

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

In the matter of the appeal of

POLICE OFFICER PATRICK R. ELM
from
MPD Personnel Order No. 2008-73

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION

Hearing Date: November 19, 2008

Conducted Before: Commissioners Richard Cox, Ernesto Baca and Kathryn Hein
with Steven Fronk acting as FPC Hearing Examiner

Appearances: Patrick R. Elm in person and by Attorney Matthew Granitz and
Attorney Scott Jess, both of Cermele & Associates, S.C.
Chief of Police Edward Flynn by Deputy Inspector Denita Ball and
Assistant City Attorney Heidi Galvan

Allegation(s):

Count 1.	Violation of MPD Rule 4, Section 2/015.00 (failure to abide by laws and ordinances)
Count 2.	Violation of MPD Rule 4, Section 2/105.00 (untruthfulness)
Count 3.	Violation of MPD Rule 4, Section 2/095.00 (under the influence of an intoxicant)
Count 4.	Violation of MPD Rule 9, Section 2/900.90(A) (consumption of intoxicants while armed)

SUMMARY OF PROCEEDINGS

At the hearing on November 20, 2008 testimony was received from citizen witnesses Jerad Holmes, Peter Stark, Katie Martin, Katherine Miceli and Casey Miller. Testimony was also received from Sergeant Heather Wurth, Sergeant Geoffrey Keen, Lieutenant Kurt Leibold, Police Officer Patrick Elm and Sergeant James MacGillis. A transcript of the proceedings will be obtained and made a part of the record. As a result, a summary of testimony from each witness will not be provided here.

FINDINGS OF FACT

1. Police Officer Patrick R. Elm, at all times pertinent hereto, was a member of the Milwaukee Police Department and bound by the rules and procedures thereof.
2. Patrick R. Elm, while off-duty on the evening of October 2, 2007, was a patron at MJ's Tavern in the City of Milwaukee. Elm consumed more than one alcoholic beverage while at MJ's Tavern and four more beers after leaving.
3. While at MJ's tavern on October 2, 2007, Patrick R. Elm became involved in a verbal dispute with one or more of the other patrons and, shortly after 9:00 p.m., displayed a handgun in a threatening manner.
4. By displaying a handgun in a public place without justification, Patrick Elm caused several others in the bar to fear for their own safety and that of others.
5. As a result of the actions of Patrick Elm, one of the patrons contacted the Milwaukee Police Department and requested that a squad be sent to the scene.
6. Patrick Elm left the scene before the first MPD squad arrived.
7. Milwaukee Police Department personnel located Patrick Elm as he arrived home more than 3 hours later and conveyed him to the MPD Professional Performance Division.
8. Elm submitted to an intoximeter test at approximately 2:40 a.m. on October 3, 2007 which indicated that he had a blood alcohol level of 0.08g/210 ml.
9. Patrick Elm admitted consuming alcohol and getting into an argument with another patron while at MJ's Tavern on October 2, 2007, but has repeatedly denied being armed with or displaying a handgun or being under the influence of an intoxicant at any time relevant to these proceedings.

APPLICABLE LEGAL STANDARDS

In order to prevail, the Chief must show by a preponderance of the evidence that the accused Department member acted in violation of Milwaukee Police Department rules and procedures.

The Board of Fire and Police Commissioners, in order to sustain the Chief, must find that the member violated Department rules or standard operating procedures as alleged in the complaint and that a preponderance of the evidence supports a finding of just cause as defined in section 62.50 (17)(b).

CONCLUSIONS OF LAW

As to Count 1, alleging that Patrick R. Elm failed to abide by laws and ordinances in violation of MPD Rule 4, Section 2/015.00:

1. Patrick Elm could reasonably have had knowledge that the inappropriate display of a handgun in a threatening manner in a public place would constitute disorderly conduct in violation of applicable laws, and that engaging in such conduct would be likely to result in disciplinary action.
2. Rule 4, Section 2/015.00 which requires members of the Milwaukee Police Department to abide by laws and ordinances is reasonable on its face. A civilized society cannot condone actions by law enforcement officers which violate the same laws and ordinances which those officers enforce.
3. Prior to issuing this charge against Patrick Elm, the Chief of Police or those acting on his behalf made a reasonable, fair and objective effort to determine whether or not Patrick Elm did in fact fail to abide by the laws of the State of Wisconsin and/or ordinances of the City of Milwaukee. At least five citizens who witnessed the alleged conduct were interviewed and Patrick Elm was given more than one opportunity to give his version of the events.
4. As a result of the investigation the Chief of Police, or those acting on his behalf, discovered substantial evidence that Patrick Elm violated Rule 4, Section 2/015.00 as alleged in the complaint. Five citizen witnesses gave credible statements indicating that there was no doubt in their minds that off-duty Officer Patrick Elm had displayed a black handgun in an inappropriate and threatening manner at MJ's Tavern and that they, as a result, had feared for their safety and/or that of others.
5. The Chief of Police, in investigating, charging and issuing discipline in this case has applied the rule fairly and without discrimination against Patrick Elm. Other members of the Milwaukee Police Department who have failed to abide by the law have been punished, often severely. Officer Elm's conduct, in displaying a handgun inappropriately in a public place and causing others to fear for their safety, cannot and must not be condoned.
6. The proposed discipline in this instance reasonably relates to the seriousness of the violation and Patrick Elm's record of service with the department. We note that Officer Elm has no prior blemish on his record with the Department, but the

