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

Fire Chief Debra H. Amesqua,
Complainant,

vs.

Apparatus Engineer Dan Madden,
Respondent

DECISION AND ORDER

Synopsis

This case, filed with the Board on December 18, 2000, alleges violations of five Department rules in five counts of misconduct. Following extensive hearings, legal argument, briefing, and deliberations, the Board by unanimous vote has found Apparatus Engineer Madden to have violated Department rules as alleged in each of the five counts and imposes as penalty a reduction in rank to Firefighter and suspension without pay for a period of 90 calendar days.

Statutory Framework

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

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

On their face these standards seem designed to guide a *review* of discipline previously imposed, even though it is our statutory task to *impose* discipline. The statute directs us to follow the seven standards "to the extent applicable." When we deliberate within the framework of the seven standards we struggle to conform our decision-making to the rigid and sometimes awkward statutory instructions. In this decision we summarize our examination of each count of the Statement of Charges in the light of each of the seven standards.

The disciplinary decisions of this Board are subject to broad judicial review. Under current review standards established at WS 62.13(5)(i), the Board has the responsibility of compiling a record for review in Circuit Court, which on statutory

appeal does not merely affirm or overrule our decision based on conventional standards of reasonableness and substantial evidence, but instead answers independently the same question which we address: "Upon the evidence is there just cause...to sustain the charges against the accused?"

Procedural Background

This matter comes to us on a Statement of Charges by Debra H. Amesqua, Fire Chief for the City of Madison, against Apparatus Engineer Dan Madden filed with the Board on December 18, 2000, alleging five counts of misconduct. Chief Amesqua has been represented by Attorney Robert Kasieta. Respondent Madden has been represented by Attorney Bruce Ehlke.

We convened our Initial Hearing on January 8, 2001, and continued proceedings with the intention of delegating certain aspects of these proceedings to a hearing examiner. However, our authority to do so was successfully challenged in collateral litigation (*Conway v. Board*, 00 CV 762; appeal pending, 01-0784). At that juncture we continued this matter during the pendency of several other cases on our calendar, reconvening the Initial Hearing on July 9, 2001, with subsequent hearing sessions beginning on September 10, 2001. After evidence was closed on February 28, 2002, the Board recessed to receive final written argument and to deliberate. Commissioners have each received copies of all papers and exhibits and have also had individual reference access to the complete hearing transcript of 840 pages and to all original marked exhibits. Commissioners convened for deliberations on March 27, April 3, April 8, April 13, and April 16, 2002, and have now reached the decision which we announce in this document.

In our deliberations we have thoroughly considered the record, although it has not always been practical to refer specifically to each exhibit in this decision; we have carefully weighed the credibility and demeanor of all witnesses, although it has not been practical to describe in detail how each element of our decision reflects such judgments. We admit hearsay in our proceedings, but we do not rely on hearsay as the exclusive or uncorroborated basis of any material factual element of our decision. However, we note that the core factual elements of the case are largely uncontested and are in fact provided to a large extent by Respondent's own testimony in which he largely acknowledges the underlying conduct which is the basis of the charges. The disputes in this case are not essentially factual but legal, consisting of challenges to Department rules and procedures which we view through the lens of the statutory standards of just cause. Of course Respondent also challenges the Chief's demand for discharge as penalty for the acknowledged misconduct.

We are never pleased to exercise our disciplinary jurisdiction, but we regret especially that this case has come to us. The evidence suggests that the parties themselves could have settled the matter before these charges were filed on a mutually satisfactory basis, which would have included some form of drug testing for A.E. Madden. However, a non-party in this case, I.A.F.F. Local 311, did not waive its claims and rights to challenge such drug testing; therefore, a "settlement" between the Chief and A.E. Madden would not in fact have settled or closed the dispute but merely deferred and relocated it into another forum. Now we are required to hear and decide the matter using the strict and limited statutory resources available to us under WS 62.13(5), which as we discuss below do not include drug testing.

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 a combination of demotion and suspension is the appropriate penalty in this case.

