BEFORE THE BOARD OF POLICE AND FIRE COMMISSIONERS
OF THE CITY OF MADISON

Fire Chief Debra H. Amesqua,
Complainant,
vs.
Firefighter David Barlow,
Respondent

DECISION AND ORDER

Synopsis

This case, filed with the Board on December 15, 2000, alleges violations of five Department rules in five counts of misconduct. Following extensive hearings, legal argument, briefing, and deliberations, the Board by unanimous vote has found Respondent Barlow to have violated Department rules on all counts. The Board by a vote of 3 to 2, with Commissioners Mendoza and Lawton dissenting, imposes the penalty of discharge from the fire service on four of the five counts; Commissioners Mendoza and Lawton would impose on each of those counts the penalty of a one year suspension without pay, to be served concurrently, effective immediately. The Board by a vote of 3 to 2, with Commissioners Seeger and Topel dissenting, imposes on one of the five counts the penalty of a one year suspension without pay, effective immediately; Commissioners Seeger and Topel would impose on this count the penalty of discharge from the fire service.

Statutory Framework

Our disciplinary decisions are subject to 62.13, Wisconsin Statutes, which sets forth the standards which the Board must use in imposing discipline, summarized generally as "just cause" and known colloquially as the "seven standards:"

> [WS 62.13]
> (em) No subordinate may be suspended, reduced in rank, suspended and reduced in rank, or removed by the board under par. (e), based on charges filed by the board, members of the board, an aggrieved person or the chief under par. (b), unless the board determines whether there is just cause, as described in this paragraph, to sustain the charges. In making its determination, the board shall apply the following standards, to the extent applicable:
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> 1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
> 2. Whether the rule or order that the subordinate allegedly violated is reasonable.
> 3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
> 4. Whether the effort described under subd. 3. was fair and objective.
> 5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
> 6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
> 7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

On their face these standards seem designed to guide a *review* of discipline previously imposed, even though it is our statutory task to *impose* discipline. The statute directs us to follow the seven standards "to the extent applicable." When we deliberate within the framework of the seven standards we struggle to conform our decision-making to the rigid and

sometimes awkward statutory instructions. In this decision we summarize our examination of each count of the Statement of Charges in the light of each of the seven standards.

The disciplinary decisions of this Board are subject to broad judicial review. Under current review standards established at WS 62.13(5)(i), the Board has the responsibility of compiling a record for review in Circuit Court, which on statutory appeal does not merely affirm or overrule our decision based on conventional standards of reasonableness and substantial evidence, but instead answers independently the same question which we address: "Upon the evidence is there just cause...to sustain the charges against the accused?"

Procedural Background

This matter comes to us on a Statement of Charges by Debra H. Amesqua, Fire Chief for the City of Madison, against Firefighter David Barlow filed with the Board on December 15, 2000, alleging five counts of misconduct. Chief Amesqua has been represented by Attorney Paul Schwartzenbart. Respondent Barlow has been represented by Attorney Bruce Ehlke.

We convened our Initial Hearing on January 8, 2001, and continued proceedings with the intention of delegating certain aspects of these proceedings to a hearing examiner. However, our authority to do so was successfully challenged in collateral litigation (*Conway v. Board,* 00 CV 762; appeal pending, 01-0784). We therefore reconvened and conducted the Initial Hearing and several subsequent evidentiary hearings. After evidence was closed on June 2, 2001, the Board recessed to receive final written argument and to deliberate. Exchange and filing of argument was completed on June 5, 2001. Commissioners have each received copies of all papers and exhibits and have also had individual reference access to the complete hearing transcript of 597 pages and to all original marked exhibits. Commissioners convened for deliberations on June 7, 9, 10, 11, and 12 and have now reached the decision which we announce in this document.

In our deliberations we have thoroughly considered the record, although it has not always been practical to refer specifically to each exhibit in this decision; we have carefully weighed the credibility and demeanor of all witnesses, although it has not been practical to describe in detail how each element of our decision reflects such judgments. We admit hearsay in our proceedings, but we do not rely on hearsay as the exclusive or uncorroborated basis of any material factual element of our decision. However, we note that the core factual elements of the case are largely uncontested and are in fact provided to a large extent by Respondent's own testimony in which he largely acknowledges the underlying conduct which is the basis of the charges.

