COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1818 **Cir. Ct. No. 2001CV1585**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CHRIS GENTILLI,

PETITIONER-APPELLANT,

V.

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

RESPONDENT-RESPONDENT,

DEBRA H. AMESQUA,

INTERVENOR-RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MORIA KRUEGER, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 CURLEY, J.[1] Chris Gentilli appeals from the order affirming the decision of the Madison Board of Police and Fire Commissioners (the board) to terminate Gentilli's employment with the City of Madison Fire Department. The case was before the circuit court on certiorari review. Gentilli contends that he was discharged under fire department rules that are unconstitutionally vague as applied. We disagree and affirm the circuit court.[2]

I. BACKGROUND.

¶2 Gentilli had been a firefighter with the City of Madison Fire Department (MFD) since 1980. In 1999, the Madison Police Department, the Federal Bureau of Investigation, and the Dane County Drug and Gang Task Force obtained information about activities involving illegal drugs among City of Madison firefighters. The Madison Fire Chief, Debra Amesqua, was informed of the discoveries and an investigation ensued. The investigation revealed that while off-duty, Gentilli had, among other things, used and possessed cocaine and marijuana. During an interview in January of 2000, Gentilli initially denied most of the allegations, but ultimately admitted that he had consumed and shared

[1] This appeal was originally filed with District IV of the Wisconsin Court of Appeals, but was transferred to District I due to the involvement of a District IV judge with the case at the circuit court level.

[2] The attorney representing Gentilli is the same attorney who represented David Barlow and Daniel Madden in appeals that resulted in our two recent unpublished decisions, ***Barlow v. Board of Police & Fire Commissioners of City of Madison***, No. 2004AP2614, unpublished slip op. (WI App Nov. 10, 2005), and ***Madden v. Board of Police & Fire Commissioners of City of Madison***, No. 2004AP3052, unpublished slip op. (WI App Dec. 22, 2005). Likewise, the chief and the board are represented by the same attorneys. With few exceptions, the briefs in this case contain, often word for word, the same legal arguments as the briefs in the ***Barlow*** and ***Madden*** appeals. Thus, much of our decision tracks our decisions in ***Barlow*** and ***Madden***.

cocaine and marijuana over a ten-year period. Gentilli subsequently recanted the admissions made in January 2000.

¶3 As a result of the investigation, disciplinary charges were filed by Fire Chief Amesqua against Gentilli and a number of other firefighters before the Board of Police and Fire Commissioners, pursuant to WIS. STAT. § 62.13(5)(b) (1999-2000),[3] for violating rules of the fire department. On September 19, 2000, Gentilli was charged with five counts for violating five MFD Rules: Rules 18, 39, 47, 51, and 58. Rule 18 provides:

> Members shall be efficient and capable in the service and must not neglect their duty. They shall hold themselves in readiness, at all times, to answer the calls and obey the orders of their superior officers. They shall treat their superiors with respect. In their demeanor to the associates on the Force, they shall be courteous and considerate, guarding themselves against envy, jealousy or other unfriendly feeling. They shall refrain from all communication to their discredit, except to their superior officers, whom it is their duty to inform of every neglect or disobedience of orders that may come to their knowledge. They shall conform to the rules and regulations of the Department, observe the laws and ordinances, and render their services to the city with zeal, courage and discretion and fidelity.

Rule 39 provides: "Members must conform to and promptly and cheerfully obey all laws, ordinances, rules, regulations, and orders, whether general, special or

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[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

WISCONSIN STAT. § 62.13(5)(b) (1999-2000) provides:

> Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body, or by any aggrieved person. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

verbal, when emanating from due authority." Rule 47 provides: "Members of the Department are required to speak the truth at all times and under all circumstances, whether under oath or otherwise." Rule 51 provides: "Officers and members shall at all times conduct themselves so as not to bring the Department in disrepute." Rule 58 provides: "It is the duty of every person connected with the Fire Department to note and report to their superior officer or to the Chief any and all violations of the Rules and Regulations which may come under their notice."

