating that the
19 accident occurred due to a blind spot. Bat. Chief Nigretto contacted the firefighter that Kinder
20 claimed acted as her backer; he stated that he did not act as Captain Kinder's backer in that
21 incident. Similarly, Captain Kinder neither challenged nor offered any explanation regarding her
22 submittal of the accident report in an untimely and inaccurate manner.

23 18. The Washington Supreme Court has held that "just cause 'is a fair and honest cause

1 or reason, regulated by good faith on the part of the party exercising the power...discharge for
2 just cause' is one which is not for any arbitrary, capricious, or illegal reason and which is based
3 on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be
4 true." *Baldwin v Sisters of Providence in Washington, Inc*, 112 Wash.2d 127, 139
5 (1989)(emphasis added). This definition "checks the subjective good faith of the employer with
6 an objective reasonable belief standard." *Id.*

7 19. The question before the Commission regarding insubordination is therefore not
8 simply whether Captain Kinder went to counseling. The question is also whether SFD, at the
9 time it made its decision, reasonably concluded that Captain Kinder had failed to meet the fit-for-
10 duty conditions, and had failed to provide the required documentation.

11 20. The testimony, including that of Dr. Roys, showed that Captain Kinder failed to
12 provide the required documentation prior to her termination. The Department's conclusion that
13 Captain Kinder had not undergone the required counseling was a reasonable one in light of the
14 Department's repeated efforts to obtain documentation and Kinder's continued refusal to provide
15 it.

16 21. All the evidence presented is consistent. For nearly two years, SFD sought information
17 regarding Captain Kinder's compliance with the fit-for-duty conditions. SFD sent Captain Kinder
18 letter after letter notifying her that it lacked documentation of her compliance. Although she had to
19 have known that her lack of documentation was a primary issue to be discussed during the May
20 2007 Loudermill, and although the Loudermill was set nearly one month in advance, she brought no
21 documents to that meeting showing she was in compliance. Instead, she promised Chief Dean that
22 she would get documents within a week. She did not. Instead, she sent SFD a list of her phone
23 records, which showed nothing about compliance with the conditions.

1 22. Captain Kinder also does not contest that she was out of compliance with EMT
2 certification requirements. All evidence concludes that she was out of compliance, and that she was
3 the only SFD member to be out of compliance for more than one year. There is no dispute
4 regarding this issue, or the fact that such a status violated Department rules.

5 The Discipline Was Even-Handed

6 23. The heart of Captain Kinder's case is that the Department singled her out for unfair
7 treatment. She makes several arguments. The Commission considers each argument.

8 Retaliation for Prior Lawsuit

9 24. Captain Kinder argues she was treated unfairly because she's a woman who has
10 previously sued the Department. However, Captain Kinder produced no evidence that her long-ago
11 lawsuit had any bearing on her discipline.

12 General Sex Discrimination in the Department⁸

13 25. Captain Kinder also presented generalized "evidence" regarding an alleged anti-female
14 bias in the Department. That testimony was based on speculation from a single witness who was
15 unaware of any of Captain Kinder's conduct and who admitted that the conduct, once she heard it,
16 was in fact troubling. In any event, no evidence connected any such bias to Chief Dean, the person
17 who decided to terminate Captain Kinder.

18 26. Even though the Department bears the burden of proof that it acted with just cause, an
19 Appellant cannot defeat the Department's evidence simply with generalized claims of
20 discrimination that do not connect any such discrimination with the decision maker in their case.

21 The Discipline was Unfair in Light of Department Comparables

22 _____
23 ⁸ The Commission does not have jurisdiction to determine if unlawful discrimination occurred. Rather, it evaluates such claims in the context of whether the employer had just cause to do what it did. Captain Kinder filed a discrimination complaint with the Seattle Office of Civil Rights in April 2006, but later withdrew it. (Ex. A-10).

1 27. Captain Kinder also argues that SFD's comparables show that others received less
2 serious discipline for similar conduct. Captain Kinder's arguments that the recommendations were
3 out of place, given treatment of "comparable" members, ignores the differences between her
4 conduct and that of others (for example, her aggravating behavior such as lying about the backing
5 incident or the off-duty car accident). There simply are not any comparables to Captain Kinder,
6 because no other officer has engaged in similar conduct.

