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

Police Chief Noble Wray,
Complainant

vs.

Police Officer Russell Henderson,
Respondent

DECISION AND ORDER

Synopsis

The Complaint in this case, dated June 13, 2005, alleges multiple violations of two department rules and asks the Board to discharge the Respondent. Following extensive hearings, legal argument, briefing, and deliberations, the Board has found the Respondent culpable on all counts and imposes the discipline of discharge.

Procedural Background

This matter comes to us on a Complaint by Noble Wray, Chief for the City of Madison, against Police Officer Russell Henderson, dated June 13, 2005. Chief Wray has been represented by Assistant City Attorney Carolyn Hogg. Respondent Henderson has been represented by Attorney Gordon McQuillen.

The five separate counts of the charges allege violations of the Manual of Policy, Regulations and Procedures of the Madison Police Department. After preliminary proceedings, we first convened an evidentiary hearing on August 18, 2005, recessing and reconvening for 28 sessions over several months. The evidentiary portion of our hearings was completed on July 19, 2006, following which the parties stipulated to a briefing calendar for final arguments. Extensive briefing by the parties was completed on October 4, 2006. 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 2731 pages and to the 130 offered exhibits. Commissioners reconvened for deliberations on October 11 and October 30, 2006, having reviewed multiple decision drafts between sessions and reconvened for final deliberations on November 8, 2006. We have now reached the decision which we announce in this document.

Our deliberations have been limited strictly to the record in this case, although it has not been practical to refer specifically to each exhibit and point of testimony relied upon in this decision. We have carefully weighed the demeanor and credibility of the witnesses as they have appeared before us in this matter, although it has not been practical to describe in detail how each element of our decision reflects such judgments. We have been especially sensitive to the demeanor of the witnesses, including the Respondent, whose attitude, perspective, and interpretation of events and relationships is so crucial in the context of these allegations. In general, we have found that the evidence sustains the allegations brought by Chief Wray, with important exceptions noted in our discussion.

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(5)(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, as their historical origin from an arbitration context would suggest, 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." When 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 we summarize our examination of each of the five counts of the Complaint in the light of each of the seven standards. The Board has found that the evidence sustains all counts, with Comm. Talis concurring in part and dissenting in part, as expressed in his separate opinion.

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

Count 1, Unlawful conduct (disorderly conduct, WS 947.01, September 2, 2004)

Rule 2-219

1. *Members of the Department shall not engage in conduct which would constitute a violation of law, or ordinance corresponding to a state statute that constitutes a crime, first time OWI, or hit and run. We believe thee is a public expectation that public safety employees should not violate laws or ordinances.*
2. *Members of the department who are contacted by any law enforcement agency regarding their involvement as a suspect, victim, or witness in:*
    a. *Violations of criminal law;*
    b. *Violation of ordinance that constitutes a crime;*
    c. *OWI or hit and run;*

shall report the incident to their commanding Officer within 24 hours of their return to duty following contact. The commanding Officer receiving the report shall review the circumstances of

the incident and determine whether any further investigation or action by the Madison Police Department is necessary.

3. *The fact that an employee has not been charged or convicted of an incident does not bar department investigation and/or discipline under this policy.*

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, once known as the "Blue Book," has been in use within the department and as the basis of disciplinary charges before this Board for many years. We have consistently accepted its authority and continue to do so. The department has consistently proclaimed the basic and obvious priority of the value of lawful conduct by police officers. This Board has consistently supported that priority, for both departments under our jurisdiction. All Madison police and fire officers know or should know that unlawful conduct is unacceptable in the extreme. See for example our cases *Williams v. Williams*, 1996; *Amesqua v. Wagner*, 1999.

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

We have consistently supported the reasonableness of the Police Department disciplinary rules on their face and we continue to do so, subject of course to application in specific cases. The rule codifying the prohibition of unlawful criminal conduct, reasonable in any employment situation, is even more reasonable in any public employment, and is not merely reasonable but critical as applied to police. This Board and our community expect our law enforcers to obey the criminal laws.

