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

Police Chief Noble Wray,
Complainant

vs.

Police Officer Michael Grogan,
Respondent

DECISION AND ORDER

Synopsis

The Complaint in this case, dated March 31, 2006, alleges violation of the department rule requiring cooperation with internal investigations and asks the Board to suspend the Respondent for a period of five days. Following evidentiary hearing, oral closing argument, and deliberations, the Board has found that the alleged violation did occur and has imposed the penalty of suspension for three days.

Procedural Background

This matter comes to us on a Complaint by Noble Wray, Chief for the City of Madison, against Police Officer Michael Grogan, dated March 31, 2006. Chief Wray has been represented by Assistant City Attorney Steven Brist. Respondent Grogan has been represented by Attorney Gordon McQuillen.

After preliminary proceedings, we conducted an evidentiary hearing on October 13, 2006, recessing to November 8 for oral closing argument. We have had individual reference access to the complete hearing transcript pages and to the exhibits. Commissioners reconvened for deliberations following argument on November 8, reviewed multiple decision drafts, and have now reached the decision which we announce in this document.

Our deliberations have been limited strictly to the record in this case. In general, we confirm the validity of the rule in question, find that the violation did occur, and impose a penalty of suspension without pay for a period of three days.

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:*
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> *1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.*
> *2. Whether the rule or order that the subordinate allegedly violated is reasonable.*
> *3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.*
> *4. Whether the effort described under subd. 3. was fair and objective.*
> *5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.*

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

On their face these standards seem designed to guide a *review* of discipline previously imposed, 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 the single count of the Complaint 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

Count 1, Failure to cooperate with internal investigation

Rule 2-231 - Cooperation with Investigations Required

Members of the department must cooperate in internal investigations of alleged misconduct, illegal activity or policy violations. Failure to answer questions or submit to proper investigative techniques constitutes insubordination.

The Seven Standards, Standard 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. All officers surely know in fact that we expect them to be familiar with Department rules, and no officer could reasonably have any contrary understanding.

In our view, this standard does not require that each officer must have accurately envisioned the actual penalty which we would impose for any given violation. This standard requires us, rather, to determine that a reasonable officer would have understood beforehand that the conduct would be considered to have violated a rule, and to have understood that the violation would result in discipline.

We are confident that Madison police officers understand that cooperation with internal investigations is required by rule. Any other understanding would be unreasonable. We are similarly confident that Madison police officers, as reasonable officers, anticipate disciplinary consequences for non-cooperation with internal investigations.

In short, this standard has been met.

Standard 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 Chief has not overstated the importance of the rule in question. We reiterate and re-emphasize that officers must cooperate fully with internal investigations. The Chief expects such cooperation, and the PFC expects it. The good order of the department and the integrity of the public trust depend upon it.

We find nothing in our record to suggest that any member of the department entertains any practical doubts regarding the responsibility of the department and the Chief to review and confirm the professionalism of our officers and to investigate allegations of misconduct. We believe that the reasonableness, indeed the necessity, of cooperation with those responsibilities is beyond question. The record of this case clearly confirms that Respondent Grogan himself regarded the rule as valid, applicable, reasonable, and important.

Standard 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. We understand our evidentiary hearing to be 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 as reviews of the Chief's pre-hearing conduct, that is, his charging decision. We have 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." 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 pre-charging investigation which was reasonable under the circumstances. We are fully satisfied that the investigation constituted at least a reasonable effort to discover specifically whether or not Respondent did in fact violate the rule requiring cooperation with an internal investigation.

We recognize that the investigation in this matter was somewhat truncated in comparison with the comprehensive investigations of multiple or open-ended allegations and fact situations which the department sometimes conducts and which sometimes are presented to us. However, the investigation was appropriate and sufficient for its purposes. 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.

Standard 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.

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

Standard 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 the rule requiring cooperation with internal investigations.

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 department rule. Officer Grogan on at least one occasion actively interfered with the Department's internal investigation by instructing his brother-in-law not to provide certain records which had been requested in the course of that investigation. These records were records of a business operated by Officer Grogan's brother-in-law. This interference constituted an intentional, positive, material violation of the rule requiring cooperation with an internal investigation.

We offer these further comments to address constructively certain contextual misunderstandings which we perceive throughout the case record. Officer Grogan's interference with the investigation was not somehow excepted from the requirements of the rule requiring cooperation with departmental investigation by Officer Grogan's apparent misunderstanding of the implications and mechanics of his privilege against self-incrimination. His immediate error was to attach his privilege to materials in the possession of a third party. More broadly, Officer Grogan, and perhaps other officers and department management, may not fully appreciate that the constitutional privilege of sworn officers with respect to self-incrimination has no role or weight in the administrative proceedings of the department, nor in these proceedings. Officers must answer questions, and must cooperate, upon risk of discipline including discharge. "Garrity" warnings do not dilute either that obligation or that risk; in fact, the warnings serve to clarify and confirm the obligation to cooperate. An officer is not constitutionally entitled to condition compliance with department rules upon the department's effective insulation of the resulting information from a criminal proceeding. Protecting the criminal prosecution from contamination by

constitutionally privileged information at the cost of police department internal investigation is not a proper task of internal investigators (nor of this body), nor is the threat of such contamination a proper basis on which an officer may refuse to cooperate with internal investigation (or with our proceedings.) If material provided under threat of employment action is used adversely in a criminal proceeding, the officer's remedy lies in evidentiary suppression in that criminal proceeding.

In summary, Officer Grogan wrongfully interfered with a department internal investigation by directing, instructing, or advising non-cooperation with an investigative inquiry.

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

We refer 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 in question fairly against Respondent and without discrimination.

2. In acting under and applying the rule in question we are acting fairly and without discrimination.

Standard 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 violation which undoubtedly occurred in this instance is ameliorated by two factors. First, the practical effect on the internal investigation resulting from Officer Grogan's actions was a brief obstruction or disruption of the internal investigation, perhaps 24 hours in duration. Second, we believe that Officer Grogan acted from a genuine, although mistaken, understanding of his legal rights.

On the other hand, Officer Grogan very deliberately instructed his brother-in-law not to cooperate with the investigation, and did not take the initiative to inform the department that he had done so. Furthermore, the prompt remediation of Officer Grogan's obstruction is attributable to the department's investigative persistence, not to any action by Grogan.

We are not here primarily to punish Respondent, but to protect the public, to uphold the public interest in the integrity and efficiency of police authority, and to preserve the reputation and good order of the Department. As we have noted, the rule in question in this case is fundamental and vital. Under some circumstances violation might conceivably carry the utmost importance and urgency, requiring severe consequences, potentially including discharge.

We agree with Chief Wray that this case does not rise to that level. Weighing all circumstances revealed in our record, and intending fully to confirm the inherent primacy of the rule in question and the internal investigation process, we have concluded that a disciplinary suspension of three days is appropriate.

Order

On the entire record of these proceedings including the foregoing, and pursuant to 62.13(5)(e), Wisconsin Statutes, the Respondent is suspended without pay for a period of three working days, to be scheduled at the convenience of the Department.

Approved following deliberations,
and
filed with the Secretary this ____ day of November, 2006:

MADISON BOARD OF POLICE AND FIRE COMMISSIONERS

Gretchen Lowe, Commissioner

John Talis, President

Michael Lawton, Commissioner

Note: Comms. LaMarr Billups and Shiva Bidar-Sielaff, secretary of the Board, did not participate in this hearing or decision. Comm. Billups resigned from the Board prior to the filing of this decision.