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

Richard K. Williams
Complainant
vs.
Police Detective Herbert J. Williams
Respondent

DECISION AND ORDER

Procedural Background

This matter comes to us on a Statement of Charges by Richard K. Williams, Police Chief for the City of Madison, against Detective Herbert J. Williams, dated July 18, 1995. The four separate counts of the charges allege violations of the Manual of Policy, Regulations and Procedures of the Madison Police Department, relating generally to events in March, 1995, and to the subsequent departmental investigation of those events. After preliminary proceedings we first convened an Evidentiary hearing on November 6, 1995, recessing and reconvening for 18 sessions over several months, totalling something over 45 hours of hearing time. The evidentiary portion of our hearings was completed on August 1, 1996, following which the parties stipulated to a briefing calendar for final arguments. During the course of the briefing counsel for complainant filed a motion objecting to certain portions of respondent's brief. We received the final briefs of the parties, including argument on complainants' motion, on Friday, September 27, 1996, as scheduled. Briefs were promptly distributed to commissioners for individual review prior to deliberation; we have also had individual reference access to the complete hearing transcript of 1335 pages and to the 78 exhibits. Commissioners reconvened for deliberations on September 30, October 1, and October 9, 1996, and have reached the decision which we announce in this document.

Our disciplinary decisions are subject to 62.13, Wisconsin Statutes, as amended notably by 1993 Wisconsin Act 54, effective November 24, 1993. That amendment set forth in an entirely new subsection 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 consider the initial imposition of discipline. The statute directs us rather unhelpfully to follow the seven standards "to the extent applicable." We do not regret the fact that this Board has as yet had little occasion to deliberate within the framework of the seven standards, but we have frankly struggled to conform our decision-making to the new, rigid, and sometimes inapposite statutory instructions. In this decision we summarize our examination of each the four "counts" of the Statement of Charges in the light of each of the seven standards.

Decision

Complainant's Motion to strike portions of respondent's brief. Complainant challenges an appendix and related argument as a belated and inappropriate introduction of hearsay and expert evidence. Respondent's counsel defends the challenged material on the basis *inter alia* that "the learned treatises were introduced not to so much impeach [complainant's witness] Collins ... but to challenge the sufficiency of the Chief's investigation and to challenge the Chief as to the discharge of his burden of proof." [RESPONDENT'S BRIEF IN OPPOSITION TO COMPLAINANT'S MOTION TO STRIKE PORTIONS OF RESPONDENT'S BRIEF, p.7] Respondent's counsel also observes correctly that we are not bound to a strict adherence to formal rules of evidence, and we have allowed both parties considerable evidentiary latitude during the course of these hearings. We have received respondent's briefs as submitted and have weighed their probative value for the purposes suggested by respondent's counsel in the course of reaching our decisions in the case. Complainant's motion to strike is denied.

Count 1, Untruthfulness.

Rule 2-1816

> Members of the Department are required to speak the truth at all times and under all circumstances, whether under oath or otherwise.
>
> This regulation prohibits perjury, withholding of evidence from a judicial proceeding, false public statements, untruthful statements made within the department, and any other misrepresentations. The regulation does not require divulgence of matters prohibited in Rule 2-1837.

General Comments The factual summary of this count presented in the Statement of Charges has not been disputed except for the final sentence pertaining to inferences related to cocaine metabolites. The gravamen of this count is that respondent was untruthful during the course of the departmental investigation. We do not repeat that summary here but include it by reference, including the final sentence, which has been established to our satisfaction by at least a preponderance of the evidence presented. We have also been persuaded by Chief Williams' testimony that respondent was untruthful in several respects. We have found Chief Williams' testimony credible and persuasive, while respondent's testimony was hesitant, inconclusive, incomplete, and generally unpersuasive. The Chief's allegations constitute a coherent description and interpretation of respondent's conduct well supported by the evidence; respondent's denial is unconvincing and poorly supported.

The Seven Standards

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

The Manual of Policy, Regulations and Procedures of the Madison Police Department ("Blue Book") has been in use within the department and as the basis of disciplinary charges before this Board for more than 20 years. We have consistently accepted its authority and continue to do so. The department has consistently proclaimed the highest priority for the value of truthfulness by officers, in the Blue Book and otherwise. This Board has consistently supported that priority. All Madison police officers know or should know that untruthfulness is unacceptable in the extreme.

