

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

Debra H. Amesqua,
Complainant
vs.
Firefighter Charles T. Wagner,
Respondent

DECISION AND ORDER

Synopsis

This case, filed with the Board on August 10, 1998, alleges violations of four department rules in eight counts of misconduct. Following extensive hearings, legal argument, briefing, and deliberations, the Board has declined to find culpability on five counts and has found Respondent Wagner culpable on three counts. The Board imposes on each of those three counts 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 Charles T. Wagner, filed with the Board on August 10, 1998, alleging fifteen counts of misconduct. That original complaint was supplanted by the Amended Statement of Charges filed on October 12, 1998, alleging eight separate counts of misconduct in violation of four rules of the Madison Fire Department. Chief Amesqua has been represented by Assistant City Attorney Roger Allen. Respondent Wagner has been represented by Attorney Charles Giesen.

After various preliminary proceedings we first convened an evidentiary hearing on December 10, 1998, recessing and reconvening for several sessions over several months. Testimony was closed on June 3, 1999, with a calendar for post-hearing written arguments. The briefs of the parties and substantially complete copies of the exhibits and case documents were distributed to commissioners for individual review prior to deliberation; we have also had individual reference access to the complete hearing transcript of 566 pages, to videotaped evidentiary statements and transcripts, and to all original marked exhibits and other materials. Commissioners reconvened for deliberations on several occasions 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 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. In general, we have found that the evidence sustains three of the counts brought by Chief Amesqua, while we decline to sustain the balance of the counts.

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. (c), 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 consider the initial imposition of discipline. The statute directs us to follow the seven standards "to the extent applicable." Whenever we deliberate within the framework of the seven standards we struggle to conform our decision-making to the rigid and sometimes inapposite statutory instructions. In this decision, after addressing preliminary matters, we summarize our examination of each the counts of the Statement of Charges in the light of each of the seven standards.

The disciplinary decisions of this Board are subject to unusually broad judicial review. Under current review standards established at WS 62.13(5)(i), the ultimate responsibility of this Board is the compilation of a record available for thorough review in Circuit Court, which on statutory appeal does not merely affirm or overrule our decision but answers independently the same question which we address: "Upon the evidence is there just cause...to sustain the charges against the accused?"

Decision

Preliminary Matters: Redacted exhibits We have accepted into the record as substituted exhibits the copy set of exhibits numbered 6 through 149 prepared by Atty. Allen with redactions of irrelevant identifying information.

Preliminary Matters: Post-hearing Statement of Respondent By stipulation and with our consent, after the close of evidentiary proceedings Respondent was allowed to submit affidavits from several individuals in the nature of character or reputation evidence. In addition to those affidavits, Respondent submitted his own statement. Complainant in the course of the post-hearing briefing duly objected to Respondent's statement as beyond the intended scope of the submissions and as an inappropriate avoidance of cross-examination. (Our rules prohibit Complainant from calling Respondent adversely.) We have received the statement of Respondent Wagner for whatever value it may have in evaluating his knowledge of department rules, his record of service, his reputation, and his character. We have not used Respondent's statement for the purposes of fact-finding on the counts of misconduct.

Charges We have re-grouped the counts to discuss first the counts on which we have found culpability.

Count 8, 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 might reasonably be expected to bring the department into disrepute. We do not require proof of actual damage to the department's reputation.

The Seven Standards

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.

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 complainants. 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 on May 30, 1997, 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 Rule 51.

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 Rule 51. Respondent's conviction of misdemeanor theft in violation of WS 943.20 is undisputed; we have no difficulty in concluding that this conviction is damaging to the Department's reputation and constitutes on its face a violation of Rule 51.

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, representation by advocate or counsel, and disclosures.

2. We are fully satisfied that our own proceedings have been fair and objective. We conducted numerous hearing sessions over many months, compiling 566 pages of stenographic transcript and numerous exhibits, documents, and written argument. We have listened attentively, read carefully, and deliberated thoroughly and at length

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 burden of proof?

We decline to do so, at least until so directed by the body of judicial authority which will be evolving as cases are decided under WS 62.13(5)(em). No 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 Rule 51.
2. We have concluded that substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that Respondent was convicted of misdemeanor theft as alleged. The conviction is a matter of public record. We have also concluded that respondent's actions and the conviction violate Rule 51.

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 Rule 51 fairly against respondent and without discrimination. We find no support anywhere in our record for any contrary conclusion. We cannot analogize Respondent's theft conviction to any of the many and varied examples of misconduct or misbehavior by other firefighters adduced by Respondent. The voluminous material provided by the parties regarding disciplinary records of other fire officers does not provide any meaningful comparative data derogating the fairness or consistency of Chief Amesqua's enforcement of Rule 51 with respect to theft convictions or otherwise.
2. In acting under and applying Rule 51 to this instance of a theft conviction we are acting fairly and without 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.*

We are not 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 theft conviction. 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 Rule 51 set forth in Count 8 we impose the penalty of separation and discharge from the service.

