

AGENDA- revised
FIRE MERIT COMMISSION
Monday, February 10, 2025

3:30 P.M.

Council Chambers

Municipal Building, 229 S. Second Street, Elkhart, IN 46516

<https://signin.webex.com/join>

MEETING NUMBER (Access Code): 2302 678 3263 MEETING PASSWORD: Fire25
JOIN BY PHONE: 1-415-655-0001

- 1. Call to Order**
- 2. Roll Call**
- 3. Approve Agenda**
- 4. Approve Minutes- Regular Meeting January 27, 2025**
- 5. Fire Department**
 - Disciplinary Notice- Firefighter Ryan Billings**
 - Request for Disciplinary Hearing- Chief David Cushwa (tabled)**
- 6. IAFF Local 338**
- 7. Public Participation**
- 8. Adjournment**

FIRE MERIT COMMISSION
Monday, January 27, 2025

President Mandy Leazenby called a regular meeting of the Fire Merit Commission (FMC) to order at 3:30 p.m., Monday, January 27, 2025. Clerk Nancy Wilson called the role. Commissioners Mandy Leazenby, Regina Fultes, Jim Rodino and Bunita Fields-Buggs were present. Doug Bowlby was absent.

1. AGENDA

On motion by Bunita Fields-Buggs, seconded by Jim Rodino and carried 4-0, the agenda was approved.

Mandy Leazenby noted for the record the Elkhart Common Council appointed her for another four-year term from 1-1-25 through 12-31-28.

2. ELECTION OF 2025 FMC OFFICERS

On motion by Regina Fultes, seconded by Jim Rodino and carried 4-0, Mandy Leazenby was elected President of the Fire Merit Commission for 2025.

On motion by Jim Rodino, seconded by Bunita Fields-Buggs and carried 4-0, Regina Fultes was elected as Vice-President of the Fire Merit Commission for 2025.

On motion by Jim Rodino, seconded Regina Fultes and carried 4-0, Bunita Fields-Buggs was elected Secretary of the Fire Merit Commission for 2025. Congratulations!

3. MINUTES

On motion by Jim Rodino, seconded by Regina Fultes and carried 4-0, the minutes from the Regular Meeting on November 25, 2024 were approved.

4. FIRE DEPARTMENT

Certification of Battalion Chief Promotional List

On motion by Regina Fultes, seconded by Jim Rodino and carried 4-0, the FMC certified the Promotional List effective 1-13-25 for Battalion Chief as presented.

Promotions

Chief Rodney Dale presented a promotion for Captain Robin Anderson to Battalion Chief Effective January 13, 2025.

On motion by Jim Rodino, seconded by Bunita Fields-Buggs and carried 4-0, the FMC promoted Captain Robin Anderson to Battalion Chief effective January 13, 2025.

Chief Rodney Day presented a promotion for Pump Operator Jason Gour to Division Chief of Operations effective January 1, 2025. On motion by Regina Fultes, seconded by Bunita Fields-Buggs and carried 4-0, the FMC promoted Pump Operator Jason Gour to Division Chief of Operations effective January 1, 2025.

Pinning Ceremony

The following Firefighters were pinned during the ceremony: Battalion Chief Robin Anderson and Division Chief Jason Gour.

Lateral Transfer

Chief Rodney Dale informed the Commissioners of the lateral move of former Division Chief of Operations David Cushwa to Division Chief of Safety effective January 1, 2025. Mandy accepted the notification.

Disciplinary Notices

Chief Dale presented a Disciplinary Notice for Driver/Operator Marcus Perez.

FIRE MERIT COMMISSION
Monday, January 27, 2025

He violated Indiana Code 36-8-3.5-17 (2)(B) by using department clothing and apparatus in social media posts. He was issued a written warning. Mandy accepted the notification.

Chief Dale presented a Disciplinary Notice for Firefighter Ryan Billings. He violated Indiana Code 36-8-3.5-17 Section 17 (2)(A). He received a verbal warning for arriving late for duty.

Chief Dale presented Disciplinary Notice for Firefighter LaVarius Macon. He violated Indiana Code 36-8-3.5-17 (2)(B) by arriving late for work. It was the second time in one year. He was issued an 8-hour suspension. Mandy accepted the notification.

Chief Dale presented a Disciplinary Notice for Division Chief Cushwa. Chief Cushwa said if discipline is issued he contests the Discipline and requests a hearing in front of the FMC. Deputy City Attorney Kevin Davis said Chief Dale already issued the discipline. Attorney Davis said that this morning he received a written response from the grievant that was drafted by an Attorney that is not licensed in the State of Indiana and who has not made an appearance before this Commission. As the Attorney for this Commission, Kevin said he needs to respond to the request, so he asked them to continue the matter to the next FMC meeting. Kevin said the Attorney can't respond because he has not asked for permission to enter his appearance before this commission, and this commission needs to vote on whether or not they are going to allow the Attorney to enter an appearance. Mandy asked Chief Cushwa if he had any objection to a continuance. Chief Cushwa said he did not object to the continuance because at this point nothing has been presented for that. Mr. Davis had issued a motion to suppress my contestation of the discipline, of which I responded to him and to the Commission. The Attorney in question, as this is an administrative hearing, gave me advice. I'm allowed to propose this as the person that is involved in the discipline, so that is why I'm submitting that. He said he is also seeking Legal Counsel that will be retained in the State of Indiana. The timing was short to find someone that did not have conflicts with the City. He said he contacted many Attorneys. He said he is getting someone down state and just spoke to them before this meeting. Attorney Dan Norris spoke on Webex to Chief Cushwa and asked him to inform the Commission that he does not need their permission, he needs permission from the Supreme Court of the State of Indiana. Mandy responded to him that he can not speak at this time on this matter. Jim Rodino asked Chief Cushwa if he was in agreement with what the disciplinary action is for? Chief Cushwa said no. He has paperwork to go with that, and that will come out in the hearing but not prior to. On motion by Jim Rodino, seconded by Bunita Fields-Buggs and carried 4-0, the Request for a Disciplinary Hearing was tabled to the next FMC meeting.

