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

April 2007 Complaint

Synopsis

The Complaint in this case alleges violation of the department rules which prohibit unlawful conduct and untruthfulness and asks the Board to discharge the Respondent from the Madison Police Department. Following evidentiary hearings and related proceedings conducted by our Hearing Examiner, Hon. Moria G. Krueger, and based on Judge Krueger's report as well as our own deliberations and examination of the record, the Board has found that significant violations did occur and has imposed the penalty of discharge.

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 29, 2007, and filed April 4, 2007, arising from events in December, 2004. Chief Wray has been represented by Assistant City Attorney Steven Brist. Respondent Grogan has been represented by Attorney Gordon McQuillen.

Following the initial hearing, we granted the motion of Chief Wray to conduct further proceedings pursuant to our Rule 6, which provides for a Hearing Examiner. We engaged the Hon. Moria G. Krueger in that capacity. Judge Krueger assumed her duties with a case conference on June 8, 2007, and subsequently presided at multiple hearing sessions, compiling a complete record of exhibits, written transcripts, and videographic recording. The evidentiary portion of the case concluded on September 4, 2007. Judge Krueger then received the final written closing arguments of the parties on November 26, 2007, and issued her report to the Board on December 13, 2007.

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." Judge Krueger's report reflects and supports our responsibility to conform our decision to this statutory framework.

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?"

After we received the Hearing Examiner's report we invited the parties to file written objections to it, which we received on January 10, 2008. We have now thoroughly reviewed and deliberated regarding the complete case record of evidentiary proceedings, written argument, Hearing Examiner's Report, and objections. We have examined substantial portions of the videographic recordings of testimony, including the complete videographic record of the respondent's testimony. We have adopted Judge Krueger's report as our substantive decision in this matter, subject to certain modifications, and on the basis of that report we have discharged Michael Grogan from the Madison Police Department.

Decision

We attach, adopt, and incorporate by reference Judge Krueger's report as our decision in the case, with the modifications stated below.

<u>Count 1, Unlawful conduct (damage to property, WS 943.01(1), December 19, 2004)</u>

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.*

For the reasons stated in Judge Krueger's report, fully adopted and incorporated by reference here as our decision in the case, we sustain Count 1 of the Complaint and impose the penalty of discharge.

<u>Count 2, Unlawful conduct (disorderly conduct, WS 947.01, December 19, 2004)</u>

For the reasons stated in Judge Krueger's report, fully adopted and incorporated by reference here as our decision in the case, we sustain Count 2 of the Complaint and impose the penalty of discharge.

<u>Count 3, Untruthfulness, multiple occasions (see Complaint)</u>

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).*

For the reasons stated in Judge Krueger's report, fully adopted and incorporated by reference here as our decision in the case, we sustain Count 3 of the Complaint and impose the penalty of discharge.

In doing so we have based our decision with respect to penalty on untruthfulness prior to the filing of charges as alleged in the Complaint, which obstructed and impeded the lawful investigation by the department. Judge Krueger's conclusion regarding Respondent's untruthfulness during the course of the hearing, which we share, reflects and supports the determination of Respondent's credibility as a witness, but is not the direct basis of the penalty imposed for violations of department rules.

<u>Count 4, Unlawful conduct (failure to report August 28, 2006, law enforcement contact)</u>

Rule 2-219 - See Counts 1 and 2, above.

We dismiss Count 4 of the Complaint, with prejudice, based upon the Complainant's concession that we may do so, without reaching Judge Krueger's discussion and interpretation of Rule 2-219 with respect to this count.

Attached and incorporated into the Decision, subject to the modifications stated above:

REPORT OF THE HEARING EXAMINER

PROCEDURAL BACKGROUND

In support of his request for the termination of Officer Michael Grogan, Chief Wray has filed a complaint alleging four counts of professional misconduct against this subordinate. This charging document was filed on April 4, 2007 and served on Respondent's counsel on April 12, 2007. Respondent filed his answer, and an initial hearing occurred on May 16, 2007. On May23, 2007, I was engaged to act as hearing examiner in this matter. Dates for evidentiary hearing and other matters were ordered after a case conference on June 8, 2007, and pretrial rulings resulted from a hearing on July 13, 2007. Evidence was presented on July 17, 18, 30, 31, August 1 and September 4th, 2007. Complainant presented 16 witnesses; respondent offered only his testimony and brief testimony from one of the owners of the property involved in alleged law violations. Both sides have had more than ample opportunity to present written closing arguments and have done so.

GENERAL FACTUAL BACKGROUND

The facts alleged in the first three counts against Officer Grogan either occurred on December 19, 2004 or involve this officer's response to the Department's investigation of the events of that date. These counts claim that respondent violated Department rules prohibiting unlawful conduct and requiring truthfulness. The fourth and final count charges that he had contact with a member of a law enforcement agency as a suspect in an August 29, 2006 gas drive-off incident and that, contrary to a Department rule, he failed to notify his commanding officer of that law enforcement contact within 24 hours of his return to duty. Count four is separated in time and nature from the first three counts. Because it presents primarily a legal issue and can be resolved without fact-finding, it will be addressed first and in its own section of this report.[1]

COUNT FOUR:
FAILURE TO REPORT LAW ENFORCEMENT CONTACT

Ideally, the Respondent's challenge to this count should have been brought and decided as a pre-hearing motion.[2] The issue appears to have coalesced during the hearing, and it questions the applicability of part 2 of Rule 2-219 to the particular law violation of a gas drive-off. The relevant part of the rule reads:

> 2. Members of the department who are contacted by a law enforcement agency regarding their involvement as a suspect, victim, or witness in:
>   a. Violation 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 the 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.

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[1] Even if not always couched in those terms, my findings and conclusions are always meant as recommendations to the Commission and are never offered as anything but that.

[2] A pre-hearing ruling, as will be seen, would have obviated the need to present any evidence on this count.

Only certain kinds of law enforcement contact trigger the need to report: suspicion of violating the criminal law or perhaps an ordinance in conformity with a criminal law[3] or operating a motor vehicle while under the influence of an intoxicant or hit and run. While Mr. Grogan denies that he had any requirement to report to his commanding officer about the gas station incident in August 2006, the tenor of his argument makes clear that he concedes that if he did have to report, it would have been as a suspect, rather than as a witness or victim. He does deny intentionally driving off without paying for his gas; he also denies that he had contact with law enforcement regarding that concern. Nonetheless, for the purpose of deciding this legal issue, all the facts relating to court four as spelled out in the complaint will be deemed true. This posture crystalizes the issue for a clearer consideration of Officer Grogan's contention. His position is that because the statutory penalty for a gas drive-off is only a forfeiture, regardless of the truth of the allegations, he is not subject the reporting requirement.[4]

The law he was suspected of violating is Wis. Stat. § 943.21:

> **Fraud on hotel or restaurant keeper, recreational attraction, taxicab operator, or gas station.**
> (1m) Whoever does any of the following may be penalized as provided in sub.(3):
> (d) Having obtained gasoline or diesel fuel from a service station, garage or other place where gasoline or diesel fuel is sold at retail or offered for sale at retail intentially absconds without paying for the gasoline or diesel fuel.
>
> (3)(bm) Whoever violates sub. (1m)(d) is subject to a Class D forfeiture.[5]

And Wis. Stat. § 939.12 states:

> **Crime defined.**
> A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime.

