

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

Sharon Irwin,
Complainant

vs.

Police Chief Michael Koval,
Respondent

and

CONSOLIDATED
DECISION AND ORDER

Shadayra Kilfoy-Flores
Complainant

vs.

Police Chief Michael Koval,
Respondent

SYNOPSIS

The Statements of Charges in these two cases allege violations by Police Chief Michael Koval of various pertinent standards of conduct established for the Madison Police Department. The charging documents do not specify a proposed penalty, but in final argument the Complainants ask the PFC to impose a disciplinary suspension. Following hearing, legal argument, and deliberations, the PFC found that Chief Koval engaged in misconduct by violating applicable standards of conduct with respect to one incident, but also found that there was no misconduct with respect to the two other incidents averred by Complainants. The PFC has only three options for discipline when it finds misconduct by a sworn officer: suspension, demotion, or discharge. The PFC has determined that the Chief's misconduct in the one incident was not of such a nature to warrant any of those extraordinary disciplinary actions.

DECISION

Complainant Sharon Irwin filed a Statement of Charges against Police Chief Michael Koval ("Respondent") on August 15, 2016. Complainant Shadayra Kilfoy-Flores filed a separate but related Statement of Charges against Respondent on August 22, 2016. Both Complainants filed *pro se* but have subsequently been represented by Atty. Alfred Matano. Respondent is represented by Atty. Lester Pines. By stipulation we consolidated the matters for hearing and argument. Following an evidentiary hearing on November 16, 2016, we continued the matters for the scheduled exchange of written closing argument, completed on January 23, 2016, and for our deliberations. We now issue this decision and order in both matters.

Complainants cite various rules and standards of the Madison Police Department and City of Madison, collectively the "Standards of Conduct," alleged to have been violated by Respondent in three distinct acts or incidents. The existence and authority of the Standards of Conduct are not in dispute and we do not restate them here. The Complainants did a thorough job of quoting them in their Statements

of Charges. Although there are additional and more specific statements contained in the Standards, we view the following basic tenets as being at the heart of the Standards as applicable here:

Madison Police Department Code of Conduct

Introduction

Police comprise a special class of public employee. In light of the fact that police presence and actions are highly visible examples, of the desired role of police in a free society - guardians of constitutional rights - police conduct must be above reproach and held to high standards of professional behavior. When police conduct is found to be lacking, criticism is deservedly more warranted given the fiduciary relationship of trust established with the community. If community trust is lost, support and respect is diminished, as is the efficacy of police operations.

Core Values

Integrity. We are committed our work with the highest degree of honesty, integrity and professionalism.

Human Dignity. We acknowledge the value of all people and carry out our duties with dignity, respect, and fairness to all. Furthermore, the Department recognizes and respects the value of all human life.

Code of Conduct

10. Courtesy, Respect and Professional Conduct. Members of the Department shall be courteous and respectful to the public . . . Members of MPD should avoid abusive, profane language and gestures and actions that bring disrespect upon the Department or members of the community.

City of Madison Administrative Procedure Memorandum No. 2-33

Unacceptable Conduct

A(1). Discourteous or abusive behavior toward a . . . member of the general public.

C(1). Engaging in unruly, abusive, violent, bullying or other threatening or intimidating behavior or language . . .

For the purposes of this discussion we characterize the acts or incidents alleged by Complainants as the Stairwell Incident and the Council Chambers Incident (both from the Irwin Statement of Charges), and the Gun Gesture Incident (from the Kilfoy-Flores Statement of Charges.)

Stairwell Incident

In broadest summary, passing over significant differences of nuance and recollection: during the course of a meeting of the Madison Common Council on June 7, 2016, Respondent had occasion to meet and

converse outside the Council chambers with two citizens. Complainants were standing nearby and overhead that conversation, and Complainant Irwin attempted to join in it. Respondent walked with the citizens as they exited the chambers foyer and the City-County Building; Complainants followed them much of the way and Complainant Irwin attempted to engage the two citizens and Respondent in unwanted conversation. Respondent then walked to a stairwell leading to the lower floors of the building and was followed by Complainants, with Complainant Irwin continuing her unwanted attempt to engage Respondent in conversation. Respondent did not converse with Complainants or respond to questions. As Respondent continued down the stairwell, still followed by Complainants, an unrelated third party at the rear of this descending group remarked to Complainant Irwin that she should “Make an appointment” to talk to Respondent, to which Respondent commented to the third party that he would not make an appointment with her and that she was a “raging lunatic.”