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. This Board does not, of course, sit to review the decision of the Chief. 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 prefer to construe, and have repeatedly construed, this 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, albeit "to the extent applicable." (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 Standard 3. requires us to make a two-fold determination:

1. The evidence has demonstrated clearly and to our satisfaction that Chief Wray 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 unlawful conduct. The statute does not require that the Chief go beyond the level of investigation that is reasonable, and we conclude that he has met the requirement.

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

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 behavior which we allowed into the record. We are utterly unconvinced by the many efforts to delve into the relationship between the Respondent and the former Chief that this relationship had any effect on this case.

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 false view of our proceedings 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 Wray discovered substantial evidence that Respondent violated department rules, including the rule against unlawful conduct. 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 sitting in review of the 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 acted in violation of the criminal law, as alleged in Count 1 of the Complaint.

Count 1 focuses on off-duty conduct on September 2, 2004, specifically Respondent's confrontation and interactions with a juvenile identified by stipulation as J.R.O., who is the minor child of Respondent's spouse. This conduct subsequently was the basis of a criminal charge in Dane County Circuit Court alleging disorderly conduct in violation of WS 947.01. Respondent pled guilty to that charge and acknowledged engaging in disorderly conduct in colloquy with the Court during a plea hearing on January 7, 2005. Exhibit 40.

In our view, Respondent's plea to the criminal charge is a sufficient basis for our finding of culpability. The plea itself is further supported by Respondent's statements to the Court, in which Respondent explicitly confirms engaging in disorderly conduct on September 2, 2004. We cannot conceive how we could properly reach any contrary conclusion in our proceedings in the face of the record of that judicial criminal proceeding: Respondent was charged, pled guilty and admitted the conduct on the record; whether the conviction of misdemeanor disorderly conduct was later expunged in compliance with the first offender program does not negate the fact that the criminal conduct occurred and was admitted. We note that the Respondent never sought to withdraw either his plea or his admissions in the criminal case.

The parties, however, seem to have a different view of the law, or perhaps made a more complex tactical judgment, and presented an extraordinarily thorough recapitulation of the underlying facts of the September 2, 2004, incident. We have been independently convinced by that evidence that Respondent did indeed engage in disorderly conduct essentially as alleged. Respondent's interaction with J.R.O. on that date was violent and abusive and tended to cause or provoke a disturbance, and, in short, was disorderly conduct.

The totality of the direct testimony as to what happened on September 2, 2004, and the corroboration by written interview summaries in the police reports, was sufficient to prove the violation by a preponderance of the evidence. The Board has considered the testimony of the Respondent as to what happened on September 2 and does not find his version to be convincing. Among other things, we do not accept the assertion that J.R.O. was not injured by the headlock perpetrated by the Respondent.

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 Wray has applied the rule against unlawful conduct fairly against Respondent and without discrimination. This rule has been a traditional and appropriate 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 unalwful conduct 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.

This Count is before us as the first of five counts, four of which allege unlawful conduct, and two of which refer to events on September 2, 2004, which were the subject of criminal charges, guilty plea, and admission of wrongdoing. While these four counts, and particularly these two September 2 counts, are mutually aggravating viewed in their entirely, the facts of each count stand alone, and we have distinguished among the counts in considering the proper penalty for each. We have not regarded classic "progressive discipline" as appropriate among the various counts of this Complaint, even though some of the events occurred several years ago, because the events and specific conduct for all of the counts are first presented here for discipline in one case. However, we observe that the incident of September 2, 2004 is the third in a series of similar incidents in an approximately two-year period. See Counts 3 and 4, p. 9ff, *infra*.

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 character and past service 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 forgiveness of his family, but these are not the standards for continuing service as a police officer in the face of criminal conduct. As the hiring authority of the Madison Police Department, we confidently assure Respondent and the public that there are many fine human beings who are not thereby qualified to be, and acceptable as, police officers.