The contact this Officer is accused of failing to report was not contact regarding a crime under § 943.21(1m)(d) and (3)(bm). Still, the complainant contends that at the time of the incident, Mr. Grogan *could* have been charged with the crime of misdemeanor theft under Wis. Stat. § 943.20. As argued by counsel for complainant, it is true that a prosecutor's charging discretion is almost unfettered. There are, however, certain precepts that weaken the alternate charging theory.

A. Doctrine of the specific controlling the general:

Even a quick review of the legislative history of the two sections of Chapter 943 of the Wisconsin Statutes shows that the far more specific § 943.21(1m)(d) [the forfeiture] is only four years old, while the current general prohibition on theft of any moveable property has been codified for at least forty years. This chronology shows that the legislature intended to remove gas drive-offs from criminal consequences. In re J.S., 137 Wis.2d 217, 404 N.W. 2d 79, 83 (Ct. App. 1987).

If the legislature did not mean to give law enforcement and prosecutors a message by so drastically changing the character and consequences of taking gas without paying for it, why would it have bothered to create the new forfeiture language? Only the offense of gas drive-off, of all the thefts prohibited and defined in § 943.21, was down-graded into a forfeiture. Failure to pay a bill of less than $2,500 due a hotel, restaurant, taxi, or recreational attraction still is a class "A" misdemeanor, punishable by up to 9 months

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[3] The "perhaps" is used advisedly; much more will be said about "b" later in this document.

[4] No one contends that suspected OWI or hit and run (sub. "c") could be the basis of this count.

[5] Wis. Stat. § 939.52(3)(d) makes a class D forfeiture of not more than $200.00.

imprisonment and/or $10,000.00 fine.[6] Something about this drive-off offense must have inspired our law makers to decriminalize the act of taking gas. "It is a general rule of statutory construction that when a general statute and a specific statue relate to the same subject matter, the specific statute controls." Motorola v. Labor and Industry Reveiw Commission, 219 Wis. 2d 588, ¶ 28, 580 N.W. 2d 297 (1998).

B. Rule of lenity:

Even if charging under the relatively-recent forfeiture statute is not mandatory by virtue of the doctrine that the specific controls the general, the rule of lenity adds greater impetus to such a conclusion.

> The principal objective of statutory interpretation is to ascertain and give effect to the intent of the legislature. The court must ascertain the legislature's intent from the language of the statute in relation to its context, scope, history, and the objective intended to be accomplished. Statutes relating to the same subject matter should be read together and harmonized when possible. Furthermore, when there is doubt as to the meaning of a criminal statute, a court should apply the rule of lenity and interpret the statute in favor of the accused. State v. Cole, 262 Wis. 2d 167,¶ 13, 663 N.W. 2d 700 (2003).

Doubtless, the newer statute on drive-off gas-taking is more favorable to an accused than is the misdemeanor theft law. Charging and judgment under the new statute cannot result in imprisonment or a criminal record. Nevertheless, it does remain in a chapter of the statutes entitled, "Crimes - - - Property." Even the potential monetary penalty is fifty times greater under the old statute. Because this is not a criminal matter, application of the rule of lenity is not mandatory , but there is precedent for viewing disciplinary proceedings as quasi-punitive in nature, given the requirement of due process and potential for loss of employment.

What all of this discussion leads to is the conclusion that the respondent should be given the benefit of the doubt on a legal issue such as whether any law enforcement contact in August 2006 was because he was suspected of committing a crime. For the reasons stated, my recommendation is that the finding be that Officer Grogan was not suspected on August 29 , 2006 of having committed a crime, only of committing a statutory forfeiture violation.

C. Unreasonableness of the Department rule:

Wis. Stat. § 62.13(5)(em) establishes seven Standards to be applied by a Police and Fire Commission in making its determination. The second Standard is: " Whether the rule or order that the subordinate allegedly violated is reasonable." Reference has already been made to the problematic nature of Rule 2-219 sub 2.b. as to the kinds of law enforcement contact that should be reported to an officer's superior. That subsection lists "Violation of ordinance that constitutes a crime." That phrase is nonsensical: violation of an ordinance simply cannot "constitute a crime." The definition of "crime" previously quoted from Wis. Stat. § 939.12 makes this irrefutable. Ordinances are not state law; they cannot impose either fines or imprisonment.

It may be that what was intended by the imprecise phrase "ordinance that constitutes a crime" is an ordinance that **conforms** to a criminal law.[7] For example, both an ordinance and a criminal statute can penalize the same act of possession of marijuana or trespass, with the ordinance carrying solely a monetary penalty of forfeiture and no possibility of incarceration. Unfortunately, the language used in this subsection does not say anything to suggest what I am guessing. The very act of guessing is misplaced in a rule designed to tell members of the Department what is prohibited. Holding them to a standard that makes no

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[6] *See,* Wis. Stat. § 939.51(3)(a).

[7] Indeed, the preceding section of that Rule properly references an "ordinance corresponding to a state statute that constitutes a crime."

sense, that requires guesswork and speculation cannot constitute due process, and any rule with these deficits cannot be reasonable.[8]

D. Recommendation as to Count Four:

With apologies to the non-lawyers on the Commission, I offer the preceding examination of the legal difficulties with the charge in count four of this complaint. Because the specific statute prohibiting gas drive-offs is not criminal and because the Policy language on ordinance violation is an impossibility, I believe that due process and fundamental fairness require dismissal of count four, without the necessity of detailed fact finding.[9]

<u>COUNTS ONE -THREE</u>: RULES

Counts one and two allege that respondent violated Rule 2-219 1. **UNLAWFUL CONDUCT**: (*inter alia*)

> Members of the department shall not engage in conduct which would constitute a violation of criminal law or ordinance corresponding to a state statute that constitutes a crime, first time OWI, or hit and run. We believe there is a public expectation that public safety employees should not violate laws or ordinances.

Count three alleges that respondent violated Rule 2-216 **UNTRUTHFULNESS:** (*inter alia***)**

> 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.