It should be stated that Complainant Irwin is the grandmother of Tony Robinson, an individual killed by a Madison police officer on March 6, 2015. That shooting has been the subject of investigation and significant controversy. It was also the subject of litigation brought by the estate of Tony Robinson. At the time of the June 7, 2016, Common Council meeting, Respondent had been directed by legal counsel in that litigation not to discuss any aspect of the matter. Complainant Irwin has persistently and vociferously challenged Respondent and the Police Department to comment on the matter publicly despite being aware that neither the Department nor the Respondent are able to comment thereon. These challenges were the basis of Complainant Irwin’s persistent and unwanted commentary to Respondent in the Stairwell Incident on June 7, 2016. Complainant Irwin describes herself as “...a vet with PTSD...”

Respondent openly acknowledged that he used the phrase “raging lunatic,” and apologized for that statement. Respondent was correct in stating in his testimony that the comments were inappropriate and unacceptable. We regard the comments made in the Stairwell Incident to be a violation of applicable Standards of Conduct.

The PFC fully agrees with both the language and the spirit of the Standards of Conduct. The PFC, in its limited range of authority (hiring, promotions, discipline), continually attempts to ensure that all sworn officers, from patrol officers to the chief, fully understand, appreciate, and adhere to those Standards. We hire the Police Chief. In our role of hiring the City of Madison Police Chief, we expected our Police Chief, as the leader of the Department to serve as an example for the entire Department, and always be beyond reproach no matter how frustrated or how harassed he or she may feel. Respondent failed in this instance.

However, we regard the comments as isolated and literally unique within the Respondent’s record of service. As stated above, we expect from our Police Chief a higher standard than reflected in his comments made in Complainant Irwin’s presence, and in fact we perceive that he does act consistently to that higher standard. Respondent’s unacceptable statement in the Stairwell Incident is an aberration, not part of a pattern. He has apologized publicly, on our record. We understand that Complainants do not accept his apology, and they certainly are not required in any way to do so.

Under Section 62.13(5) of the Wisconsin Statutes, the PFC has only three options for discipline when it determines that a sworn officer has engaged in misconduct: suspension, demotion, or discharge. All of those options are extraordinary and severe in nature. Less severe options that a Police Chief could impose on his or her subordinates, for example requiring counseling or issuing a formal reprimand, are not available to us. Although we conclude that Respondent's comments made in the Stairwell Incident do in fact constitute misconduct, we also conclude that such misconduct does not warrant any of the extraordinary disciplinary actions available to us.

Gun Gesture Incident

Complainant Kilfoy-Flores' Statement of Charges emphasizes this incident, which is also referred to in the Irwin Statement of Charges. Kilfoy-Flores especially perceived a motion of the Respondent's hand toward his hip as a threatening gesture to his sidearm. We simply are not persuaded that such a gesture was made by the Respondent.

Council Chambers Incident

All parties returned to the Council chambers after the events of the Stairwell Incident and after considerable delay Complainant Irwin took her turn in testifying to the Council. She did not adhere to the 3-minute time limit, and after the timing-buzzer sounded Respondent, who was present in the chambers at his usual staff seat, struck the desktop with his hand three times to signal to the presiding Council President that Irwin's time had run. We viewed a videotape of this incident in our record and we conclude that this action by the Respondent was not unreasonable or indecorous, did not violate any Police Department rule or standard, and did not cause a disruption to the Council proceedings. It is noteworthy that Respondent was not admonished by the Council President. We find no misconduct by the Respondent with respect to this incident.

We have examined several technical and formal issues that might bear on our decision in such a matter as this, such as the application of the statutory "Seven Standards of Just Cause" in proceedings brought by citizen aggrieved persons rather than by a Chief. However, we have reached our decision based directly on the evidentiary facts as presented to us on the record and in our hearing, and reflecting our views of the credibility of the witnesses.

This DECISION AND ORDER is our disposition of the matter brought to us and should not be construed as a finding or comment on any other matter or on any other issue not presented to us on the record in this matter.

ORDER

On the entire record in these proceedings, including the foregoing the Statements of Charges in these matters are each dismissed, with prejudice.