We are not obliged to impose the same discipline as proposed by the complainant, whether Chief or citizen. In cases where we disagree with the proposed discipline, or where no specific discipline is proposed, it might be clearer that this seventh standard guides our own decision rather than a hypothetical review of the complainant's proposal. In this case we have a clear recommendation of proposed discipline from the complaining Chief, and we have determined that:

1. The Complaint proposes removal as a general penalty for all counts but does not specify a separate proposed discipline for each count. In the Complaint and in his testimony, Chief Wray suggests that termination is the appropriate sanction for unlawful conduct. Transcript, p. 1946ff.

We have concluded that this "proposed discipline" conforms to this statutory standard. Unlawful conduct, specifically criminal disorderly conduct, as alleged in Count 1 and as established in our proceedings, is extremely serious and unacceptable in a Madison police officer. This is particularly so when, as noted above, it is the third incident in a series of similar criminal incidents over a period of approximately two years. In making this determination, we have considered Respondent's record of service, but find nothing there which ameliorates the gravity of this misconduct. In fact, that service record, while containing many very positive elements, including commendations and professional accomplishments, also reflects significant prior discipline, albeit not for violation of Rule 2-219, but serious nonetheless. (We need not determine here whether Respondent's misrepresentations regarding insurance eligibility, for which he was disciplined in 1992, also constituted illegal conduct.) The rule against unlawful conduct approaches an absolute department value and a paramount public interest, and cannot be outweighed by any factors which we see in this case.

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

Count 2, Unlawful conduct (telephoned threat, WS 947.012(1)(a), September 2, 2004

Rule 2-219: see Count 1, above

The Seven Standards

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 have considered the record before us with respect to each standard as applied to each count. We reaffirm and incorporate here our comments regarding these standards as applied to Count 1 and we find that these standards have been met 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 reaffirm and incorporate here our general comments regarding this standard as applied to Count 1 and we find that this standard has been met with respect to Count 2.

This count, like Count 1, focuses on off-duty conduct on September 2, 2004, in this instance Respondent's telephone call to his wife, in which Respondent clearly threatened to inflict physical harm on J.R.O., the minor child of Respondent's spouse, and which subsequently was the basis of a criminal charge in Dane County Circuit Court alleging criminal violation of WS 947.012(1)(a), to which Respondent pled guilty, and admitted the criminal conduct on the record in court. Exhibit 40.

Our view of the criminal proceedings, the plea, and the evidence in our proceedings as they relate to Count 2 corresponds to our views expressed above with respect to Count 1. In short, Respondent pled guilty in criminal court and explicitly acknowledged his criminal conduct in colloquy with the Court.

In addition and independently, the evidence in our proceeding establishes this violation as alleged in the Complaint. We were able to listen to the recording of the phone message (Exhibit 2), and we conclude that this was indeed a threat against the physical safety of J.R.O., conveyed to his mother. The recording cannot be written off as mere joking or hyperbole by Respondent, given what had happened earlier on September 2 at the Henderson residence. The Respondent's wife (the mother of J.R.O.) was sufficiently concerned that she saved the call.

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

We reaffirm and incorporate here our general comments regarding this standard as applied to Count 1 and we find that this standard has been met with respect to Count 2.

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 reaffirm and incorporate here our comments regarding this standard as applied to Count 1. We impose the proposed discipline of removal as penalty for this violation.

Count 3, Unlawful conduct (bodily harm, WS 940.19(1), November 8, 2003)

Rule 2-219: see Count 1, above

The Seven Standards

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 have considered the record before us with respect to each standard as applied to each count. We reaffirm and incorporate here our comments regarding these standards as applied to Count 1 and we find that these standards have been met 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 reaffirm and incorporate here our general comments regarding this standard as applied to Count 1 and we find that this standard has been met with respect to Count 3.

The events of November 8, 2003, had not been the subject of criminal charges, and first came to the attention of the Chief and the department in the course of the investigation which had been precipitated by the events of September 2, 2004.

