MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA
Held at 800 West Washington Street
Conference Room 308
Phoenix, Arizona 85007
Tuesday, October 6, 2015 – 1:00 p.m.

Present:	Dale L. Schultz	Chairman
	Joseph M. Hennelly, Jr.	Commissioner (video)
	Clint Bolick	Commissioner
	Andrew Wade	Acting Director
	William Warren	ADOSH Director
	Steven Ripple	Compliance Officer
	Jesse Perez	Compliance Officer
	Kara Dimas	Commission Secretary

Chairman Schultz convened the Commission meeting at 1:00 p.m. noting a quorum present. Also in attendance were Ellen Van Riper, representing the City of Winslow, Arizona, Jason Weber of Snell & Wilmer, and Ryan Bolick.

Discussion and/or Action of Arizona Division of Occupational Safety and Health Discrimination Complaint.

14-2919-26- Chris Jack vs. Winslow Fire Department

William Warren presented a summary of Mr. Jack's complaint, the employer's response, and the results of the ADOSH investigation. Mr. Wade stated it may be appropriate for the Commission to move into executive session to obtain legal advice and discuss contemplated litigation.

Chairman Schultz asked if there was a motion to move into executive session. Commissioner Bolick asked if there was anyone that wants to be heard before executive session. Ellen Van Riper replied that she is the attorney for the City of Winslow and is here to answer any questions that the Commission may have. She added that the City disagrees that there was any unlawful discrimination or retaliation against Mr. Jack.

Executive Session under A.R.S. § 38-431.03(A)(3) and (A)(4) to Discuss Arizona Division of Occupational Safety and Health Discrimination Complaint.

14-2919-26 - Chris Jack vs. Winslow Fire Department

Mr. Wade described an appropriate motion to move into executive session. Commissioner Bolick moved the Commission move into executive session to obtain legal advice and to discuss or instruct it attorneys regarding contemplated or pending litigation. Commissioner Hennelly seconded the motion. The Commission unanimously voted in favor of the motion. Chairman Schultz announced the Commission would move into executive session.

The Commission returned to regular session at 1:23 p.m.

Chairman Schultz asked if there was anything Ms. Ellen Van Riper would like to add about the actions taken by the City relative to the termination of Mr. Jack.

Ms. Van Riper addressed the Commission and stated that obviously the investigation was done and Mr. Jack was terminated. She commented that the story is a little different than what was reflected in the ADOSH report. She referred to the incident in question regarding the corrective lenses and the three arson fires that happened in the early morning time in the historical downtown area. She described the situation in Winslow at the time of the incident. She noted that the Chief was told Mr. Jack did not have his glasses, not that the glasses broke after he arrived. Mr. Jack needed the lenses to see and because he did not have the lenses he could not go in to fight the fire. She stated that the safety protocol was one in and two out and given the limited number of firefighters, there was a safety concern if all that Mr. Jack could do because of not having the lenses would be the engineer and run the truck. She acknowledged the use of profanity and described the circumstances as emotional because the firefighter was not ready. She commented on follow-up with police investigations, the state fire inspector, and internal investigations because of the arson fires. A week after the fire, there was the termination of Mr. Jack. She described the issue with the lenses as the final straw and the City of Winslow follows a progressive discipline process for employees and she described the timeline. She described other disciplinary issues. She added that he did not say they were broken until well after this event and until they were in the administrative hearing. She reiterated that they did not hear about it until preparing for the administrative hearing and there was no mention that they broke or did not have them available. Mr. Jack had a full administrative hearing, he was represented, there was a neutral hearing officer and he had every opportunity to present his case and call witnesses as did the City. The hearing officer confirmed the action taken by the City. It was not just because he did not have the glasses, and he did not say they broke, or he did not have them available, he said he did not have them and that made a difference. The totality of the record supports this action taken by the City. She asked if there were any questions, she would answer anything.