*Approved following deliberations, and
filed with the Secretary this 14 day of March, 2017*

MADISON BOARD OF POLICE AND FIRE COMMISSIONERS

/s/
Comm. Wesley Sparkman, President

/s/
Comm. Craig Yapp, Secretary

/s/
Comm. Nia Enemuoh-Trammell

/s/
Comm. Fabiola Hamdan

/s/
Comm. George Kamperschroer

distribution:
Commissioners, Counsel



City of Madison

City of Madison
Madison, WI 53703
www.cityofmadison.com

Legislation Details (With Text)

File #: 14235 **Version:** 1 **Name:** Payment of Legal Fees for Police Officers
Type: Resolution **Status:** Passed
File created: 3/30/2009 **In control:** BOARD OF ESTIMATES
On agenda: 5/5/2009 **Final action:** 5/5/2009
Enactment date: 5/6/2009 **Enactment #:** RES-09-00404

Title: Authorizing a payment of legal fees for the defense of police officers and appropriating \$11,202 from the contingent reserve to the miscellaneous litigation account.

Sponsors: David J. Cieslewicz

Indexes:

Code sections:

Attachments:

Date	Ver.	Action By	Action	Result
5/5/2009	1	COMMON COUNCIL	Adopt	Pass
4/27/2009	1	BOARD OF ESTIMATES	RECOMMEND TO COUNCIL TO ADOPT (15 VOTES REQUIRED) - REPORT OF OFFICER	Pass
4/21/2009	1	COMMON COUNCIL	Referred	
3/30/2009	1	Attorney's Office	Referred for Introduction	

Funds are available in the Contingent Reserve. The current balance is \$1,144,682. There is no impact on the tax levy or State Expenditure Restraint Program eligibility limits.

Authorizing a payment of legal fees for the defense of police officers and appropriating \$11,202 from the contingent reserve to the miscellaneous litigation account.

WHEREAS, a citizen complaint was filed with the Police & Fire Commission (PFC) against Madison Police Officers Christopher J. Kobinsky and Dao T. Xiong; and

WHEREAS, a separate citizen complaint was filed with the PFC against Madison Police Officers Nick Eull and Daniel Borth; and

WHEREAS, the officers in both matters were defended before the PFC by Attorney Gordon E. McQuillen; and

WHEREAS, the defense of the officers in both cases was successful and the charges in both cases were dismissed, with prejudice; and

WHEREAS, the collective bargaining agreement between the City of Madison and the Madison Professional Police Officers Association provides in Article XVII, A., 2., that the City agrees to pay the reasonable attorney's fees for any police officers who are exonerated in a complaint filed with the Police & Fire Commission by dismissal or withdrawal of all the charges; and

WHEREAS, in the first matter, Attorney McQuillen's legal fees total \$8,145.00, and out of pocket costs of \$104.57, for a total billing of \$8,249.57; and in the second matter, Attorney McQuillen's legal fees total \$2,902.50, and out of pocket costs of \$49.90, for a total billing of \$2,952.40; the total for both cases is \$11,201.97; and

WHEREAS, the City Attorney has reviewed the time, hourly rate, and expenses of Attorney McQuillen and finds them to be reasonable for the services provided.

NOW, THEREFORE, BE IT RESOLVED that the City of Madison will reimburse Attorney Gordon E. McQuillen in the amount of \$11,201.97; and

BE IT FURTHER RESOLVED, that a corresponding appropriation of \$11,202 is made from the contingent reserve to the miscellaneous litigation account to make such payment of legal fees.

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

Frank T. White,
Complainant

vs.

Officer Nicholas J. Eull,
Respondent

CONSOLIDATED
DECISIONS AND ORDERS

and

Frank T. White,
Complainant

vs.

Officer Daniel J. Borth,
Respondent

CONSOLIDATED DECISIONS

Case Summary

On November 3, 2008, Complainant Frank T. White filed charges against Police Officers Nicholas J. Eull and Daniel J. Borth, regarding events on October 22, 2008. After preliminary correspondence between Mr. White and Board counsel Scott Herrick, the officers accepted service of the complaints through their attorney on December 22, 2008. We convened our Preliminary Hearing on January 12, 2009, and the Evidentiary Hearing on February 18, 2009.

The Complainant has appeared in person; respondents have appeared in person and by Attorney Gordon McQuillen. After receiving the testimony and exhibits offered by the parties at hearing, we recessed for deliberations and now issue our decisions and orders in this consolidated document.

The focus of the complaint is the entrusting of Mr. White's property to a third person at the time of Mr. White's arrest. We find that Mr. White consented to that procedure and therefore the officers' conduct was not wrongful.

Legal Standard

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:"

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.

These standards are clearly designed to guide decisions on charges prosecuted by chiefs, but the statute does not distinguish formally between such charges and those brought by a citizen such as Mr. White; we are merely directed to consider the seven standards "to the extent applicable," and therefore we must evaluate the applicability of the seven standards to the facts before us in each instance.