<u>COUNTS ONE -THREE:</u> FACTS:

Even though there was a limited, pre-hearing "Agreed Statement of Uncontested Facts,"[10] at the conclusion of the evidence, it turned out that many more facts were not contested. Officer Grogan is not actually challenging the basics of **what** occurred on December 19, 2004. His issues go to **why** those events occurred and to **whether** he was truthful with the Department's investigation that ensued.

A. Uncontested facts: [11]

1. "Police Officer Michael Grogan was hired by the City of Madison as police officer in its Police Department on May 22, 2000." Just before the incidents of December 19, 2004, he had been recommended for promotion to detective, but that recommendation was withdrawn upon his present suspension. No concerns about respondent's on-duty performance were presented.

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[8] The problem with Policy 219-2.b. "ordinance that constitutes a crime" was not noticed until this report was being drafted. Neither counsel had an opportunity to comment on this language, but I did not feel it was necessary to further delay resolution of these charges beyond the inordinate time that has already passed.

[9] If the Board disagrees with my analysis and recommendation on count 4, I will do a fact-finding upon request.

[10] *See*, Joint Pre-Hearing Report, signed by counsel for each side.

[11] Quotation marks indicate that the language is taken *verbatim* from either the Joint Pre-Hearing Report or from the Complaint. These uncontested facts are found to be true by evidence that is clear, satisfactory, and convincing, a higher standard of proof than required. They are garnered from the "Agreed Statement of Uncontested F act"s portion of the Joint Pre-Hearing report and supporting evidence.

2. "As a police officer, Police Officer Grogan was given a copy of the Madison Police Department Manual of Policy, Regulations and Procedures and is a was at all time relevant to this complaint responsible for familiarizing himself with its contents, including additions modifications, and for performing his duties in accordance with its policies, standards, guidelines and regulations. Included in the Manual are MPD Rule 2-216 Untruthfulness and MPD Rule 2-219 Unlawful conduct."

3. Officer Grogan was previously disciplined in 2001 for a civil conviction for operating a motor vehicle while under the influence of an intoxicant and in 2006 for failure to cooperate with an internal investigation.[12] Each disposition was a short period of suspension.

4. "On December 19, 2004, during the early morning hours at approximately 2:00 a.m., Michael Grogan was involved in a one car traffic accident when driving his 2003 Toyota Corolla. The vehicle ended up in the ditch at the end of the driveway at N5W31924 White Tail Run, Delafield, Wisconsin."

5. "The incident occurred while Officer Grogan was off-duty as a City of Madison Police Officer."

6. "The circumstances of the accident were that Police Officer Grogan drove into the driveway of the residence at N5W31924 White Tail Run; as Police Officer Grogan was backing out of the driveway of the residence on White Tail Run, his vehicle went off the driveway and traveled down into a ditch at the street end of the driveway."

7. "Officer Grogan attempted unsuccessfully to drive out of the ditch by driving the vehicle back and forth" for a period of time. "Officer Grogan subsequently left the scene on foot leaving the vehicle locked and in the ditch."

8. "Subsequent to the accident during the early morning hours of December 19, 2004, Officer Grogan made his way from the ditch at the driveway end of N5W31924 White Tail Run, Delafield to a residence at N2W31919 Twin Oaks Avenue, Delafield occupied by Pam and James Nejedlo."

9. "Officer Grogan rang the doorbell awakening the residents. James Nejedlo answered the door and spoke with a male individual, later found to be Michael Grogan. According to James Nejedlo, Grogan said that his car was in a ditch and asked to come in the house."

10. "Grogan was unknown to Nejedlo; Nejedlo would not allow him to come in . . . Sometime thereafter, James Nejedlo decided to drive around and look for the car and offer assistance if needed. Nejedlo located the car in he ditch at the end of the driveway on White Tail Run. He advised his wife who then alerted the Waukesha County Sheriff Department"

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[12] It is noteworthy that this Commission found that Of. Grogan "instructed his brother-in-law not to provide certain records which had been requested in the course of that investigation." Decision of 11-22-06, p. 4. What was being investigated was related to the instant charges, but the specific concern ultimately was found to be without merit. This lack of cooperation occurred during the investigation of the counts contained in this complaint.

11. "Waukesha County dispatched a deputy to respond to the scene. The vehicle was found unattended in the ditch at approximately 3:48 a.m. by Waukesha County Sheriff Deputy Bradley Stenulson. The vehicle, Wisconsin Registration 414GHF, had a registered owner listed at Michael Grogan, W314 Cambridge Court, Delafield, Wisconsin."

12. "The residents at N5W31924 White Tail Run, Dr. and Ms. Reuben, were contacted about the vehicle in the ditch by Deputy Stenulson at about 4:00 a.m. on the morning of December 19, 2004. They advised the officer that they were not familiar with the vehicle or its registered owner but had heard someone spinning car tires at about 2:00 a.m."

13. "On December 19, 2004, after speaking to the owners of the residence, Deputy Sheriff Stenulson went to the Grogan home and made contact with Michael Grogan's wife, Theresa L. . . . Grogan. Ms. Grogan advised Deputy Stenulson she did not know where her husband was. In fact, she had not known that Michael Grogan had left the residence. She confirmed that the vehicle was missing from the garage and that Michael Grogan was the likely operator."

14. "On December 19, 2004 at approximately 7:13 a.m., the Waukesha County Sheriff's Department was dispatched to N2W31808 Twin Oaks Drive, Delafield, Wisconsin regarding a possible burglary. Deputy Andrew Weber responded to the scene and made contact with Matthew Ebbe and Mary Ellen Handrich. Deputy D. Gondek also responded to the scene to assist in the investigation. Waukesha County Deputy Steve Spak was also dispatched to assist in locating the suspect who had left the scene. Matthew Ebbe, who lived at the residence with his parents, returned home with his aunt, Mary Ellen Handrich, on the morning of December 19, 2004 at about 7:00 a. m. Matthew Ebbe observed that the front door of the residence appeared to have been kicked in causing damage and allowing entry into the home." That damage as shown in Exhibit 12, C-H, was caused by Officer Grogan. "[Ebbe]also observed a male individual, later identified to be Police Officer Michael Grogan asleep on the living room floor. When asked by Matthew Ebbe why he (Grogan) was in the Ebbe home, Grogan replied, 'this is my home.' Shortly thereafter, Officer Grogan put on his coat and left the house. Grogan did not respond to repeated requests for identification from Matthew Ebbe."

