

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

**In the Matter of the Appeal of Eric S. Devries
Personnel Order 2013-22**

Hearing Date: May 22, 2013

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

Commissioners: Kathryn A. Hein
Paoi X. Lor
Michael M. O'Hear

Hearing Examiner: Michael M. O'Hear

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

Attorney Jonathan Cermele
For Appellant Eric S. Devries

PROCEDURAL HISTORY

The Chief of Police, Edward A. Flynn, charged Police Officer Eric S. Devries in Personnel Order 2013-22 dated February 20, 2013, with the following violations of Milwaukee Police Department Rules and Procedures:

1. Core Value 3.00 – Integrity, referencing Guiding Principle 3.05: Failure to obey state law.
2. Core Value 3.00 – Integrity, referencing Guiding Principle 3.05: Failure to obey state law.

Devries, the Appellant in this matter, filed an appeal with the Milwaukee Fire and Police Commission from the order of the Chief of Police and a hearing was held.

SUMMARY OF HEARING PROCEEDINGS

The hearing was conducted on May 22, 2013. The hearing was recorded by a stenographic reporter. Testimony was taken from the following witnesses:

For the Chief of Police: Sergeant Michelle Pagán, Milwaukee Police Department
Lieutenant David Salazar, Jr., Milwaukee Police Department
Lieutenant Johnny Sgrignuoli, Milwaukee Police Department
Chief Edward Flynn, Milwaukee Police Department

For the Appellant: Sergeant Sterling Harding, Milwaukee Police Department
Sergeant Joe Roberson, Milwaukee Police Department
Megan Devries
Police Officer Eric J. Mlodzik, Milwaukee Police Department
Police Officer Eric S. Devries, Milwaukee Police Department

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

FINDINGS OF FACT

1. Police Officer Eric S. Devries began working for the Milwaukee Police Department in 2001. (Ex. 13) Prior to the personnel order at issue in this proceeding, Devries had never been disciplined by the Department for a rules violation. Moreover, the testimony of Sergeants Sterling Harding and Joe Roberson, who had been Devries' supervisors, and the evaluations contained in Exhibit 8 establish that Devries was a capable and well-regarded police officer. In 2005, he received recognition from the Department for a meritorious arrest. (Ex. 14)
2. On October 19, 2012, Devries attended a Milwaukee Admirals hockey game in downtown Milwaukee with his friend Police Officer Eric J. Mlodzik. Both were off-duty. At the game, Devries consumed five 20-ounce beers between approximately 6:00 and 9:30 p.m. After the game, Devries and Mlodzik left the area in Devries' personal vehicle, with Devries driving. (Exs. 2, 6)
3. At approximately 9:56 p.m., Devries' vehicle was involved in a single-car accident on Interstate 43 southbound near South Chase Avenue in Milwaukee. The vehicle struck a median wall and knocked over a light pole. Both Devries and Mlodzik sustained lacerations to the head as a result of the accident, and both were transported to Froedtert Hospital for treatment. (Exs. 2, 6) Photographs of the accident scene and of the injuries were presented to the Commission as Exhibit 7.
4. Following the accident, a test of Devries' blood revealed an alcohol concentration of 0.11 g/100 ml of blood. (Ex. 6)