¶4 Count one alleged that Gentilli had "repeatedly used, possessed, and purchased marijuana and cocaine in violation of federal and state laws prohibiting the unauthorized possession of controlled substances," and had thereby violated MFD Rules 18 and 39. Count two alleged that Gentilli had "distributed … cocaine on at least two occasions in violation of federal and state laws prohibiting the unauthorized distribution or delivery of controlled substances," and had thereby violated MFD Rules 18 and 39. Count three alleged that Gentilli "had repeatedly been untruthful in investigative interviews regarding his involvement in illegal drug activity," and had thereby violated MFD Rule 47. Count four alleged that "Gentilli's repeated possession, use, purchase, and distribution of cocaine" and "untruthfulness in his interview with federal and local law enforcement officials and with Madison Fire Department investigators" "place the Madison Fire Department in disrepute," violating MFD Rule 51. Count five alleged that Gentilli possessed first-hand knowledge of the illegal drug activities of at least four co-workers in the Madison Fire Department," and "[a]t no time did Gentilli advise superiors in the MFD of the misconduct of any of his co-workers" violating MFD Rule 58.

¶5 At a hearing conducted before the board, testimony from witnesses, as well as Gentilli's own testimony, established that the five MFD rules in

question had been violated. On June 6, 2001, the board issued a decision and order concluding that Gentilli had committed each of the alleged violations and, pursuant to WIS. STAT. § 62.13(5)(e) (1999-2000), imposed a penalty of discharge on each count.

¶6 Gentilli appealed the board's decision through both a statutory appeal under WIS. STAT. § 62.13(5)(i) (1999-2000),[4] and a parallel common-law certiorari proceeding. The circuit court granted the board's motion to defer the certiorari review pending the outcome of the statutory appeal. In a statutory appeal, the circuit court reviews the board's decision to determine whether the board had "just cause" to discipline the person in question. ***Id.*** On July 2, 2002, the circuit court determined that the board did have "just cause" to discipline Gentilli, and upheld the board's decision. The court also dismissed the certiorari review, which argued that MFD Rules 18, 39, 47, 51, and 58 are unconstitutionally vague, finding that Gentilli had failed to advance an additional basis for review for the certiorari proceeding that had not been addressed in the statutory appeal.

[4] WISCONSIN STAT. § 62.13(5)(i) (1999-2000) provides in pertinent part:

> Any person suspended, reduced, suspended and reduced, or removed by the board may appeal from the order of the board to the circuit court by serving written notice of the appeal on the secretary of the board.… The court shall upon application of the accused or of the board fix a date of trial.… The trial shall be by the court and upon the return of the board, except that the court may require further return or the taking and return of further evidence by the board. The question to be determined by the court shall be: Upon the evidence is there just cause, as described under par. (em), to sustain the charges against the accused? … If the order of the board is reversed, the accused shall be forthwith reinstated and entitled to pay as though in continuous service. If the order of the board is sustained it shall be final and conclusive.

¶7 The trial court's decision in the statutory appeal is final, ***id.***, but the dismissal of the certiorari review may be appealed. Gentilli appealed the dismissal of the certiorari review to this court, and this court certified the appeal to the Wisconsin Supreme Court. The supreme court accepted the certification, and in ***Gentilli v. Board of Police & Fire Commissioners of City of Madison***, 2004 WI 60, 272 Wis. 2d 1, 680 N.W.2d 335, determined that the trial court had erred as a matter of law in dismissing the action without considering the merits of Gentilli's constitutional claims and remanded the certiorari proceeding. ***Id.***, ¶3. The court reasoned that Gentilli could pursue the constitutional issues in a petition for certiorari, even if those issues "somewhat overlapp[ed]" the issues decided in the statutory appeal:

> The constitutional issues of vagueness or overbreadth of administrative rules that Gentilli raised in his petition for a writ of certiorari are issues of law that even if somewhat overlapping with the issues in the statutory appeal proceeding may be considered under certiorari because they concern whether the PFC board kept within its jurisdiction and proceeded on a correct theory of the law.

Id. On remand, the trial court upheld the decision of the board and issued a Memorandum Decision and Order. This appeal follows.

II. ANALYSIS.

¶8 In ***Gentilli***, the supreme court explained the standard of review to be employed in cases where the board's determination is subject to both statutory and certiorari review, noting that "Wis. Stat. § 62.13(5)(i) is not an exclusive procedure for review of a disciplinary order of a board of police and fire commissioners. The statute merely limits a circuit court's scope of certiorari review, but does not eliminate a circuit court's ability to issue writs of certiorari[,]" ***Gentilli***, 272 Wis. 2d 1, ¶21 (footnote omitted). The court thus made

clear that the correct standard remains the one set forth in ***State ex rel. Kaczkowski v. Board of Fire & Police Commissioners of City of Milwaukee***, 33 Wis. 2d 488, 148 N.W.2d 44 (1967), according to which "a circuit court may determine in a certiorari action whether a board of police and fire commissioners kept within its jurisdiction and whether the board proceeded on correct theory of the law." ***Gentilli***, 272 Wis. 2d 1, ¶21 (footnote omitted).