The overwhelming preponderance of the evidence establishes that Respondent Russell Henderson deliberately and wrongfully caused bodily harm to Judith Henderson on November 8, 2003. This conduct clearly violated WS 940.19(1), was criminal conduct, and thereby violated Rule 2-219. The testimony of the Respondent's wife (e.g., Transcript, p 972ff) provides adequate direct evidence of the violation, and is corroborated by comprehensive evidence and testimony from the Fitchburg police investigation. Exhibits 12, 14. The Respondent's testimony did not provide anything of substance to explain this incident as anything other than a crime.

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

We reaffirm and incorporate here our comments regarding this standard as applied to Count 1 and we find that this standard has been met with respect to Count 3.

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 reaffirm and incorporate here our comments regarding this standard as applied to Count 1. We note in addition that this was the second incident and followed approximately 18 months after a similar incident in 2002. See Count 4, below. We also note that this second incident involved a battery in which injury was inflicted, a more serious violation in our view than disorderly conduct. We

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

Count 4, Discorderly conduct, WS 947.01, May 12, 2002

Rule 2-219: see Count 1, above

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 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.

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 considered the record before us with respect to each standard as applied to each count. We reaffirm and incorporate here our comments regarding these standards as applied to Count 1 and we find that these standards have been met 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 reaffirm and incorporate here our general comments regarding this standard as applied to Count 1 and we find that this standard has been met with respect to Count 4.

The events of May 12, 2002, like those of November 8, 2003, had not been the subject of criminal charges, and first came to the attention of the Chief and the department in the course of the investigation which had been precipitated by the events of September 2, 2004. The overwhelming preponderance of the evidence establishes that Respondent Russell Henderson deliberately and wrongfully engaged in violent and abusive conduct on May 12, 2002, clearly in violation of WS 947.01, a crime, and thereby a violation of Rule 2-219.

The testimony of Respondent's wife (e.g., Transcript, p. 983ff) provides adequate direct evidence of the violation and is corroborated by comprehensive evidence and testimony from the Fitchburg police investigation. Ex. 12. The Respondent's testimony did not provide anything of substance to explain this incident as anything other than a crime.

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

We reaffirm and incorporate here our comments regarding this standard as applied to Count 1 and we find that this standard has been met with respect to Count 4.

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 reaffirm and incorporate here our comments regarding this standard as applied to Count 1, subject to the specific limitations expressed in this section of our Decision. For the reasons set forth here, we impose the discipline of suspension without pay for a period of 60 days.

We provide a lesser penalty for this count for the following reasons: This was the first offense and was not a battery. Also, at the time of this violation, the other incidents had not yet occurred and cannot be considered. If this misdemeanor offense had been the sole offense, it would likely have been dealt with through the District Attorney's first offender's program, with the record expunged, and had this been the first and only violation before us, the Respondent's service record at that time would have merited some consideration in mitigation of the penalty. These factors do not excuse the conduct, but we recognize that in a misdemeanor situation such as this count, some consideration for a long and generally favorable service record is appropriate. No reduction in rank is possible in this case, because the Respondent does not hold a promoted rank.

5, Untruthfulness, multiple occasions (see Complaint)

Rule 2-216

> *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 police records where otherwise prohibited by policy and does not apply to untruthfulness as part of legitimate investigative activity or negotiation techniques undertaken in the course of duty (i.e., undercover work, hostage negotiations).*

The Seven Standards

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 have considered the record before us with respect to each standard as applied to each count. We reaffirm and incorporate here our comments regarding these standards as applied to Count 1 and we find that these standards have been met with respect to Count 5.

We note that Respondent has been charged with violation of two of the most essential rules of police conduct in any democracy, or indeed in any civil society: lawfulness (Counts 1 through 4), and truthfulness (Count 5). Not all rules carry such weight; police may behave badly, and make errors of judgment, without necessarily raising a fundamental societal question. But police must obey the law, and must be candid and truthful during internal investigations, at the risk of undermining the good faith and social foundations of the very institution of policing. We have consistently emphasized these concerns in our disciplinary actions; see for example *Williams v. Williams*, 1996; *Amesqua v. Wagner*, 1999; and the series of Fire Department matters known colloquially as the "Jocko's Cases."

