

**BOARD OF FIRE AND POLICE COMMISSIONERS
OF THE CITY OF MILWAUKEE**

In the Matter of the Appeal of Matthew A. Palmer

Hearing Dates: July 31, 2013

Hearing Location: 200 East Wells Street, Room 301B, City Hall
Milwaukee, Wisconsin

Commissioners: Kathryn A. Hein
Sarah W. Morgan
Michael M. O'Hear

Appearances: Adam B. Stephens, Assistant City Attorney
For the Milwaukee Fire Department

Attorneys John F. Fuchs and Rebecca D. Boyle
For Appellant Matthew A. Palmer

PROCEDURAL HISTORY

The Chief of the Fire Department, Mark Rohlring, charged Firefighter Matthew A. Palmer ("Palmer") in a complaint dated April 25, 2013, with the following violations of Milwaukee Fire Department ("Department") Rules and Procedures:

1. Rule 24, Section 24.1 – Rules, Orders, Laws, Ordinances, Etc.
2. Rule 24, Section 24.2 – General Conduct
3. Rule 27, Section 27.1 – Charges
4. Rule 27, Section 27.2 – Violations
5. Numbered Notice #2006-06 – Commitment to Professional Conduct and Behavior
6. Numbered Notice #2013-17 – Department-Wide Accountability Expectation

7. Numbered Notice #2012-55 – Workplace Violence Prevention Policy
8. Oath of Office for Firefighter

Palmer filed an appeal with Milwaukee Fire and Police Commission (“Commission”) and a hearing was held.

SUMMARY OF HEARING PROCEEDINGS

The hearing was conducted on July 31, 2013. The hearing was recorded by a stenographic reporter. Testimony was taken from the following witnesses:

For the Fire Chief: Heavy Equipment Operator Brian Giegerich, Milwaukee Fire Department

Assistant Chief Gerard M. Washington, Milwaukee Fire Department

Chief Mark Rohlfing, Milwaukee Fire Department

For the Appellant: Firefighter Matthew A. Palmer, Milwaukee Fire Department

David Seager, Milwaukee Professional Fire Fighters’ Association
Local 215, AFL-CIO

Based upon the evidence received at the hearing, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Palmer was appointed to the Milwaukee Fire Department on August 6, 2000.
2. During his tenure with the Department, Palmer has been subject to approximately fifteen disciplinary actions of varying degrees of severity, as detailed in Exhibit 6. Many of these actions were for tardiness, although a few were for more serious violations.
3. While off duty, on March 18, 2013, or the very early morning of March 19, 2013, Palmer had some drinks at a bar with Captain Mike Ambroch of the Milwaukee Fire Department. Based on their conversation, Palmer came to feel that the Department was not being sufficiently supportive of Captain Ambroch as he recovered from certain injuries.
4. At about 2:30 a.m. on March 19, 2013, Palmer rang the doorbell at the quarters of Engine 2. His intent was to discuss Captain Ambroch’s situation with Deputy Chief Aaron Lipski.

5. Heavy Equipment Operator Brian Giegerich ("Giegerich"), who was on duty at the time, responded to the bell. He had a brief conversation with Palmer inside the fire station door. Video (but no audio) of this conversation was recorded and later presented at the hearing in this matter as Exhibit 3. Based on the video, it appears that the conversation lasted a little less than two minutes. In the video, Palmer appears to be speaking with considerable animation, but we could see no indication that he was behaving in a violent or physically aggressive fashion. Giegerich testified that he did not feel threatened during the encounter and that Palmer did not act in a disrespectful manner to him or anyone else.
6. Giegerich believed Palmer to be intoxicated, based on Palmer's statement that he had been drinking at a bar with Captain Ambroch, a peppermint smell on Palmer's breath, and the fact that he had some difficulty with walking. However, at the hearing, Palmer denied that he was intoxicated. Of course, intoxication is a matter of degree, and no clear line separates "intoxicated" from "not intoxicated," which may account for this inconsistency in the testimony. In any event, we found Giegerich to be a highly credible witness, and we think his characterization of Palmer as intoxicated to be a fair one. Intoxication seems the most likely explanation for the decision to try to take up a personnel matter with Chief Lipski at 2:30 in the morning, for Palmer's agitated state (evident in the video), and for his subsequent behavior. On the other hand, we do not see any indications on the video of extreme intoxication, such as stumbling or obvious loss of balance.
7. Giegerich testified that he explained to Palmer that it was not a good time for him to try to have his conversation with Chief Lipski. Giegerich then ushered Palmer to a back room, where Palmer eventually lay down on a couch. Giegerich explained that he did not think it would have been safe for Palmer to drive home, which is why he brought Palmer into the back room.
8. Giegerich then went upstairs to try to contact someone who could give Palmer a ride home, but was unsuccessful. Giegerich eventually fell asleep. He was awakened at about 5:45 a.m. by a commotion, which was apparently unrelated to Palmer. At that time, Giegerich noticed that Palmer was asleep in a recliner in the firefighters' day room. About fifteen minutes later, Giegerich saw that Palmer had left, apparently by sliding down the fire pole.
9. Other than whether and to what extent Palmer was intoxicated, we do not believe there to be any genuine dispute regarding any of the foregoing findings. Nor does Palmer deny that his actions during the early morning of March 19 were "inappropriate," as he indicated in the statement entered into evidence as Exhibit 4.

