

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

Fire Chief Debra H. Amesqua,
Complainant,

vs.

Firefighter Chris Gentilli,
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 has found Respondent Gentilli to have violated department rules on all counts. The Board imposes on each 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:

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 Chris Gentilli filed with the Board on December 15, 2000, alleging five counts of misconduct. Chief Amesqua has been represented by Attorney Paul Schwartzbart. Respondent Gentilli has been represented by Attorney Robert Gingras.

We convened our Initial Hearing on January 8, 2001, at which Respondent presented several motions orally, including motions for recusal of Comm. Seeger and to dismiss. We adjourned the Initial Hearing to allow written submissions by the parties and subsequently denied all motions except the MOTION TO DISMISS dated January 16, 2001, which we took under advisement pending further proceedings. At the reconvened Initial Hearing on February 12 we resolved additional procedural issues and confirmed our decision not to resolve the case at the threshold on Respondent's motion to dismiss. We reconvened for evidentiary proceedings on March 14 and seven subsequent sessions. At the close of Complainant's case Respondent orally renewed his motion for recusal of Comm. Seeger and moved to dismiss on several grounds. Comm. Seeger and the Board denied recusal. The Board reserved ruling on the other motions pending completion of testimony and final argument. After evidence was closed on May 9, 2001, the Board recessed to receive final written argument and to deliberate. Exchange and filing of argument was completed on May 29, 2001. Commissioners have each received copies of all papers and exhibits and have also had individual reference access to the complete hearing transcript of 1006 pages and to all original marked exhibits. Commissioners convened for deliberations on May 31, June 2, June 4, and June 5, and have unanimously 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; Respondent did not testify and, as his closing argument confirms, 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 constitutional and other 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, we have found just cause for terminating the employment of Firefighter Chris Gentilli.

Decision

Motions We began deliberations with several motions by Respondent under advisement. We now deny those motions. More particularly:

MOTION TO DISMISS dated January 16, 2001: This motion challenges the constitutionality of department rules under which these charges were brought, alleging in summary that the rules are unreasonable, vague, and overbroad. These challenges coincide with the analysis required by WS 62.13(5)(em)1. and 2. and implicitly 3., 4., and 6. This motion is denied for the reasons set forth throughout our decision in our discussion of the statutory standards.

MOTIONS TO DISMISS, oral, May 9, 2001: Respondent's counsel articulated seven grounds for dismissal in oral argument to the Board at the final hearing session and renewed his earlier request or motion for the recusal of Comm. Seeger. The Board and Comm. Seeger again denied the recusal request, commented briefly on portions of the argument, and reserved ruling on the seven dismissal arguments pending final briefing. Dismissal based on those grounds is now denied, for the reasons set forth more fully throughout our discussion of just cause in this decision. In summary:

1. *Dismiss because Gentilli was not allowed to participate in other pending cases:* Gentilli has not been denied due process. The argument that he has been denied the right to cross-examine witnesses in other cases is really an argument that Gentilli 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 could make the same argument. A remedy would be to try all of the cases together, but surely Gentilli 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, Firefighters Barlow and Elvord, and the several law enforcement officers who interviewed firefighters, have been well known to Gentilli and his counsel. The Chief's case in all of the other cases was completed before Gentilli 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; Gentilli chose not to do so. Further, Gentilli 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 Gentilli in this case at length, and they could have been called again if Gentilli 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 Gentilli'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.
2. *Dismiss because department rules are unconstitutional:* We reject the battery of constitutional challenges. First, the rules involved in this case are not overbroad. This is not a case which implicates First Amendment rights. This case involves illegal drug use and no claim is made here that this activity involves the exercise of a First Amendment right. Overbreadth arguments in our view are asserted primarily in First Amendment situations. We examine the rules as applied in each case to assure ourselves that the rule is not overbroad or unreasonable, as that is our statutory mandate. We find that the application of the rules at issue in this case to the facts of this case is reasonable, for the reasons set out throughout this decision. We do not find that the rules at issue here are so overbroad that they will impact the exercise of First Amendment rights by firefighters.