4. ADJOURNMENT

On motion by Bunita Fields-Buggs, seconded by Regina Fultes and carried 4-0, the City of Elkhart, Indiana Fire Merit Commission was adjourned at 3:55 p.m.

_____ Mandy Leazenby, President

Attest: _____ Bunita Fields-Buggs, Secretary



02/03/2025

Rod Roberson
Mayor

Fire Merit Commission
229 S, Second Street
Elkhart, IN 46516

Rodney Dale
Fire Chief

RE: 8-hour suspension for Ryan Billings

Kristl Sommer
Assistant Fire Chief

The following is a summary of the case and its resolution:

Fire Department
500 East Street
Elkhart, Indiana 46516

An incident report from Battalion Wade Snider was submitted to the Division Chief of Operations on January 10th, 2025. The report stated that Firefighter Ryan Billings did not arrive for duty until 0730. This failure to report on time for duty is a violation of Indiana Code 36-8-3.5-17 *Section 17 (2)(A)*, and is his second offense in one year.

Phone: (574) 293-8931
Fax: (574) 522-1023

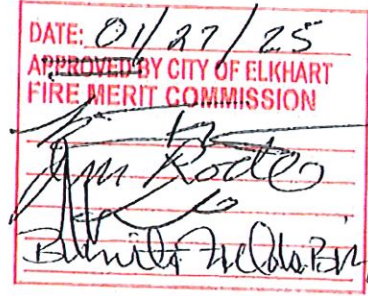
An investigation confirmed that Ryan Billings was indeed late for the second time in one year.

Email:
fire@elkhartfire.org

The Fire Chief is notifying the Fire Merit Commission that Firefighter Ryan Billings received an 8-hour suspension for these violations.

Rodney Dale
Fire Chief

Continued Tabled



01/16/2024

Rod Roberson
Mayor

Rodney Dale
Fire Chief

Kristl Sommer
Assistant Fire Chief

Fire Department
500 East Street
Elkhart, Indiana 46516

Phone: (574) 293-8931
Fax: (574) 522-1023

Email:
fire@elkhartfire.org

Fire Merit Commission
229 S, Second Street
Elkhart, IN 46516

RE: 40-hour suspension for David Cushwa

The following is a summary of the case and its resolution:

On December 9th, Division Chief Cushwa did not report to duty as scheduled and was contacted by Assistant Chief Sommer to see where he was. He informed Assistant Chief Sommer that he would not report for duty for the remainder of the month. The actions on December 9th followed a meeting between Fire Chief Dale and Division Chief Cushwa, in which Chief Cushwa needed to report any time taken off to the Fire Chief. These actions are a violation of IC 36-8-3.56-17 Section 17 (2)(C).

An investigation confirmed that Division Chief Cushwa disobeyed a direct order to request time off through the Fire Chief.

The Fire Chief is notifying the Fire Merit Commission that Division Chief Cushwa received a forty (40) hour suspension for these violations.


Rodney Dale
Fire Chief

Elkhart Fire Department - Employee Disciplinary Notice

Employee Name David Cushwa Position Division Chief

Department/Division Fire Shift 40hr

Date of Notice _____ Time _____

Date of Alleged Incident 12/09/2024 Time 0700

ALLEGED VIOLATION

Violations are laid out in Elkhart Fire Department Merit Commission Rules and IC 36-8-3.5-17

Neglect of Duty Violation of the Rules Incapacity

Neglect or Disobedience of Orders Absence without Leave Immoral Conduct

Conduct Injurious to the Public Peace or Welfare Conduct Unbecoming a Member Another Breach of Discipline

SUPERVISOR STATEMENT

*Use attachment if necessary.

Facts and Work Rule(s) Violated:

See attached.

Suggested Discipline: Written Verbal _____ Written Warning _____ Suspension Dismissal _____
Other _____ (See Attachment, if applicable)

EMPLOYEE STATEMENT (Use attachment if necessary)

This statement has been received and will be disputed for a lack of following city rules of progressive discipline and failure to cite a specific rules, regulation or order and is a step in overreach in this matter. I dispute these charges.

IC 36-8-2.1-5 Procedures; statement of rights

Sec. 5. (a) This section applies to a public safety officer who is the subject of a complaint or an internal investigation.

(b) When a public safety officer is subjected to interview by the public safety officer's department, as described in subsection (a), the following procedures apply:

- (1) The interview shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, unless, in the judgment of the interviewer, the seriousness of the investigation requires an immediate interview.
- (2) The interview shall take place at the public safety officer's department or an equivalent office setting designated by the interviewer.
- (3) The interviewer shall inform the public safety officer of the name, rank, and assignment of the officer or member of the fire department in charge of the investigation, the interviewer, and all other persons present during the interview.
- (4) The interviewer shall present the public safety officer with a statement of rights to be signed by the interviewer and the public safety officer. The statement of rights must be in substantially the following form:

STATEMENT OF RIGHTS

I wish to advise you that you are being questioned as part of an official investigation of the Blkhart Fire Department. You will be asked questions specifically, directly, and narrowly related to the performance of your official duties as a Firefighter or concerning your fitness for service as a Firefighter. You have the constitutional right not to incriminate yourself.

Under no circumstances will your statement be used in any subsequent criminal court action against you. However, factual information contained in the internal affairs file on this investigation, including your statement, is generally discoverable in civil rights litigation filed in federal or state court and may be used to impeach your testimony. In addition, this factual information may be used in any criminal proceeding in which you are a witness.

I further wish to advise you that if you refuse to give a statement or answer questions relating to the performance of your official duties or fitness for duty, you will be subjected to departmental charges that could result in your dismissal from the Blkhart Fire Department.

I have read the above and understand it fully. I sign this statement having been advised of the above rights before any questions have been asked of me.

(5) In a noncriminal case, once a public safety officer is scheduled for an interview under this subsection, the officer in charge of the investigation must provide the public safety officer with a copy of the complaint, if one exists. In a criminal case, the officer in charge of the investigation must inform the public safety officer of the nature of the complaint. The officer in charge of the investigation is not required to disclose the name of the complainant to the public safety officer.