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

We have consistently supported the reasonableness of the disciplinary rules of the Blue Book on their face and we continue to do so, subject of course to application in specific cases. 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 police. This Board and our community expect absolute truthfulness from our police, who bear the exclusive mandate of legitimate armed civil force. Anything less than truthfulness among police is an instance of tyranny.

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 difficulties if taken literally. As counsel for respondent notes in his INITIAL BRIEF, "this Commission does not, of course, sit to review the decision of the Chief...." [p.78] Surely 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, his charging decision. We would prefer to construe this relatively new statute as consistently as possible with our straightforward conventional duty to try the case against respondent and not undertake a new 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 Chief Williams and the department conducted a reasonable investigation before filing these charges. We are fully satisfied that the investigation

constituted at least a reasonable effort to discover whether respondent did in fact violate a rule or order, including the rule against untruthfulness.

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

3. As we have discussed in our general comments, above, we have been persuaded by the evidence that respondent was untruthful.

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 decisions. We have determined that:

1. The Chief's investigation was fair and objective. We found literally no evidence to the contrary. We were not able to draw any pertinent or useful inferences from the vague expressions of discontent with the department's personnel practices and with the Chief's personal demeanor which we allowed into the record.

2. We are fully satisfied that our own proceedings have been 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.

Standard 5. is the only one of the seven standards which goes 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 a 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 Williams discovered substantial evidence that respondent violated department rules, including the rule against untruthfulness. We cannot determine formally whether the

substantial evidence discovered by the Chief during the course of his investigation constituted a preponderance of the evidence of that investigation, because we are not reviewing a record of that investigation.

2. We have concluded that substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that respondent was untruthful during the course of the investigation into his conduct.

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 Williams has applied the rule against untruthfulness fairly against respondent and without discrimination. This rule has been a traditional mainstay of department policy and practice. We find no support anywhere in our record for any contrary conclusion.

2. In acting under and applying the rule against untruthfulness 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.

To our prior discussion we add the observation that we are not obliged to impose the same discipline as proposed by the complainant, whether Chief or citizen. In those cases where we disagree with the 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. In this case we have a clear recommendation or proposed discipline from the complaining Chief, and we have determined that:

1. The Statement of Charges proposes removal as a general penalty for all counts but does not specify a separate proposed discipline for each count. In his testimony Chief Williams suggests that termination is the appropriate sanction for untruthfulness. [trans. p.807] This "proposed discipline" conforms to this statutory standard. Substantive untruthfulness in an investigation into misconduct involving drug use and absence from duty and in which civilians were involved is extremely serious and unacceptable in a Madison police officer. In making this determination we have considered respondent's record of service but find nothing there which ameliorates the gravity of this misconduct. The rule against police officer untruthfulness approaches an absolute department value and public interest and cannot be outweighed by any factors which we see in this case.

2. We impose the proposed discipline of removal as penalty for this violation.

Count 2, Absence from duty

Rule 2-1812

> Members shall not be absent from duty without permission from their team leader, or designee, or, in his/her absence, the on-duty Patrol Team Lieutenant, or designee.
>
> In the event of illness or injury, notification is necessary prior to the time designated for reporting for duty and may be made by telephone or by written report. If extenuating circumstances make timely notification impossible, notification within a reasonable time is necessary.
>
> If, during a work shift, a change occurs in the conditions which necessitated the request for sick leave benefits, members will immediately make the same contact as detailed in paragraph 1.

General Comments The record does not contradict the bare facts of the allegations of absence from duty; that is, respondent was absent. Respondent's counsel argues [INITIAL BRIEF, p.40] that the absence was due to "illness," thereby triggering a supplementary provision of the Rule and impliedly excusing the absence. We find no support in the record for the suggestion that respondent was ill within the meaning of the Rule or any meaningful sense of the word; he may have been impaired by his own actions. Furthermore, even if he was ill, we cannot find from this record that he complied with the Rule as applied to illness.

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

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.	We note that respondent has not suggested that he was unaware of the consequences of absence from duty. We note also that our record discloses several instances of prior discipline for absence from duty or related misconduct, suggesting that respondent had direct experience as well as general knowledge of the rule and its consequences.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.	Respondent has not argued that this rule is unreasonable, and seems implicitly to accept the reasonableness of the rule in his argument about its application to his situation. It is inherently reasonable to expect attendance in exchange for compensation; this is the central concept of employment. The special requirements of police attendance at duty include limited police personnel resources, public safety, and officer support and safety.

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.

Despite some argument regarding the meaning and application of this rule, respondent apparently concedes that a violation has been established, with the disputed issue being that of penalty. [REPLY BRIEF, p.17] We agree. We have determined that the elements of these standards 3. through 6. have been established.