We reject the argument that the rules involved in this case are unconstitutionally vague for the reasons set forth throughout this opinion. We look at the reasonableness of the application of the rules to each case as part of our statutory mandate, and we do not believe that it is unreasonable to apply the rules here to the factual situation in this case.

We also reject the argument that the rules are unconstitutional in lacking a rational basis which is related to a legitimate governmental objective. For the reasons set forth throughout this decision, we believe firmly that all of the rules here have a rational basis which is related to a legitimate governmental objective of the Fire Department. We also find no disparate treatment of Gentilli which rises to the level of an unconstitutional deprivation of Equal Protection rights.

3. *Dismiss because the defense was wrongly limited with respect to defense allegations of wrongful disclosure of federal grand jury materials:* Rule 6(e), Federal Rules of Criminal Procedure, is a procedural rule of the federal court system. Enforcement of this Rule is not a part of this Board's statutory mandate, nor is it a part of our rules, nor is it a part of the Constitutions of this state or the United States. If a violation of such Rule has occurred (and we do not make any factual finding as to this issue), the remedy must be found in the federal court system through contempt of court or other proceedings, and the matter can be reported to federal law enforcement authorities. No authority has been presented to this Board wherein any state or local administrative body has been required to adopt an exclusionary rule and engage in a "fruits of the poisonous tree" analysis to evaluate evidence which is purported to be so-called Rule 6(e) material. We decline in this case to adopt a procedure and rule for which there is no authority. We are not bound by any opinions of Chief Amesqua or Chief Saxe as to whether there is a problem with considering alleged Rule 6(e) material in this case, since we are the interpreters of the law with respect to our statutory mandate and procedures. Given the Board's decision on Rule 6(e), hearing testimony by Attorney Tracy Wood concerning Rule 6(e), or by Jason Shepard concerning the sources for his news reporting, would have been a waste of time and we properly excluded such testimony.
4. *Dismiss because Ann Gibneski testified after being wrongfully immunized:* The objection raised to our consideration of the Gibneski testimony has no merit. Gibneski came into our hearing and testified under oath. Respondent's dissatisfaction with the collateral judicial proceedings in which she was apparently granted immunity goes to the credibility of the witness, which commissioners duly weighed, but there is no violation of our rules, the statute we operate under, or the Constitutions of this state or the United States, in considering her testimony, giving it such weight as we think it merits. In this case, as this decision demonstrates, we have based the factual elements of our decision primarily on Gentilli's own admissions, thus making the entire Gibneski issue one of little importance.
5. *Dismiss because Gentilli has already received discipline for the conduct in question in the form of an MOU and drug assessment.* "MOU's" (memoranda of understanding) and drug assessment are not discipline, are not binding on the Board, do not somehow restrict or preempt the disciplinary jurisdiction of the Board, and in this instance the MOU on its face does not preclude discipline.
6. *Dismiss because a City of Madison Administrative Procedure Memorandum applies to this case and preempts discipline under department rules:* We allowed extensive and unproductive testimony and argument about the meaning, scope, and application of APM 2-49 or 2- 23. The APM does not preclude discipline, does not preclude or preempt department rules, and does not restrict or preempt the disciplinary jurisdiction of the Board.
7. *Dismiss because Gentilli was improperly selected for discipline:* There has been no showing that any action was taken against Gentilli by anyone because he was a member of any protected class. The "evidence" on this point consisted entirely of speculation, rumor, innuendo, and heated rhetoric by counsel.

We have incorporated our analysis of the motions in our discussion of the application of the statutory standards of just cause to the individual counts of the complaint.

Just Cause

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 officers 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*) and for other illegal conduct (*Amesqua v. Wagner*). We cannot believe that any firefighter in fact has doubted that drug-related misconduct would lead to serious discipline, but any such belief would be absolutely unreasonable. Furthermore, Gentilli's final argument concedes that some serious level of discipline would be appropriate.

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 officers 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.

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. We note again that Gentilli has conceded that serious discipline is appropriate.

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 1006 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, Gentilli's own admissions clearly acknowledge and establish the allegations of this count. He has admitted to cocaine use over a ten-year period with Perry Bowers on 5 to 10 occasions, with Terry Rice and Ann Gibneski on 2 occasions, with Dave Barlow on 2 occasions, once with Paul Elvord, on 3 to 4 occasions with Dan Madden, and with Dave Anderson one time.