¶9 Gentilli's claims that the MFD Rules are unconstitutionally vague as applied because they were applied differently in this case than they had been in the past, and, as a result, did not give him fair notice that his off-duty drug use would subject him to being discharged.[5]

¶10 Vagueness is a due process issue, and due process determinations are questions of law that this court reviews *de novo*. *See* ***State v. Aufderhaar***, 2005 WI 108, ¶10, 283 Wis. 2d 336, 700 N.W.2d 4. When discussing vagueness, our supreme court has explained: "'[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process law.'" ***State ex rel. Kalt v. Board of Fire & Police Commissioners for City of Milwaukee***, 145 Wis. 2d 504, 510, 427 N.W.2d 408 (Ct. App. 1988) (quoting ***Bence v. Breier***, 501 F.2d 1185, 1188 (7th Cir. 1974)). "This rule applies to administrative regulations affecting conditions of

[5] Chief Amesqua raises a mootness claim with respect to Gentilli's argument. Amesqua argues that Gentilli contends only that Rules 18 and 39 are vague as applied. She points out, however, that the board imposed the penalty of discharge for each of the counts of misconduct. Thus, according to Chief Amesqua, Gentilli's failure to argue that Rules 47, 51, and 58 are vague as applied renders our resolution of whether Rules 18 and 39 are vague as applied moot. Because we decide that Rules 18 and 39 are not vague as applied, we do not address the mootness question.

governmental employment in the same manner as it applies to penal statutes." ***Id.*** (footnote omitted).

¶11 The only issue Gentilli pursues on appeal is whether the fire department rules identified above are unconstitutionally vague as applied.[6] We agree with Chief Amesqua[7] that Gentilli effectively concedes that the fire department rules under which he was disciplined are not unconstitutionally vague on their face. Gentilli does not, therefore, argue that the rules are void for vagueness, but instead makes an as-applied vagueness challenge. *See* ***United States v. Powell***, 423 U.S. 87, 92 (1975) (a statute which is void on its face for vagueness is one that "may not constitutionally be applied to any set of facts").

¶12 Gentilli claims that given the board's previous application of the rules, he did not have fair notice that his off-duty conduct could constitute a rule violation and subject him to discharge. We interpret Gentilli's argument as having two prongs: first, that Gentilli did not receive notice that his off-duty conduct could result in a rule violation, and, second, that Gentilli did not receive notice that his particular conduct could result in discharge because previous violations had been treated quite differently. We reject both arguments.

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[6] At one point in his brief, Gentilli asserts that the fire department rules "are breathtakingly broad in their potential application." We read this assertion to be a constitutional overbreadth argument, but decline to address it because Gentilli does not provide legal authority and does not present developed argument on the topic. *See* ***Cemetery Servs., Inc. v. Department of Regulation & Licensing***, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998) (we do not address constitutional arguments that are inadequately developed).

[7] Both the board and Fire Chief Amesqua are respondents to this appeal. They have submitted separate briefs. However, because much of their respective arguments overlap, we will refer to both parties as Chief Amesqua.

A. Whether Gentilli Had Notice That His Off-Duty Conduct Could Result In A Rule Violation

¶13 Gentilli contends that administrative rules that clearly apply to given conduct on plain reading may *become* vague through the way in which those rules are applied. Thus, Gentilli argues that the department's historical failure to apply the rules to off-duty conduct created vagueness because it led employees like Gentilli to believe that the rules, despite their plain language to the contrary, did not apply to off-duty conduct.[8] We disagree.

¶14 A party making an as-applied challenge to a statute must "prove, beyond a reasonable doubt, that as applied to him the statute is unconstitutional." ***State v. Joseph E.G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137. This analysis applies to administrative regulations in the same way it does to statutes. *See* ***Wisconsin Builders Ass'n v. DOT***, 2005 WI App 160, ¶34, 285 Wis. 2d 472, 702 N.W.2d 433. Thus, Gentilli has the burden of proving, beyond a reasonable doubt, that, as applied to him, the rules are unconstitutionally vague. *See* ***Joseph E.G.***, 240 Wis. 2d 481, ¶5.