15. "After leaving the Ebbe residence, Officer Grogan then walked into the backyard of another residence nearby, W313 N380 White Tail Run, Delafield, Wisconsin and was observed by the residents, Joseph and Jill Pfalz, very close to their back sliding door. Joseph Pfalz made contact with Officer Grogan and asked why he (Grogan) was in the yard. Officer Grogan said he was looking for his car. Joseph Pfalz continued to observe Officer Grogan who went to the front driveway area of the Pfalz house and then ran from the area and into neighboring woods."

16. "Shortly after 7:13 a.m. on December 19, 2004, Deputy Spak went to the Grogan residence on Cambridge Court, where he made contact with the wife of Michael Grogan. Ms. Grogan told Deputy Spak that she and her husband had been at a wedding together and arrived home at about 1:00 a.m. on December 19, 2004. Ms. Grogan also indicated that both she and her husband had consumed intoxicants. At that time Ms. Grogan had brief telephone contact with Michael Grogan in Deputy Spak's presence and provided Officer Grogan's cell phone number to the Deputy."

17. "At or about 8:00 a.m. on December 19, 2004 Waukeha County Sheriff Deputies began tracking Officer Grogan who had . . . " gone "into the woods in the area of Twin Oaks Avenue behind the Ebbe residence."

18. "In the course of the search, Deputy Spak was able to contact Officer Grogan on Grogan's cell phone. Officer Grogan ultimately indicated his location and agreed to" . . . meet the deputies. "He was taken into custody by Deputy Christopher Ireland. Deputy Ireland asked if Grogan wanted to be examined for possible injuries of hypothermia. Grogan replied, 'No.'"

19. "Officer Grogan was returned to Twin Oaks Drive where Matthew Ebbe and Mary Handrich positively identified him as the individual lying on the floor of the Ebbe resident. Joseph Pfalz clearly and positively identified him as the individual who walked into his backyard."

20. On December 19, 2004, Officer Grogan told no Sheriff's deputy or employee nor any citizen witness that he had any injury to his head.

21. "On May 18, 2005 and May 15, 2006, Lt. Ackeret interviewed Officer Grogan in the PS&IA office of the Madison Police Department concerning the events that occurred Saturday evening of December 18, 2004 and the early morning hours of December 19, 2004. During the interview, Officer Grogan, in response to questions by Lt. Ackeret, in part stated that he could not remember the circumstances of his car accident because he suffered a head injury in the accident; further, he indicated the head injury impaired his memory of certain circumstances both before and after the accident."

22. "On August 16, 2006, Officer Grogan was convicted after a jury trial of the misdemeanor crime of disorderly conduct contrary to § 947.01, Wis. Stats. In State v. Michael A. Grogan, 2005 CM 000197." The underlying facts supporting this conviction relate to Officer Grogan's activities in the early morning of December 19, 2004. He was not convicted of criminal damage to property.

B. Contested facts: [13]

1. Did Officer Grogan Sustain a Head Injury that Impaired his Memory and Caused his Behavior on August 19, 2004 ?

The defense appears to be that by virtue of receiving a head injury in the accident in the ditch, respondent suffered significant memory gaps and is absolved of responsibility for the law violations alleged in this complaint. Several considerations mitigate against accepting Officer Grogan's contentions:

i.) *There is no reliable medical testimony in this record:*

There can be no dispute as to the need for expert medical testimony as to the seriousness of a head injury and its affect on a sufferer's conduct. Such neurological information is not within the knowledge of person who is not medically trained. [14] In essence, Officer Grogan is propounding a medical defense without offering facts on which to base it. Because this is a defense, the obligation to produce medical

[13] All recommended findings in this section are at least to the level of a preponderance of the evidence,. unless otherwise indicated.

[14] *See*, Wis. Stat. § 907.02. Of course, respondent can say he hurt his head, but nothing about the severity of the injury or his memory or conduct can be inferred.

evidence was Officer Grogan's, not Chief Wray's. [15] In other words, if there is a reason Officer Grogan should not be held to account for his actions, it is his job to present it, not the complainant's duty to ferret out all possible defenses before charging.

Since Dr. Kelly was Officer Grogan's personal physician who treated him the day after the accident, he had to be called by his own patient. Without that testimony at this hearing, it is reasonable to infer that such testimony would have unfavorable to the defense position. Valiga v. National Food Co., 58 Wis. 2d 232, 245, 206 N. W. 2d 377, 384-85 (1977) ; *see also* Wis J I-Civil 410. Rather than present his own doctor as he did at his criminal trial, Officer Grogan chose to rely on the handwritten notes taken during the criminal trial by his primary accuser in this action, Lt. Brian Ackeret. (Exhibit 215 is handwritten, with incomplete sentences and unexplained abbreviations.) While hearsay is most assuredly admissible in an administrative hearing, this latitude is not without limit. On this absolutely critical point, respondent is proffering hearsay upon hearsay.[16] What cannot be overcome is the principle that hearsay, standing alone, does not constitute "substantial evidence" and cannot be relied upon for a critical finding of fact. Gehin v. Wisconsin Group Insurance Board, 278 Wis. 2d 111, 692 NW2d 572 (2005). The Gehin case is an appeal of a decision I issued as a Circuit Court Judge. It involved reliance upon medical reports in an administrative decision, without tesimony from the doctor who created the record. The Supreme Court, in reversing the Court of Appeals, sustained my ruling that a medical report as hearsay did not constitute "substantial evidence," that the non-hearsay testimony of a different doctor was "substantial evidence" and carried the day. This means that what Officer Grogan has presented about his head injury through the notes of Lt. Ackeret is not substantial evidence and that respondent cannot establish any facts about his having sustained a head injury with memory loss and judgment impairment simply though the notes of Lt. Ackeret.

ii.) *Officer Grogan mentioned nothing to witnesses in this case about a head injury on the day of the incidents or for three weeks after the accident.*

Despite many opportunities, on December 19, 2004 this seasoned law enforcement officer told none of the people in the neighborhood White Tail Run whom he encountered nor any of the Waukesha County Sheriff's personnel about what he claims to have been a serious head injury. No one reported seeing any injury to Mr. Grogan's head on December 19, 2004. The explanation he offers is that he knew if he complained of such an injury, he would be escorted to the doctor in handcuffs and with deputies. He didn't want that kind of exposure and he didn't want to be late for his young son's birthday party. (Tscpt p. 1008)

His reasoning seems dubious in light of the testimony of Mr. Nedjelo that his offer to call the police was declined by Officer Grogan, who also claims that he was in fear for his life due to the elements and his head injury. **(**Exhibits 18 & 35; Transcript at p. 1005) He reports that he, ". . . told them [the Nedjedlos] I wasn't

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[15] This passage is meant to put to rest all the endless argument about the reasons respondent did not sign a release of medical records for the Department when requested. It is irrelevant to the issue of what was presented at this hearing, and the Garrity argument is illogical since Of. Grogan, himself, introduced medical testimony at the criminal trial. Therefore, it is impossible to fathom just what rights as a criminal defendant Of. Grogan was worried about jeopardizing. These observations are also meant to counter footnote 7, p. 20 of respondent's brief. He was also represented by counsel thoughout.