The disputes in this case are not essentially factual but legal, consisting of challenges to Department rules and procedures which we view through the lens of the statutory standards of just cause. Respondent also challenges the Chief's demand for discharge as the penalty for the acknowledged misconduct.

In summary, we have concluded that the Department rules are a proper basis of disciplinary proceedings under the facts in this case and are not unreasonable or otherwise improper as applied in this case; we will continue to examine the reasonableness of their application to each case that comes before us. The rules are needed and are reasonable because of concerns for maintaining the integrity of and public respect and trust for the Fire Department; to protect and preserve morale and high standards, discipline, and trust within the Department; to protect the safety of members of the Department and the public; and to protect and preserve the ability to manage the Department. For reasons more fully discussed throughout the decision, we have concluded that discharge is the appropriate penalty in this case.

In short, the Board has found just cause for terminating the employment of Firefighter Dave Barlow.

Decision

Count 1, Rule 18: *Members shall...treat their superiors with respect... Members...shall conform to the rules and regulations of the Department, observe the laws and ordinances, and render their services to the city with zeal, courage and discretion and fidelity.*

Rule 39: *Members must conform to and promptly and cheerfully obey all laws, ordinances, rules, regulations, and orders, whether general, special or verbal, when emanating from due authority. They shall be strictly on time to the minute, and obedience must be prompt, implicit, unqualified and unequivocal.*

General Comments This count alleges use of an illegal substance, i.e. cocaine, but also includes possession of cocaine within its scope.

The Seven Standards

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

We have consistently recognized the reasonableness of the disciplinary rules of the Fire Department at issue here on their face and we continue to do so, subject of course to application in specific cases. No reasonable firefighter could believe that the conduct which is the subject of these charges would not subject the firefighter to grave consequences. The rules are of long standing. This Board has clearly and consistently maintained high but simple expectations that police and fire personnel obey the law. We have imposed the discipline of termination in prior cases involving unlawful conduct, both for drug-related misconduct (*Williams v. Williams, Amesqua v. Patterson, Amesqua v. Gentilli*) and for other illegal conduct (*Amesqua v. Wagner).* We cannot believe that any firefighter in fact could doubt that drug-related misconduct would lead to serious discipline. Any such doubt, should it exist, would be absolutely unreasonable. Barlow's suggestion in final argument that a formal reprimand might be sufficient or appropriate is not reasonable on its face.

We allowed extensive and ultimately unproductive testimony and argument about the meaning, scope, and application of APM 2-49 or 2- 23 and the collective bargaining agreement between the City of Madison and Local 311, I.A.F.F. Respondent apparently wishes us to conclude that the existence and status of those documents somehow render discipline under Department rules improper. The APM and the collective agreement do not preclude discipline, do not preclude or preempt Department rules, and do not restrict or preempt the disciplinary jurisdiction of the Board. The Board is not a party to the collective bargaining agreement.

2. Whether the rule or order that the subordinate allegedly violated is reasonable.

The expectation of legal conduct is a simple and reasonable framework for public employment, especially in the emergency services. Who may the government expect to obey the law, if not sworn fire and police personnel? The public is entitled to rely upon firefighters and police personnel to act in conformity with the law which they enforce and embody. Less abstractly, the public must trust firefighters with their goods and lives absolutely, without hesitation, as firefighters must trust each other; no room exists for ambiguity or doubts as to the uprightness of the public servants who enter our homes, protect our goods, and guard our lives. The fire and police departments and this Board have properly extended appropriate standards of conduct to the personal lives of their personnel as well as to on-duty hours when we have found that such an extension has a sufficient connection to legitimate departmental interests as an employer of emergency services staff and to the legitimate interests of the public as consumers of

those services. In this case we find a fully sufficient connection. It may be that under some circumstances an overbroad or vindictive application of these rules could be unreasonable or unfair, but as applied here the rules are just. These rules are not merely reasonable; they are fundamental. In finding that this standard has been met we affirm our unanimous belief that police and fire personnel must obey the law.

We note that there is no requirement that a criminal prosecution must occur before charges are filed under this rule; the issue in our proceedings is the relationship of the conduct to the pertinent law. A criminal conviction is merely one form of evidence of violation of the Department rule.

3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.