In short, the Board has found just cause for demoting Apparatus Engineer Dan Madden to the rank of Firefighter and suspending him for 90 calendar days.

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 a illegal substances, i.e. cocaine and marijuana, but also includes possession of those drugs 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. Elvord*, *Amesqua v. Barlow*) 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 federal regulations, about collective bargaining agreements in other organizations both inside and outside of government, about the meaning, scope, and application of City of Madison APM 2-49 or 2- 23, and about 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. Those materials 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.

We also received evidence offered by Respondent relating to nationally recognized training materials and local training materials and practices. We have found these materials completely unhelpful. None of this evidence justifies any reduced loyalty by A.E. Madden to his oath; none of this evidence suggests that illegal drug use is not a serious problem; none of this evidence mitigates our consistent requirement that sworn officers obey the law. A.E. Madden was not aware of this material prior to the filing of these charges. For that matter, even though we received it, none of this evidence even appears to have relevance in these proceedings, let alone weight.

A.E. Madden was not caught and charged for doing something that he and other firefighters thought was reasonable and proper; he was caught and charged for conduct which he knew was wrong, which he initially attempted to disguise, and which, as we judge his demeanor, he may still be dissembling. He may not have known he would

be caught, and he may not have expected to be caught, but neither A.E. Madden nor any reasonable firefighter could have doubted that serious consequences would result if he were to be caught.

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

The expectation of legal conduct is a simple and reasonable framework for public employment, especially in the emergency services. Who may the government expect to obey the law, if not sworn fire and police personnel? The public is entitled to rely upon firefighters and police personnel to act in conformity with the law which they enforce and embody. Less abstractly, the public must trust firefighters with their goods and lives absolutely, without hesitation, as firefighters must trust each other; no room exists for ambiguity or doubts as to the uprightness of the public servants who enter our homes, protect our goods, and guard our lives.

The fire and police departments and this Board have properly extended appropriate standards of conduct to the personal lives of their personnel as well as to on-duty hours when we have found that such an extension has a sufficient connection to legitimate departmental interests as an employer of emergency services staff and to the legitimate interests of the public as consumers of those services. In this case we find a fully sufficient connection. It may be that under some circumstances an overbroad or vindictive application of these rules could be unreasonable or unfair, but as applied here the rules are just. These rules are not merely reasonable; they are fundamental. In finding that this standard has been met we affirm our unanimous belief that police and fire personnel must obey the law.

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

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

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

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

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

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

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

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

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

2. We are fully satisfied that our own proceedings have been fair and objective. We conducted numerous hearing sessions, compiling 840 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, Madden's own admissions clearly acknowledge and establish the factual allegations of this count. He has admitted to cocaine use over several years with Firefighters Elvord and Barlow and another non-firefighter, as well as regular and repeated use of marijuana.

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.

   The commissioners who are deciding this case have done so based solely on the evidence in this case, basing their decision largely on Madden's own admissions, and the commissioners have been aided by the transcripts and the parties' briefs in carefully limiting their decision to the record in this case only.

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

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

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

We have considered the issue of requiring unannounced drug testing as part of our decision in order to limit the possibility of a repeat violation. However, the statute we operate under does not give us the authority to impose such a requirement directly or as a condition of some other penalty. This may be regrettable. However, we cannot take action which is not allowed by the statute, even where one of the parties may request 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, drug testing is not merely omitted from our enumerated statutory discipline; it may be a subject of collective bargaining. Thus the collective bargaining agent, in this instance I.A.F.F. Local 311, may assert a distinct and separate interest and authority regarding drug testing, and as the evidence showed us may claim to protect and exercise that interest and authority independently from the interests and wishes of the parties before us. Thus we do not believe that we can appropriate drug testing to our disciplinary resources 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. Madden 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, Amesqua v. Gentilli, Amesqua v. Elvord,* and *Amesqua v. Barlow*, we treat cocaine use and distribution by our sworn personnel as a very grave matter, for which termination may be the appropriate penalty. The general principles supporting an expectation of lawfulness by public employees are redoubled for the protective services, and redoubled again with respect to illegal substances.