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 reaffirm and incorporate here our general comments regarding this standard as applied to Count 1 and we find that this standard has been met with respect to Count 5.

Respondent Henderson's alleged untruthfulness, like the events of May 12, 2002, and November 8, 2003, had not been the subject of criminal charges. The untruthfulness for which we find Respondent culpable occurred in the course of the investigation which had been precipitated by the events of September 2, 2004. The overwhelming preponderance of the evidence establishes that Respondent Russell Henderson deliberately and wrongfully did not speak the truth on several occasions during that investigation on matters related to that investigation, including these instances:

- his absolute denials to Lt. Ackeret of the Madison Police Department and to Det. Stetzer of the Fitchburg Police Department of any physical confrontation with his wife, which we have found to have occurred in fact;
- his denial to Lt. Ackeret of any telephone threat against J.R.O., which we have found to have occurred in fact; and
- his denial to Lt. Ackeret and to Det. Stetzer of any physical confrontation with J.R.O., which we have found to have occurred in fact.

Such denials were intended to obstruct, and had the effect of obstructing, the legitimate efforts of the Fitchburg and Madison Police Departments, in the performance of their legal responsibilities, to determine what actually happened. The false statements took place on more than one occasion and were made to more than one person.

We note that we *do not* find that Respondent Henderson lied in court during the plea hearing on January 7, 2005, one of the particular allegations of Count 5. We find his statements on that occasion were credible and accurate. Henderson's statements to the Court were true; the out-of-court statements are the problem.

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

We reaffirm and incorporate here our comments regarding this standard as applied to Count 1 and we find that this standard has been met with respect to Count 5.

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 reaffirm and incorporate here our comments regarding this standard as applied to Count 1. We have determined that:

1. In his testimony Chief Wray suggests that termination is the appropriate sanction in this instance for untruthfulness. Transcript p. 1961ff. This "proposed discipline" conforms to the statutory standard. Untruthfulness, like unlawful conduct, is extremely serious and unacceptable in a Madison police officer. As we noted with respect to Standard 5, above, the expectations of truthfulness and lawfulness are especially vital elements in our community's relationship with our police.

In hearing the evidence in this case, and in examining Respondent Henderson's record of service for the purpose of determining the proper penalty for this violation, we note the many positive aspects of Respondent's service record, but we have also found two prior instances of discipline for untruthfulness, in 1992 and 1995. We regard the untruthfulness established in the instant matter as sufficient in itself for discharge.

Although we considered Respondent's length of service and overall service record, we could not give these factors greater weight than his misrepresentations and criminal conduct, especially in the context of the prior discipline. In our view, nothing in Henderson's record of service ameliorates the gravity of his misconduct proven in this case, particularly in the context of the prior disciplinary actions; we would remove the Respondent, even without the prior discipline, give the gravity of the violation here. The prior discipline only strengthens our belief that discharge is the right penalty.

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

Commissioners note for the benefit of those reading this decision that a proactive approach by officers involved in a one-time off-duty incident, combined with complete candor with investigators, may avoid the consequences seen in this case. Seeking help for anger or other domestic problems, not allowing

incidents to become cumulative, and telling the truth about an initial error in judgment concerning off-duty misconduct, are the best course of action, in contrast to the course followed in this case.