This standard poses serious technical difficulties if taken literally. This Board does not, of course, sit to review the decision of the Chief; our evidentiary hearing must be understood as the primary vehicle by which to determine whether the Respondent did in fact violate a rule or order. Yet this standard and the standards following it are phrased in terms of review of the Chief's pre-hearing conduct, that is, her charging decision. We would prefer to construe this relatively new statute as consistently as possible with our straightforward conventional duty to try the case filed against Respondent and not undertake an added responsibility of reviewing the charging procedures and decisions of Complainant. Yet these standards 3. through 7. seem to direct our attention to the internal procedures of the department and the pre-hearing decisions of the Chief. (These standards are even more anomalous when we hear charges brought by citizen Complainants.) Perhaps these standards also imply a duty explicitly to examine our own proceedings. We conclude that we must make a three-fold determination:

1. The evidence has demonstrated clearly and to our satisfaction that before filing these charges Chief Amesqua and the Department conducted a reasonable investigation, including a pre-determination hearing, at which Respondent appeared with counsel. We are fully satisfied that the investigation constituted at least a reasonable effort to discover the facts of the matter, and whether Respondent did in fact violate a rule or order, including Rules 18 and 39.

2. We believe that our own proceedings have constituted a reasonable effort to determine the merits of the charges.

3. We have been persuaded by the evidence that Respondent violated Rules 18 and 39, as he in fact acknowledges.

4. Whether the effort described under subd. 3. was fair and objective.

We refer back to our discussion of the ambiguities of the seven standards as guidelines for our initial, non-appellate disciplinary decisions. We have determined that:

1. The Chief's investigation was fair and objective, following all customary and established procedures for pre-determination review.

2. We are fully satisfied that our own proceedings have been fair and objective. We conducted numerous hearing sessions, compiling 597 pages of stenographic transcript and numerous exhibits, documents, and written argument. We have listened attentively, read carefully, and deliberated thoroughly before reaching our decisions on each of the allegations.

5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.

Standard 5. is the one of the seven standards which goes most directly to the issue of culpability, and in doing so it poses an additional interpretive challenge. *Substantial evidence* is a conventional formulation of an appellate review standard, and in this context reinforces an inappropriate view of our process as an appellate process rather than an initial imposition of discipline. The burden of proof to be applied by Commissioners under WS 62.13(5) prior to 1993 Wisconsin Act 54 was well established as the "preponderance of the evidence," which is the usual minimum civil burden of proof but which is also significantly greater than "substantial evidence." Should we conclude that the seven standards lowered the chief's burden of proof? We decline to do so, at least until so directed by the body of judicial authority which is evolving as cases are decided under WS 62.13(5)(em). No sworn officer should be subject to discipline without a showing of culpability by a preponderance of the evidence. To do so would probably be unconstitutional even if authorized on the face of the statute. We determine as follows:

1. We have concluded that Chief Amesqua discovered substantial evidence that Respondent violated department rules, including Rules 18 and 39.

2. We have concluded that substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that Respondent violated Rules 18 and 39. In fact, Barlow's own admissions clearly acknowledge and establish the factual allegations of this count. He has admitted to cocaine use over a 12-year period with Firefighters Elvord, Patterson, and Gentilli, Apparatus Engineer Madden, and others.

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

We refer back again to our discussion of the interpretive difficulties posed for us by the seven standards. We have determined that:

1. Chief Amesqua has applied Rules 18 and 39 fairly against Respondent and without unlawful discrimination, racial or otherwise. We find no support anywhere in our record for any contrary conclusion.

2. In acting under and applying Rules 18 and 39 to this instance of drug-related misconduct we are acting fairly and without unlawful discrimination. Barlow suggests in argument that he has been denied due process because he has been denied the right to cross-examine witnesses in other cases; this really is an argument that Barlow has a right to have his case tried first. We are not aware of any such constitutional right to have one's case tried first, and it is a logical impossibility, as all seven firefighters whose cases came to us at the same time could make the same argument. A remedy would be to try all of the cases together, but surely Barlow would have argued that he was prejudiced by his association with the others, and he would have demanded a separate hearing. In fact, all of the hearings were held openly in a public forum as required by law and the transcribed record in the other cases has been available for examination by all parties and by the public as it was prepared. The identity of the principal witnesses in the other cases, e.g. Chiefs Amesqua and Saxe, Firefighter Elvord, and the several law enforcement officers who interviewed firefighters, have been well known to Barlow and his counsel. The Chief's case-in-chief in all of the other cases was completed before Barlow rested and if he had wanted to call witnesses in the other cases who were not called in this

case he had the ability to do so by subpoena; Barlow chose not to do so. Further, Barlow made no request to recall any witnesses who testified earlier in this case, although he could have done so. Chief Amesqua and Chief Saxe were cross-examined by Barlow in this case, and they could have been called again if Barlow had wanted to do so.