CONCLUSIONS OF LAW

10. This appeal is governed by the seven just cause standards set forth in Wis. Stat. §62.50(17)(b).
11. At the hearing, Palmer stipulated that the first four standards are satisfied. Accordingly, we will not discuss them further.
12. The fifth just cause standard is “Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.” Answering this question is a bit complicated simply because of the many overlapping charges filed against Palmer, all of which are based factually on the single short sequence of events that occurred at about 2:30 a.m. on March 19, 2013. We will take the charges in the order in which they were listed above.
13. First, Palmer was charged with violating Section 24.1, which requires all members of the Fire Department to “obey all rules, orders, instructions, the laws of the United States and the State of Wisconsin, the Ordinances of the City of Milwaukee, and all applicable regulations of governing bodies.” However, the charges do not identify any specific “rules, orders, instructions, . . . laws, . . . Ordinances . . . , [or] . . . regulations” that were violated, apart from those identified in other charges. Therefore, we conclude that the alleged violation of Section 24.1 has no independent significance in this matter; Section 24.1 is only violated to the extent that we sustain any of the other charges against Palmer.
14. Second, Palmer was charged with violating Section 24.2, which states, “In matters of general conduct not within the scope of department rules, members shall be governed by ordinary rules of good behavior expected of all law-abiding citizens. Conduct which brings reproach or unfavorable reflection on the department, failure to respect the proper orders of any agent of the law, untruthfulness, insubordination, misconduct, or resisting lawful arrest, shall be considered a violation of these rules, and subjects the offender to the penalties provided.” As a basis for disciplinary action, this is a troublingly vague provision that might be understood to impose on all members an undefined requirement of “good behavior” at all times and under all circumstances. Fairness demands some limitations on this requirement, and we believe that some are reasonably discernible in the text. Most importantly for present purposes, there is the prefatory phrase, referring to “matters of general conduct *not within the scope of department rules.*” Based on this language, we understand Section 24.2 only to apply to conduct that is not addressed by any more specific Department rules. Because we conclude that Palmer’s conduct does fall within the scope of other rules (see below), we conclude that he has not violated Section 24.2.
15. Third, the Chief invoked Section 27.1, which reads in relevant part as follows: “Charges may be preferred when information is received that any member is judged to have violated any of the following: (1) These rules and regulations[,] (2) Fire department numbered notices . . . (4) Any law, including statutes, ordinances, rules, regulations or resolutions, regardless of whether the member of the department has been prosecuted for

such violation[,] (5) Failure to take appropriate or proper action in any situation normally expected or required of any member.” Subsections 1, 2, and 4 are plainly not stand-alone provisions, but require a cross-reference to some other rule, regulation, notice, or law. No such cross-references are made in the charges. Thus, as we concluded with respect to Section 24.1 above, the charges under Subsections 1, 2, and 4 of Section 27.1 are sustainable only to the extent that we sustain some other charge; these subsections lack any independent significance for present purposes.