(6) An interview session shall be for a reasonable duration of time and must allow for personal necessities and rest periods as reasonably necessary.

(7) An interview of a public safety officer as described in this subsection shall be tape recorded at the request of either party. A written transcript must be provided to the public safety officer upon request, at no cost to the public safety officer.

(8) If at the time of the interview the public safety officer is under arrest or in custody, the interviewer must completely inform the public safety officer of the public safety officer's federal and state constitutional rights regarding self-incrimination prior to the commencement of the interview.

(9) A public safety officer may not be required to waive any immunities under federal or state law at any point in an investigation.

(10) A question posed to a public safety officer must specifically, directly, and narrowly relate to the performance of duties or fitness for service as a public safety officer.

(11) A public safety officer shall have the right to be represented by an attorney or other representative during an interview where the interview relates to the public safety officer's continued fitness for law enforcement service (in the case of a police officer) or fire service (in the case of a firefighter). The public safety officer shall be provided a reasonable period of time to obtain representation, which may not exceed seventy-two (72) hours from the time of request, unless agreed upon by both parties. The attorney or representative may not participate in the interview, except to advise the public safety officer.

As added by P.L.271-2019, SEC. 1. Amended by P.L.33-2020, SEC. 7.

I understand my rights as listed above

Date/Time 01/15/2025 1525 hours

Name (Firefighter) DAVID F. CUSHWA

Name (Interviewer) _____

Signature [Handwritten Signature]

Signature _____

Employee Disciplinary Notice – Continued

PREVIOUS DISCIPLINARY ACTION: Attach previous discipline Administered in the Past Twelve Months

Chief's Comments (if Necessary)

40 hours

FINAL DETERMINATION: Dismissal
Written Verbal _____ Written Warning _____ Suspension _____
Other _____ (See Attachment, If applicable)

D. CUSHWA
Signature of Employee

01/16/2025
Date

Signature of Union Steward (if applicable)

Date

[Signature]
Signature of Division of Operations

1/15/25
Date

[Signature]
Signature of Chief or Assistant Chief

1-15-25
Date

ROUTING: File _____ Human Resource _____ Other _____

At approximately 2:15 p.m. on 2 January 2025, I was asked by Division Chief Gour to come to his office because he "wanted to talk to me at some point today." Upon entering the room and sitting, I was informed that I was being brought up on disciplinary charges at the request of the Fire Chief Rodney Dale. Mr. Gour read me my rights according to the Firefighter Bill of Rights and stated that I may refuse to answer questions asked but in doing so I would be subject to further discipline and possible termination. I informed Mr. Gour that I had no issue with answering questions and asked for a copy of the complaint against me. He provided a document signed by the fire chief that stated that I did not inform the fire chief that I would be using my benefit days (vacation time and other accrued time) for the remainder of the month of December 2024 and that he (fire chief) wanted to discipline me for 40 hour suspension. According to Mr. Gour, he stated that he had a conversation with the fire chief that included Mr. Gour telling Chief Dale that he (Gour) would have to investigate the matter before issuing discipline.

I, Division Chief David Cushwa, gave a verbal statement [responding to the statements posed by Division Chief Jason Gour on 01/02/25 regarding the use of vacation days for Division Chief David Cushwa.](#)

This statement is based on the handwritten notes taken by Chief Gour and amended by Chief Cushwa to form a written statement of the interview conducted on 02JAN2025. (*Please see note for further details.)

Statement:

In the start of questioning, Mr. Gour asked about time off in November of 2024 (vacation days used). He asked if I spoke with Chief Dale about this time off. I stated that I had. Dale said that I did not inform anyone about taking this time off, to which I stated that Chief Dale was off-duty during that time, I entered my time off into my service record which is available to all personnel in the Admin group and I also informed Assistant Chief Sommer of my vacation time. Dale stated that "as a courtesy, he would like to know when I am going to be off." I stated I understand but followed all normal procedures for taking time off.

[Cushwa took time off in November and told Chief Sommer verbally that he would be using vacation time. Chief Cushwa stated that he told his superior officer and followed the procedure. Chief Cushwa recalls a verbal conversation in Chief Dale's office in which Chief Dale stated he wanted to be informed when Chief Cushwa went on vacation. Chief Cushwa stated that he put time off in his service record. However, he knows Chief Dale does not look at the service records. Chief Cushwa also noted that everyone in the administration can access service records.](#)

[Administration time off since \(and prior to\) July 2020 was just put into service records, and you did not have to tell anyone. This had been the case with chiefs such as Chad Carey, Steve Kamp and Shaun Edgerton.](#)

[When asked if there was a written procedure, Chief Cushwa said there was not, but it was operated according to past practice.](#)

[Chief Cushwa said he took time off from December 4th to the 31st. He stated that he told Chief Sommer after the December 11th administrative staff meeting that he would be taking the rest of the month off.](#)

I did work on departmental service records and vacation lists from December 3rd through the 7th at various time during my vacation and did not enter these times in my service record as was a customary practice of Administrative personnel that frequently work longer hours and on my days off and weekends to maintain operational efficiencies. These times can be found in the Time & Attendance folder by seeking "created by" and time and date stamped. I also was at the Command Staff Meeting on Wednesday, December 11th, 2024 and worked the remainder of that day.

JG
I did
not say
that

Chief Cushwa stated that he did not notify Chief Dale but used his accrued time off when he found out he was being reassigned without cause or reason to the Battalion Chief's office (a move that would be considered a demotion) on 02DEC2024 and he would not be allowed to carry over any vacation time into the next year as Chief Dale was going to allow the administrative staff to do from 2024 to 2025.

Chief Cushwa again stated that all time off was put into his service records and Assistant Chief Sommer again was notified that Cushwa and Division Chief Kornrumpf would be off for the remainder of the year, using vacation time.

Chief Dale contacted Chief Cushwa via phone on 03DEC2024 and informed me that I was being reassigned to a Safety Officer role at the Division Chief level.

* Note: Text that is written in black was authored by David F. Cushwa and text in blue are the notes as recorded by Jason Gour and submitted to Cushwa to act as a written statement of the interview notes of 02JAN2025.