7 28. Captain Kinder argues that no other member of the Department was terminated for acts
8 related to preventable accidents, errors in receipt of alarms, and off-duty accidents. The Department
9 agrees. Captain Kinder was not terminated for any of those actions standing alone. No other
10 member of SFD has had as many separate incidents in such a short period of time as Kinder, and
11 neither Chief Dean nor Chief Tipler could recall any other member of the Department refusing a
12 direct order, as Captain Kinder did repeatedly.

13 29. Captain Kinder produced no evidence of any other female fire fighter being disciplined,
14 let alone disciplined in a harsher manner than a male firefighter who engaged in similar misconduct.

15 Information Missing from Captain Kinder's Personnel File

16 30. Captain Kinder alleges that commendations, awards, and other positive information are
17 missing from her personnel file. Witnesses testified that she received awards and community
18 commendations. Linda Czeisler testified she did not know why the material was not in Kinder's
19 file.

20 31. The Commission concludes that the Department inexplicably failed to maintain in
21 Captain Kinder's personnel file various documents favorable to Captain Kinder. However, the
22 Department does not contest that she had a generally positive work record and does not contend that
23 it relied on any discipline prior to 2005 in determining what discipline to impose for the misconduct

1 that is the subject in this appeal. The Commission also concludes there is no evidence any such
2 records were wrongfully destroyed. Therefore, the Commission concludes that absence of the
3 favorable records in her personnel file does not affect the just cause issue before the Commission.

4 The Transfer Memo

5 32. Assistant Chief Vickery distributed a transfer memorandum dated December 27, 2005.
6 (Ex. A-32). Chief Vickery included in that memorandum information regarding Captain Kinder.
7 Captain Kinder argues that it was unnecessary and inappropriate for Chief Vickery to include that
8 information in such a memorandum. Assuming that is true, however, there is no evidence that the
9 memo affected Chief Dean's 2007 decision to terminate Captain Kinder.

10 Inadequate Notice of the First Loudermill

11 33. Captain Kinder argues that she received shorter notice for her first Loudermill
12 compared to other Department employees. Ex. SFD 16 was dated August 22, 2005 and scheduled
13 her Loudermill for August 24, 2005. SFD 16 included the phrase "If you do not want to meet,
14 please contact".

15 34. Another employee's Loudermill notice in the record showed a longer notice period
16 (fourteen days between date on letter and the scheduled meeting date) and, unlike hers, also
17 included the phrase "If you do not want to meet or you need to reschedule another time, please
18 contact" (emphasis added).

19 35. The Exhibits are different on their face. However, that was the notice for her first
20 Loudermill in 2005, which Captain Kinder did not appeal. There is no evidence that the notice
21 regarding that 2005 Loudermill affected the 2007 termination that is the subject of this appeal.
22 There is also no reason to believe that the difference in the letters reflects any personal bias on the
23 part of Chief Dean, the ultimate decision maker in each case, who testified the letters were routinely

1 prepared by staff for his signature.

2 Captain Kinder's Removal from Duty in June 2005

3 36. Captain Kinder argues her removal from duty in June 2005 did not follow appropriate
4 Departmental procedures. She offered an unemployment decision of the Washington Department
5 of Employment Security in support of that argument. (Ex. A-4). The August 12, 2005 decision did
6 find that Captain Kinder was eligible for unemployment compensation because "...it is held that the
7 request for a fitness-for-duty exam was not a reasonable request at that juncture." (emphasis added)

8 37. However, the decision deals with the events that occurred in June 2005 and does not
9 establish that the Department did not have cause to discipline Captain Kinder two years later in June
10 2007.

11 The Order Not to Enter Any SFD stations

12 38. Assistant Chief Tipler sent Assistant Chief Vickery memorandum dated July 6, 2005,
13 stating that "Captain Kinder is not permitted on Fire Department premises". (Ex. A-3, p. 2) Chief
14 Dean later rescinded that order and at the hearing testified that it was wrongfully issued. There is
15 no evidence that Chief Tipler's 2005 memorandum affected Chief Dean's 2007 decision to
16 terminate Captain Kinder.