Chairman Schultz asked if the situation with Mr. Jack was the middle of the three fires and Ms. Van Riper replied that it was and she described the location and times of the fires. Chairman Schultz asked if Mr. Jack was at the first fire and Ms. Van Riper replied that he was only at one fire and he may have attended to another fire later when they were redistributing but she was not sure. Chairman Schultz asked if Mr. Jack had turned out and had his equipment for the first fire, and whether Mr. Jack was only called because other firefighters were still involved with the first fire. He added to the question why was Mr. Jack at the fire and whether the middle fire was his first opportunity for him to present with or without equipment and if he went to the next fire and participated in fighting that fire. Ms. Van Riper referred to the personnel hearing where she asked Mr. Jack if he did not have his glasses that he would use with SCBA, was he able to do anything else. She noted that Mr. Jack responded that he had his regular glasses so he could operate the fire engine. She explained that Mr. Jack could not wear regular glasses inside the SCBA. Ms. Van Riper added that if Mr. Jack did proceed to the next fire, that he probably ran the truck. Chairman Schultz commented on information that Mr. Jack had arranged with another firefighter to switch jobs, with the other firefighter agreeing to turn out so Mr. Jack could run the truck. He asked if that was acceptable or if there would be a problem with that. Ms. Van Riper replied that she did not remember all the testimony and to her recollection there was not an idea to exchange. Chairman Schultz referred to the investigation and noted that Mr. Jack had told Mr. Goetz that his glasses were broken, asked to trade jobs, and Mr. Goetz agreed to turn out. He added that it was when Mr. Jack walked over to Chief Hernandez that is when Chief Hernandez started rather aggressively questioning him. Ms. Van Riper stated the City is not denying there was a heated exchange.

Chairman Schultz reviewed the report and noted that Mr. Jack did work the water pump and Mr. Goetz assisted with putting out the fire. Ms. Van Riper stated that part of the problem that night was Mr. Jack telling the Chief that he did not have his glasses. She explained that fire regulations require firefighters to have everything they need to fight the fire when they respond and that if they do not have a necessary item, that they are not to respond to a fire. She added that Mr. Jack was on the call back because he worked the prior shift, and was called back because of the arson fires. Chairman Schultz clarified that there was a need for a firefighter but the City would have rather the firefighter not respond without their equipment. Ms. Van Riper stated that in this case Mr. Jack was limited in what he could do, there may be certain things on the truck like gloves for firefighters to use, but without the lenses he was limited. She added that it was the understanding of the Chief that Mr. Jack just did not have his glasses, not that they broke when he was putting them on. Chairman Schultz commented that Mr. Jack still performed a valuable function as somebody had to run the truck and if it was not him it would have to been somebody else. Ms. Van Riper stated that the City is not denying that. Chairman Schultz explained he was not understanding why the equipment was more important than the body, when the City has such a small available staff. He added that he was surprised that the Chief managed this serious situation by yelling back and forth which prevents effective communication. Chairman Schultz commented on the lack of communication. Ms. Van Riper stated that there was communication and the Chief was told that Mr. Jack did not have his glasses. She commented on the chaotic scene and noted that a firefighter must come ready, you cannot come and not be ready.

Chairman Schultz asked if there was any discipline against the Chief in light of the fact that he did not show up with appropriate equipment. He explained that the Chief was wearing tennis shoes and the Fire Captain did not don appropriate boots, so they were also both not able to fulfill functions unless she says that chiefs and captains are never expected to fight fires. Ms. Van Riper replied that she did not recollect those facts and added that the Chief had just arrived on the scene and was directing, but he eventually did turn out and help fight the fire. She added that the Captain had boots, they were not the fully official boots, but they were protective boots. Chairman Schultz asked if there were any other questions. There were no further questions and he thanked Ms. Van Riper for the additional information.

Chairman Schultz stated that before the Commission was the discrimination claim of Chris Jack versus the City of Winslow and asked if there was a motion. Commissioner Hennelly moved to pursue the matter. Mr. Wade asked if the motion included directing staff to file a lawsuit and take other action as necessary. Commissioner Mr. Hennelly replied that it did. Commission Bolick seconded the motion and asked to explain why he was seconding the motion. He explained the Commission's analysis as being much narrower than the City's focus on progressive discipline. He posed the issue as whether the adverse action taken against Mr. Jack resulted from his expressing a safety concern and in viewing the facts in the context of that narrow prism, it seems like that is exactly the case here. Commissioner Bolick explained that one way or the other, the Chief ordered Mr. Jack to perform in an unsafe manner and there is no question that the Chief knew that the safety equipment was not present. He noted what tips the City's explanations into the areas of pretext is that there is a wide range of activities, including the reaction of the Chief to the request to order safety equipment and where there is a discrepancy between the City and Mr. Jack, and there are witnesses, consistently the witnesses testify in support of Mr. Jack's account. Commissioner Bolick explained that the City authorizing adverse action against Mr. Jack based on what happened here is a violation of the statute and for that reason he seconded the motion. The Commission unanimously approved the motion.

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

The Commission reviewed the meeting schedule through December.

Public Comment.

There was no public comment and Chairman Schultz asked if there was a motion to adjourn. Commissioner Bolick moved to adjourn and Commissioner Hennelly seconded the motion. The Commission unanimously voted to adjourn and the meeting was adjourned at 1:45 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By _____
Andrew Wade, Acting Director

ATTEST:

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Kara Dimas, Commission Secretary