**Separate Statement of Comm. John Talis,
Concurring in Part and Dissenting in Part**

I agree with many findings made by my colleagues. For example, I find that Officer Henderson has committed multiple criminal acts of violence. I further find that these acts have been directed at least two different members of his family. The facts necessary to find that these incidents have occurred are proven by his criminal convictions on at least two occasions, which having been proven beyond a reasonable doubt in a criminal plea proceeding are proven as a matter of issue preclusion (collateral estoppel) pursuant to the lower standard of proof in our administrative proceedings. Even in the absence of the pleas in the two criminal cases, all four allegations were amply proven in a thorough presentation by the Chief of Police through testimony, exhibits (including medical records), and indeed through the testimony of Officer Henderson's family members. I further find that Officer Henderson did essentially nothing to mitigate his unlawful conduct in his testimony before this Board, in which he took little responsibility for his actions and tended to blame others for his own conduct.

Unfortunately, the Chief of Police did not stop with counts related to unlawful conduct. He added an additional count alleging that Officer Henderson violated the Department's rule regarding untruthfulness. And as a part of this untruthfulness count, the Chief of Police specifically alleged that Officer Henderson had been untruthful in his plea colloquy before the Dane County Circuit Court. At other times during the course of the hearing, the Chief seemed to argue that Officer Henderson's statements in the plea hearing were truthful, but that those statements in the plea hearing demonstrated that Officer Henderson had been untruthful at other times and places. In my view, in either event the Chief clearly erred in seeking to use a criminal plea as a basis for this untruthfulness count.

Over 90% of criminal cases are resolved by plea bargain rather than trial. U.S. Department of Justice, Office of Justice Programs, Victim Input Into Plea Agreements (Legal Series Bulletin #7, November, 2002). The reasons for this are multiple. First and foremost, a criminal trial before a jury (while it may be the finest method of truth finding available) is an extraordinarily slow and expensive process. The criminal trial could go on for days or weeks, whereas a plea can be given to a circuit judge in a matter of minutes. The trial involves substantial public expense, including the cost of a judge, a bailiff, and a clerk over a substantial period of time. And the criminal trial involves substantial inconvenience for up to thirteen jurors performing a public service, who are taken away from their jobs and their family responsibilities for a substantial period of time. Therefore, it is quite clear that if every criminal defendant took their case to trial, the circuit courts in the State of Wisconsin would be in very serious administrative trouble. Their dockets would explode. State v. Smith, 207 Wis.2d 258, 271, n.10, 558 N.W.2d 379 (1997) (calling proper plea bargaining "an essential component of the administration of justice."). See also State v. Garcia, 192 Wis.2d 845, 857-858, 532 N.W.2d 111 (1995).

The public policy of the State of Wisconsin favors the use of plea agreements in criminal cases to avoid this possibility (among other reasons). Smith, supra. The Wisconsin legislature has explicitly recognized this public policy via a statute which sets forth the procedures by which such pleas should be taken. Sec. 971.08, Stats. And the Wisconsin Supreme Court has itself further interpreted that statute. State v. Bangert, 131 Wis.2d 246, 266-272, 389 N.W.2d 12 (1986).

In this case, the Chief of Police has attempted to apply the rule on untruthfulness to Officer Henderson's statements in the plea hearing before the circuit court. The critical question is what scope the Police

Chief is giving to this work rule. The usual labor law presumption is that a work rule applies only to on-the-job conduct (with some very limited exceptions). And I have no quarrel with the concept that police officers and firefighters should expect a broader application of work rules to their off-duty conduct as public safety employees. But that does not mean the rule can apply to all off-duty conduct or statements consistent with just cause. As a hypothetical, the Chief of Police was asked at hearing whether the rule would reach rather innocuous off-duty conduct. For example, whether (to use a stereotypical example) a male Madison police officer asked by his wife or girlfriend whether particular clothing made her look fat, who answered in the negative when that answer was not really true, could be prosecuted under this rule. The Police Chief was absolutely unambiguous in his testimony that he could prosecute that officer under this rule for an act of this type. While I acknowledge that this was only a hypothetical and not specific to the facts of this case, the Police Chief's answer is in my view not reasonable and began to raise my concerns about the scope of the rule being applied.