17 The PIP (Personal Improvement Plan)

18 39. Bat. Chief Nigretto prepared a Performance Improvement Plan (PIP) for Captain Kinder
19 in November 2005. (Ex.A-9). Hers was one of the first prepared under a then-new SFD policy.
20 (Nigretto testimony). The original PIP contained a statement denying Captain Kinder overtime.
21 That provision was arguably disciplinary and not appropriate under Department policy. Bat. Chief
22 Nigretto soon thereafter prepared another PIP that did not include the overtime provision. There
23 was no evidence that the original 2005 PIP affected Chief Dean's 2007 decision to terminate

1 Captain Kinder.

2 Excessive Drilling

3 40. Captain Kinder argues she was required to perform more drills, including in bad
4 weather, than other Department personnel. She offered some witness testimony that such drilling
5 was unusual. (Beers testimony) However, there is no evidence connecting that alleged excessive
6 drilling with her subsequent termination by Chief Dean in 2007.

7 Rumors Regarding Captain Kinder Circulating in the Department

8 41. Captain Kinder argues that the rumor mill in the Department was rampant about her and
9 that Department personnel spread information about her that was untrue or confidential.

10 42. Paramedic Mitzi Simmons testified that she heard a Department employee (a union
11 representative who was not a Department officer) make derogatory remarks about Captain Kinder in
12 one of the fire stations. (Ex. A-29). Other witnesses also testified that many other department
13 personnel were involved in discussing Captain Kinder.

14 43. The Commission has no trouble concluding that such gossip and spreading of rumors is
15 inappropriate. However, there was no evidence that any Department officer was involved. There is
16 also no evidence that Chief Dean participated in, condoned, or allowed inappropriate gossip or
17 rumors to in any way affect his decisions regarding Captain Kinder's discipline.

18 Captain Kinder's Applications for Other Assignments

19 44. Lieutenant Todd Wernet testified that he received a telephone call from Battalion
20 Chief Walsh on the morning Captain Kinder returned to work for an overtime shift at Station 32.
21 Lt. Wernet testified that Bat. Chief Walsh told him "if something big happens, you are in charge"
22 and "if she is not doing a good job, you can change her orders", or words to that effect.

1 45. The Commission majority concludes that if the Battalion Chief had concerns about
2 Captain Kinder's return to work or ability to perform the job, such verbal instructions to Lt.
3 Wernet were not an appropriate way to handle that situation. However, the Commission also
4 unanimously concludes that there is no evidence that Bat. Chief's Walsh's instructions in any way
5 affected Chief Dean's decisions regarding Captain Kinder's discipline, including for her actions
6 related to the subsequent alarm and backing incidents at Station 30 or the off-duty car accident.

7 46. Captain Kinder argues she applied for several "ADA" jobs – assignments in the
8 Department that do not require the employee to be able to perform the full range of duties otherwise
9 required. Captain Kinder argues she was not seriously considered for those positions. She argues
10 she provided Chief Dean with her telephone records after the May 2007 Loudermill to support her
11 claim that she had sought out alternative assignments.

12 47. However, there is no evidence connecting her claims regarding such efforts affected
13 Chief Dean's decision to terminate her. Indeed, Chief Dean testified that Captain Kinder stated at
14 the Loudermill that she was not arguing that she was disabled or that a disability prevented her from
15 providing the Department with the required documentation.

16 48. The Department had just cause to discipline Captain Kinder.

17 **B. Did the Department Have Just Cause to Terminate Captain Kinder?**

18 49. In determining whether the discipline is proportional to the misconduct, the
19 Commission considers whether the penalty is reasonably related to the seriousness of the
20 employee's proven misconduct and the employee's record of service.
21
22
23

1 Seriousness of the Proven Misconduct

2 50. The Commission concludes that the Department has met its burden of proving that
3 Captain Kinder engaged in misconduct regarding the alarm response, the backing incident, the
4 off-duty car accident, and was insubordinate in failing to meet the fit-for-duty conditions.

5 51. Those separate incidents of misconduct demonstrate that Captain Kinder engaged in
6 a wide-ranging pattern of misconduct. The Commission finds that one of the incidents (the
7 alarm incident) is less serious and might well not by itself justify serious discipline.

8 52. However, the issue is whether the misconduct, taken as a whole, justifies
9 termination. Misrepresenting to the Department the facts regarding the backing incident,
10 misrepresenting to the police officer the circumstances of the off-duty accident, verbally abusing
11 a subordinate employee, and failing for nearly two years to comply with the Department's fit-
12 for-duty conditions represent serious lapses in the level of judgment that the Department is
13 entitled to expect from one of its captains. The 2005 suspension also demonstrates that the
14 Department followed progressive discipline requirements in addressing Captain Kinder's
15 insubordination. Captain Kinder's misconduct and lapses in judgment were very serious.