A Signature that the statements made were accurate



David F. Cushwa

06 JAN 2025

Date/Time

**ELKHART FIRE DEPARTMENT
INCIDENT REPORT**

CONFIDENTIAL

DATE OF INCIDENT: 12/04/2024 TIME OF INCIDENT: 0800

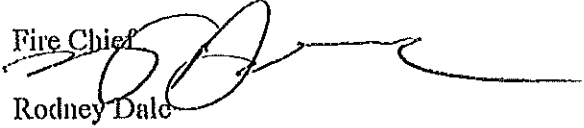
INCIDENT NUMBER: David Cushwa FILE: _____

REQUIRES IMMEDIATE ATTENTION: Yes PAGE 1 OF 1

NARRATIVE: Division Chief David Cushwa decided to take vacation from December 4th thru December 31st without notifying myself, Chief Rodney Dale, or anyone else. Chief Cushwa only marked his time off in his service record. Chief Cushwa and I had a conversation once before in November of 2024 concerning him taking time off and not informing me. I told Chief Cushwa directly when his time is going to be used, I am to be notified. It is my recommendation that Division Chief Cushwa be given 40 hours off, thanks.

Fire Chief

Rodney Dale



NAME/RANK _____

IC 36-8-2.1-5 Procedures; statement of rights

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- (2) The interview shall take place at the public safety officer's department or an equivalent office setting designated by the interviewer.
- (3) The interviewer shall inform the public safety officer of the name, rank, and assignment of the officer or member of the fire department in charge of the investigation, the interviewer, and all other persons present during the interview.
- (4) The interviewer shall present the public safety officer with a statement of rights to be signed by the interviewer and the public safety officer. The statement of rights must be in substantially the following form:

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Under no circumstances will your statement be used in any subsequent criminal court action against you. However, factual information contained in the internal affairs file on this investigation, including your statement, is generally discoverable in civil rights litigation filed in federal or state court and may be used to impeach your testimony. In addition, this factual information may be used in any criminal proceeding in which you are a witness.

I further wish to advise you that if you refuse to give a statement or answer questions relating to the performance of your official duties or fitness for duty, you will be subjected to departmental charges that could result in your dismissal from the Elkhart Fire Department.

I have read the above and understand it fully. I sign this statement having been advised of the above rights before any questions have been asked of me.

(5) In a noncriminal case, once a public safety officer is scheduled for an interview under this subsection, the officer in charge of the investigation must provide the public safety officer with a copy of the complaint, if one exists. In a criminal case, the officer in charge of the investigation must inform the public safety officer of the nature of the complaint. The officer in charge of the investigation is not required to disclose the name of the complainant to the public safety officer.

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(7) An interview of a public safety officer as described in this subsection shall be tape recorded at the request of either party. A written transcript must be provided to the public safety officer upon request, at no cost to the public safety officer.

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As added by P.L.271-2019, SEC.1. Amended by P.L.33-2020, SEC.7.

I understand my rights as listed above

Date/Time 01/02/2025 1422 hrs

Name (Firefighter) DAVID F. CUSHWA

Name (Interviewer) [Signature]

Signature [Signature]

Signature Jason Gour

Sommer, Kristi

From: Sommer, Kristi
Sent: Thursday, May 9, 2024 3:43 PM
To: Dale, Rodney; Kornrumpf, Will; Gerber, Aaron; Cushwa, David; Sullivan, William
Subject: time off

Good Afternoon,

As a common courtesy, we need to be sending out an email to this group when we are taking time-off.

Thank-you

Kristi Sommer
Assistant Chief

Fire Chief Rodney Dale gave a statement to Division Chief Jason Gour on 01/02/25 regarding the use of vacation days for Division Chief David Cushwa.

Statement:


Chief Dale stated that he had a verbal conversation with Chief Cushwa in November regarding Chief Cushwa taking time off and not reporting it to the Fire Chief.

Chief Dale stated that he was very clear in his communication and that it was a direct order to report vacation time to the Fire Chief.

Chief Dale stated that he was unaware that Chief Cushwa was taking any time off in December.

On the morning of December 9th, Chief Dale directed Assistant Chief Sommer to find out why Chief Cushwa was not there. She came back to him and said that he would be taking the rest of the month off. Chief Dale said he was unaware of Chief Cushwa taking time off, and it went directly against the order that was given in November.

Signature that the above statements are correct.



Fire Chief Rodney Dale

1/03/24

Date/Time

1:30 p.m.

Assistant Chief Kristl Sommer gave a statement to Division Chief Jason Gour on 01/02/25 regarding the use of vacation days for Division Chief David Cushwa.

Statement:

Chief Sommer said she doesn't recall Chief Cushwa officially telling her he was taking the day off in November but was aware of him taking the day off through outside work communication.

Chief Sommer was not informed of specific dates that Chief Cushwa would be taking off outside of November 27th and Days until December 9th.

Chief Sommer was under the Impression that Chief Cushwa would be back to work on the 9th, so she spoke with him on the phone after Chief Dale directed her to find out where he was on the morning of the 9th.

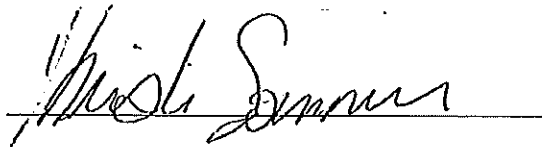
Chief Sommer does not recall any conversation with Chief Cushwa on December 11th after the administrative staff meeting.

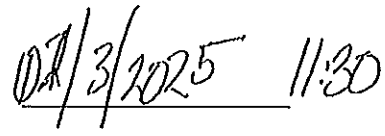
Chief Sommer said she only knew that Chief Cushwa planned to be off work after the 9th by looking at his service records.

However, Chief Sommer stated that she knew he would be taking some time off at the end of December but was unaware of when that would be.

Chief Sommer stated that Chief Cushwa informed her on the phone on the 9th that he would be taking the rest of the year off.

Signature that the above statements are correct.