5. Devries' injuries included multiple facial lacerations and a fractured nose. (Ex. 6) Mlodzik testified at the hearing that he required stitches and staples for his injuries, spent one day in the hospital, and missed eight days of work.
6. Devries faced various criminal and traffic charges in connection with the accident. (Ex. 6) In March 2013, he pled no contest to a charge of causing injury while operating under the influence, in violation of Wis. Stat. §346.63(2)(a). (Ex. 5)
7. The Department's Internal Affairs investigation is documented in Exhibit 6. The investigation led to a decision to charge Devries with two counts of violating Core Value 3.00, referencing Guiding Principle 3.05, both arising from the same incident of October 19, 2012. As to Count One, the Chief imposed a suspension of thirty days without pay. As to Count Two, the Chief ordered Devries discharged from the Department. The present appeal relates only to Count Two and the discharge decision.
8. Lieutenant Johnny Sgrignuoli testified as to the processes leading to the Chief's decision to discharge, which included the compilation of information regarding Devries' work performance (as set forth in Exhibit 8) and the discipline imposed by Chief Flynn in other drunk-driving cases (as set forth in Exhibit 9).
9. At the hearing, the Chief testified that the primary considerations in his decision to discharge Devries were (1) the severity of the offense (particularly the degree of harm caused by Devries), and (2) the need to send a message regarding the consequences for police officers of driving under the influence of alcohol. The Chief noted longstanding concerns regarding alcohol abuse by police officers. He also described his escalating efforts to address the drunk-driving problem within the Milwaukee Police Department. These efforts have included progressively more severe discipline for OWI offenses since 2008. Lieutenant Salazar's testimony provided additional details regarding the Department's alcohol awareness campaign in 2011.
10. Devries has accepted responsibility for his offense (as indicated, for instance, in Exhibit 2), and we have no particular reason to doubt his sincerity in doing so. His testimony and that of his wife Megan indicate that he has completely stopped drinking alcohol since the accident. Lucia Micheli, Devries' psychotherapist, has written, "In my opinion he has chosen to look at his recent DUI as a wake up call and is taking his drinking problem very seriously." (Ex. 15) Based on Devries' testimony at the hearing, which we found very credible, we agree that Devries has learned from his mistakes on October 19, 2012, and that he has taken significant steps to prevent a recurrence.
11. Harding, Roberson, Mlodzik, and Megan Devries all testified persuasively as to Devries' good character. Apart from the offense of October 19, 2012, and any underlying tendency to abuse alcohol (which seems now to be under control), we have no reason to doubt the accuracy of the very positive picture of Devries that was drawn by his supporters at the hearing.

12. At the hearing, both sides seemed in agreement as to the essential facts in this appeal (although the two sides differed, of course, as to the significance of various facts). We do not understand there to be any genuine, material dispute as to any of the foregoing findings of fact.

CONCLUSIONS OF LAW

13. This appeal is governed by the seven just cause standards set forth in Wis. Stat. §62.50(17)(b). For purposes of this appeal, Devries has conceded that he violated Core Value 3.00 as charged in Count Two of Personnel Order 2013-22. He further admits that the first five just cause standards are satisfied. Even apart from these admissions, and as outlined above, there is substantial evidence in the record in support of the first five just cause standards. Therefore, we determine that the charge is sustained by a preponderance of the evidence, and we turn our attention to “whether the good of the service requires that [Devries] be permanently discharged,” in light of the sixth and seventh just cause standards. *See* Wis. Stat. §62.50(17)(a). In answering this question, we take into account our own rules on trial procedures (Ex. 4), including the evidence that we are authorized to receive under Section 14 of Rule XVI (i.e., evidence regarding “character, work record, and the impact of the misconduct on the complainant, department, and community”).
14. The sixth just cause standard is “Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.” The Chief based his decision in this case on an extensive investigation of Devries’ conduct, and further testified as to the various legitimate considerations that governed his decision. (*See* ¶¶ 7-9 above) No evidence was presented indicating that the Chief was motivated by personal animus against Devries or otherwise took into account improper considerations.
15. Devries’ counsel suggested at the hearing that the investigation could have been more thorough, particularly by including interviews of Devries’ supervisors, rather than relying on their written responses on a standardized form (Ex. 8). It is unclear if counsel intended this argument to relate to the sixth just cause standard. It does seem possible, though, that evidence of a shoddy investigation might, in some circumstances, support a conclusion that a rule has been applied in an unfair or discriminatory manner. However, in the particular circumstances of this case, we see nothing improper or suspicious in the Department’s investigation. First, the investigation apparently conformed to standard procedures; a thin investigation would seem more suspicious if it deviated from protocol. Second, the written record presented a consistent picture of Devries’ character and work record; there was no apparent need to supplement the written record in order to resolve discrepancies or ambiguities. Third, the Chief testified that he tends to give much less weight to work record in cases of very serious rules violations, such as the present one, and we see nothing inappropriate in that approach. In sum, while we might be troubled by a failure to interview supervisors regarding work performance in some cases, this is not one of those cases.
16. Bearing on both the sixth and seventh standards, the Chief was presented with several “comparables,” that is, earlier cases that also involved OWI-related charges (Ex. 9). There was considerable testimony and argument at the hearing regarding the significance