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.

The Statement of Charges does not propose or recommend a penalty specifically for this count. We have weighed this violation carefully, giving some weight to our conclusions that the absence was not ameliorated or extenuated by any valid external circumstances and was in support or furtherance of misconduct, but also separating the absence charge as a count distinct from the other allegations. We did not give weight to respondent's prior disciplines for absence, which seem too old for additive purposes, and looked to them simply as corroborative of respondent's knowledge of the rule. In this light we regard respondent's absence as a serious matter for which a significant suspension would be appropriate. We would impose a seven-day suspension on this count.

Count 3, Unlawful conduct

Rule 2-1819

> Members of the Department shall not engage in conduct which would constitute a violation of law in Wisconsin, unless the conduct is lawful in the jurisdiction in which it is committed.

General Comments Respondent candidly acknowledges that he entered a no-contest plea to a misdemeanor charge of possession of drug paraphernalia and that he smoked cracked cocaine in company with his friend. Details of respondent's conduct have certainly been disputed, but the dispute has centered around elements of counts 1. and 4. and around the appropriate penalty counts 2. and 3.

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 the third 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.

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.

We concur with the view expressed or implied in respondent's REPLY BRIEF [p.17] that the third count has been sustained. We have determined that each of these standards 1. through 6. have been met.

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 before, the Statement of Charges does not specify a proposed penalty for this violation. In his testimony Chief Williams suggests that termination is the appropriate sanction for untruthfulness. [trans. p.809] We have determined that:

1. This "proposed discipline" conforms to this statutory standard.

2. We impose removal as penalty under this count. We have given full weight to respondent's record of service. We have listened with respect to the supportive testimony of respondent's friends, colleagues, and members of his church. We have considered the comments of Chief Williams offered on behalf of an individual facing criminal sentencing for a drug offense and introduced here by respondent partly to ameliorate our penalty and partly, perhaps, to impeach the Chief's credibility. The Chief's comments

have had neither effect on our deliberations. Our position is fundamental and simple. We are not here primarily to punish respondent, but to uphold the public interest in the integrity and efficiency of police authority. We need not reject respondent's evidence regarding his hardships, character and rehabilitation, in order to conclude that he should not continue as a Madison police officer. We or other decisionmakers may well be persuaded that an individual should not go to jail, or is a good father, or has faced difficult personal trials, or that he enjoys the forgiving embrace of his church community. These are not the standards for qualification as a police officer. As the hiring authority of the Madison Police Department we confidently assure respondent and the public that there are many thoroughly decent human beings who are not thereby qualified and acceptable as police officers.

3. The case presents us with a combination of criminal conviction and acknowledgement of drug-related misconduct. We would impose this penalty for the drug-related conduct which was the subject of respondent's misdemeanor conviction if that conduct were established to our satisfaction without an independent criminal prosecution and conviction. We would also impose this penalty for the separate drug-related conduct which respondent has acknowledged and for which he has not been prosecuted or convicted. In short, the drug-related misconduct in this case, however analyzed and parsed, is an absolute disqualification for continuation in service as a Madison police officer.

Count 4, Criminal association

Rule 2-1834

> Members of the Department shall not associate with persons or places known to them as being engaged in criminal activity.
>
> This regulation intends to protect the Department and its members from charges of impropriety and conflicts of interest. Association consists of more than a single occurrence, more than general contacts or more than associations that may develop in the line of official police business. If over a period of time a member continues to frequent an establishment(s) believed to be engaged in illegal activity, or continues to carry on private business with a known criminal, he/she is in direct violation of this regulation.

General Comments We have found the technical formalities of this count especially intricate. The Statement of Charges refers to respondent's conduct in a motel room. Respondent has acknowledged engaging in separate illegal conduct in the company of another prior to the motel events; has been convicted of misdemeanor possession of drug paraphernalia in the motel room; and denies personal drug use in the motel. Counsel have contested the proper construction of the rule, in particular the relationship of the first sentence to the

paragraph which follows it. During the course of the hearing we discerned the theory that respondent violated the rule against criminal association by his acknowledged drug use prior to the motel events; counsel for complainant has presented that argument in his briefing, and respondent's counsel has joined issue on that argument, contending that complainant misconstrues the rule. We note specifically that Respondent has not objected to the absence from the Statement of Charges under Count 4. of any reference to the acknowledged instance of drug use prior to the motel events. In summary we perceive no pertinent dispute of evidentiary fact related to this count but considerable dispute in the interpretation of the rule.

