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

Fire Chief Debra H. Amesqua,
Complainant,

vs.

Firefighter Paul Elvord,
Respondent

DECISION AND ORDER

Synopsis

This case, filed with the Board on December 15, 2000, alleges violations of five Department rules in four counts of misconduct. Following extensive hearings, legal argument, briefing, and deliberations, the Board has found Respondent Paul Elvord 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 Paul Elvord filed with the Board on December 15, 2000, alleging five counts of misconduct. Chief Amesqua has been represented by Attorney Richard G. Niess. Respondent Elvord has been represented by Attorney Victor Arellano.

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 May 14, 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 621 pages and to all original marked exhibits. Commissioners convened for deliberations on June 7, 9, 10, 11, and 12 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 and are in fact proved 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, we have found just cause for terminating the employment of Firefighter Paul Elvord.

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.

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.

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 621 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 personnel 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, Elvord's own admissions clearly acknowledge and establish the factual allegations of this count. He has admitted to cocaine use over a 6-year period with Firefighters Barlow (10 to 20 occasions) and Gentilli (twice), Fire Lieutenant Rice (3 or 4 occasions), Apparatus Engineer Madden (1 to 5 occasions), and John Doe (2 to 3 occasions). A serious aggravating circumstance is that Elvord came into possession of cocaine on one occasion on Fire Department property; by his later account the package was left in his unlocked car in the station parking lot, but by the more credible evidence of his earlier admission to three law enforcement officers as recorded in their written report, the transaction occurred in the firehouse proper. We are especially troubled by the fact that Elvord nonchalantly paid for the firehouse transaction in part by crediting the fire station's "chow fund" account of the cocaine supplier, Firefighter Tracy Patterson; in other words, the common fund used to buy food for the firefighters in Elvord's station was used as the bank or clearing account for a drug deal, egregiously violating the responsibility entrusted to him by his co-workers. This conduct on the fire station premises in intolerable.

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. Elvord 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 is really an argument that Elvord 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 Elvord 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 Barlow, and the several law enforcement officers who interviewed firefighters, have been well known to Elvord and his counsel. The Chief's case-in-chief in all of the other cases was completed before Elvord 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; Elvord chose not to do so. Further, Elvord 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 Elvord in this case at length, and they could have been called again if Elvord had wanted to do so. Elvord's testimony in other proceedings before us was not introduced into evidence in this case and was not referred to or relied upon in our deliberations.

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 Elvord'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 Respondent's record of service and all materials submitted by Respondent, but we find nothing there which ameliorates the gravity of this conduct, particularly given the presence of drugs on Fire Department property and the use of the station chow fund. 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. Elvord 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*, 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.

The City has a substantial investment in Elvord and in each firefighter both intangibly as members of the Department family and in simple terms of training and experience. Elvord has been with the Fire Department for over 20 years, has built up a substantial body of experience as a firefighter and paramedic, and has a respectable record of service. However, his misconduct has been substantial, with several aggravating factors, including our special concern with the fire station transaction. We are also concerned by the extent and duration of Elvord's drug use, and by inconsistencies in the way it has been presented to us. We note that Elvord did not present medical or other professional evidence describing any drug assessment or related diagnosis. To terminate Elvord in 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, 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, we 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, particularly in view of the fire station incident. He had not stepped forward on his own either to acknowledge misconduct or to seek medical or psychological assistance prior to being approached by law enforcement officers. 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. Elvord did not violate the rule requiring honesty but we can give him little credit in mitigation of his admitted misconduct for merely telling the truth when confronted by investigators.

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 discussions of Count 1 and add here only additional comments related to specifically Count 2.

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.

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.

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. Elvord arranged for and participated in the acquisition, distribution, and sharing of cocaine on several occasions in varying amounts with Fire Lieutenant Terry Rice and Firefighters Dave Barlow and Tracy Patterson, albeit perhaps not on a commercial or profit-

motivated basis. The fact that these transactions were cordial social affairs among friends rather than cold entrepreneurial deals gives us little comfort. In fact, we are especially disturbed by the view emerging from the evidence in this case of a cozy drug clique or subculture within the larger Fire Department family.

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. 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 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 3.

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. Elvord'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 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.

Count 4, 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. Elvord 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 Elvord's own admissions clearly establish: he failed to report the illegal conduct of Fire Lt. Rice, Apparatus Engineer Madden, and Firefighters Patterson, Gentilli, and Barlow.

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 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 58.

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

6. Whether the chief is apptying 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. During the period in which the police investigation had begun and come to public attention and the Department had begun to investigate, Elvord kept silent about his knowledge of drug activity by others until the net of the investigations actually reached him. Thus Elvord's failure to report any misconduct of others was not merely a passive failure to step forward in aid of the Department investigation, but was essentially self-protective. 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 Paul Elvord 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 Paul Elvord 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 Paul Elvord 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 Paul Elvord 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

Michael Lawton, Commissioner

Marcia Topel, Commissioner

Elizabeth Snider Allen, Commissioner

Note: Commissioner Mario Mendoza, Board Secretary, did not participate in this decision.

Distribution:
Commissioners
Atty. Arellano
Atty. Niess

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.