16. Subsection 5 is different. Like Section 24.2, it is something of a catch-all, evidently intended to provide a basis for disciplinary action in cases not involving violations of more specific provisions. Such provisions are of obvious value, for it is not practically feasible for the Department to spell out in precise terms in a single rulebook all of the conduct that is potentially detrimental to the Department. At the same time, such provisions can also raise fairness concerns to the extent they fail to put members on notice of the conduct for which they may be disciplined. In order to balance these considerations, we believe that Subsection 5 is best read in conjunction with Section 27.2, which is captioned “Violations” and lists various specific forms of misconduct. We understand this to be a non-exhaustive set of illustrations of specific misconduct that will give rise to charges under Section 27.1. In the absence of any clearly articulated alternate theory from the Department, we conclude that Subsection 5 liability in this case depends on whether or not Palmer has committed any of the specific violations listed in Section 27.2. In other words, at least in this particular case, we think it best to look to Section 27.2 in order to determine “what is normally expected or required of any member.”
17. This brings us to the fourth set of charges, that is, the alleged violations of Section 27.2. The Chief has invoked five specific subsections of Section 27.2: (1) commission of a felony or misdemeanor under any law, (2) intoxication, (5) negligence, (13) discourtesy or insolence, and (20) any other act or omission contrary to good order and discipline. We see no basis in the evidence for (1) or (5). There might be slightly more basis for (13), but Giegerich specifically denied that Palmer acted discourteously, and if anyone would have grounds to complain about Palmer on this score, it would be he.
18. On the other hand, for reasons that we discussed above, there is a strong basis in the record for concluding that Palmer was intoxicated. This raises the question, though, of whether the Department really has or claims to have the authority to discipline any member who is intoxicated to any degree at any time or place, without regard to any extenuating circumstances. Read this way, Section 27.2(2) would arguably be an overbroad and oppressive intrusion by the Department into the private lives of its members. However, we need not in this case decide the outer bounds of the conduct regulated by Section 27.2(2), for we are confident that, at a minimum, the Department can discipline a member for being intoxicated on the Department’s own property (whether or not the member is on duty). This seems a commonsensical proposition that can hardly take any member by surprise. Thus, we conclude that Palmer’s intoxication did violate Section 27.2(2).

19. We also conclude that Palmer's conduct constitutes "any other act or omission contrary to good order and discipline." We reach this conclusion based on a combination of considerations: Palmer's stationhouse visit disturbed the rest of at least one fellow member (Giegerich); the hour of his visit, as even Palmer concedes, was inappropriate; Palmer's highly animated conversation with Giegerich, while not physically threatening, was hardly orderly in its appearance; Palmer was attempting to involve himself in another member's personnel matter; and he was attempting to do so in a direct, personal fashion with a senior manager in the Department. Based on all of this, we conclude that Palmer violated Section 27.2(20).
20. Fifth, the Chief charged Palmer with violating Numbered Notice #2006-06. The relevant portion appears to be a prohibition on "negative and harmful behaviors among personnel." We believe that it is a "negative and harmful behavior" for a member to challenge in a loud and open fashion a manager's handling of another member's personnel matter, at least when this behavior occurs at a concededly inappropriate time and place and is disruptive to other members (as Palmer's conduct here was disruptive to Giegerich's rest). While Palmer's conduct was not *physically* harmful to anyone, we believe that it was harmful to good order and discipline in the Department. For these reasons, we conclude that Palmer did violate Numbered Notice #2006-06.
21. Sixth, the Chief charged Palmer with violating Numbered Notice #2013-17, which requires accountability of members. "Accountability," in relevant part, "is the acknowledgement and assumption of responsibility for actions, decisions, and policies. . . encompassing the obligation to report, explain, and be answerable for resulting consequences." It appears to us that Palmer has acted consistently with the accountability requirement. He provided a statement to Assistant Chief Washington regarding his conduct on March 19, 2013, and in it acknowledged that what he did was "inappropriate" and reflected a "lapse in judgment." (Exhibit 4) At the hearing, it was suggested that Palmer was disingenuous to claim in his statement that "[a]fter [he] entered Engine 2 and took some time to rethink and reevaluate [his] actions," he "came to the conclusion it was inappropriate to discuss any situation with Chief Lipski late at night." This may indeed downplay the significance of Giegerich's role in calming Palmer, but it is hard to tell based on the evidence we have before us what exactly Giegerich said and what impact it had on Palmer. So, while Palmer's statement may, to some extent, put a more positive spin on his conduct than is truly warranted, we are not able to find there is substantial evidence to demonstrate a violation of Numbered Notice #2013-17.
22. Seventh, the Chief charged Palmer with violating Numbered Notice #2012-55, which prohibits "aggressive or hostile behavior that creates a reasonable fear of injury to another person or subjects another individual to emotional distress." As indicated in our findings of fact, we do not view Palmer's behavior as "aggressive or hostile," and neither did Giegerich, who would have been the only apparent "victim" of any aggression or hostility. There was some discussion at the hearing of whether the governing standard is "objective" or "subjective," but we need not resolve that dispute, as we believe that the charge fails under either approach.

