

Before the Industrial Relations Commission  
Of New South Wales

No. IRC 1191 of 2012  
Re: Fire Brigade Regulation 2008

Applicant  
Fire Brigade Employees' Union of NSW

Respondent  
Fire and Rescue NSW

### **Outline of issues for the Fire Brigade Employees' Union of NSW**

[1] The settlement of the 2011 Awards (set out in the Union's letter to the Department of 3 March 2011) included the following:

#### ***5. Streamlined Disciplinary Process***

*The parties agree that negotiations will commence for a new disciplinary Regulation to replace the current preliminary and formal inquiry process with a streamlined process which otherwise maintains all existing members' rights and protections, as set out within the Regulation, FRNSW Standing Orders and the Awards. The parties agree that the new process should be both simpler and quicker and with this in mind will, where possible, include minimum time frames, as well as the capacity for appeal to the Industrial Relations Commission of NSW.*

[2] The Department has proposed a new part to the Regulation to cover disciplinary provisions which the Union contends goes beyond the agreement and at the same time does not maintain the existing rights and protections, does not include minimum time frames nor a capacity for appeal to the Industrial Relations Commission of NSW.

[3] In particular the Union contends that the following rights and protections would no longer exist if the Department's proposed Regulation were to be made:

- a) Right to be furnished with a copy of the complaint or allegations (current Regulation 36(3));
- b) Right to be furnished with a copy of the charge, setting out the grounds of the alleged misconduct (current Regulation 43(2))

- c) The right to be furnished with a copy of the relevant portions of the Department's file and Preliminary Inquiry Report (current Regulation 43 (3));
- d) The right to an inquiry and to be represented at an Inquiry (current Regulation 44 (2));
- e) The right to have a plea recorded in response to a charge, and by extension the opportunity to formally show contrition that may be used to mitigate against penalty;
- f) The right to call evidence, and test any evidence being considered (current Regulation 44 (6)), as formal hearings involving cross examination are explicitly prohibited by the Department's draft Regulation 36 (6);
- g) The right to inspect any document or thing furnished during the course of a Formal Inquiry (current Regulation 44 (7)).
- h) Right to admit guilt or be found guilty before remedial or disciplinary action is imposed;
- i) Right to remove any record of disciplinary action taken against a firefighter under current Regulation 46 (1) (a), (b) or (c) if the firefighter has been of good behaviour for at least 2 years since the taking of the action
- j) Rights regarding suspension from duty, including the requirement for all reasonable steps to be taken for a firefighter to be informed of the reason for the suspension and given an opportunity to respond before the suspension taking effect. Clauses providing for a maintenance payment (current Regulation 39 (2)), reimbursement of pay if a complaint of misconduct is dismissed (current Regulation 39 (3)), and reimbursement of pay if found guilty (current Regulation 39 (4)) have also been deleted.
- k) The right under Regulation 47 (2) that a fine is not to be deducted until 30 days after the Commissioner's decision to impose the fine has been made to the firefighter and Regulation 47 (3) which provides that deductions from a firefighter's pay towards payment of a fine are not to be made pending the determination of any appeal to the Industrial Relations Commission against the imposition of a fine.

- [4] Other concerns with the Department's Regulation include:
- a) The introduction of transfers as a form of 'remedial action';
  - b) The introduction of 'unsatisfactory performance' as a discipline/conduct issue;
  - c) The general expansion of the definition of misconduct;
  - d) The use of a policy document to regulate a number of existing conditions, which will be at the Commissioner's discretion and could be altered at any time;
  - e) The absence of clearly defined timeframes for the disciplinary process;
  - f) The absence of a clearly defined role for the Industrial Relations Commission of NSW;
  - g) Excessive confidentiality provisions which hinder the ability of a firefighter to make a case in defense;
  - h) The treatment of off duty conduct and conduct prior to commencement of employment with FRNSW;
  - i) No right for suspension to be lifted within 14 days where disciplinary proceedings have not commenced.