[16] Exhibit 215, itself, is hearsay as are its contents. It is very sketchy and not totally comprehensible. Obviously, no cross examination is available by use of notes.

feeling well . . . " (Exhibit 18, p.7) and then ". . . that I felt like I was tired and going to fall asleep . . . "[17] (Tscpt. P. 1004). Is it that even in the dark and cold, Officer Grogan was worried about a law enforcement escort and being late for his son's party?

Such a thought process seems highly implausible. More realistic would be for someone in this situation having grave concern about and wanting immediate treatment for an injury to his head that was hurting so "severely" that the sufferer had buzzing in his ears and affected vision making it "very, very difficult to see." (Exhibit 18, p. 5) [18] The unavoidable fact concerning the refusal of the Nedjedlo offer is that at that point there would have been no reason for Mr. Grogan to expect a law enforcement escort for medical treatment from deputies if he were not under arrest for something. If respondent's version of his not having been under the influence of intoxicants were true, it is difficult to imagine why he would have been arrested had he permitted Mr. Nedjedlo to call the police. [19] None of the problematic behaviors at the Ebbe residence had yet taken place. The timing of the Nedjedlo encounter (around 3 a.m.) would have allowed medical treatment without impinging on the birthday party (unless Officer Grogan had to be hospitalized). His injury could have been addressed at the time of the Nedjedlo encounter without the adverse consequences he listed as keeping him from reporting the injury. This means that Officer Grogan has offered no viable reason whatsoever for not getting help for his claimed injury at the time Mr. Nedjedlo offered to call the police for him.

Respondent's lengthy failure to report any injury is difficult to understand even when his excuses could have pertained. Balancing the potential for brain damage against the possible embarrassment of an in-custody medical exam and the missing of a child's birthday party makes the later factors seem very lightweight. The fact that those considerations against reporting could not have been operant during the Nejedlo meeting also lessens their plausibility when cited as reasons for not speaking up later**.**

And finally, there is no escaping the fact that as an experienced police officer, respondent would have known that a head injury so severe as to limit his recall and judgment could only have worked in his favor in explaining the events of that evening to his Department and/or to a jury. He would also have known that fresh evidence is the best evidence; yet, he stayed silent about his injury during all his encounters with neighbors of White Tail Run (six people), his time with several deputies, and when specifically asked whether he had any injuries by the booking officer. None of the Sheriff's Deputies at the scene were able to make a specific inspection of the Grogan vehicle on the night of the accident. Even Mr. Grogan offered no pictures or body shop evidence indicating violent contact between any part of his body and the interior of his car. All of this adds up the respondent having had another reason for saying nothing on December 19, 2004 about a head injury - - - he had no such serious injury, and he knew he would arrested for *something* if police were called to the scene within a few hours of his landing in the ditch.

iii.) Evidence at the scene of the accident is not supportive of the head injury claim:

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[17] Even though Of. Grogan remembers this part of the exchange with Mr. Nedjedlo, the Officer has no recollection of Mr. Nedjedlo's offer to call the police.

[18] It is clear from this interview, that Of. Grogan means the timing of these symptoms to be shortly after he landed in the ditch. Thus, refuting his lawyer's contention that he "may not have realized he was injured, hence he had no reason to seek medical attention from Pfalz or the responding deputies." (Resp. Brief, p. 19).

[19] As between someone who doesn't remember a number of critical points and someone who has no memory problems and no interest in the outcome of this case, the latter is a more reliable source. (See also, the section on Of. Grogan's overall credibility.)

It may well be that Officer Grogan bumped his head when he had his accident, but there is no physical evidence in this record that would support an injury of the magnitude and impact he describes. (And, as noted in the previous section, no opportunity afforded by respondent to even check for physical evidence.) Deputy Bradley Stenulson, a Waukesha law enforcement officer with substantial experience investigating traffic accidents, who came upon the Grogon vehicle in the ditch testified as follows:

> A. I didn't believe there was a head injury involved, sustained during this.
>
> Q. Why?
>
> A. Once again we talk mostly about is the low speed or travel of the vehicle, the speed, the fact that the vehicle entered the ditch at an angle. It did not just back into or off the driveway culvert.
>
> There was no rear end damage to the vehicle, very minor front end damage to the vehicle. There was no cracked windshields, no cracked driver's side windshield which would indicate hitting your head off a windshield, no bent steering wheels. There was nothing to indicate any injury whatsoever. (Transcript at p. 220)

Deputy Stenulson's observations, standing alone would not be determinative of the question, but when considered with the other matters reviewed in this subsection, they are valuable as corroboration.

vi.) Based on the facts and reasoning in the preceding subsections, I am satisfied beyond a preponderance of the evidence that neither respondent's memory nor his judgment were impaired by a head injury on December 19, 2004, nor was his behavior on the date caused by a head injury. I recommend that the Commission so find.

2. Is Officer Grogan generally credible ?

> . . . In determining the credibility of witnesses and weight you give to the testimony of each witness, including expert witnesses, you should consider their interest or lack of interest in the result of this trial, their conduct and demeanor on the witness stand, their bias or prejudice, if any has been shown, the clearness of, or lack of clearness of their recollection, their opportunity for observing and know tihe matters and things given in evidence by them. Wis. JI Civil 215**)**

The conclusion that the head injury of his defense is untruthful not only eviscerates that theory of the case, it also calls into question Mr. Grogan's overall believability. He, of course, is the witness most motivated to lie. With the exception of Lt. Akeret and Chief Wray (whose impartiality respondent challenges), all the other witnesses had no stake whatsoever in the outcome of these proceedings. Any interest the Chief or Lt. Ackeret would have in this case is purely professional and much less intense than respondent's.

As a witness, Michael Grogan seemed unusually resolute in the way he offered his testimony. My personal notes from watching him testify say "steely-eyed." My impression was that he was trying to make his listeners believe him through sheer force of his will and intention. He did not strike me as honest, only as intense, unwilling to countenance disbelief. Instead, disbelief was exactly what he engendered in this listener.

On the "clearness or lack of clearness of recollection" scale, Mr. Grogan registers very low. He blanks on most important points. The following is only a partial list of such instances from the events of December 19th :

1. How he got onto White Tail Run
2. How he ended up in a ditch
3. Using his cell phone twice at around 2:40 a.m.

4. Saying to the Nejedlo's that he was "freezing his fucking balls off"
5. Telling Mr. Nejedlo not to call the police
6. The number of doors he knocked on
7. Petting a dog he says was trying to attack him.