Assistant Chief Kristl Sommer


Date/Time

Wilson, Nancy

From: Cushwa, David
Sent: Friday, January 24, 2025 2:53 PM
To: Davis, Kevin; Wilson, Nancy; mandy@tragreen.com
Subject: RE: Motion to Dismiss

The email shown below was within the time requirement as per IC Code 36-8-3.5-17 and the EFD Policy Manual issued May 18, 2018 from adopted Merit Rules on February 5, 2018. I was asked to print the request to the clerk the for submission with my signature, which I did and was also within the allotted five (5) day period. The Martin Luther King Jr. (01/20) holiday is a federal, state and city holiday and cannot be considered to be counted within the five day timeline.



Tue 1/21/2025 3:44 PM

Cushwa, David
Request for Hearing

To mandy@tragreen.com; Wilson, Nancy

Dear Nancy and Merit Board President Leazenby,

I would like to request a hearing in contest to the discipline of a 40-hour suspension issued by Fire Chief Rodney Dale.

David F. Cushwa

Division Chief
Elkhart Fire Department
500 East Street – FD Headquarters
Elkhart, IN 46516
(574)293-8931 EFD
(574)536-4443 Mobile



IAFC
International Association of Fire Chiefs



Tue 1/21/2025 3:47 PM

Wilson, Nancy

RE: Request for Hearing

To: Cushwa, David; mandy@tragreen.com

Please put your request in writing and bring it to my office with your signature. I will date stamp it for you and your re
Thanks,
Nancy

From: Cushwa, David <David.Cushwa@elkhartfire.org>
Sent: Tuesday, January 21, 2025 3:44 PM
To: mandy@tragreen.com; Wilson, Nancy <nancy.wilson@coei.org>
Subject: Request for Hearing

Dear Nancy and Merit Board President Leazenby,

I would like to request a hearing in contest to the discipline of a 40-hour suspension issued by Fire Chief Rodney Dale. I am currently seeking legal representation for this hearing (when scheduled). Thank you.

David F. Cushwa

Division Chief
Elkhart Fire Department
500 East Street – FD Headquarters
Elkhart, IN 46516
(574)293-8931 EFD
(574)536-4443 Mobile



IAFC

International Association of Fire Chiefs

Elkhart Fire Department

Policy Manual

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Disciplinary Procedure and Hearing Process - IC 36-8-3.5-17

Disciplinary Procedure and Hearing Process

1305.1 DISCIPLINARY PROCEDURE AND HEARING PROCESS

Disciplinary Procedures –

A. The Chief of the Department, after an investigation, may proffer charges against a member of the Department for an alleged breach of discipline, including any civilian complaint of an alleged breach of discipline. The Chief may recommend discipline including suspension with or without pay in excess of forty (40) working hours, demotion, or dismissal from the

Department. Any member who receives notice of charges against him may request that the Merit Commission conduct a hearing on the matter.

B. If a member wishes to have a hearing, the member must submit a written request for a hearing to the Merit Commission within five (5) days of the date the Chief provides the member with notice of the charges brought against him along with the recommendation for suspension, demotion or dismissal.

From: Davis, Kevin <kevin.davis@coei.org>
Sent: Friday, January 24, 2025 1:55 PM
To: Cushwa, David <David.Cushwa@elkhartfire.org>
Cc: Dale, Rodney <Rodney.Dale@elkhartfire.org>
Subject: Motion to Dismiss

Chief Cushwa

Please see the attached. A copy was sent to the FMC clerk.

Thank you

Kevin Davis



Deputy City Attorney
229 S. Second Street
Elkhart, Indiana 46516
Kevin.Davis@coei.org
www.elkhartindiana.org
(Tel.) 574-294-
5471;1079
Mobile: 574-612-0406

Wednesday 22 JAN 2025

David F. Cushwa
Division Chief, Elkhart Fire Department
500 East Street
Elkhart, IN 46516

Tabled
DATE: *1/29/25*
APPROVED BY CITY OF ELKHART
FIRE MERIT COMMISSION
[Signature]
Burinda Wilson

To: Mandy Leazenby, Fire Merit Board President
Nancy Wilson - Administrative Assistant to Corporate Counsel;
Board of Public Safety, Fire Merit Commission (and others)
229 S. Second St.
Elkhart, IN. 46516

Re: Request for Hearing

Dear Nancy and Merit Board President Leazenby,

I have been issued discipline by the fire chief that has yet to be presented to the Fire Merit Commission. Once this is presented, I would like to request a hearing in contest to the discipline of a 40-hour suspension issued by Fire Chief Rodney Dale. I am currently seeking legal representation for this hearing (when scheduled). Thank you.

David F. Cushwa
Division Chief
Elkhart Fire Department
500 East Street – FD Headquarters
Elkhart, IN 46516
(574)293-8931 EFD
(574)536-4443 Mobile

[Signature]



RECEIVED
JAN 22 2025

FIRE MERIT COMMISSION

NW

BEFORE THE CITY OF ELKHART
FIRE MERIT COMMISSION

IN RE: The Matter of Request for Hearing by Division Chief David Cushwa

MOTION TO DISMISS

Comes now the City of Elkhart, by counsel, and hereby moves this Commission to dismiss the Request for Hearing filed by Division Chief David Cushwa, for failure to timely file his request for hearing.

In support of this Motion, counsel states as follows:

1. Indiana Code §36-8-3.5-19(b) states, "If a chief reprimands a member in writing or suspends a member, the chief shall, within forty-eight (48) hours, notify the commission in writing of the action and the reasons for the action." On January 16, 2025, Fire Chief Rodney Dale issued a written disciplinary notice to Division Chief David Cushwa. Chief Dale notified the Fire Merit Commission of the discipline issued and the reason for the actions on January 16, 2025. See Exhibit A.
2. Division Chief failed to timely file his request for a hearing. Indiana Code § 36-8-3.5-16(b) further states, "A member who is reprimanded in writing or suspended under this section may, within forty-eight (48) hours after receiving notice of the reprimand or suspension, request in writing that the commission review the reprimand or suspension and either uphold or reverse the chief's decision." Division Chief Cushwa received notice of his discipline on January 16, 2025, as noted in Exhibit A. Division Chief Cushwa filed his request for a hearing to review Chief Dale's discipline on January 21, 2025, one hundred and twenty (120) hours after his receiving his discipline which is beyond the time limit established by statute.
3. This Commission must find that Chief Cushwa timely filed his request for a hearing within forty-eight (48) hours as outlined in the statute in order to review his discipline.
4. Absent a finding on the record, that Chief Cushwa filed his request for review within forty-eight (48) hours, this Commission must dismiss Chief Cushwa's request for review in accordance with the statute.