[5] In settlement of this matter the Union proposes an alternative Regulation. This draft Regulation ought to be made on the basis that it:

- a) Streamlines the process by removing the two-stage (Preliminary and Formal) inquiry process and replacing it with one Inquiry;
- b) Provides timeframes throughout the inquiry process so that from the time a complaint is made to the time it is settled could be completed as soon as 4 weeks, or at worse with a mediation and inquiry after 13 weeks, subject to Department resourcing;
- c) Maintains all existing rights and protections;
- d) Consolidates all existing policy, procedures and entitlements into one Regulation, whereas the Department's document (some 60 pages, across four documents) is complex and unworkable.

[6] In drafting the proposed Regulation the Union has taken into consideration the complaints raised by management with the existing process. It has not however adopted the Department's approach, which is to remove the inquiry process entirely and replace it with an investigative process. This is because the Union does not believe that there is anything wrong with the Inquiry process covered by the existing Regulations.

[7] The Union contends that it is the Department's application of the Regulation that has led to unnecessarily lengthy and complicated matters.

[8] Firstly, matters that ought to have been resolved at the preliminary inquiry stage, or sooner, often have not due to the Department's unwillingness to conduct negotiations around pleas and penalties.

[9] This was not always the case. The Union has considered a number of discipline cases conducted over the last 15 years in preparation for this matter, many of which never made it to the Formal Inquiry stage as many settled as a result of plea-bargaining and negotiation. It is only recently, that is in the last few years that the Department has refused to enter into such negotiations therefore forcing matters that may have previously been settled into the formal inquiry stage.

[10] In light of this, the Union has inserted into its proposed Regulation a mediation stage which should result in more matters being settled rather than advancing to and inquiry. The Union has also removed the requirement for a firefighter to admit guilt in order to agree to undertake remedial action, recognising that a firefighter may be willing to undertake Remedial Action even when they do not accept that they were guilty of misconduct. The Union does not accept however that a firefighter should be required to undertake Remedial Action if they believe they are innocent.

[11] The Union contends that these two changes will minimise significantly the occurrence of inquiries and does so on the basis of case history that shows where the Department was willing to engage in plea bargaining and negotiate outcomes the number of formal inquiries decreased.

[12] That said, the value and need for Inquiries should not be ignored. There is still a requirement for inquiries in cases where the firefighter does not admit to the misconduct or does not agree to participate in remedial action.

[13] For its part, the Department has often complained about the formality of Inquiry proceedings, which has involved the calling of witnesses to give evidence on a stand, legal representation of both parties, the giving of opening and closing addresses and other such court room practices as the use of objections during proceedings and the like.

[14] However, there is nothing in the Regulation that requires such a 'court room' style process, rather the Regulations allow for the Formal Inquiry to be held in whatever manner the presiding officer sees fit within the confines of the Commissioner's Orders. There is no Commissioner's Order which stipulates how a Formal Inquiry is to be conducted, however there are guidelines which have been inserted into the Union's proposed Regulations. Nothing in these guidelines prevents a less formal approach to the inquiry.

[15] The Union contends that the Department's reliance on the use of legal representation at such inquiries in the past as led to hearings that are excessively formal. On the contrary the Union contends that the protections of the Regulation can be satisfied in a less formal way. For example, numerous tribunals have adopted conference style hearings where parties gather around a table with the presiding member who also acts as a chair allowing each party to address the issues at hand. Nothing in this style of hearing prevents witnesses being able to give evidence and be questioned by any of the attending parties.

[16] Such a process enables evidence to be tested, witnesses to be called on behalf of both the Department and the employee who has been charged and for the officer conducting the inquiry to make a determination based on the evidence before them and the submissions supplied.

[17] That said, there might be occasions where a more formal approach is warranted, however this is entirely at the discretion of the officer conducting the inquiry. Therefore, the Department cannot complain about the process being overly formal or complicated when it is a problem entirely of its own making and which can be avoided.

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