Turning to the actual application of this work rule in this particular case, I similarly find that intruding on an individual's criminal plea before the circuit court using this work rule is contrary to the public policy the State of Wisconsin. The intrusion of this rule could cause police officers or fire fighters who would otherwise plead out their criminal cases to decline a plea and insist upon a trial for fear that any statements made in the plea hearing could be used against them by their employer as a basis for further discipline, resulting in an unnecessary criminal trial. Or it could cause the police officer or fire fighter to parse and limit their statements in the criminal plea hearing to maintain their employment status in a way that would cause the circuit court to reject an otherwise appropriate criminal plea, resulting in an unnecessary trial. In the context of this particular case, Officer Henderson was entitled to consider among other things the recommendation of his counsel, likely including the effects of a potential trial on his family, the financial cost of attorney's fees and otherwise of insisting on a trial, and the risk of conviction by a jury (including the risk present in every case that he could be wrongly convicted by a jury of a particular crime). For all of his broad authority, the Police Chief does not have the effective authority to compel the circuit courts of Wisconsin to conduct a criminal trial when an elected District Attorney (likely through an assistant district attorney) has chosen to offer a plea and Officer Henderson has followed the recommendation of his counsel in accepting it. Officer Henderson is entitled to make the statements necessary to enter the plea even if (for example) he does not really believe he is guilty and is simply trying to manage his various risks. The circuit court is entitled as a part of the legal authority previously cited as well as its own inherent authority to efficiently manage its docket and accept a plea on this basis and avoid a trial. Wis. Const. Art. 7; Sec. 753.03, Stats. If anyone is to be heard to challenge the truthfulness of his statements in this context, it should be the circuit court itself through a perjury charge. It should not be the Officer Henderson's employer. The application of the untruthfulness work rule in this case, in my view, was contrary to the public policy of Wisconsin and also an overbroad application of the work rule. The work rule does not properly reach the functions of the circuit court at a plea hearing, whatever may be said of sworn testimony at trial. (Officer Henderson was not under oath when he entered his plea.) Therefore, as to the untruthfulness count I find that the Chief's rule as applied was not reasonable in violation of sec. 62.13(5)(em)2, Stats. and not fairly applied in violation of sec. 62.13(5)(em)6, Stats. because it was contrary to public policy.

Note that the problem of applying a work rule regarding untruthfulness to a plea hearing in circuit court becomes even more apparent when we recognize that the Wisconsin Supreme Court has sanctioned the use of the so-called "Alford plea," in which a criminal defendant is permitted to plead guilty while simultaneously maintaining his innocence (or not admitting commission of the crime). Garcia, supra., 192 Wis.2d at 856. Given the complex legal nature of that type of guilty plea, an employee could be subject to multiple charges of untruthfulness from a variety of directions by his employer if the Police

Chief's position in the present case were sustained. Many see the "Alford plea" itself as logically inconsistent.

My colleagues agree with me that the plea agreement aspect of the untruthfulness count was not proven. But I must respectfully disagree with my colleagues' decision to perform no further analysis regarding this failure of proof. The question (for me) is whether this failure of proof as to a part of the untruthfulness count must cause the entire count to fall, or whether the Board can simply ignore the failed aspect of the count and rely on other grounds in the count (e.g. Officer Henderson's alleged untruthfulness during the internal investigation). I will assume for purposes of this opinion (and the proof offered made it likely) that other aspects of the untruthfulness count were proven outside of the failed plea agreement element.