of these comparables. It is clear, on the one hand, that Devries is not the first Department member to be discharged as a result of driving drunk. On the other hand, it is also clear that other members have engaged in serious OWI-related misconduct and have received lesser discipline. Of course, if we see a pattern of members receiving markedly different discipline for engaging in equally serious misconduct, we may have difficulty concluding that the Chief is applying his rules in a fair and nondiscriminatory manner. In this case, however, we are not particularly troubled by what we see in the comparables. For one thing, the Chief has identified a principled consideration that differentiates Devries' case from any of the other comparables: Devries' misconduct resulted in serious physical injuries to someone besides himself. There seems nothing unfair about treating this as a significantly aggravating circumstance relative to other OWI cases. For another, the Chief testified that he has deliberately sought to increase the severity of discipline in OWI cases in order to send an increasingly strong and clear message against drunk-driving by police officers. The list of comparables itself indicates that the message was not getting through when the Chief was using a softer approach; there were eight cases in 2012 alone, even after the extensive alcohol awareness campaign in 2011. While we continue to believe that comparables should be presented and considered in appeals of this nature, we do not wish for this aspect of our procedures to become a straitjacket for the Chief, preventing the Chief from increasing discipline over time if circumstances warrant such a change.

17. We conclude, for the foregoing reasons, that the Department has satisfied the sixth just cause standard by a preponderance of the evidence.
18. The seventh just cause standard is "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." The violation in this case was undeniably a serious one. First, Devries violated a criminal law. Any time a police officer commits a crime, public confidence in the Department as a whole is put at risk. Second, the particular crime that Devries committed is one that creates extraordinary dangers for the public. Third, Devries and Mlodzik were seriously injured as a result of the violation. Finally, although we do not believe that Devries intentionally caused the injuries, we do believe that he was nonetheless culpably reckless or willful in driving after consuming five 20-ounce beers in one evening, especially in the wake of the Department's extensive efforts to warn officers of the dangers of OWI in 2011.
19. To counter the seriousness of the violation, Devries principally relies on his good character and work record, acceptance of responsibility, and commendable post-accident rehabilitative efforts. We do not understand the Department to dispute any of these matters. Rather, the Department's view is that the nature and seriousness of the violation in this case simply outweigh any mitigating considerations. We share this view. It is possible that we might see things differently if OWI were not such an important, recurring problem for the Department. The long list of violations in Exhibit 9 is quite troubling, especially the incidents that have occurred after the Department's alcohol awareness campaign in 2011. Reflecting his understandable frustration with this problem, the Chief suggested at the hearing that there might be a good case to be made for an automatic discharge rule any time an officer is guilty of OWI, regardless of

whether there was an accident or any other aggravating circumstance. For present purposes, we need not opine on the merits of such a hypothetical rule. Suffice it to say that on the facts of this particular case, for the reasons outlined in the previous paragraph, we conclude that the Department has satisfied the seventh just cause standard by a preponderance of the evidence, and that the good of the service requires a permanent discharge.

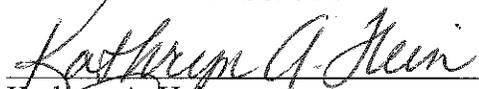
20. There remains one final matter to address. At the hearing, Officer Mlodzik, in a quite moving way, forgave Devries and requested that the Commission restore Devries to his position in the Department. It is not entirely clear whether or how we should take this into account. Certainly, it cannot be a dispositive consideration in and of itself. After all, we must determine what is necessary “for the good of the service,” and Mlodzik is only one small part of the “service.” Our trial rules do authorize us to receive evidence (and hence, presumably, to consider) “the impact of the misconduct on the complainant.” Although Mlodzik is not technically a “complainant,” it is possible to read the rule as more generally making relevant what would be called “victim impact statements” in criminal law, and Mlodzik’s statement may plausibly count as such. Moreover, with or without the rule, a victim impact statement may be relevant to “the seriousness of the alleged violation” under the seventh just cause standard. But, even at that, we believe that a victim’s stated preferences for discipline should be given only very modest weight, if any at all, in our determination of what is required for the “good of the service.” This is not only because a victim’s personal interests and wishes may have little to do with what best serves the Department, but also because giving substantial weight to the subjective views of victims may undermine uniformity in the enforcement of Department rules, result in mixed messages for Department members, and invite coercion and abuse. For these reasons, while we appreciate in a general way the moral value of apology and forgiveness, we do not believe that Mlodzik’s forgiveness of Devries warrants a lesser discipline on the particular facts of this case.

DECISION

The charge against the Appellant, Eric S. Devries, is sustained, and he is ordered discharged from the Department.

Dated at Milwaukee, Wisconsin.

BY THE COMMISSION:



Kathryn A. Hein

5/30/13, 2013



Paul X. Lor

5/30/13, 2013



Michael M. O'Hear

May 28, 2013