16 Captain Kinder's Record of Service

17 53. The Commission reviews the discipline in light of the employee's record. The
18 Commission concludes that the Department inexplicably failed to maintain in Captain Kinder's
19 personnel file various documents favorable to Captain Kinder. However, the Department does
20 not contest that she had a generally positive work record and does not contend that it relied on
21 any pre-2005 discipline in determining what discipline to impose for the misconduct that is the
22 subject of this appeal. The Commission also concludes there is no evidence that the Department
23 wrongfully destroyed any such records.

1 54. As noted above, Captain Kinder had a good record of service for twenty years prior
2 to the events of 2005. Several witnesses testified regarding Captain Kinder's overall good
3 performance, particularly prior to 2005. Since the Department cannot explain the absence of
4 favorable documents from her personnel file, the Commission also accepts that she received
5 numerous letters of commendation and other positive indicators of performance as described in
6 Ex A-1.

7 55. However, things began to go wrong – very wrong – for Captain Kinder in 2005.
8 Captain Kinder's problems were probably related to problems she was experiencing in her
9 private life.⁹ For whatever reasons, Captain Kinder was unable to obtain the assistance she
10 needed to successfully deal with those problems. Her work performance, and particularly her
11 judgment, was seriously impacted.

12 56. The Department, and in particular Chief Dean, gave her every reasonable opportunity
13 to continue to succeed as a Captain in the Fire Department. Captain Kinder inexplicably failed
14 to take advantage of those repeated opportunities.

15 **CONCLUSION**

16 57. The largely uncontested facts establish that the Department had just cause to
17 discipline Captain Kinder. Her arguments regarding unfair and disparate treatment in a variety
18 of procedural irregularities, even if established as true, do not change the Commission's ultimate
19 conclusion that the Department had just cause to discipline her for the November 2005 incidents
20 and for her undisputed failure to timely document to the Department her compliance with the
21 fitness-for-duty conditions.

22 58. This particularly true in light of the undisputed fact that there is no evidence that
23

⁹ Since Captain Kinder did not testify, the Commission has before it very limited information about those problems.

1 Chief Dean, the ultimate decision-maker in the Department, either participated in or
2 countenanced any irregularities. Chief Dean reduced Captain Kinder's originally proposed
3 termination in August 2005 to a suspension, in effect giving her another opportunity to comply
4 with the Department's fit-for-duty requirements.

5 59. Even after she demonstrated very poor judgment in November 2005, particularly in
6 the off-duty car accident incident, Chief Dean gave her yet another opportunity after her second
7 Loudermill in May 2007 to prove she was in compliance with the fit for duty conditions.

8 60. If any others involved in her discipline were motivated to unjustly discipline Captain
9 Kinder, and we do not believe the evidence establishes that any were, Chief Dean more than
10 compensated for that by providing Captain Kinder repeated opportunities to comply. Sadly,
11 Captain Kinder failed to do so.

12 61. The November 2005 backing and off-duty car accident incidents represent serious
13 lapses of judgment on the part of Captain Kinder. The Commission concludes that the
14 Department had just cause to terminate Captain Kinder based upon the November 2005
15 incidents.

16 62. Captain Kinder's refusal to comply with the Department's fit for duty conditions, and
17 to timely document to the Department such compliance, represent serious acts of
18 insubordination. The Commission concludes that the Department also had separate and
19 independent just cause to terminate Captain Kinder for insubordination.

20 63. Chief Dean had just cause to terminate Captain Kinder in June 2007.

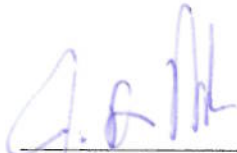
21 DATED this 20th day of March, 2008.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

IV. ORDER.


The Department's termination of Captain Kinder was for just cause and is therefore UPHELD, and her appeal is DISMISSED.

**PUBLIC SAFETY CIVIL SERVICE COMMISSION
OF THE CITY OF SEATTLE**



Commissioner Joel Nark, Chair

03/20/08
Date



Commissioner Herb Johnson

03/20/2008
Date



Commissioner David Bown

3/20/08
Date