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 the fourth count.

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

In applying this rule to this case, we read the prohibition to contain several components, including *association*, a present engagement in criminal acts, and the knowledge of the officer regarding that activity. The criminal record of an associate does not seem to us critical or even pertinent; the question is: is the person known to the officer "as being engaged in criminal activity?" This question is in the present tense, grammatically and functionally; the officer's inquiry and duty is not about individuals' past but their present. We agree with the suggestion of respondent's counsel that we cannot expect an officer reasonably to anticipate the consequences of an association which the officer does not know was improper; but we reasonably expect officers to know that they will be penalized for associating with persons known to be engaged in criminal acts. We do not hold respondent accountable with respect to the technical criminal records of his associates; we examine his association with them in the course of their and his known illegal conduct. Thus understood and applied the rule is entirely consistent with this standard. Respondent and officers generally can reasonably be expected to know that they will be subject to discipline for associating with persons engaged in criminal activity; in fact they should have ready a good explanation for not arresting such persons.

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

The rule as we understand and apply it in this case is not merely reasonable but is another fundamental aspect of police responsibility to the public.

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 again make a three-fold determination:

1. The evidence has demonstrated clearly and to our complete satisfaction that Chief Williams and the department conducted a thorough investigation before filing these charges. We are fully satisfied that the investigation constituted at least a reasonable effort to discover whether respondent did in fact violate a rule or

order, including the rule against criminal association.

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

3. The evidence is undisputed that respondent engaged in personal drug use with an associate, and that respondent was convicted for misdemeanor possession of drug paraphernalia. The occasions or incidents are clearly separate, since respondent acknowledges his direct participation in one instance and denies it in another. We have concluded from the evidence in these proceedings that respondent was aware that illegal conduct was occurring in the motel. We have likewise concluded that respondent knew that his friend Lloyd Moss was engaged in criminal activity generally and particularly on the dates and times reviewed in these proceedings. We have been persuaded by the evidence that respondent violated Rule 2-1834.

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

We have determined that:

1. The Chief's investigation was fair and objective.

2. We are fully satisfied that our own proceedings have been 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 have determined that:

1. We have concluded that Chief Williams discovered substantial evidence that respondent violated department rules, including the rule against criminal association. We cannot determine formally whether the substantial evidence discovered by the Chief during the course of his investigation constituted a preponderance of the evidence of that investigation, because we are not reviewing a record of that investigation.

2. We have concluded that substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that respondent violated the rule against criminal association. In fact, the factual component of this count is established largely by the respondent's acknowledged conduct.

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

We have determined that:

1. Chief Williams has applied this rule fairly against respondent, without discrimination. We find no support anywhere in our record for any contrary conclusion.

2. In acting under and applying this rule 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 have determined that:

1. As noted, the Statement of Charges proposes removal as a general penalty for all counts but does not specify a separate proposed discipline for this count. Because the substance of the criminal association violation involved drug use and active participation by respondent, we infer from this record that the Chief regards this count with seriousness comparable to counts 1. and 3. We concur in that view.

2. We impose the proposed discipline of removal as penalty for this violation. We have again considered respondent's service history and the supportive testimony of these proceedings, and again find no amelioration of this penalty. This Board and the Madison community expect our police authority to be free of association with persons engaged in criminal conduct.

Order

Pursuant to 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 Detective Herbert J. Williams is removed from the Madison Police Department, effective immediately upon the filing of this Order.

2. As penalty for misconduct alleged in Count 2 of the Statement of Charges, Respondent Detective Herbert J. Williams is suspended from the Madison Police Department for a period of seven working days. In light of respondent's removal under other provisions of this Order, this suspension is stayed as moot.

3. As penalty for misconduct alleged in Count 3 of the Statement of Charges, Respondent Detective Herbert J. Williams is removed from the Madison Police Department, effective immediately upon the filing of this Order.

4. As penalty for misconduct alleged in Count 4 of the Statement of Charges, Respondent Detective Herbert J. Williams is removed from the Madison Police Department, effective immediately upon the filing of this Order.

Approved following deliberations,
and
filed with the Secretary this 10th day of October, 1996:

MADISON BOARD OF POLICE AND FIRE COMMISSIONERS

Alan Seeger, Commissioner

Margaret McMurray, Secretary

Byron Bishop, Commissioner

Yolanda Garza, Vice-president

Note: President Brenda Pfaehler withdrew from these proceedings for medical reasons and did not participate in this decision.