In this and all disciplinary cases we do not act in punishment of the Respondent but rather we seek to protect the public and to preserve the reputation and good order of the Department. We have considered Respondent's record of service and all materials submitted by Respondent. All commissioners recognize that the City has a substantial investment in Madden and in each firefighter both intangibly as members of the Department family and in simple terms of training and experience. Madden has been with the Fire Department since 1983, has built up a substantial body of experience as a firefighter, and has a respectable record of service including promotion to the rank of Apparatus Engineer. However, his misconduct has been substantial. His regret at having been caught is clear to all; his remorse at having engaged in the conduct for which he has been charged is less clear.

Commissioners have agreed that on balance the appropriate penalty is a combination of reduction in rank and suspension. We have concluded that Respondent Madden's violations established by the evidence before us fall just short of a threshold for termination. However, on the first and subsequent counts we find that the violation is incompatible with the responsibilities of promoted rank, and therefore we reduce Apparatus Engineer Madden to the rank of Firefighter. We also find that a substantial suspension penalty is commensurate with the violations of law and regulation committed by Respondent Madden.

As penalty for the violation of Rules 18 and 39 set forth in Count 1 we impose the penalty of reduction in rank to Firefighter and suspension without pay for a period of 90 calendar days, concurrent with the other suspensions we have imposed. 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 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.

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 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 Rule 47.

2. Substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that Respondent violated Rule 47. A.E. Madden's own admissions clearly prove that he lied in the first interview with law enforcement officers on January 27, 2000.

   A.E. Madden seems to have attempted to straighten out his story within a few days of that interview, and we do not find a persuasive preponderance of evidence that he lied thereafter. We observe that the corrections which he offered voluntarily to the police were self-protective, motivated by his concerns regarding statements of others or other evidence which might come to light. Certainly his statements and demeanor in the investigative interviews and in our proceedings do not impress us as candid or forthcoming, but neither do we find that untruthfulness after the police interview has been established.

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.

We have weighed this violation carefully, with full consideration of the factors we discussed with respect to Count 1. This rule is not aimed at the conscience of individual firefighters but rather protects the welfare of the department and the City. We wish to encourage simple, honest candor by department personnel, not mere grudging accuracy, because candor by sworn officers is good for the department and good for the community.

We do not wish to appear to give no value to Madden's correction of his initial lies. However, we observe that this Respondent was caught as the result of a broad police investigation, lied, and then on reflection, after consultation with another firefighter being interviewed, revised his statement. Such admission under pressure is not quite enough when weighed against the seriousness of this count and these charges generally. He had not stepped forward on his own either to acknowledge misconduct or to seek medical or psychological assistance. The timeline of his drug use which Respondent himself prepared and submitted to us shows that his drug use continued over many years, with the last admitted use of cocaine occurring in 1999. 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. We can give Madden but little credit in mitigation of his admitted misconduct for merely changing his mind about lying to the law enforcement officers investigating drug usage patterns in our community.

As penalty for the violation of Rule 47 set forth in Count 2 we impose the penalty of reduction in rank to Firefighter and suspension without pay for a period of 90 calendar days, concurrent with the other suspensions we have imposed. We conclude that on the evidence and admissions in this case, there is just cause to sustain the charge in Count 2 and the penalty we impose.

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. Madden's admissions establish the factual components of this count, namely illegal drug use and lying to law enforcement investigators. These actions clearly are not attractive reflections on the department.

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. Respondent Madden was comparatively discreet or circumspect in his drug activities. Commissioners do not intend this rule simply to duplicate the substantive violations of other rules, but to address distinctively the effect or potential effects of misconduct on the Department's standing and stature. We observe in this case perhaps a less blatant disregard for the Department than we have seen in other matters before us.

As penalty for the violation of Rule 51 set forth in Count 3 we impose the penalty of reduction in rank to Firefighter and suspension without pay for a period of 90 calendar days, concurrent with the other suspensions we have imposed. 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. Madden 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 Madden's own admissions clearly establish: he failed to report the illegal conduct of Firefighters Barlow, Gentilli, and Elvord.