WHEREFORE, counsel respectfully requests Division Chief Cushwa's request for a hearing be dismissed for his failure to timely file his request.

Respectfully submitted,

/s/Kevin Davis
Kevin Davis
Deputy City Attorney
City of Elkhart
229 S. Second Street
Elkhart, Indiana 46516

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been duly served by First Class U.S. Mail and email transmission this 24th day of January 2025 to the following:

David Cushwa
500 East Street
Elkhart, In 46516

Nancy A. Wilson
Fire Merit Commission
229 S. Second St.
Elkhart, IN. 46516
Nancy.wilson@coei.org

/s/Kevin Davis
Kevin Davis
Deputy City Attorney
City of Elkhart
229 S. Second Street
Elkhart, IN 4651624_
kevin.davis@coei.org

Elkhart Fire Department - Employee Disciplinary Notice

Employee Name David Cushwa Position Division Chief

Department/Division Fire Shift 40hr

Date of Notice _____ Time _____

Date of Alleged Incident 12/09/2024 Time 0700

ALLEGED VIOLATION

Violations are laid out in Elkhart Fire Department Merit Commission Rules and IC 36-8-3.5-17

Neglect of Duty Violation of the Rules Incapacity

Neglect or Disobedience of Orders Absence without Leave Immoral Conduct

Conduct Injurious to the Public Peace or Welfare Conduct Unbecoming a Member Another Breach of Discipline

SUPERVISOR STATEMENT

*Use attachment if necessary.

Facts and Work Rule(s) Violated:

See attached.

Suggested Discipline: Written Verbal _____ Written Warning _____ Suspension Dismissal _____
Other _____ (See Attachment, if applicable)

EMPLOYEE STATEMENT (Use attachment if necessary)

This statement has been received and will be disputed for a lack of following city rules of progressive discipline and failure to cite a specific rule, regulation or order and is a step in overreach in this matter. I dispute these charges.

IC 36-8-2.1-5 Procedures; statement of rights

Sec. 5. (a) This section applies to a public safety officer who is the subject of a complaint or an internal investigation.

(b) When a public safety officer is subjected to interview by the public safety officer's department, as described in subsection (a), the following procedures apply:

- (1) The interview shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, unless, in the judgment of the interviewer, the seriousness of the investigation requires an immediate interview.
- (2) The interview shall take place at the public safety officer's department or an equivalent office setting designated by the interviewer.
- (3) The interviewer shall inform the public safety officer of the name, rank, and assignment of the officer or member of the fire department in charge of the investigation, the interviewer, and all other persons present during the interview.
- (4) The interviewer shall present the public safety officer with a statement of rights to be signed by the interviewer and the public safety officer. The statement of rights must be in substantially the following form:

STATEMENT OF RIGHTS

I wish to advise you that you are being questioned as part of an official investigation of the Elkhart Fire Department. You will be asked questions specifically, directly, and narrowly related to the performance of your official duties as a Firefighter or concerning your fitness for service as a Firefighter. You have the constitutional right not to incriminate yourself.

Under no circumstances will your statement be used in any subsequent criminal court action against you. However, factual information contained in the internal affairs file on this investigation, including your statement, is generally discoverable in civil rights litigation filed in federal or state court and may be used to impeach your testimony. In addition, this factual information may be used in any criminal proceeding in which you are a witness.

I further wish to advise you that if you refuse to give a statement or answer questions relating to the performance of your official duties or fitness for duty, you will be subjected to departmental charges that could result in your dismissal from the Elkhart Fire Department.

I have read the above and understand it fully. I sign this statement having been advised of the above rights before my questions have been asked of me.

(5) In a noncriminal case, once a public safety officer is scheduled for an interview under this subsection, the officer in charge of the investigation must provide the public safety officer with a copy of the complaint, if one exists. In a criminal case, the officer in charge of the investigation must inform the public safety officer of the nature of the complaint. The officer in charge of the investigation is not required to disclose the name of the complainant to the public safety officer.

(6) An interview session shall be for a reasonable duration of time and must allow for personal necessities and rest periods as reasonably necessary.

(7) An interview of a public safety officer as described in this subsection shall be tape recorded at the request of either party. A written transcript must be provided to the public safety officer upon request, at no cost to the public safety officer.

(8) If at the time of the interview the public safety officer is under arrest or in custody, the interviewer must completely inform the public safety officer of the public safety officer's federal and state constitutional rights regarding self-incrimination prior to the commencement of the interview.

(9) A public safety officer may not be required to waive any immunities under federal or state law at any point in an investigation.

(10) A question posed to a public safety officer must specifically, directly, and narrowly relate to the performance of duties or fitness for service as a public safety officer.

(11) A public safety officer shall have the right to be represented by an attorney or other representative during an interview where the interview relates to the public safety officer's continued fitness for law enforcement service (in the case of a police officer) or fire service (in the case of a firefighter). The public safety officer shall be provided a reasonable period of time to obtain representation, which may not exceed seventy-two (72) hours from the time of request, unless agreed upon by both parties. The attorney or representative may not participate in the interview, except to advise the public safety officer.


As added by P.L. 271-2019, SEC. 1. Amended by P.L. 33-2020, SEC. 7.