The Board does not at this time have the legal option to have a hearing officer hear these cases, as this issue is on appeal to the Court of Appeals as a result of the trial court decision in *Conway v. Board of Police and Fire Commissioners* (00 CV 762; appeal pending, 01-0784) which held that we did not have the power to use hearing officers. Thus commissioners have no choice but to hear all cases brought to them. However, the commissioners who are deciding this case have done so based solely on the evidence in this case, primarily basing their decision on Barlow's own extensive admissions which have been received as evidence or offered in final argument, and the commissioners have been aided by the transcripts and the parties' briefs in carefully limiting their decision to the record in this case only.

In short, the requirements of this standard of just cause have been met in our proceedings.

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

Progressive discipline is important and should be encouraged in the usual course of Department affairs, but there is no statutory, constitutional, or PFC rule or practice which precludes the imposition of the highest level of discipline in a serious case, so long as the penalty comports with standard 7. Nor are we obliged to impose the same discipline as proposed by a Complainant, whether Chief or citizen. In those cases where we disagree with a proposed discipline, or where no specific discipline is proposed, it might be clearer that this standard guides our own decision rather than a hypothetical review of the Complainant's proposal. This Statement of Charges seeks discharge as a general penalty for all counts but does not specify a separate proposed discipline for each count.

We have considered the issue of requiring unannounced drug testing as part of our decision in order to limit the possibility of a repeat violation. However, the statute we operate under does not give us the authority to impose such a requirement directly or as a condition of some other penalty. This may be regrettable. However, we cannot take action which is not allowed by the statute, even where one of the parties asks for it. The statute allows only for termination, suspension or reduction in rank, and we have dealt with each of these alternatives in this decision. There is no mention of any other option. Although we have the power to make rules under the statute for the conduct of our cases, we believe that this deals solely with procedure and does not empower us to increase our substantive powers. Hence, we distinguish between our ability to appoint hearing officers, which is a procedural power we believe we have (to be decided on appeal), and our ability to impose drug testing, which is a substantive increase in our authority that only the Legislature can authorize. We believe it unlikely that the courts would approve of this Board's developing creative approaches to sanctions which are not expressly provided in the statute. Drug testing is very much a

part of the modern workplace, and some flexibility under the statute to impose it might appear to be desirable. However, we do not believe that we can exercise such power

without a change in the statute.

The somewhat sensational focus of the evidence and argument in this case on drug use and practices should not obscure the core element of the primary rule violations: compliance with the law. Barlow broke Department rules by breaking the law. We expect firefighters to obey the law. Drug laws are a particular instance of our community's general expectation of lawful behavior by emergency service personnel. We believe that Madison citizens who dial 911 expect the professional personnel responding to their call to be law abiding.

As we demonstrated in *Williams v. Williams* and more recently in *Amesqua v. Patterson* and *Amesqua v. Gentilli* by unanimous votes, we treat cocaine use and distribution by our sworn personnel as a very grave matter, for which termination is the appropriate penalty. The general principles supporting an expectation of lawfulness by public employees are redoubled for the protective services, and redoubled again with respect to illegal substances.

In this and all disciplinary cases we do not act in punishment of the Respondent but rather we seek to protect the public and to preserve the reputation and good order of the Department. We have considered respondent's record of service and all materials submitted by Respondent. All commissioners agree entirely with the decision analysis of the first six "just cause" standards, above. Commissioners have divergent views, however, regarding the appropriate penalty which should result in this case.