As phrased by Complainant's counsel, these memory losses are "conveniently selective." It is helpful to Officer Grogan that his faulty recall can foreclose anyone from looking too closely into the how and why he ended up in a ditch in a strange neighborhood or why he did not use the cell phone to call for help even though he used it for two other calls, or why he would use such coarse language to the Nejedlos. Mr. Nejedlo, for example, has no reason, other than the truth, to testify that he asked Mr. Grogan whether he should call the police**.** Mr. Grogan, on the other hand, has to avoid having to explain why he answered in the negative. A well-placed memory lapse accomplishes that. There is one explanation that accounts for most of these actions: that Officer Grogan was under the influence of alcohol, and because of this, he rejected contacting the police or calling anyone who might involved them so as to avoid a second OWI conviction, its criminal consequences and Departmental discipline.

When respondent's testimony contradicts that of citizen witnesses, his version is always to his advantage**.** For instance, Officer Grogan denies Mr. Pfalz's report that respondent patted the Pfalz dog on its head. Respondent transforms the dog into a vicious animal poised to attack him. That version, along with his tale of Mr. Ebbe chasing him, maybe even getting a weapon, offer an excuse for this Officer running away. These excuses are an attempt to negate any inference that he was fleeing from any contact with the authorities.

When his testimony is analyzed as directed in Wis JI 215, it lacks indicia of reliability. The sense of Officer Grogan's untruthfulness is reinforced by the rejection, in the previous section, of his claimed impairment due to an injury to his head. This recommended determination as to Officer Grogan's lack of credibility impacts how all the evidence is viewed. It makes the facts in the complaint ring true and reveals respondent's version as false.

C. Recommended Factual Findings:

Once the threshold decision has been made regarding Officer Grogan's pervasive untruthfulness, which compels one to discount any testimony from the respondent that contradicts the allegations in the complaint regarding these counts, it is a simple matter to find that the allegations regarding counts one, two, and three have been proven by a preponderance of evidence. That is my recommendation.

i.) The fact that a jury found beyond a reasonable doubt that Michael Grogan was guilty of disorderly conduct on December 19, 2004 is a stipulated fact and establishes that respondent violated the law.

ii.) There is no way to tell why Mr. Grogan was not convicted in Waukesha County of criminal damage to property, but while such a conviction would make the instant task easier, it is not necessary to a finding that this count has been proven, too. Respondent does not really contest that he did the damage to the door. "Probably" he said. (Tscpt p. 1029) He had to pay over $2,000 restitution for the damage to the Ebbe residence. He did not have permission to enter that home. He has no defense of "necessity" because any injury to his head was not that serious and breaking into the Ebbe residence was not "the only means of preventing imminent . . . death or great bodily harm to the actor . . . " Wis. Stat. § 939.47. The other means, if such jeopardy existed, would have been to use his cell phone to call for help or to have taken Mr. Nejedlo up on his offer to call the police or to have gotten other neighbors to get him help. There is no basis to find anything but that Mr. Grogan intended to cause the damage he did. Mr. Brist at pp. 12 & 13 of his initial brief for the complainant would have this charge elevated to a felony because of Paul Ebbe's uncontradicted testimony

that the replacement cost of the door was $3,200. Clearly, the crime of criminal damage to property has been proven by more than a preponderance of the evidence. [20] Regardless of whether it is denominated a felony or a misdemeanor, it still constitutes a criminal law violation by this Officer. Its classification does not affect this process as much as do the surrounding circumstances.

iii.) Count three charges Officer Grogan with being untruthful during the Department's investigation into the events of December 19, 2004. Exhibits 18 and 35 are *verbatim* reports of what respondent told to Lt. Ackeret, who was conducting the inquiry. They are the initial source of the head-injury "defense" which I have already discounted as untrue in an earlier section of this report. (*See*, pp.11 & p. 14.) Equally false are the respondent's concocted details of failing to remember critical matters; of claiming to be unable to find his cell phone when he was, in fact, using it; of being attacked by a dog he was patting on the head; of telling neither the citizens he encountered nor the Waukesha Sheriff's deputies of a serious injury to his head because of concerns about an in-custody medical exam or possibly missing his son's birthday party. These examples are repeated to convey how extensively Mr. Grogan's intricate web of falsehoods stretched through every aspect of his communications with the Department concerning the events of December 19, 2004. In telling his version of his bizarre behavior to the Internal Affairs Division of his Department , this Officer chose to lie whenever the facts were inculpating him in unlawful behavior. He remained consistent in his untruthfulness even through his testimony in this proceeding.

COUNTS 1-3 AND THE SEVEN STANDARDS OF WIS. STAT. § 62.13(5): JUST CAUSE

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

Agreed fact #2 (page 3 of this report) is conclusive that Officer Grogan knew these Rules. In addition, when he was disciplined for his 2001 OWI, Officer Grogan was told by the Chief and his Captain there that would be ". . . more significant discipline, for future similar violations . . . " (Exhibit 59) OWI comes under Rule 2-219 1. "Unlawful Conduct," as do the first two counts of this complaint. Respondent seems to be arguing that because there is no penalty provision for the Department rules, an officer cannot know the probable consequence of a violation. As pointed out in Complainant's Reply Brief, this Commission, itself, said in finding that this standard had been met in the 2006 discipline of this same Officer:

> 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. Wray v. Grogan, Decision and Order, 11-22-06, p. 2.

Michael. Grogan's unwavering prevarication about the events of December 19, 2004 is perhaps the clearest indication of his awareness of the seriousness of the probable consequences for his behavior. It strongly implies that he knew his job was at stake and that he thought he could lie his way out of this trouble. This is the most logical explanation for his blatant dishonesty. For all these reasons, the recommended finding is that this standard has been met.

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

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[20] The elements of the crime of criminal damage to property as defined in Wis JI Criminal 1400 have been established.

"Grogan concedes that the MPD Rules that he is alleged to have violated are reasonable as written." (Respondent's brief, p. 4) Any challenge to the manner of their application must be addressed in the discussion of other standards.

Basic common sense dictates that professionals charged with enforcing the criminal law should not be guilty of violating it and that they must honest under all the circumstances mandated by the rule. More will be said in the section on Standard seven about the importance of honesty in a police officer. This Standard is met.

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.***

Lt. Ackeret acted for Chief Wray in investigating the facts behind these three counts. These two officials are criticized on many irrelevant points such as whether the investigation was put on hold until the conclusion of the respondent's criminal trial. There is no requirement for such delay, and deferring for so long would have meant witnesses' recollection getting stale and risking the evidence being lost.