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. We find no support anywhere in our record for any contrary conclusion. The fact that the department's investigation of Gentilli proceeded at its own pace and that he was placed on administrative leave at a later time than some other firefighters is fully explained by the record and does not support any inference of unfairness or unlawful discrimination.
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.

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 Respondent's record of service and all materials submitted by Respondent, but we find nothing there which ameliorates the gravity of this conduct. We do not act in punishment of the Respondent but rather we seek to preserve the reputation and good order of the Department and more generally to protect the public.

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. Gentilli 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 officers responding to their call to be law abiding.

As we demonstrated in *Williams v. Williams* and more recently in *Amesqua v. Patterson* by a unanimous vote, we treat cocaine use and distribution by our sworn officers 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.

The City has a substantial investment in Gentilli and in each firefighter both intangibly as members of the department family and in simple terms of training and experience. Gentilli has been with the Fire Department for over 21 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, with several aggravating factors. With respect to the first count, we note that Gentilli apparently lied to the drug assessment professional to whom he had been referred by his attorney by grossly misrepresenting the extent of his drug use; and he has provided us with no evidence, particularly testimony, demonstrating his remorse, or pertinent medical status, or meaningful drug assessment based on accurate history; and of course no apology. To terminate Gentilli on the balance of these circumstances is an extreme and regrettable but not an excessive penalty.

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.

Count 2, 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 discussion of Count 1 and add here only additional comments related to the 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 Gentilli's admissions regarding his use of cocaine are qualified by his disagreement or reservation as to whether his conduct should be construed as *distribution*. This disagreement goes primarily to the legal implications or interpretation of his conduct and only secondarily to simple description of his conduct.

Gentilli procured drugs in at least two drug transactions or exchanges involving himself, Fire Lieutenant Rice, and Ann Gibneski by calling Gibneski, directing her to obtain the cocaine, arranging a rendezvous of the three for the transaction, utilizing her to retrieve the cocaine from some other party and deliver it to Rice in Gentilli's presence, and then participating in the use of the drug. Gentilli's relationship with the hapless Gibneski disclosed in our record was manipulative and low. His half-hearted and indirect suggestion in the course of his counsel's examination of witnesses that Gentilli was somehow compelled to these actions by the superior rank of Lt. Rice is unavailing: Gentilli was not obliged in any way to obey any order, implied or otherwise, to engage in illegal conduct, and his failure to report Lt. Rice is in fact a proper component of the separate charge in these proceedings under Count 5.

We recognize that Gentilli's conduct would not ordinarily be prosecuted criminally as "distribution," and that he was not acting from a commercial motive. However, we believe that his communications with Gibneski to arrange and carry out two drug transactions among Gibneski, Rice, and himself was both technically illegal and reprehensible. We have concluded that Gentilli's misconduct in the Gibneski transactions constituted either actual or constructive distribution of cocaine. Gentilli's immediate personal use encompassed in Count 1 thus was compounded by his planning and carrying out transactions involving others. 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. Our discussion of Count 2 has suggested aggravating factors affecting our view of the penalty on this count, notably the manipulation and predation of a third party and the absence of remorse or even understanding regarding the seriousness of this misconduct.

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 in this case, there is just cause to sustain the charge in Count 2 and the penalty we impose.

Count 3, Rule 47: *Members of the department are required to speak the truth at all times and under all circumstances, whether under oath or otherwise.*

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

The fire and police departments have consistently proclaimed the highest priority for the value of truthfulness by officers and this Board has consistently supported that priority. All Madison firefighters know or can reasonably be expected to know that untruthfulness is unacceptable in the extreme.

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

The rule codifying the prohibition of untruthfulness would be entirely reasonable in any employment situation, even more in any public employment, and is not merely reasonable but critical as applied to the protective services. This Board and our community expect absolute truthfulness from our firefighters, whom we entrust with our lives and property under conditions of extreme danger, stress, and vulnerability.

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.

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 3.