We combine our discussions of Counts 1 and 2.

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.*

Count 2, Rule 18: [see above]

Rule 39: [see above]

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

General Comments Counts 1 and 2 encompass conduct related to the conviction which is the basis of Count 8. Count 1 effectively alleges the theft which led to the conviction. Count 2 alleges various misrepresentations associated with the theft made by Wagner to a third party.

The Seven Standards We refer back to our general comments about each of the standards in our discussion of the Count 8 and add here only additional comments related to the Counts 1 and 2.

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

We have determined that the elements of standards 1. through 4. have been established.

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.*

See above; in addition, we note that the Chief considered and relied on the theft conviction, a police report, standard departmental disciplinary investigative procedures, and extensive review by her counsel. The Chief's efforts before filing these charges were reasonable.

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.*

Key evidence on these counts is provided by Respondent's conviction of misdemeanor theft under WS 943.20. Respondent had entered an "Alford plea" of guilty [*North Carolina v. Alford*, 400 US 25, 92 S.Ct. 160, 27 L.Ed2 162(1970)]. In our DECISION ON MOTIONS AND ORDER dated December 3, 1998, denying cross-motions for summary judgment, we stated: *From the submissions of the parties we conclude that Respondent has been convicted in Dane County Circuit Court Case No. 97-CI-220. We do not entertain in our forum evidence or argument offered for the purpose of proving or disproving elements established by a conviction in a judicial process. Our practice in this regard is not dependent on or altered by the particular tactical purposes which*

may underlie a party's plea in any given case. We do not re-litigate criminal matters.

We understand the "Alford" plea to reflect a judicial determination that strong evidence of guilt had been produced. We conclude from the fact of the conviction, from the required or implied basis of the conviction, and from evidence adduced additionally in our proceedings that Respondent both committed theft as alleged in Count 1 and misrepresented related circumstances as alleged in Count 2.

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

We refer to our prior general discussion of this standard. We find no credible suggestion or evidence that the chief seeks to apply these rules in any inappropriate way to or against this respondent.

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 each of these violations carefully, with full consideration to the factors we discussed with respect to Count 8.

As penalty for the violations set forth in each of Counts 1 and 2, we impose separately and distinctly the penalty of separation and discharge from the service.

We combine our discussions of Counts 3 through 7.

Count 3, Rules 47 and 51: [see above]

Count 4, Rules 18, 39, 47, and 51: [see above]

Count 5, Rules 18, 39, and 51: [see above]

Count 6, Rule 51: [see above]

Count 7, Rules 47 and 51: [see above]

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 these counts.

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 these standards have been established with respect to Counts 3 through 7. The chief's procedures and conclusions were reasonable, fair, and objective, and are supported on the record in our proceedings.

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 refer to our prior discussions of this standard. In reviewing the record of our proceedings for "substantial evidence" to support the charges and in applying the "preponderance of the evidence" test as we feel we properly should, we are troubled by the dearth of direct, primary proof of the factual

elements of these counts. We admit hearsay in our proceedings, but we do not rely on hearsay as the exclusive or uncorroborated basis of any key factual element of our decisions. We admitted Exhibit 9, a police report, consistent with that practice, but we decline to base an ultimate disciplinary finding of culpability solely on a police report or other hearsay. Evidence is not sufficient merely because it is admissible.

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

We conclude that the Chief has met this standard with respect to these charges. Our concerns regarding the sufficiency of the evidence do not detract from the fairness and objectivity of the Chief's actions prior to our hearings.

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

Because we do not find culpability on these counts for the reasons stated, we do not reach questions of penalty.

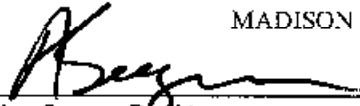
Order

Pursuant to 62.13(5)(c), Wisconsin Statutes, we order as follows:

1. Counts 3, 4, 5, 6, and 7 of the Amended Statement of Charges are dismissed.
2. As penalty for misconduct alleged in Count 1 of the Amended Statement of Charges, Respondent Firefighter Charles T. Wagner is separated and discharged from the Madison Fire Department, effective immediately.
3. As penalty for misconduct alleged in Count 2 of the Amended Statement of Charges, Respondent Firefighter Charles T. Wagner is separated and discharged from the Madison Fire Department, effective immediately.
4. As penalty for misconduct alleged in Count 8 of the Amended Statement of Charges, Respondent Firefighter Charles T. Wagner is separated and discharged from the Madison Fire Department, effective immediately.

Approved following deliberations,
and
filed with the Secretary this 18th day of August, 1999:

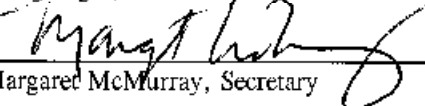
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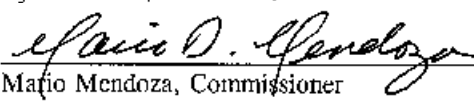
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