I understand my rights as listed above

Date/Time 01/15/2025 1525 hours

Name (Firefighter) DAVID F. CUSHWA

Name (Interviewer) _____

Signature 

Signature _____

Employee Disciplinary Notice – Continued

PREVIOUS DISCIPLINARY ACTION: Attach previous discipline Administered in the Past Twelve Months

Chief's Comments (if Necessary)

40 hours

FINAL DETERMINATION: Written Verbal _____ Written Warning _____ Suspension Dismissal _____
Other _____ (See Attachment, if applicable)

D. C. SHAW
Signature of Employee

01/16/2025
Date

Signature of Union Steward (if applicable)

Date

[Signature]
Signature of Division of Operations

1/15/25
Date

[Signature]
Signature of Chief or Assistant Chief

1-15-25
Date

ROUTING: File _____ Human Resource _____ Other _____

1
2 BEFORE THE CITY OF
3 ELKHART
4 FIRE MERIT COMMISSION
5

IN RE: The matter of request
for hearing by Division Chief
David Cushwa

6 **RESPONSE TO THE CITY'S DISMISSAL MOTION**

7 The City's request to dismiss Division Chief Cushwa's request for a hearing should be
8 denied because Division Chief Cushwa timely filed his request for a hearing. The Fire Chief
9 (hereinafter referred to as the chief) informed Division Chief Cushwa he was going to be
10 disciplined on January 15, 2025, but the chief first had to investigate. On Thursday January
11 16, 2025, the chief served Division Chief Cushwa with a notice of discipline, which Division
12 Chief Cushwa accepted. Division Chief Cushwa made a request for a hearing on January 16th,
13 2025, in his written response to the discipline notice. January 18, 2025, was a Saturday,
14 January 19, 2025, was a Sunday, and January 20, 2025 was a state holiday.

15 Thus, even if Division Chief Cushwa's request for a hearing in the notice of discipline
16 did not formally request a hearing, the city acknowledges that Division Chief Cushwa's
17 January 21, 2025, filed the day after the holiday weekend, met the hearing request.

18 **ARGUMENT**

19 First, the city contends that Division Chief Cushwa's request for a hearing had to be
20 filed within 48 hours (two days). Contrary to the legal authority cited by the city the chief's
21 notice of discipline was filed after an investigation. Thus, this is a disciplinary matter
22 governed by Ind. Code Ann. § 36-8-3.5-17 which provides:

23 *If the chief of the department, after an investigation within the department, prefers charges*
24 *against a member of the department for an alleged breach of discipline under subsection (b),*

1 including any civilian complaint of an alleged breach of discipline under subsection (b)(2)(I),
2 (b)(2)(G), or (b)(2)(H), a hearing shall be conducted upon the request of the member. If a
3 hearing is requested within five (5) days of the chief preferring charges, the parties may by
4 agreement designate a hearing officer who is qualified by education, training, or experience.
5 If the parties do not agree within this five (5) day period, the commission may hold the
6 hearing or designate a person or board to conduct the hearing, as provided in the
7 commission's rules.

8 Ind. Code Ann. § 36-8-3.5-17

9 Pursuant to the Indiana Rules of Civil procedure 6, time is computed as follows:

10 *Computation. In computing any period of time prescribed or allowed by these rules, by order*
11 *of the court, or by any applicable statute, the day of the act, event, or default from which the*
12 *designated period of time begins to run shall not be included. The last day of the period so*
13 *computed is to be included unless it is:*

14 (1) a Saturday,

15 (2) a Sunday,

16 (3) a legal holiday as defined by state statute, or

17 (4) a day the office in which the act is to be done is closed during regular business hours.

18 In any event, the period runs until the end of the next day that is not a Saturday, a Sunday, a
19 legal holiday, or a day on which the office is closed. When the period of time allowed is less
20 than seven days, intermediate Saturdays, Sundays, legal holidays, and days on which the
21 office is closed must be excluded from the computations.

22 Ind. R. Trial P. 6

23

24

1 Division Chief Cushwa requested his hearing within the 5 allotted days.

2 Second, even if this is a matter governed by IC 36-8-3.5-19, Division Chief Cushwa
3 met the two-day request requirement. Pursuant to Ind. R. Trial P. 6, the two-day request time
4 started on Friday January 16, 2025, The weekend and holiday tolled time computation until
5 January 21, 2025. Chief Cushwa filed his request for a hearing within the two-day period.

6 REQUEST FOR ATTORNEY FEES

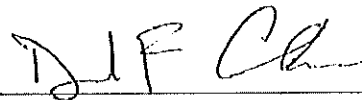
7 Pursuant to Ind. R. Trial P. 11 Division Chief Cushwa requests \$1,400 in attorney fees
8 for the City's bad faith in citing the incorrect law and failing to compute the time correctly.
9 Division Chief Cushwa incurred two hours of weekend rate attorney billing for consultation
10 and assistance in this matter from Dan Norris. Mr. Norris is an attorney licensed to practice
11 law in Oregon; OSB # 881341. Mr. Norris is seeking Pro Hac Vice admittance from the
12 Indiana Supreme Court in this matter. His normal hourly rate is \$350 per hour, and he
13 charges double the usual rate for emergency weekend matters.

14 The city filed the motion to dismiss on Friday, January 24, 2025, at the close of
15 business, requiring a response before the meeting Division Chief Cushwa was ordered to
16 attend on Monday, January 27, 2025.

17 Respectfully submitted this 26th day of January 2025.

18

19



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Division Chief David Cushwa

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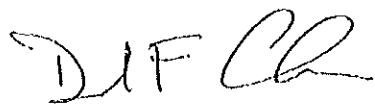
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CERTIFICATE OF SERVICE

I, Division Chief David Cushwa, certify I served a true and correct copy of this response to the city's dismissal motion and for rule 11 fees via e-mail on this 26th day of January 2025 on:

Kevin Davis
Deputy Elkhart City Attorney
At: kevin.davis@coei.org



BEFORE THE CITY OF ELKHART
FIRE MERIT COMMISSION

RE: The Matter of Request for a Hearing by Division Chief David Cushwa

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Chief Cushwa's request for hearing should be dismissed for failure to timely file in accordance Indiana Code § 36-8-3.5-19(b) which requires "a member who is reprimanded in writing or suspended under this section may, within forty-eight (48) hours after receiving notice of the reprimand or suspension, request in writing that the commission review the reprimand or suspension and either uphold or reverse the chief's decision."

