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

Fire Chief Debra H. Amesqua,
Complainant,
vs.
Firefighter Marc Behrend,
Respondent

DECISION AND ORDER

Synopsis

This case, filed with the Board on December 15, 2000, alleges violations of four Department rules in three counts of misconduct. Following extensive hearings, legal argument, briefing, and deliberations, the Board has sustained the count alleging untruthfulness but has concluded that the complainant did not meet her burden of proof with respect to the other counts. The Board therefore dismisses the two unproven counts; on the sustained count the Board imposes 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 Marc Behrend filed with the Board on December 15, 2000, alleging three counts of misconduct. Chief Amesqua has been represented by Attorney Richard G. Niess. Respondent Behrend has been represented by Attorney Jon Jackson.

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 4, 2001, the Board recessed to receive final written and oral argument and to deliberate. Argument was completed on June 11, 2001. Commissioners have each received copies of all papers and exhibits and have also had individual reference access to the complete hearing transcript of 957 pages and to all original marked exhibits. Commissioners convened for deliberations on June 11, 12, and 13 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.

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.

Under the circumstances presented by the evidence in this case our central task has been reduced to two mixed questions of law and fact: Did the complainant prove that respondent used cocaine on the occasions alleged in Count 1 of the Complaint? Was respondent untruthful in investigative interviews? We have concluded that the complainant did not establish by a preponderance of substantial credible evidence that respondent used cocaine as alleged; therefore we dismiss Count 1 and Count 3. We have also concluded that respondent was untruthful in an investigative interview, sustaining Count 2. For reasons more fully discussed throughout the decision, we have concluded that the appropriate penalty for the violation of Count 2 is discharge from the fire service.

In short, we have found just cause for terminating the employment of Firefighter Marc Behrend.

Motions and Objections

Counsel for both parties have presented various motions and objections which we have decided as necessary during the course of our proceedings. We confirm our rulings, including without limitation our ruling that the Statement of Charges as amended is legally sufficient.

We also specifically confirm and supplement our ruling and comments regarding Respondent's argument that 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.

To the extent that any motions or objections may remain pending, we have decided them implicitly by this decision or explicitly as reflected in our analysis of the application of the statutory standards of just cause to the individual counts of the complaint.

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, Amesqua v. Barlow, Amesqua v. Elvord*) 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.

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. The attack on the investigation in Respondent's brief (at page 24) is rhetorically excessive and misguided; the investigation was not perfect, but its single largest flaw was its obstruction by Respondent's lie to Division Chief Aldworth, which we discuss more fully under Count 2.

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

3. We do not find sufficiently persuasive the evidence in these proceedings that Respondent violated Rules 18 and 39 as alleged in this count.

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 957 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 to a reasonable certainty, by the greater weight of the credible 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 has discovered substantial evidence constituting a prima facie case that Respondent violated Department Rules 18 and 39.

2. However, we have not been persuaded to a reasonable certainty by a preponderance of substantial, credible evidence that Respondent violated Rules 18 and 39 as alleged. We cannot conclude on this record whether Respondent did or did not use cocaine. We recognize that complainant can present only such testimony and other evidence as arises in the facts and circumstances of the case, and so is limited to reliance on certain unsavory denizens of Jocko's Bar. But the Respondent is not charged with unsavory associations and bad taste in bars; he is charged with specific instances of cocaine use. We draw adverse inferences with regard to the questions that Behrend declined to answer without valid objection regarding ownership of the drug paraphernalia found in his car. We also draw adverse inferences with regard to questions for which Behrend claimed privilege against self-

incrimination, without ruling on or determining the validity of the claim of privilege in our proceedings. But the substance of these inferences does not directly support the charges of misconduct. We do not find Behrend credible, but absent corroboration, the evidence presented by Complainant in the form of John Salmon's testimony falls just short of the required level of certainty with respect to the specific allegations of Count 1.

In considering the evidence in this case we have been compelled to attend very carefully to our general standard practice regarding hearsay material, discussed earlier in this decision. In short, we admit but do not rely on uncorroborated hearsay in our fact-finding. On this principle we have not regarded the Ann Gibneski written hearsay statement as proof of a rule violation by Respondent. We concluded that the Rob Hudson written hearsay statement is not subject to the hearsay exception for an unavailable witness because we discerned no showing that his statement was contrary to interest in any meaningful way or to any meaningful extent on this record; therefore we have not regarded his statement as proof of a rule violation by Respondent. The written hearsay statements of Schuh, Schlicht, and Kay, like those of Gibneski and Hudson, were evidence of the nature and scope of the investigation, but we did not consider them as proof of a rule violation by Respondent. Kay alone of these individuals testified, but his testimony was credible, was not inconsistent with his written hearsay statement, and provides no basis for giving substantive weight to the hearsay in our fact-finding.

We fully understand why the Complainant decided that she must file these charges, and we do not fault that decision. But we now find ourselves in an awkward guessing game. The net ambiguity of the evidence would compel us to speculate rather than reach a weighed determination on the preponderance of the evidence. Our verdict on this count is "not proven."