¶15 As support for his particular as-applied vagueness theory, that is, that a rule may lose its plain meaning, Gentilli cites ***Wolfel v. Morris***, 972 F.2d 712 (6th Cir. 1992), and ***Waters v. Peterson***, 495 F.2d 91 (D.C. Cir. 1973). ***Wolfel*** and ***Waters*** involved prison inmates and government employees, respectively, who engaged in conduct for which they could have been, and were, disciplined

[8] To the extent Gentilli tries to distinguish off-duty *drug-related* conduct from off-duty conduct generally for purposes of discipline under the rules, we are not persuaded. None of the rules under which he was disciplined expressly refer to drug-related conduct. All are couched in terms of any conduct that would constitute a failure to obey the law, bring the fire department into disrepute, constitute a failure to inform a superior officer of rule violations, or a failure to tell the truth.

under a plain reading of the applicable rules. *See* ***Wolfel***, 972 F.2d at 715, 718; ***Waters***, 495 F.2d at 94, 99. The courts in both of those cases concluded that the disciplinary rules were vague as applied because the rules had not previously been applied to the conduct at issue, even though the parties themselves or other parties had previously engaged in the same conduct. ***Wolfel***, 972 F.2d at 717; ***Waters***, 495 F.2d at 100. In other words, until disciplinary action was taken against the parties in ***Wolfel*** and ***Waters***, the parties and others had engaged in the same conduct on numerous occasions without consequence. The parties, therefore, had no notice that their conduct would subject them to discipline under those rules and, for that reason, the courts concluded that the rules were vague as applied. ***Wolfel***, 972 F.2d at 717; ***Waters***, 495 F.2d at 101.

¶16 ***Wolfel*** and ***Waters*** are not binding on this court, and it is not readily apparent that the vagueness analysis used in those cases flows from an accurate interpretation of the due process clause. However, we need not address that issue because Gentilli's argument contains a flaw that does not require resolution of whether ***Wolfel*** and ***Waters*** use a correct as-applied vagueness analysis. Even assuming that the ***Wolfel***/***Waters*** vagueness analysis is correct, to conclude that a rule is unconstitutionally vague as applied under that analysis requires a record that shows that the past application of the rules would lead a person to believe that the conduct at issue is not subject to the discipline imposed. Here, the record does not show that the fire department or the Board of Police and Fire Commissioners failed to previously apply the disputed rules to identified instances of off-duty conduct.

¶17 Gentilli refers to testimony by Assistant Fire Chief Carl Saxe, Fire Chief Amesqua, and Fire Department Lieutenant Joseph Conway, in an effort to

show that the established practice at the MFD was that the rules did not apply to off-duty conduct, absent evidence of an on-duty impact.

¶18 Gentilli cites a portion of Assistant Chief Saxe's testimony, which described a "generic discussion" about "potential damage control" with respect to the emerging information about drug use among firefighters. Saxe indicated that the parameters being considered were that an employee dealing or using drugs would result in immediate suspension, an investigation, and possible termination. Gentilli does not, however, explain how this reference to a discussion about responses that were considered shows that the rules had not previously been applied to off duty-conduct. The testimony appears to in fact support the notion that termination was a penalty that was being considered.

¶19 The portions of Chief Amesqua's testimony on which Gentilli relies concern a document from 1980 involving a former firefighter. Chief Amesqua admitted never seeing the document, and after reviewing it, noted that it was an agreement between the then-Fire Chief and the former firefighter regarding "chemical abuse." Chief Amesqua indicated that the document made no mention of an investigation, and she concluded that there was very little she could deduce from it. Chief Amesqua was then questioned about two other instances, one of which was described as an individual being "involved in a prior situation," and one which was described simply as "smoking marijuana." Chief Amesqua acknowledged knowledge of both instances, and specifically noted that the situation involving the firefighter who had smoked marijuana also involved issues related to a possible inappropriate revocation of his probationary period as a result of the use of police records, rather than an internal investigation by the department, and that the firefighter was therefore brought back to the department for other reasons, "not because he was given a second chance for using

marijuana." We do not see how the limited portions of Chief Amesqua's testimony that Gentilli cites support his claim that discipline was not previously imposed for off-duty conduct.