Citing the July 3, 2006 investigation report,[21] Officer Grogan misrepresents that Lt. Ackeret included no reference to a head injury in his report to the Chief. Any point to be made from such an oversight is lost by virtue of the fact that the May 18, 2005 interview with Officer Grogan is described in detail at pp.17-20 of the report, with quotes from respondent about his head injury. Most certainly, this non-point does not reflect badly on the investigation. It is this type of tangential and unsubstantiated argument that is meant by the phrase "irrelevant points."

Lt. Ackeret not only read all the Waukesha Sheriff's Department reports, he personally interviewed nine members of that Department, plus eight citizen witnesses, and he talked twice with Officer Grogan, who has been represented by counsel throughout. In addition, Lt. Ackeret secured the respondent's telephone records and tried unsuccessfully to obtain Officer Grogan's medical records concerning his claimed head injury. The lieutenant also attended respondent's criminal trial. The Department afforded Officer Grogan a pre-determination hearing plus extensive opportunities to present his version of events and to counter the contents of the investigative reports.

Other than Lt. Ackeret's failing to wrest respondent's medical records from him and failing to track down people from the bar and wedding to try to verify exactly how much respondent had to drink that night, even respondent cannot point to relevant evidence this very thorough investigation missed. The release of medical records was completely within Mr. Grogan's control, and he had the services of his own counsel to help him with release forms, if that was a problem. This report has already noted that all medical evidence in this case was defensive and should have been provided by the patient/respondent. As to more information about Officer Grogan's alcohol consumption on December 19, 2004, that would have been very helpful, but it is not necessary to the charges that have been brought and it is not known whether it could have been garnered. Such information could also be viewed as defensive since respondent knew full well what the Department's suspicions were. Michael Grogan would have known people from the wedding (including his own wife, supposedly) and from the bar who could have corroborated his claim of how much he drank. He presented none of these people.

The Standard requires "a reasonable effort to discover whether the subordinate did in fact violate a rule or order," not a perfect or a completely exhaustive effort. What the Department did in response to the events

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[21] *See,* Respondent's brief at p. 7. The exhibit number is given as 35, but it actually is **37**.

of December 19 and in response to Officer Grogan's statements, in my opinion, was more than reasonable. It was thorough and thoughtful.

The evidentiary hearings were conducted for the Commission so as to constitute a reasonable effort to determine the merits of the charges. The recommendation is that they be found to have done that . (*See*, pp. 15-17 of this Report.)

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

It is difficult to separate respondent's criticisms under Standard 3 from Standard 4. In his argument his counsel has combined them. Therefore, points made in this and the preceding section can be applied to each Standard. Much is made of the early and continuous concern by Lt. Ackeret and Chief Wray that alcohol overuse accounted for this strange series of events on December 19, 2004. In my opinion, such a suspicion would naturally occur to just about any adult who learned even the broad outlines of what happened on December 19, 2004. The briefs submitted on behalf of the Chief do a thorough job of assembling all the references from witnesses as to the possibility of Officer Grogan being under the influence of alcohol, and they are adopted by reference. [22] These references, combined with the the drinking that was admitted to, his wife's comment that "he's a drinker," his ending up in a ditch, and Officer Grogan's aberrant and irrational behavior, indicate the likelihood of intoxication to any person familiar with the affects of drinking. The fact that this suspicion arose shortly after the incidents does not signify a lack of fairness. Rather it is a recognition that the underlying facts are of the kind classically found in cases involving OWI. Respondent's disagreement with the opinions of Department officials does not impugn the objectivity of their investigation.

Officer Grogan's own lack of candor reinforces the belief that it was alcohol that caused these events and that he had to come up with an innocent explanation. The two cell phone calls from respondent's phone at about 2:40 a.m. make it impossible to accept respondent's contention that he had to go house to house to get help. He has offered no sensible explanation for these irreconcilable "facts." This is just one of the most easily disproven Grogan-versions of that night. The other is his story of a vicious, attacking dog versus the one that citizen witnesses, Joseph and Jill Pfalz, both report Officer Grogan as having patted on the head. If he is willing to lie about these things, he is unlikely to have any compunctions about making up facts about his drinking or head injury. Disbelief of his version, in the face of all this - - - whether by the Department or the hearing examiner - - - seems fully justified, as well as fair and objective.[23]

The hearing itself accorded each side as much time with witnesses as it wanted. In fact several more days had been reserved for the taking of testimony than wereutilized. All the evidence was presented before I came to a firm position regarding these charges. That position came about only after an intensive review of the evidence and thorough examination of each side's briefing. Like the Department's, this examiner's effort was 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.***

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[22] Complainant's initial brief at p. 31-32 and reply brief at p. 3. It must be remembered that we are NOT dealing with an OWI charge. Alcohol involvement goes to whether Of. Grogan had a reason not to want authorities involved and to whether he had a motivation for claiming a head injury.

[23] The fact is that complaints against Lt. Ackeret by Officer Grogan triggered an investigation by the Department of Justice.. While the finding of DOJ pointedly does not reflect on the lieutenant's work in this case, it is telling that this respondent would make meritless charges of criminal conduct against his investigator.

Since the charges were not filed for almost two and a half years after the law violations and almost two years after Officer Grogan first perpetrated his untruthfulness in the Department's investigation, the evidence that the Chief had is almost the same as was presented at the hearings. That evidence has convinced me to the requisite level of proof of Officer Grogan's culpability regarding these three charges, and that analysis has been presented in considerable detail in the fact finding section of this report. This means that the Chief had discovered "substantial evidence" of respondent's violations.

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

Initial unfamiliarity with these Standards, lead me to allow far more evidentiary exploration of the phrase "fairly and without discrimination" than I now believe is appropriate. The phrase in this Standard does not require everyone to be treated identically. Different circumstances can and should be considered by the Chief and the Commission without running afoul of this Standard. This Standard is meant to assure no prejudices or preferences influence the bringing of charges or the results of charging. Obviously this precludes any of the traditionally suspect categories (race, gender, religion, ethnic background, sexual orientation) from being part of this process. Personal favor or disfavor also have no place under this Standard. There is no evidence that any of these improper considerations influenced the Chief's charging decision, and the same can be said unequivocally for the recommendations for findings made in this report.