egregious, dangerous and public nature of the conduct leads us to necessarily conclude that the discipline imposed is reasonable.

As to Count 2, alleging that Patrick R. Elm was untruthful in violation of MPD Rule 4, Section 2/105.00 when questioned regarding his conduct on October 2, 2007:

7. Patrick Elm could reasonably have had knowledge that a failure to be truthful when questioned by the Milwaukee Police Department Professional Performance Division regarding his conduct on October 2, 2007, was in violation of Milwaukee Police Department rules and would be likely to result in disciplinary action.
8. Rule 4, Section 2/105.00 which requires members of the Milwaukee Police Department to be truthful when responding to questions concerning alleged violations of the law and/or Department rules, is absolutely essential and reasonable on its face. The effectiveness of our justice system, in large part, hinges upon the truthfulness, accuracy and credibility of law enforcement officers. A failure to be truthful when responding to legitimate questions from a superior officer cannot be tolerated.
9. Prior to issuing this charge, the Chief of Police or those acting on his behalf made a reasonable, fair and objective effort to determine whether or not Patrick Elm did in fact fail to abide by the laws of the State of Wisconsin and/or ordinances of the City of Milwaukee. At least five citizen witnesses were interviewed and Patrick Elm was given more than one opportunity to give his version of the events and attempt to correct any initial inaccuracies.
10. As a result of the investigation the Chief of Police, or those acting on his behalf, discovered substantial evidence that Patrick Elm violated Rule 4, Section 2/105.00 as alleged in the complaint. His repeated assertion that he neither had nor displayed a handgun at MJ's on October 2, 2007 is not credible. Five citizen witnesses gave credible statements to investigators and testified before this Board to the contrary.
11. The Chief of Police, in investigating, charging and issuing discipline in this case, has applied the rule fairly and without discrimination against Patrick Elm. A number of Milwaukee Police Department members who were untruthful have been discharged in recent years. There is no evidence in this record that Officer Elm was treated any differently than other Department members would have been under similar circumstances.

12. The proposed discipline reasonably relates to the seriousness of the violation and Patrick Elm's record of service with the department. Officer Elm has an excellent record with the Police Department but no discipline short of discharge can adequately convey to Officer Elm and others the negative impact upon the Department, its members and our system of justice when an officer is untruthful in an instance such as this.

As to Count 3, alleging that Patrick R. Elm was, on October 2 and/or 3, 2007, under the influence of an intoxicant in violation of MPD Rule 4, Section 2/095.00:

13. Patrick Elm could reasonably have had knowledge that being under the influence of an intoxicant, whether on or off duty, was in violation of Milwaukee Police Department rules and could result in disciplinary action.
14. Rule 4, Section 2/095.00 which prohibits a member of the Milwaukee Police Department from being under the influence of an intoxicant to the degree where it substantially lessens their capacity for rational action or conduct, is reasonable. Law enforcement officers must be prepared to take rational action to assist whenever and wherever necessary to the extent that they are then capable of doing so. This means that they must be ready to apply their specialized training, accurately note necessary information, exercise rational judgment and seek an appropriate public safety response if that is what is required. A level of intoxication that substantially lessens an officer's capacity for rational action or conduct is unacceptable, regardless of whether on or off duty.
15. Prior to issuing this charge, the Chief of Police or those acting on his behalf made a reasonable, fair and objective effort to determine whether or not Patrick Elm was under the influence of an intoxicant to the extent that it lessened his capacity for rational conduct. Once again, several witnesses and Officer Elm were interviewed and an intoximeter test was administered in order to determine Elm's BAC.
16. The Chief of Police, or those acting on his behalf, discovered substantial evidence that Patrick Elm violated Rule 4, Section 2/095.00 as alleged in the complaint. Officer Elm admitted that he consumed at least six alcoholic beverages on the evening of October 2, 2007. The intoximeter test given at 2:40 a.m. on October 3, 2007 indicated a BAC of 0.08. Officer Elm's conduct indicates an impaired capacity for rational action. There is substantial evidence that Patrick Elm was under the influence of an intoxicant on October 2 and/or October 3, 2007.