Reasoning by analogy to other areas of labor law relating to motive, there is federal law support for the conclusion that the existence of other proven bases in the count should salvage the count. NLRB v. Transportation Management Corp., 462 U.S. 393, 402, 103 S.Ct. 2469, 2474-2475, 76 L.Ed. 2d 667 (1983).[1] On other hand, Wisconsin law on the subject supports the position that a failure to prove all of the elements of a count could cause it to be dismissed entirely. Employment Relations Dept. v. WERC, 122 Wis.2d 132, 141-142, 361 N.W.2d 660 (1985); Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540, 151 N.W.2d 617 (1967). While I would join in my colleagues' apparent conclusion that minor flaws in the count should not invalidate the count in its entirety (e.g. the fact that the count refers to a police officer driving a red van when she in fact is proven that she was driving a white van while committing misconduct is irrelevant and does not undermine the count as a whole, or that a wholly minor part of a count that asserts a minor infraction was not proven does not undermine the count as a whole that contains far more serious elements that have been proven), in my view we should take the Wisconsin view that the failure of a major element of a count results in the dismissal of the count as a whole. This enforces the appropriate burden of proof in disciplinary cases on Chiefs when there is not specific evidence in the record as to whether they would have proceeded with the count in the absence of the failed portion, and if they did so whether the penalty they would impose for the misconduct charged would remain the same. Elkouri & Elkouri, How Arbitration Works, 6th ed. (2003), at 949 (burden of proof on employer to prove misconduct); Id., at 961 (majority rule is that employer must prove just nature of penalty). Whatever the ultimate legal scope of the Board's authority as statutory decisionmaker pursuant to sec. 62.13, Stats., in my view the Board should in its discretion rely on the presentations of the adversary parties in the vast majority of cases (including this one) as an impartial decisionmaker. It should not assist the Chief in carrying his required burden of proof. Therefore, I conclude the unproven element of the untruthfulness count was major and, therefore, that the count in its entirety fails.

I have found that Officer Henderson violated the rules of the Madison Police Department and engaged in unlawful conduct on multiple occasions. For this he must be disciplined, and given the nature of his violations that discipline will need to be substantial. In evaluating penalty I am guided by the rule that discipline should be corrective and not punitive. In particular, this is not the appropriate forum to address the broader social issue of domestic violence, however reprehensible it is. Some may well disagree with the statutes passed by the Wisconsin legislature and the judgments made by the elected District Attorney in this matter whereby Officer Henderson was given a deferred prosecution agreement rather than incarcerated for a substantial period of time. But that is the extent of the punishment which was imposed upon him by the criminal justice system which is designed (at least in part) to punish. This forum does not exist to punish him in the way that the criminal justice system does. Instead, given Officer Henderson's unlawful conduct and his record of service, the question is whether any penalty short of

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[1] Transportation Management was overruled on another ground not relevant to the one being discussed in OWCP, DOL v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 2d 221 (1994).

discharge can be given. In considering these issues, I note that the Police Chief testified that the untruthfulness allegations (which I have found to have failed) were more significant than the unlawfulness allegations. I do consider the prospect of returning a convicted criminal to duty in a law enforcement agency and the real difficulties that may create. But I also consider the uncontradicted testimony that there has been no input from either within the Madison Police Department or any of the police departments which frequently interact with the Department that indicates that Officer Henderson cannot return to duty despite his criminal convictions.

Finally, I consider the nature of Officer Henderson's work record pursuant to sec. 62.13(5)(em)7, Stats.. He has been a police officer with Madison Police Department for approximately 20 years. He has had some disciplinary infractions leading to suspensions of five days or less in the past, but none of those infractions have occurred in approximately the last 10 years. I further note that his record contains multiple commendations from citizens, other officers on the Department, and educators (among others) citing his positive work with Madison Police Department. I also note that Chief Wray provided a commendation recognizing Officer Henderson's contributions to the Department when Officer Henderson reached his twentieth anniversary of service during the course of this proceeding. I find that Officer Henderson has a strong work record and a long record of service.

Given all this information, and having considered the evidence of past disciplinary cases contained the record, I would impose a unpaid disciplinary suspension of two years on Officer Henderson for his unlawful conduct resulting in serious violations of the rules of the Madison Police Department. I am satisfied that this penalty would (among other things) result in the loss of tens of thousands of dollars in wages, impose negative consequences on Officer Henderson's pension, and as a practical matter end any prospect he has for promotion for the foreseeable future. I believe these penalties are sufficient to create a reasonable chance that Officer Henderson will correct his conduct in the future.