Having now heard testimony in seven cases involving various drug-related offenses over many years by Madison firefighters, with two earlier cases having led to resignations before hearings were held, Commissioners cannot avoid speculating what problems, costs, embarrassments, and personal tragedies might have been avoided if even one firefighter had stepped forward on a timely basis.

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

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

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

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

As we noted, the Statement of Charges does not propose or recommend a penalty specifically for each count. We have weighed this violation carefully, with full consideration of the factors previously discussed. All commissioners agree entirely with the decision analysis of the first six "just cause" standards, above. Madden's failure to report any misconduct of others was not merely a passive failure to step forward but was essentially self-protective.

We have noted previously that although we have not discharged Respondent Madden we regard his violations of law and regulations to be incompatible with promoted rank. As an Apparatus Engineer with seniority Madden has held significant responsibility within the department, frequently functioning as an "acting" lieutenant. As an Apparatus Engineer and acting lieutenant Madden has been trusted by the department with practical supervision and care of both personnel and equipment. He has been someone to whom others have been required to report. Madden's irresponsibility over many years in his own behavior has disqualified him from exercising special responsibility within the department.

As penalty for the violation of Rule 58 set forth in Count 4 we impose the penalty of reduction in rank to Firefighter and suspension without pay for a period of 90 calendar days, concurrent with the other suspensions we have imposed. 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 18: [see above]
Rule 39: [see above]

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

The Seven Standards We refer back to our general comments about each of the standards in our discussions of prior counts and add here only additional comments related specifically to Count 5.

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 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 Rules 18 and 39.

2. Substantial evidence constituting at least a preponderance of the evidence in our proceedings has persuaded us that Respondent violated Rules 18 and 39 on one occasion by providing cocaine to Firefighter Dave Barlow.

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. Although we find that distribution of cocaine by Respondent Madden has been proven to a sufficient standard on one occasion only, we find little comfort in the fact that he more often partook of cocaine and marijuana apparently without having provided the substances. We perceive an unpleasant pattern of cordial social drug use among firefighters and other friends. In fact, we are especially disturbed by the view confirmed in this case of a cozy drug clique or subculture within the larger Fire Department family.

As penalty for the violation of Rule 51 set forth in Count 5 we impose the penalty of reduction in rank to Firefighter and suspension without pay for a period of 90 calendar days, concurrent with the other suspensions we have imposed. 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 Apparatus Engineer Dan Madden is reduced in rank to Firefighter and suspended without pay for a period of 90 continuous calendar days, to be scheduled promptly following this Order at the convenience of the Fire Department.

2. As penalty for misconduct alleged in Count 2 of the Statement of Charges, Respondent Apparatus Engineer Dan Madden is reduced in rank to Firefighter and suspended without pay for a period of 90 continuous calendar days, to be scheduled promptly following this Order at the convenience of the Fire Department.

3. As penalty for misconduct alleged in Count 3 of the Statement of Charges, Respondent Apparatus Engineer Dan Madden is reduced in rank to Firefighter and suspended without pay for a period of 90 continuous calendar days, to be scheduled promptly following this Order at the convenience of the Fire Department.

4. As penalty for misconduct alleged in Count 4 of the Statement of Charges, Respondent Apparatus Engineer Dan Madden is reduced in rank to Firefighter and suspended without pay for a period of 90 continuous calendar days, to be scheduled promptly following this Order at the convenience of the Fire Department.

5. As penalty for misconduct alleged in Count 5 of the Statement of Charges, Respondent Apparatus Engineer Dan Madden is reduced in rank to Firefighter and suspended without pay for a period of 90 continuous calendar days, to be scheduled promptly following this Order at the convenience of the Fire Department.

6. These penalties shall commence simultaneously and run concurrently for their respective terms.

Approved following deliberations and filed with the Secretary April 16, 2002
MADISON BOARD OF POLICE AND FIRE COMMISSIONERS

Alan Seeger, Commissioner and President

Eugenia Podesta, Commissioner

Marcia Topel, Commissioner

Michael Lawton, Commissioner

Note: Commissioner Snider did not participate in this decision.

Distribution:
Commissioners
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