Commissioners Lawton and Mendoza in dissent would impose the penalty of a one year suspension without pay on this count, effective immediately, to be served concurrently with suspensions on other counts, for the following reasons: The violations of Department rules which Firefighter Barlow committed under the heading of Count I are very serious and termination would be an appropriate penalty in this case, but for the following circumstances which mitigate the penalty and distinguish this case from our cases *Amesqua v. Patterson* and *Amesqua v. Gentilli*, previously decided, and *Amesqua v. Elvord*, decided today, as well as earlier cases dealing with drugs, e.g. *Williams v. Williams*, and theft, e.g. *Amesqua v. Wagner*. In their view: (a) Firefighter Barlow has consistently told the truth throughout this matter, including all interviews by law enforcement and the Department, with Investigator Whyte referring to him as being "very" candid (Tr. 46). (b) The Board does not have a policy of terminating everyone who tells the truth and admits a drug violation. The dissenting commissioners believe this is a case where termination may be counterproductive, as there are some occasions where truth-telling should be valued as a mitigating factor to encourage self-policing and discourage a "conspiracy of silence" mentality among employees. (c) Firefighter Barlow may be capable of returning to service, in that he submitted evidence in the form of Respondent's Exhibit 18, dated June 26, 2000, from NewStart, which stated that "The conclusions of our assessment do not warrant a diagnosis of either abuse or dependence on alcohol or drugs. There is no recommendation for treatment", which report appears to have been based on an accurate statement of Mr. Barlow's drug usage by providing the police reports to the NewStart assessor. Given the Commission's lack of power to impose drug testing, this type of information, based on accurate data, is important. (d) There is no evidence in the record that Mr. Barlow possessed,

distributed or received drugs on Department property or used the firefighter "chow

fund" at his station to facilitate any drug transaction. (e) There is evidence in the record that Mr. Barlow is a good to very good firefighter with a record of service of more than 20 years. (f) Mr. Barlow has participated in various charitable activities which have benefitted the community. (g) Mr. Barlow is not in a promoted position in the Department and is not a supervisor. Any law enforcement activities he engages in have been and will be incidental to his job as a firefighter. (h) A longer suspension than one year would be a *de facto* termination of Mr. Barlow, making that approach inappropriate; a shorter suspension would not demonstrate to Mr. Barlow and others the strength of our objection to his conduct. (i) Chief Amesqua was right to thoroughly investigate this matter and to get to the truth, but it is our duty and burden to decide what is "just cause," in the words of the statute, in any given case.

Commissioners Seeger, Topel, and Snider Allen appreciate the fact that this Respondent is not charged with lying to police or departmental investigators and that he was a credible witness. However, they feel that his honesty when investigated is not nearly as valuable as positive, forthcoming candor would have been. This majority of the Board would respect, reward, and encourage truly voluntary admissions which bring misconduct to light and which seek assistance with personal problems which might have a potential disciplinary implication, for example substance abuse. The mere avoidance of lying does not constitute mitigation of penalty in these commissioners' eyes. These commissioners also do not regard the fact that Barlow has no pertinent medical diagnosis as a mitigating factor; if anything, the absence of medical diagnosis or excuse is an aggravating factor, or at least neutral with respect to penalty.

All commissioners recognize that the City has a substantial investment in Barlow and in each firefighter both intangibly as members of the Department family and in simple terms of training and experience. Barlow has been with the Fire Department for over 20 years, has built up a substantial body of experience as a firefighter and has a respectable record of service. However, his misconduct has been substantial, aggravated in the majority view by several factors. With respect to the first count, the majority notes that Barlow engaged in illegal drug use over most of his career as a firefighter, apparently not stopping until the police raid on the notorious Jocko's, at which he was a long-term customer. His regret at having been caught is clear to all; his remorse at having engaged in the conduct for which he has been charged is less clear to the majority of commissioners. Barlow's inability to articulate why he used cocaine and his failure to understand the significance of his behavior in using illegal drugs since 1988 are sad commentaries. The majority has concluded that termination on the balance of these circumstances is an extreme and regrettable but not an excessive penalty.

We note that this Respondent is not charged with lying about his drug use, answered investigative questions fully, testified in our proceedings, and acknowledges the essential facts of the charges against him. We do not wish to appear to give no value to his cooperation. However, the majority must observe that this respondent was caught as the result of a broad police investigation and then admitted what he had done. Such admission under pressure is not quite enough when weighed against the seriousness of this count and these charges generally. He had not stepped forward on his own either to acknowledge misconduct or to seek medical or psychological assistance. In fact, as the timeline of his drug use which Respondent himself prepared and submitted to us shows, his drug use did not abate until after the police raid on Jocko's Bar. The point

of the rule requiring honesty is not simply to ease the personal conscience of firefighters when they happen to be subjected to investigation; the point is to tell the truth when it can help. Barlow did not violate the rule requiring honesty but the majority can give him little credit in mitigation of his admitted misconduct for merely telling the truth when he was confronted by investigators.