Indiana Code §36-8-3.5 establishes the procedures for Police and Fire Merit Systems. The Fire Merit Commission (Commission) derives its powers from this statute and can only take actions(s) if there is a statutory provision for such actions. Therefore, the Commission cannot grant itself powers not defined by the statute.

In disciplinary matters, the facts surrounding discipline will determine the proper procedure and section of the statute for handling the discipline. There are two relevant sections for member discipline and the determination of the relevant section is a fact-based analysis. Indiana Code §36-8-3.5-17 gives the procedures for discipline when it is the Commission that is issuing the discipline. The section's language is clear. Section 17 (a) states, "The Commission may take the following disciplinary actions against a regular member of the department (1) Suspension with or without pay; (2) Demotion; (3) Dismissal." This is the section relevant to actions taken by the

Commission. This section goes on to say, “ If the chief of the department, after an investigation within the department, prefers charges against a member of the department for an alleged breach of discipline under subsection (b), including any civilian complaint of an alleged breach of discipline under subsection (b)(2)(F), (b)(2)(G), or (b)(2)(H), a hearing shall be conducted upon the request of the member. If a hearing is requested within five (5) days of the chief preferring charges, the parties may by agreement designate a hearing officer who is qualified by education, training, or experience. If the parties do not agree within this five (5) day period, the commission may hold the hearing or designate a person or board to conduct the hearing, as provided in the commission's rules.”

In those cases where the Commission is issuing the discipline based on the Fire Chief's recommendation, the member has the right to request a hearing within five (5) days of the issuance of the discipline. The cases falling within this section of the statute are those where the Fire Chief is recommending to the Commission a discipline that exceeds the Fire Chief's discretion. Cases where the Fire Chief is recommending suspension greater than five (5) days, or that the member be demoted or terminated. The Fire Chief merely makes recommendations for the Commission to impose proposed discipline, and the Commission has the power to impose the recommended discipline. The discipline is not final until the Commission renders a decision. The facts of the issue with Chief Cushwa, are that the Fire Chief had issued the discipline and not the Commission.

Discipline that is within the Fire Chief's discretion is covered by Indiana Code §36-8-3.5-19. This section recognizes the Fire Chief's ability to discipline a member of the department, using the Fire Chief's own authority under the statute and it is not discipline that is issued by the Commission. Again, this ability to discipline is in addition to those powers of the Commission.

The statute states, “The Chief of the department may, without a hearing, reprimand or suspend without pay a member, for a maximum of five (5) working days. For the purposes of this subsection, eight (8) hours of paid time constitutes one (1) working day.” The subsection further states, “that if a chief reprimands a member in writing or suspends a member, the Chief shall, within forty-eight (48) hours, notify the Commission in writing of the action and the reason for the action. A member who is reprimanded in writing or suspended under this section may, within forty-eight (48) hours after receiving notice of the reprimand or suspension, request in writing, that the Commission review the reprimand or suspension and either uphold or reverse the Chief’s decision.”

When we examine the facts in this matter before this Commission and apply those facts to the relevant section of the statute, Section 19 and its requirements apply. On January 16, 2025, the Fire Chief issued a five-day suspension without pay. The Fire Chief, in accordance with this section of the statute, notified this Commission on January 16, 2025, by written notice. The notice was within the forty-eight (48) hours required by the statute. Chief Cushaw acknowledged receipt of the disciplinary notice on January 16, 2025; however, he did not notify the Commission in writing until January 21, 2025.

Chief Cushwa, in his response failed to recognize the differences between Indiana Code §36-8-3.5-17, discipline outside the Chief’s authority versus Indiana Code §36-8-3.5-19 discipline within the Chief’s authority. If the Fire Chief issues the discipline, the Fire Chief has forty-eight (48) hours to notify the Commission and Chief Cushwa has forty-eight (48) hours to request in writing a hearing on the discipline and not five (5) days.

Chief Cushwa also failed to recognize that the Indiana Rules of Civil Procedure do not apply to this section of the statute. If the legislature had intended the Rules of Civil Procedure to apply to

this section, it would have included that language in this part of the statute. For example, in other sections of the statute regarding Police and Fire Pensions, Indiana Code §36-8-8-12.7(f), the statute states, “the local board shall, at the request of the member or the safety board, issue, (1) subpoenas, (2) discovery orders, (3) protective orders in accordance with the Indiana Trial Rules of Procedure that govern discovery, deposition, and subpoenas in civil actions.” This language is not included in either Indiana Code §36-8-3.5-17 or 19. Therefore the legislature’s intention was not to apply the Rules of Civil Procedure.

Chief Cushwa failed to recognize the City’s Board of Safety, Fire and Police Merit Commissions do not recognize weekends and holidays in the computation of time. First responders do not have weekends and holidays off and so the computation of time has always been day for day. The City’s Board of Safety and the Police and Fire Merit Commissions have held both the administration and the members to the same requirements for time computation. If either the Police or Fire Chief issues a written discipline, it must be sent to the respective Commission within forty-eight (48) hours and if the member wishes to request a hearing, that request must be sent to the respective Commission within forty-eight (48) hours. These have been the requirements, and all parties understand these requirements and have held each other to those requirements.

Chief Cushwa is asking this Commission to grant him an exception, to change the law, because he failed to request a hearing in a timely fashion. He is asking the Commission to ignore the statute, and its procedures, and create a rule just for him and grant him a hearing outside the statutory requirements with no legal basis to support his request.

WHEREFORE, counsel respectfully requests Division Chief Cushwa’s request for a hearing be dismissed for his failure to timely file his request.

Respectfully submitted,

/s/Kevin Davis

Kevin Davis

Deputy City Attorney

City of Elkhart

229 S. Second Street Elkhart, Indiana 46516

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been duly served by First Class U.S. Mail and email transmission this 3rd day of February 2025 to the following:

David Cushwa

500 East Street

Elkhart, In 46516

Nancy A. Wilson

Police Merit Commission 229 S. Second St.

Elkhart, IN. 46516 Nancy.wilson@coei.org

/s/Kevin Davis

Kevin Davis

Deputy City Attorney

City of Elkhart

229 S. Second Street

Elkhart, IN 4651624

kevin.davis@coei.org