¶20 The most significant testimony cited by Gentilli is that of Lieutenant Conway, who testified that he believed the rules had not previously been applied to off-duty conduct. Conway's testimony covered his knowledge of Madison firefighters who had engaged in some type of drug use or possession at some point. Some of the incidents about which Conway testified involved random drug and alcohol testing and, for most of the rest of the incidents, it is unclear how the firefighters' drug use was discovered. The firefighters all received some sort of discipline, or entered into a settlement in which they signed an agreement, which, if violated, could lead to their discharge. As such, Lieutenant Conway's testimony does not show that previous off-duty drug violations were not subject to discipline under the rules in question. In fact, Conway's testimony indicates that, in at least some prior instances, off-duty drug use had significant consequences, including the threat of discharge.

¶21 For instance, Gentilli cites portions of Conway's testimony in which Conway testified about the investigations of a firefighter and a lieutenant. Conway referenced a meeting at which he remembered Chief Amesqua stating, "drug use in itself doesn't warrant termination…" and recited a report from the meeting which included a section that read "suspended with pay. Chief has taken a soft stance; does not want termination." Gentilli, however, also cites a portion in which Conway testified that Chief Amesqua wanted an investigation into the alleged drug use by the two men, and a portion in which Conway referenced a meeting at which Chief Amesqua stated she was seeking their termination and acknowledged that Chief Amesqua's "stance changed." Given that both men were

part of the same investigation as Gentilli, anything involving the two cannot be referred to as indicative of prior practices. In addition, because Amesqua sought the termination of both men, and because both men retired after complaints seeking their termination were filed against them, rather than showing that off-duty drug-related misconduct had previously gone undisciplined, these instances appear to show the opposite.[9]

¶22 In addition, an examination of case law leads to the conclusion that these rules have previously been applied by the fire department and the board to off-duty conduct. In ***Greer v. Amesqua***, 212 F.3d 358 (7th Cir. 2000), a case involving both conduct and discipline that pre-date a large portion of the conduct in this case, a federal court upheld the board's decision to dismiss a firefighter for off-duty conduct in 1997 that violated, among others, Rule 51, which prohibits conduct that would bring the fire department into disrepute. ***Id.*** at 365, 369. Additionally, in 1997, a firefighter was dismissed under the rules directing firefighters to obey all laws (Rules 18 and 39) for a crime committed prior to his becoming a firefighter. *See* ***City of Madison v. DWD***, 2002 WI App 199, ¶¶2-3,

[9] In another portion of Conway's testimony that Gentilli cites, after explaining that the department has a zero tolerance rule when it comes to drug usage on the job, Conway was asked whether this policy meant that "it's no problem if a firefighter abuses drugs while off duty?" Conway responded, "No, that's not what I stated," and went on to describe various ways, not including discipline, in which he might intervene if he were to be informed about off-duty drug usage by a firefighter. When asked whether he would report knowledge of off-duty drug use by a firefighter to the Fire Chief under Rule 58, Lieutenant Conway responded that he would not report it because he does not trust Chief Amesqua because "with Chief Amesqua's history of launching investigations and discipline, … if we brought it to her attention that … would be her course of action." While such comments by Conway reflect disagreement between him and the Fire Chief, they do not imply a history of unwillingness to discipline firefighters for off-duty drug use. To the contrary, they appear to show that the Fire Chief is especially willing to investigate misconduct and impose discipline.

257 Wis. 2d 348, 651 N.W.2d 292, *rev'd on other grounds*, 2003 WI 76, 262 Wis. 2d 652, 664 N.W.2d 584.

¶23 Gentilli effectively admits that a plain reading of the rules informs firefighters that the rules apply to off-duty conduct.[10] Under Gentilli's ***Wolfel/Waters*** argument, in order to show that the rules were rendered vague by the lack of prior application, Gentilli needed to point to evidence in the record showing that the board allowed off-duty rule violations to go undisciplined. He has not done so.

B. Whether Gentilli Had Fair Notice That His Conduct Could Result In Discharge

¶24 Gentilli also argues that the rules were vague as applied because previous enforcement of the rules led him to conclude that he would not be discharged for his conduct. We disagree.

[10] Both parties discuss Gentilli's own subjective beliefs. However, even assuming the validity of Gentilli's vagueness-as-applied argument, under it, a person's subjective beliefs are not relevant. The court in ***Waters v. Peterson***, 495 F.2d 91 (D.C. Cir. 1973), one of the cases Gentilli relies on, wrote:

> In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Supreme Court found it "irrelevant that petitioners at one point testified that they had intended to be arrested," since the determination whether a statute affords "fair warning ... must be made on the basis of the statute itself and the other pertinent law, rather than on ... an ad hoc appraisal of the subjective expectations of particular defendants." 378 U.S. at 355-356 n.5.