We again reach a two-part conclusion:

1. Chief Amesqua discovered substantial evidence that Respondent violated department rules, including Rule 47.
2. Substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that Respondent violated Rule 47. Gentilli's own admissions clearly prove that he lied in the first investigative interview to a superior officer, on May 18, 2000, on a matter relevant to the Fire Department's duties, and these lies were material and damaging to the investigation.

Gentilli seems to have straightened out his story by the time of the second interview with the Department four months later, on September 12, 2000, which somewhat mitigated the damage. However, a major factor in this count is the obstruction of the overall departmental investigation which resulted from Gentilli's initial lies. The point of the rule is not simply the personal conscience of firefighters, which Gentilli may perhaps after four months have cleansed, when subjected to another investigative interview; the point is to tell the truth when it counts. There was no excuse for the lies in May 2000, and the effect of the untruthfulness was felt for four months. Because Gentilli did not testify, we have no evidence that any issues regarding the employee assistance program had anything to do with his lies in May 2000, as there is no evidence that his wife talked to him about the EAP. There also has been no testimony to substantiate a claim or implication by Gentilli that medication he was taking may have caused his false statements. He also lied in the first police interview to a more limited extent, but he seems to have largely straightened that out by the end of the interview, so we do not include that prevarication in our findings of a violation, and we base our penalty analysis solely on the lies in the May 2000 interview.

We have determined that this standard has been met by the Chief and in our proceedings.

We have weighed this violation carefully, with full consideration of the factors we discussed with respect to Count 1. As our discussion suggests, we have been especially troubled by the obstructive effect of Gentilli's four-month misrepresentations, and by his apparent view that this rule is aimed at his conscience rather than the welfare of the department and the City.

As penalty for the violation of Rule 47 set forth in Count 3 we impose the penalty of separation and discharge from the service. We conclude that on the evidence in this case, there is just cause to sustain the charge in Count 3 and the penalty we impose.

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 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 effort to discover whether the subordinate did in fact violate a rule or order.*

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.

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

We again reach a two-part conclusion:

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

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. Gentilli'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 we discussed with respect to Count 1. As penalty for the violation of Rule 51 set forth in Count 4 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 4 and the penalty we impose.

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.*

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

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.

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

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. Gentilli 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 Gentilli's own admissions clearly establish: he failed to report the illegal conduct of Lt. Rice and Firefighters Madden, Barlow 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.*

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.*

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 Gentilli and inferences directly from them, has demonstrated that Respondent violated Rule 58.

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

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. Gentilli's failure to report any misconduct of others was not merely a passive failure to step forward but was essentially self-protective, compounding his initial lies and obstructing the department's investigation and understanding of the larger situation. As penalty for the violation of Rule 58 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.

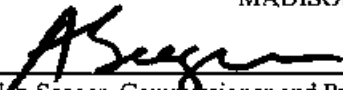
Order

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

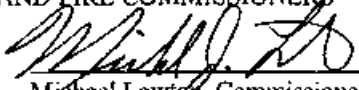
1. As penalty for misconduct alleged in Count 1 of the Statement of Charges, Respondent Firefighter Chris Gentili is separated and discharged from the Madison Fire Department, effective immediately.
2. As penalty for misconduct alleged in Count 2 of the Statement of Charges, Respondent Firefighter Chris Gentili 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 Chris Gentili 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 Chris Gentili is separated and discharged from the Madison Fire Department, effective immediately.
5. As penalty for misconduct alleged in Count 5 of the Statement of Charges, Respondent Firefighter Chris Gentili is separated and discharged from the Madison Fire Department, effective immediately.

Approved following deliberations June 5, 2001, and filed with the Secretary June 6, 2001.

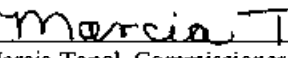
MADISON BOARD OF POLICE AND FIRE COMMISSIONERS



Alan Seeger, Commissioner and President



Michael Lawton, Commissioner



Marcia Topel, Commissioner

Note: Commissioners Mario Mendoza and Elizabeth Snider Allen did not participate in this decision.

Distribution:

Commissioners
Atty. Gingras
Atty. Schwartzenbart

F:\WP\SH\PFC\Gentilli\Decision.d06.final.wpd

This document was created with Win2PDF available at <http://www.daneprairie.com>.
The unregistered version of Win2PDF is for evaluation or non-commercial use only.