The Incident and the Charges: Findings of Fact

We sketch in broad outline pertinent events underlying these complaints, omitting many details. On October 22, 2008, following an episode of social drinking, the complainant was involved in an altercation among himself, another male, and a female. Officers Eull and Borth responded separately and almost simultaneously; Borth was the investigating officer. The three individuals were each charged with ordinance disorderly conduct; the other two were ticketed, but complainant was conveyed to the Dane County Jail pursuant to City of Madison policy because he did not have a permanent address. Complainant had in his immediate possession two large bags or parcels and one somewhat small bag, all containing his personal property. The two larger bags apparently exceeded the size or weight limitations imposed by the Dane County Jail, and following discussion all three bags were left in the care of the female, in order to avoid entrusting them to the police officers and the Madison Police Department property room. The officers provided a handwritten notation of the female's phone number to the complainant. Following release from Dane County Jail on October 23, the complainant attempted to reach the female by phone three times over several days but was unable to do so, and has not yet retrieved the property entrusted to her. Complainant is concerned regarding the loss of his property, particularly regarding lost identification papers.

The three parties each testified at our hearing, and their testimony, while differing naturally in emphasis and emotion, was broadly in accord on many points relevant to our decision. The focus of difference is the question of complainant's consent to entrust his property to the female on the scene. Complainant denies doing so; the officers are clear that he did so. All parties agree that the female received the property, and that her phone number was provided to the complainant.

No party called the female as a witness. No testimony suggests that complainant objected at the time of the arrest to the entrusting of his property to the female.

We observed the demeanor of the parties carefully in our hearing, and while respecting the complainant's good faith and legitimate concerns, we are convinced by the evidence that on October 22, 2008, the officers reasonably and correctly believed that the complainant had consented to their entrusting complainant's property to the female.

Discussion; Conclusions of Law

The complaints do not specify violations of department rules, City of Madison ordinances, or state statutes, referring instead to violation of civil liberty and the 4th, 6th, 8th, and 14th amendments to the U.S. Constitution. During the Evidentiary Hearing Mr. White withdrew his 6th amendment claims.

Respondents did not object to the complaints on the grounds of insufficient specificity of these allegations, and we believe that the complaints in context are sufficiently specific to frame the issues of possible violations. Respondents certainly know and knew that they must conform to the requirements of the U.S. Constitution, on risk of discipline. In short, the complaints are sufficient under the first two of the “Seven Standards,” to the extent that those standards are applicable.

Standards 3 through 6 are suggestive of the due process which we would expect to respect in our decision-making, calling for fairness, objectivity, and non-discrimination. Overall and in summary, in accordance with these elements of the Seven Standards to the extent applicable and in accordance with other legal requirements, in order to impose discipline we must find by a preponderance of the evidence that the respondents did in fact violate a rule or order, in this instance the enumerated amendments to the U.S. Constitution.

We have concluded that the evidence before us has not established that either respondent violated any constitutional standard of conduct. This conclusion reflects very simply our finding that the officers handled Mr. White’s property in accordance with his consent and instructions.

We note that our orders following hearings are limited by statute to a simple set of possible penalties: suspension, reduction in rank, and discharge. In the absence of sustained allegations of misconduct, we need not address possible penalties or orders broadly or in the framework of the seventh of the seven standards, which deals with setting an appropriate penalty for misconduct.

CONSOLIDATED ORDERS

Respondents’ motions to dismiss made at the conclusion of the Evidentiary Hearing are granted. The Complaints of Frank T. White served December 22, 2008, are dismissed, on their merits and with prejudice.

*Approved following deliberations, and
filed with the Secretary this ____ day of March, 2009:*
MADISON BOARD OF POLICE AND FIRE COMMISSIONERS

Comm. Shiva Bidar-Sielaff, President

Comm. Michael Lawton

Comm. Wesley Sparkman, Secretary

Comm. Craig Yapp

Comm. George Kamperschroer

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

Christopher L. Davis,
Complainant

CONSOLIDATED ORDER

vs.

Police Officers Dao T. Xiong and Christopher
Kobinsky,
Respondents

Complainant by Atty. Anthony Delyea having withdrawn the complaint immediately prior to the scheduled evidentiary hearing, and Respondents by Atty. Gordon McQuillen not objecting,

IT IS ORDERED:

The charges in these matters are dismissed, with prejudice.

February 11, 2009

For the Board:

Scott Herrick, legal counsel