23. Finally, the Chief charged Palmer with violating his oath of office. The oath requires Palmer to obey laws, ordinances, rules, regulations, and orders of superiors, but imposes no more specific duties than these. In this sense, the oath of office charge seems largely duplicative of the Section 24.1 charge, and we reach the same conclusion as to it that we reached as to the latter: it has no independent significance for present purposes.
24. In sum, with respect to the fifth just cause standard, we conclude that the Chief has met his burden of proof (preponderance of the evidence) and presented substantial evidence in support of three alleged violations: (1) intoxication, (2) acts or omissions contrary to good order and discipline, and (3) negative and harmful behaviors among personnel.
25. The sixth just cause standard is “Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.” Normally, we assess this standard primarily by reference to the sanctions imposed in other, comparable cases. In this case, however, we are informed by the Chief that there are no comparables, and Palmer has not disputed this contention. We see no reason to count the absence of comparables against the Chief (or *for* him, for that matter). The evidence we do have, in the form of testimony from Chief Rohlfing and Assistant Chief Washington, provides ample basis for concluding that the Department undertook a careful, objective investigation of the March 19 incident; considered a range of potential disciplinary actions; and based its ultimate decision on legally permissible and appropriate considerations. We conclude that the Chief has met his burden of proof (preponderance of the evidence) with respect to the sixth just cause standard.
26. The seventh and final just cause standard is “Whether the proposed discipline [in this case, termination from the Department] reasonably relates to the seriousness of the alleged violation and to the subordinate’s record of service with the chief’s department.” This is a close question, for Palmer’s violations were not especially high on the seriousness scale. No one was physically harmed. While Palmer’s conduct was disruptive and contrary to good order and discipline, the disruption was neither lengthy nor particularly intense. Additionally, Palmer seems to have acted more in the heat of passion than in a coldly calculated manner, and, to his credit, he determined rather quickly after his arrival at Engine 2 that he was acting inappropriately (due in part, perhaps, to Giegerich’s response). Moreover, he has to a meaningful (if perhaps not quite complete) extent accepted responsibility for his misconduct.
27. At the hearing, the Department indicated that it nonetheless viewed Palmer’s misconduct as quite serious in light of many recent, tragic incidents of workplace violence across the country. We appreciate and applaud the Chief’s concern for workplace safety. However, we do not believe that Palmer’s actions on March 19 can fairly be characterized as an incident of workplace violence. What we see in the video and through Giegerich’s testimony is a somewhat agitated employee expressing his displeasure regarding a manager to a colleague. There is no doubt that such exchanges can, and sometimes do, escalate into violent confrontations. Indeed, it is *possible* that Palmer *might* have become violent had Giegerich not responded in the calm, professional manner in which he did. Based on the evidence before us, however, we think that possibility of violence to be a

highly speculative one, and we would be reluctant to approve so severe a sanction as termination without more.

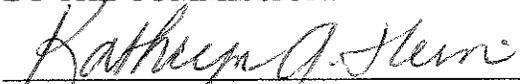
28. On the other hand, the seventh just cause standard instructs us to consider not only the seriousness of the violation, but also “the subordinate’s record of service with the department,” and Palmer’s record of service is a very troubling one indeed. To be sure, many of the prior disciplinary actions relate only to workplace tardiness, but others are for considerably more serious matters, such as the so-called “Moore-Nelson” computer case, for which Palmer was nearly terminated. (Exhibits 6, 7, 8) More important than the seriousness of any individual matter, though, is the cumulative effect—the extraordinary number and frequency of violations. We cannot conclude but that Palmer, for whatever reason, has proven himself chronically incapable of conforming his behavior to the Department’s legitimate expectations. The present violation, while perhaps not the most serious when viewed in isolation, is the proverbial “straw that broke the camel’s back.” In saying this, we do not discount the testimony of President David Seager that Palmer has a positive reputation among his peers. Nor do we doubt Palmer’s own testimony that he has put himself in harm’s way on many occasions in order to help others. But, in the end, we cannot see our way past Palmer’s disciplinary record. However sincere Palmer may be in his desire to overcome these problems, we have little confidence that the present violation would be his last.
29. In sum, we conclude that the Chief has satisfied the seventh just cause standard by a preponderance of the evidence.

DECISION

The seven just cause standards are satisfied with respect to the charges of (1) intoxication, (2) acts or omissions contrary to good order and discipline, and (3) negative and harmful behaviors among personnel, and with respect to the recommended discipline of termination from the Department. Pursuant to Wis. Stat. §62.50(17)(a), we conclude “that the good of the service requires that [Palmer] be permanently discharged” as to each of the three charges that we have sustained.

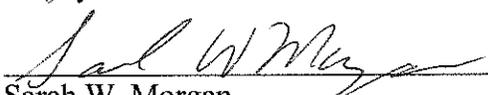
Dated at Milwaukee, Wisconsin.

BY THE COMMISSION:



Kathryn A. Helm

August 5/15, 2013



Sarah W. Morgan

August 14, 2013



Michael M. O'Hear

August 14, 2013