Thus, by majority vote as penalty for the violation of Rules 18 and 39 set forth in Count 1 we impose the penalty of separation and discharge from the service. We conclude that on the evidence and admissions in this case, there is just cause to sustain the charge in Count 1 and the penalty we impose by majority vote.

Count 2, Rule 18: [see above]
Rule 39: [see above]

General Comments This count alleges participation in the manufacture of an illegal substance, i.e., cocaine.

The Seven Standards We refer back to our general comments about each of the standards in our discussion of Count 1 and add here only additional comments related specifically to Count 2.

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

We refer again to our previous comments about standards 1. through 4. We have determined that the elements of standards 1. through 4. have been established with respect to Count 2.

2. Whether the rule or order that the subordinate allegedly violated is reasonable.

3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.

4. Whether the effort described under subd. 3. was fair and objective.

5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.

We again reach a two-part conclusion:

1. Chief Amesqua discovered substantial evidence that Respondent violated Department rules, including Rules 18 and 39.

2. Substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that Respondent violated Rules 18 and 39. We note that Barlow's admissions regarding his preparation of paper "bindles" for packaging cocaine are qualified by his disagreement or reservation as to whether his conduct should be construed as either *manufacture* or *distribution*. This disagreement goes primarily to the legal implications or interpretation of his conduct and only secondarily to simple description of his conduct.

   Barlow knowingly if casually cut paper on one occasion for use in creating containers for use in packaging cocaine at the Jocko's drug market. This work was an extension of his amiable volunteer assistance

in bar operations, for which he received acceptance within the bar culture and the bar drug market.

We recognize that Barlow's conduct would not ordinarily be prosecuted criminally as "manufacturing," and that he was not acting from a direct commercial motive. However, we believe that his activities in Jocko's, notably the preparation of cocaine bindles which underlie this count, were both technically illegal and reprehensible. Barlow's immediate personal use encompassed in Count 1 thus was both facilitated and compounded by his activities in the bar. We find that this added dimension to his misconduct justifies the separate and distinct consideration in Count 2.

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

We refer back again to our discussion of the interpretive difficulties posed for us by the seven standards. We have determined that this standard has been met by the Chief and in our proceedings.

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

As we noted, the Statement of Charges does not propose or recommend a penalty specifically for each count. We have weighed this violation carefully, with full consideration of the factors we discussed with respect to Count 1. All commissioners agree entirely with the decision analysis of the first six "just cause" standards, above.

The majority has found aggravating factors affecting its view of the penalty on this count, notably Barlow's ongoing, intimate involvement in the underground drug culture manifested at Jocko's Bar and the absence of remorse or even understanding regarding the seriousness of this misconduct. Our conclusions as to penalty diverge as noted in our discussion of penalty for Count 1. Commissioners Lawton and Mendoza would impose the penalty of a one year suspension without pay on this count, effective immediately, to be served concurrently with suspensions on other counts, for the reasons set forth earlier. Commissioners Seeger, Topel, and Snider Allen again have concluded that termination is required.

Thus by majority vote as penalty for the violations set forth in Count 2 we impose the penalty of separation and discharge from the service. We conclude that on the evidence and admissions in this case, there is just cause to sustain the charge in Count 2 and the penalty we impose by majority vote.

Count 3, Rule 18: [see above]
Rule 39: [see above]

General Comments This count alleges illegal distribution of an illegal substance, i.e., cocaine.

The Seven Standards We refer back to our general comments about each of the standards in our discussions of prior counts and add here only additional comments related specifically to Count 3.

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

We refer again to our previous comments about standards 1. through 4. We have determined that the elements of standards 1. through 4. have been established with respect to Count 3.

2. Whether the rule or order that the subordinate allegedly violated is reasonable.

3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.

4. Whether the effort described under subd. 3. was fair and objective.

5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.

We again reach a two-part conclusion:

1. Chief Amesqua discovered substantial evidence that Respondent violated Department rules, including Rules 18 and 39.

2. Substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that Respondent violated Rules 18 and 39. Barlow arranged for, assisted with, and participated in the acquisition, distribution, and sharing of cocaine on several occasions in varying amounts with fellow firefighters Paul Elvord and Tracy Patterson, albeit not on a commercial or profit-motivated basis. Transactions took place on a Madison School District parking lot, City of Madison Parks Division property, and in private homes.