17. The Chief of Police, in investigating, charging and issuing discipline in this case has applied the rule fairly and without discrimination against Patrick Elm. Police Department members who are found to be under the influence of an intoxicant are frequently charged and disciplined for this violation.
18. The proposed discipline reasonably relates to the seriousness of the violation and Patrick Elm's record of service with the department. Officer Elm had a good employment record prior to this incident and was apparently under stress as a result of his wife's terminal illness. Although alcohol abuse is not an appropriate means of dealing with stress, it was understandable in this instance and therefore the one day suspension is appropriate.

As to Count 4, alleging that Patrick R. Elm consumed intoxicants while armed with a handgun in violation of MPD Rule 9, Section 2/900.90(A):

19. Patrick Elm could reasonably have had knowledge that consumption of intoxicants while armed with a handgun was patently inappropriate and in violation of Department rules. This is clearly spelled out in the rules, and more than one department member has received substantial punishment in recent years for violating this rule.
20. Rule 9, Section 2/900.90(A) which prohibits consuming intoxicants while armed is reasonable and clear on its face. Firearms are inherently dangerous and intoxicants, even when consumed in moderate amounts, tend to reduce one's ability for rational decision-making. Mixing the two often has tragic consequences. This rule is reasonable and absolutely essential.
21. Prior to issuing this charge the Chief of Police, or those acting on his behalf, made a reasonable, fair and objective effort to determine whether or not Patrick Elm consumed alcohol while armed. Multiple witnesses were interviewed, Elm admits having two alcoholic beverages while at MJ's Tavern on October 2, 2007, and credible testimony from five eyewitnesses in the tavern leads us to the conclusion that Officer Elm was armed with a handgun at the time he consumed intoxicants. Although Patrick Elm denies being armed, his testimony is much less credible than the citizen witnesses.
22. As a result of the investigation the Chief of Police, or those acting on his behalf, discovered substantial evidence that Patrick R. Elm violated Rule 9, Section 2/900.90(A) as alleged in the complaint. Elm admits consuming intoxicants while

at MJ's and no less than five citizen witnesses gave credible statements indicating that there was no doubt in their minds that what Officer Elm had in his hand and displayed at MJ's was a black handgun.

23. The Chief of Police, in investigating, charging and issuing discipline in this case has applied the rule fairly and without discrimination against Patrick Elm. Other members of the Milwaukee Police Department who have consumed intoxicants while armed have been punished just as severely.
24. The proposed discipline in this instance reasonably relates to the seriousness of the violation and Patrick Elm's record of service with the department. We note that Officer Elm had no prior incident of misconduct on his record with the Department, but the serious nature of the conduct in this case leads us to the necessary conclusion that the 30 day suspension imposed by Chief Flynn was and is entirely appropriate.

DECISION

Officer Elm has repeatedly stated that although he consumed alcoholic beverages on the night of October 2, 2007, he was neither armed nor intoxicated at any time. Five independent eyewitnesses testified that there was no doubt that what Patrick Elm had in his hand at MJ's Tavern was a black handgun, and that he displayed it in a threatening manner.

As to **Count 1** related to Patrick Elm's failure to abide by laws and ordinances, we sustain the charge and affirm the discharge imposed by Chief Flynn. We are convinced that the testimony of the citizen witnesses is more credible than that of Patrick Elm, and that he did in fact have a handgun which he displayed in a threatening manner, causing other patrons to fear for their safety or that of others.

As to **Count 2** related to Patrick Elm's untruthfulness regarding the incident at MJ's Tavern, we sustain the charge and affirm the discharge imposed by Chief Flynn. We are convinced that Officer Elm was not truthful when questioned by investigators and that he was also not truthful when he testified before this Board.

As to **Count 3** related to the charge of being under the influence of an intoxicant, we sustain the charge and affirm the one day suspension imposed by Chief Flynn. It is clear from a preponderance of the evidence that Officer Elm was under the influence of an intoxicant as defined in Rule 4, Section 2/095.00 on the night in question.

As to **Count 4** related to the charge of consuming intoxicants while armed with a firearm, we sustain the charge and affirm the 30 day suspension imposed by Chief Flynn. The preponderance of the evidence presented leaves no doubt in our minds that Officer Elm was armed with a handgun at MJ's Tavern when he consumed alcoholic beverages.

Board of Fire and Police Commissioners
Of the City of Milwaukee

By:



Richard Cox, Commissioner

12-4-2008

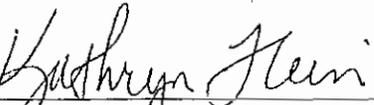
Date



Ernesto Baca, Commissioner

12.04.2008

Date



Kathryn Hein, Commissioner

12/4/08

Date