

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

Debra H. Amesqua,
Complainant

vs.
Firefighter Tracy Patterson,
Respondent

DECISION AND ORDER

Synopsis

This case, filed with the Board on December 15, 2000, alleges violations of five department rules in five counts of misconduct. Following extensive hearings, legal argument, briefing, and deliberations, the Board has found Respondent Patterson to have violated department rules on all counts. The Board imposes on each count the penalty of discharge from the fire service.

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 Tracy Patterson filed with the Board on December 15, 2000, alleging five counts of misconduct. Chief Amesqua has been represented by Assistant City Attorney Roger Allen. Respondent Patterson has been represented by Attorneys David A. Hart III and Peter L. Steinberg.

We convened our Initial Hearing on January 8, 2001, at which Respondent was represented by Attorney Bruce Ehlke. We continued the Initial Hearing 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 April 26, the Board recessed to receive final written argument and to deliberate. Exchange and filing of argument was completed on May 1, 2001. Commissioners have each received copies of all papers and exhibits and have also had individual reference access to the complete hearing transcript of 700 pages and to all original marked exhibits. Commissioners convened for deliberations on May 2, 3, 4, 5, and 9 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. We have considered the written submittals offered by the Respondent in lieu of testimony, and note that the factual elements of the case are largely uncontested, since Respondent did not present any direct testimony.

We have concluded that the Department rules are not unreasonable 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.

In general, we have found that the evidence sustains all five of the counts brought by Chief Amesqua.

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?"

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 officers obey the law. We have imposed the discipline of termination in

prior cases involving unlawful conduct, both for drug-related misconduct (*Williams v. Williams*) 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 officers to act in conformity with the law which they enforce and embody. Less abstractly, the public must trust firefighters with their goods and lives absolutely, without hesitation, as firefighters must trust each other; no room exists for ambiguity or doubts as to the uprightness of the public servants who enter our homes, protect our goods, and guard our lives. The fire and police departments and this Board have properly extended appropriate standards of conduct to the personal lives of their personnel, where such an extension has a sufficient connection to legitimate departmental interests. Here, 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 Commission 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.

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 700 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. Patterson used and possessed cocaine in violation of federal and state laws, including at least one instance of use with Firefighter David Barlow; possession to carry out two sales and deliveries to Paul Elvord, one of which involved a delivery on the grounds of a fire station; and possession to carry out at least two sales and deliveries to 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:

1. Chief Amesqua has applied Rules 18 and 39 fairly against Respondent and without unlawful discrimination. We find no support anywhere in our record for any contrary conclusion.
2. In acting under and applying Rules 18 and 39 to this instance of drug-related misconduct we are acting fairly and without unlawful discrimination.

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

Progressive discipline is important and should be encouraged in the usual course of department affairs, but there is no statutory, constitutional, or PFC rule or practice which precludes the imposition of the highest level of discipline in a serious case, so long as the penalty comports with standard 7. Nor are we obliged to impose the same discipline as proposed by a Complainant, whether Chief or citizen. In those cases where we disagree with a proposed discipline, or where no specific discipline is proposed, it might be clearer that this standard guides our own decision rather than a hypothetical review of the Complainant's proposal. This Statement of Charges seeks discharge as a general penalty for all counts but does not specify a separate proposed discipline for each count. We have considered Respondent's record of service and all materials submitted by Respondent, but we find nothing there which ameliorates the gravity of this conduct. We do not act in punishment of the Respondent but rather we seek to preserve the reputation and good order of the Department and more generally to protect the public.

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 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 distribution of an illegal substance, i.e., cocaine.

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

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

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

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

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

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

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

We again reach a two-part conclusion:

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

2. Substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that Respondent violated Rules 18 and 39. Patterson sold cocaine on several occasions in varying amounts to fellow firefighters Paul Elvord and Dave Barlow, receiving money in payment, which on at least one occasion was paid or cleared through a station "chow fund" account. At least one transaction took place at least in part on the premises of a Fire Station; others took place on Madison School District property, City of Madison Parks Division property, and in private homes.

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

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

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

As we noted, the Statement of Charges does not propose or recommend a penalty specifically for each count. We have weighed this violation carefully, with full consideration of the factors we discussed with respect to Count 1. As penalty for the violations set forth in Count 2, we impose the penalty of separation and discharge from the service. We conclude that on the evidence in this case, there is just cause to sustain the charge in Count 2 and the penalty we impose.

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

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

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

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

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

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

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 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. Patterson was untruthful with law enforcement officials and in two investigative interviews regarding his involvement in and knowledge of drug-related activities, including activities of fellow firefighters.

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

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

General Comments We construe this rule to prohibit conduct which can reasonably be expected to bring the department into disrepute. In doing so we apply an objective standard. We do not require proof of actual damage to the department's reputation and do not base our decision on publicity or media attention. We have given no evidentiary weight to any published news items.

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

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

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

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

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

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

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

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

We again reach a two-part conclusion:

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

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

2. Substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that Respondent violated Rule 51. We have no difficulty in concluding that Patterson's misconduct established in these proceedings is inherently damaging to the Department's reputation and constitutes on its face a violation of Rule 51.

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

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

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

We have weighed this violation carefully, with full consideration of the factors we discussed with respect to Count 1. As penalty for the violation of Rule 51 set forth in Count 4 we impose the penalty of separation and discharge from the service. We conclude that on the evidence in this case, there is just cause to sustain the charge in Count 4 and the penalty we impose.

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

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

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 reciprocal 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. Patterson 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, because Patterson had knowledge that at least two firefighters, Paul Elvord and David Barlow, were engaged in activities which raised serious questions as to their fitness, and yet did nothing about it.

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

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

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

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

We again reach a two-part conclusion:

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

2. Substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that Respondent violated Rule 58. First, Patterson failed to report the illegal drug purchases by fellow firefighters Paul Elvord and Dave Barlow, as well as drug use by Barlow. By extending and intermingling untruthfulness about his own activities with his dissembling concerning the misconduct of Barlow and Elvord, Patterson compounded the violation. Patterson was not merely protecting others but was at the same time concealing his own involvements.

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 we discussed with respect to Count 1. 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 in this case, there is just cause to sustain the charge in Count 5 and the penalty we impose.

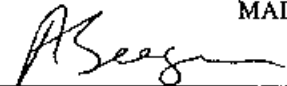
Order

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

Approved following deliberations,
and
filed with the Secretary this 9th day of May, 2001.

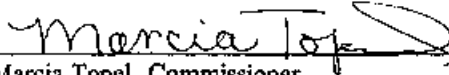
MADISON BOARD OF POLICE AND FIRE COMMISSIONERS



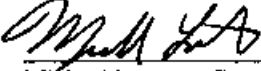
Alan Seeger, Commissioner and President



Mario Mendoza, Commissioner and Secretary



Marcia Topel, Commissioner



Michael Lawton, Commissioner

Note: Commissioner Elizabeth Snider Allen did not participate in this decision.

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