For respondent, "fairly and without discrimination" is not limited to charging and findings of culpability. By offering an extremely detailed discussion of Exhibit 41, he is contending that under Standard 6, the discipline recommended and imposed must comparable for similar charges. That exhibit lists the type of unlawful conduct or untruthfulness charged against anonymous officers since 1982 and what the discipline was. This 25 year compilation is difficult to translate into a direct comparison. For example, there is no way to know or to take the time and energy to know the details behind each of these entries.[24] For the purposes of comparison it would be necessary to know previous discipline imposed on the officers on the list and their overall service records. The hearing examiner was not given the names of the officers on Exhibit 41, but I assume that complainant's counsel is accurate when he states, "No Madison Police Officer who has been found guilty of both unlawful conduct and untruthfulness, in violation of Departmental rules, has remained on the force." (Reply brief, p. 10)

Exhibit 208 and its use by respondent shows that allowing an expansive reading of Standard 6 can involve a trial within a trial. Exhibit 208 is many pages long and involves a totally different officer and facts quite distinguishable from the instant case. Introduction of this exhibit triggered a relatively lengthy reply from complainant. All this is needlessly distracting from the issues at hand and is not required for compliance with Standard 6.

In any event, I don't believe Standard 6 is intended to reach all the way to discipline imposed or results (such as resignation) reached. For one thing, no one can **impose** a resignation on an officer, but more importantly, the language of the standard asks whether "the chief <u>is applying the rule or order fairly and without discrimination</u>" [emphasis added] which suggests that the inquiry about the chief ends once the charge is brought. Such an inquiry would be to question whether the chief is enforcing a certain rule against only certain people, not whether everyone charged with a certain violation received the same discipline. For the Commission, the inquiry would go to whether it is making its rulings on culpability without regard to

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[24] Without conceding any relevancy to this line of inquiry, I also note that under Wis. Stat. § 904.02 it could have been excluded.

anything but whether the facts have been properly proven. As to both inquiries, there is no evidence to show anything but fair and non-discriminatory application of the rules and evidence.

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.***

Whether it is from the perspective of the chief or of the Commission, it is not possible to see how Officer Grogan can remain a member of the force. This is true because of his continued law violations and because of his egregious and pervasive lying to his Department and to this Board. It is conceivable that had Michael Grogan forthrightly owned up to his misconduct on December 19, 2004 and fully cooperated with the investigation, he could have been ordered to receive treatment and suffered a lengthy suspension, rather than termination. That is far from what happened, however. Through his multiple lies he has compounded his misdeeds so that he cannot be trusted in an occupation that is often described as a "position of trust." In his testimony, Chief Wray did an admirable job of explaining why trustworthiness is a fundamental qualification for being a police officer.

> Again untruthfulness at all levels is very important in terms of maintaining that public trust. There's an expectation on the part of the community that we speak the truth at all times.
>
> They rely upon us to convey information on emergencies. The community relies upon us to relay information or provide information on serious crimes, incidents that are taking place.
>
> And the community has to be able - - has to feel comfortable and believe and rely upon us and believe that we're going to speak the truth at all times. When that happens it undermines our ability to do our job.
>
> Officers are also providing police reports. Officers act on police reports. It's important that in acting on police reports that they can rely on officers telling the truth in those reports.
>
> DAs will craft a criminal complaint based upon what an officer is saying. That information goes to court. Officers have to testify in court. They have to represent things that are taking place, witness statements, et cetera.
>
> We're also in areas while investigating in very sensitive areas of people's homes. We have the opportunity while investigating [to] take in property, valuable property. People need to understand that an officer will speak the truth and not do things that will be - - undermine that.
>
> And so in many ways it is critical, it's just part and parcel with out job, our core responsibility in terms to the ethics, the integrity of the Department that the very foundation rests on officers telling the truth. (Trscpt. Vol. IV, pp. 25-26)

Candor by police officers is required on both a functional level (to do their jobs) and on a perception level (how the public sees and reacts to members of the Department). Known and unaddressed dishonesty by an officer, whether it concerns events occurring on or off the job, erodes public trust in the entire police force. In addition, the magnitude of the lies told by Officer Grogan raises doubts as to whether he would report official matters accurately if such reporting might cast him, personally, in a bad light. The sheer number of falsehoods forming the basis of count three generates skepticism about anything he might say. A finding of culpability on count three means much of respondent's usefulness as a law enforcement office has been lost.[25]

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[25] Per Chief Wray, "Dishonesty of this degree is fundamentally incompatible with the level of trust and professionalism demanded of a sworn law enforcement officer. While your record is outstanding, your ability to fulfill the responsibilities required of a Madison Police Officer - - - particularly your ability to testify in court as a credible witness - - - has been unalterably precluded by your actions in this matter." Exhibit 43.

The law violations composing counts one and two of this complaint are, by any definition, bizarre and disturbing. Every citizen witness who was asked to comment found it shocking or distressing that the person wandering their neighborhood, knocking on their doors, trespassing onto their property, damaging property, and entering a private residence to sleep on the living room floor was a police officer. There is no need to belabor our expectation that law enforcement personnel demonstrate exemplary behavior, not aberrant, disruptive, and criminal conduct.

It is true that prior to December 19, 2004, Michael Grogan had a laudable record of performance with the Department and with the Milwaukee Police Department. But for the events and sequella of that night, he could have been promoted to the rank of detective. He has previously been disciplined for his 2001 OWI conviction and for the November 2006 finding that he failed to cooperate with **this** internal investigation.

The recommendation of the Chief is for termination, and that is concurred in by the hearing examiner. My reasons stated are above. It should be noted that the recommended dismissal of court four does not really impact on the Chief's position since even before the addition of that count, he was calling for respondent's termination from the force. (*See*, Exhibit 43.) Because of Michael Grogan's proven abilities as a police officer, it is particularly regrettable that the shared opinion is that he must forfeit that position. It is never pleasant to have to endorse such a severe consequence, but I am convinced that anything less would be inadequate and a disservice to the Department. I believe that just cause has been solidly established.

Dated this 13th day of December 2007 at Madison, Wisconsin.

___/s/____

Moria Krueger, Hearing Examiner

Order

On the entire record of these proceedings including the foregoing, and pursuant to 62.13(5)(e), Wisconsin Statutes, the Board orders as follows:

1. As penalty for misconduct alleged in Count 1 of the Complaint, Respondent Police Officer Michael Grogan 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 Complaint, Respondent Police Officer Michael Grogan is removed from the Madison Police Department, effective immediately upon the filing of this Order.
3. As penalty for misconduct alleged in Count 3 of the Complaint, Respondent Police Officer Michael Grogan is removed from the Madison Police Department, effective immediately upon the filing of this Order.
4. Count 4 of the Complaint is dismissed, with prejudice.

Approved following deliberations,

and

filed with the Secretary this 19 *day of January, 2008:*

MADISON BOARD OF POLICE AND FIRE COMMISSIONERS

/S/
Wesley Sparkman, Commissioner

/S/
John Talis, President

/S/
Michael Lawton, Commissioner

/S/
Shiva Bidar-Sielaff, Secretary

/S/
Craig Yapp, Commissioner