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

We refer back again to our discussion of the interpretive difficulties posed for us by the seven standards. We have determined that this standard has been met by the Chief and in our proceedings.

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

As we noted, the Statement of Charges does not propose or recommend a penalty specifically for each count. We have weighed this violation carefully, with full consideration of the factors previously discussed. All commissioners agree entirely with the decision analysis of the first six "just cause" standards, above.

Our conclusions as to penalty diverge as noted in our discussion of penalty for Count 1. Commissioners Lawton and Mendoza would impose the penalty of a one year suspension without pay on this count, effective immediately, to be served concurrently with suspensions on other counts, for the reasons set forth earlier. Commissioners Seeger, Topel, and Snider Allen again have concluded that termination is required.

Thus by majority vote as penalty for the violations set forth in Count 3 we impose the penalty of separation and discharge from the service. We conclude that on the evidence and admissions in this case, there is just cause to sustain the charge in Count 3 and the penalty we impose by majority vote.

Count 4, Rule 51: *Officers and members shall at all times conduct themselves so as not to bring the Department in disrepute.*

General Comments We construe this rule to prohibit conduct which can reasonably be expected to bring the Department into disrepute. In doing so we apply an objective standard. We do not require proof of actual damage to the

Department's reputation and do not base our decision on publicity or media attention. We have given no evidentiary weight to any published news items.

The Seven Standards We refer back to our general comments about each of the standards in our discussion of the prior counts and add here only additional comments related specifically to this count.

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

The Department rule is basic, long-standing, and well known, and has been the subject of previous discipline by this Board. We do not conclude merely that this firefighter might reasonably be expected to know that damaging the reputation of the Department would probably lead to discipline; we are confident that he and each member of the Department know in fact that the Department and this Board will act to protect the reputation of the Department.

2. Whether the rule or order that the subordinate allegedly violated is reasonable.

The Department and City have a valid interest in the good reputation of the Department, which is essential to the internal life of the Department as well as to public confidence in and support for Department operations. We are especially mindful of the need for mutual respect and unit cohesion in the demanding context of emergency services; historically described as para-military, the police and fire departments simply must work with trust, cooperation, and responsiveness, both internally and with respect to the public. The public interest in the efficient functioning of this workplace is exceptionally vital, and good reputation is integral to efficient functioning.

3. Whether the chief, before filing the charge against the subordinate, made a reasonable to discover whether the subordinate did in fact violate a rule or order.

4. Whether the effort described under subd. 3. was fair and objective.

We refer again to our previous comments about standards 3. and 4. We have determined that the elements of these standards have been established with respect to Count 4.

5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.

We again reach a two-part conclusion:

1. Chief Amesqua discovered substantial evidence that Respondent violated Department rules, including Rule 51.

2. Substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that Respondent violated Rule 51. Barlow's admissions establish the factual components of this count.

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

This standard has been met by the Chief and in our proceedings.

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

We have weighed this violation carefully, with full consideration of the factors previously discussed. We discount entirely Respondent's suggestion in argument that he is not responsible for any reputational impact of his conduct because the Chief, not he, made his conduct public. All commissioners agree entirely with the decision analysis of the first six "just cause" standards, above.

Our conclusions as to penalty again diverge but in a different pattern than in the previous counts. Commissioners Lawton and Mendoza's views continue as

expressed previously. Commissioner Snider Allen joins their dissent on this count because she believes that the impact on the Department's reputation associated with Barlow's conduct would not in itself warrant discharge. Commissioners Seeger and Topel would impose the penalty of separation and discharge from the service.

Thus by majority vote as penalty for the violations set forth in Count 4 we impose the penalty of suspension without pay for one year. We conclude that on the evidence and admissions in this case, there is just cause to sustain the charge in Count 4 and the penalty we impose by majority vote.

Count 5, Rule 58: *It is the duty of every person connected with the Fire Department to note and report to their superior officer or to the Chief any and all violations of the Rules and Regulations which may come to their notice.*

The Seven Standards We refer back to our general comments about each of the standards in our discussion of the prior counts and add here only additional comments related specifically to this count.