Id. at 100.

¶25 WISCONSIN STAT. § 62.13(5)(e) authorizes the board to discharge a firefighter if the board determines that rule-violation charges brought against the firefighter are sustained.[11] Further, a rule is not vague so long as one is put on notice of the conduct proscribed and the severity of the penalty that may be imposed. *See* ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 627, 563 N.W.2d 154 (1997); *see also* ***State v. Cissell***, 127 Wis. 2d 205, 216-17, 378 N.W.2d 691 (1985) (criminal statutes not unconstitutionally vague because they made clear the range of punishment authorized). Thus, the question we must answer for purposes of Gentilli's ***Wolfel/Waters*** fair notice argument is whether Gentilli could have reasonably expected that dismissal was within the range of authorized penalties for his rule violations.

¶26 In this context, Gentilli again relies on his factual arguments relating to the lack of previous application of the rules to suggest that the board had never before discharged a firefighter for drug use. However, the germane question is not whether, in general, anyone had previously been discharged for drug use, but rather, whether someone engaging in conduct comparable to Gentilli's conduct, brought to the attention of the board, was or was not discharged. As is apparent from our discussion above, we are satisfied that the record does not reflect that Gentilli's expectation that discharge was not among the possible penalties was reasonable.

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[11] WISCONSIN STAT. § 62.13(5)(e) (1999-2000) provides, as relevant:

> If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

¶27 Gentilli points to other evidence: (1) testimony by Assistant Chief Saxe, according to which Chief Amesqua had stated that mere drug use would not warrant discharge and that an employee would be disciplined only if he or she engaged in drug-dealing for profit, engaged in drug transactions on City property or used drugs while on duty; (2) the City's administrative procedure memorandum, which states that the preferred procedure for first-time positive results from random alcohol and drug tests is to have the city employee submit to rehabilitation; and (3) WIS. ADMIN. CODE § COMM 30.16, which directs the fire department to establish a policy that firefighters with any mental or physical health problems, including alcohol or substance abuse, should be referred to health care services for treatment or rehabilitation.[12]

¶28 Gentilli misreads Saxe's testimony regarding Chief Amesqua's statement. Saxe's testimony about Amesqua's comments regarding parameters for "damage control" for purposes of the investigation reads:

> Any employee dealing in drugs for profit, any transactions that took place on City property and any use while on duty were considered unacceptable, would result in immediate suspensions, and we would begin the investigation with the thought that if we could sustain those charges, the Chief would be looking at termination.

[12] The third and longest section of Gentilli's argument in his brief-in-chief is entitled, "Given the Manner in which the Fire Department Rules Had been Applied in the Past, Chris Gentilli Did Not Have Fair Notice that His Off-duty Drug Use Would Subject Him to Being Suspended from His Employment as a Firefighter, and Demoted." It is unclear why Gentilli chose to raise the issues of suspension and demotion in the heading, given that discharge – not suspension or reduction in rank – was the penalty imposed on all counts in this case. This heading is particularly peculiar because the content of the section that bore the heading discussed neither suspension nor demotion, but appropriately addressed only the penalty of discharge.

Saxe's testimony clearly did not indicate that only drug-dealing for profit, drug-dealing on City property or drug use while on duty would be considered "unacceptable"; rather, those were the situations that would result in "immediate suspensions." Saxe's testimony also in no way implies that these three instances were an exclusive list of circumstances under which a firefighter would be disciplined or that could lead to termination.

¶29 Gentilli's reliance on the policy regarding random drug and alcohol testing in the administrative procedure memorandum is likewise misplaced. First, the administrative procedure memorandum does not preclude resort to discipline under the fire department rules. Second, the policy is not implicated by Gentilli's conduct because the policy comes into play only if a firefighter tests positive during random drug testing. That is not the case here. Furthermore, what is at issue here is Gentilli's conduct, as opposed to Gentilli's dependence on controlled substances.

¶30 WISCONSIN ADMIN. CODE § COMM 30.16 also does not preclude resort to discipline under the fire department rules. Section COMM 30.16 merely directs fire departments to establish a policy regarding treatment for the physical and mental health of firefighters. It does not state a policy preference for treatment, rather than discipline or discharge, in specific fact situations.

¶31 In sum, the record does not show that the practice of either the fire department or the board rendered the rules unconstitutionally vague as applied. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.