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. Behrend 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 Behrend 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 Behrend 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, and the several law enforcement officers who interviewed firefighters, have been well known to Behrend and his counsel. The Chief's case-in-chief in all of the other cases was completed before Behrend 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; Behrend chose not to do so. Further, Behrend 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 at length by Behrend in this case, and they could have been called again if Behrend 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 Behrend's own 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.

Because we have determined that the factual elements of this count have not been sustained to the necessary standard, we have dismissed this count and have not considered possible penalty.

Count 2, 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.

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.

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 constituting a prima facie case that Respondent violated Department Rule 47.

2. Substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that Respondent violated Rule 47. We find one lie by Respondent, uncontroverted on our record and crucial. During the Department investigation on May 3, 2000, Respondent was asked if he could recall the identities of non-firefighter friends with whom he had gone into Jocko's Bar and responded "I can't recall off-hand." [Complainant's Exhibit 2, page 6] During our hearing Respondent admitted that statement was a lie; he had indeed known the identity of the individuals but "...really didn't think that it was really that necessary for me to bring anybody into this investigation." He "thought that it really didn't matter who I was in there with if it wasn't anybody from the Madison Fire Department." He "didn't know that Iwas going to end up at this point with me sitting in this chair..." [Transcript, 809ff] Thus Respondent Behrend knowingly made a false material statement to a superior officer during the course of an extremely important official investigation. This lie seriously obstructed the investigation on a continuing basis, even through the period of our own hearings.

   The point of Rule 47 is not simply to ease the personal conscience of firefighters; the point is to tell the truth when it counts. Respondent Behrend lied when it counted most, at the critical early moments of the investigation, and did not acknowledge the lie until it was too late, in the final moments of our proceedings, after we had reached the scheduled close of testimony.

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

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

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.

Even though we have dismissed the count which focuses overtly on drug use, we have considered the issue of requiring unannounced drug testing as part of our decision because the untruthfulness at stake in this sustained count relates to drug use, and because we should not ignore any resources which might 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 violation which we have found: untruthfulness. Behrend lied to investigators, thereby thwarting and obstructing a vital Department interest. The truth which he did not tell when it was needed was crucial to the ongoing investigation. We expect and require more of our firefighters. The integrity of the departmental investigation process is not expendable, and is a core element of the larger process established by WS 62.13(5).

We cannot allow firefighters to pick and choose when to answer Department investigators truthfully. Similarly, we cannot allow firefighters to pick and choose when this Board is entitled to answers to its questions and, indeed, entitled to the whole truth that all witnesses are sworn to offer. No other firefighter in recent memory has exhibited to this Board as serious a disregard for the value and necessity of telling the truth.

The City has a substantial investment in Behrend and in each firefighter both intangibly as members of the department family and in simple terms of training and experience. Behrend has been with the Fire Department for over 12 years, has built up a substantial body of experience as a firefighter and has a respectable record of service. However, his misconduct in that one pivotal lie to Div. Chief Aldworth was obstructive, disrespectful, selfish, and profoundly disturbing, and would not have come to light but for the fact that he testified in our proceedings.

As our discussion suggests, we have been especially troubled by the effect of Behrend's year-long obstruction of the Department's investigation and of our hearing. Behrend made no effort to correct his original prevarication regarding the identity of witnesses, and did so only under cross-examination in the very last moments of evidentiary proceedings. Behrend extended his deceptive and obstructive conduct into our proceedings by wilfully declining to answer questions regarding the identity of the supposed owner of drug paraphernalia found in his car. He clearly had intended to maintain and benefit from his deception.

Comm. Snider Allen concurs in the analysis of standards 1. through 6. and in the foregoing discussion of penalty. However, she dissents as to the penalty to be imposed. She finds Behrend to have been extremely naive to situations and people around him, eager for acceptance in his accustomed world of sports and its camaraderie. She believes that Behrend was naive and misguided but that he is not irredeemable as a firefighter. Although his naivete may have brought out the worst in his actions and associations, this does not put him outside the reach of discipline or accountability. She is convinced that Behrend's lack of comprehension about his duties and responsibilities was formed by his desire to belong , which led him to lie to investigators and eventually to this commission. In her judgment Respondent should be suspended without pay for a period of one calendar year.

The other commissioners have concluded that termination is the appropriate penalty. Therefore, by vote of 4 to 1, as penalty for the violation of Rule 47 set forth in Count 2 we impose the penalty of discharge from the fire 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 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 factual allegations of this count in this case pertain to the drug use alleged in Count 1.

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 has discovered substantial evidence constituting a prima facie case that Respondent violated Department rules, including Rule 51.

2. Because we have declined to sustain the allegations of Count 1 for the reasons set forth earlier, we must also decline to sustain 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.

Because we have determined that the factual elements of this count are entwined with the factual elements of Count 1 and thus have not been sustained to the necessary standard of proof, we have dismissed this count and have not considered possible penalty.

Order

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

1. Count 1 of the Statement of Charges is dismissed, with prejudice.

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

3. Count 3 of the Statement of Charges is dismissed, with prejudice.

Approved following deliberations and filed with the Secretary June 13, 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

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