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

2. Whether the rule or order that the subordinate allegedly violated is reasonable.

We address standards 1. and 2. together. Reasonable firefighters understand that their deeply rooted loyalty to the mission of the Department is essential not only to accomplishing their mission but to public safety, public order, and the safety of firefighters themselves. Firefighters entrust themselves to each other daily, and expect that trust from their fellows. Part of that trust involves a mutual and shared commitment to the values and rules by which firefighters work and live together. The reasonable firefighter knows that this shared commitment may from time to time transcend personal loyalty and convenience, that the individual must step out and speak up, and that the failure to do so may jeopardize firefighters and the public. The reasonable firefighter does not cooperate with wrongdoing. Firefighters know that they are honorable and that a breach of honor can be a very serious matter.

As with Rules 18 and 39, under some circumstances an overbroad or vindictive application of Rule 58. could be unreasonable or unfair, but as applied here the rule is reasonable. Barlow is not charged with failing to tattle about some minor incident. Failure to report others who engage in serious illegal conduct and who may not be fit for duty raises concern for safety for the public and the Department and undermines the ability of the Department to manage its affairs and accomplish its mission. It is reasonable to apply the rule here, as Barlow's own admissions clearly establish: he failed to report the illegal conduct of Fire Lt. Rice, Apparatus Engineer Madden, and Firefighters Patterson, Gentilli, and Elvord.

3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.

4. Whether the effort described under subd. 3. was fair and objective.

We have determined that the elements of standards 3. and 4. have been established with respect to Count 5.

5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.

We again reach a two-part conclusion:

1. Chief Amesqua discovered substantial evidence that Respondent violated Department rules, including Rule 58.

2. Substantial evidence constituting at least a preponderance of the evidence in our proceedings, including the admissions of Barlow and inferences directly from them, has demonstrated that Respondent violated Rule 58.

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

This standard has been met by the Chief and in our proceedings.

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

As we noted, the Statement of Charges does not propose or recommend a penalty specifically for each count. We have weighed this violation carefully, with full consideration of the factors previously discussed. All commissioners agree entirely with the decision analysis of the first six "just cause" standards, above. During the period in which the police investigation had begun and come to public attention and the Department had begun to investigate, Barlow continued his own drug use and kept silent about his knowledge of drug activity by others until the net of the investigations actually reached him. Thus Barlow's failure to report any misconduct of others was not merely a passive failure to step forward in aid of the Department's investigation but was essentially self-protective.

Our conclusions as to penalty diverge as noted in our discussion of penalty for Count 1. Commissioners Lawton and Mendoza would impose the penalty of a one year suspension without pay on this count, effective immediately, to be served concurrently with suspensions on other counts, for the reasons set forth earlier. Commissioners Seeger, Topel, and Snider Allen again have concluded that termination is required.

Thus by majority vote as penalty for the violations set forth in Count 5 we impose the penalty of separation and discharge from the service. We conclude that on the evidence and admissions in this case, there is just cause to sustain the charge in Count 5 and the penalty we impose by majority vote.

Order

Pursuant to W.S. 62.13(5)(e), Wisconsin Statutes, we order as follows:

1. As penalty for misconduct alleged in Count 1 of the Statement of Charges, Respondent Firefighter David Barlow is separated and discharged from the Madison Fire Department, effective immediately.

2. As penalty for misconduct alleged in Count 2 of the Statement of Charges, Respondent Firefighter David Barlow is separated and discharged from the Madison Fire Department, effective immediately.

3. As penalty for misconduct alleged in Count 3 of the Statement of Charges, Respondent Firefighter David Barlow is separated and discharged from the Madison Fire Department, effective immediately.

4. As penalty for misconduct alleged in Count 4 of the Statement of Charges, Respondent Firefighter David Barlow is suspended without pay for a period of one calendar year, with suspension to commence promptly at the administrative convenience of the Department.

5. As penalty for misconduct alleged in Count 5 of the Statement of Charges, Respondent Firefighter David Barlow is separated and discharged from the Madison Fire Department, effective immediately.

Approved following deliberations and filed with the Secretary June 12, 2001.
MADISON BOARD OF POLICE AND FIRE COMMISSIONERS

Alan Seeger, Commissioner and President

Mario Mendoza, Commissioner and Secretary

Marcia Topel, Commissioner

Elizabeth Snider Allen, Commissioner

Michael Lawton, Commissioner

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