

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

**In the Matter of the Appeal of Kurt D. Kezeske
Personnel Order 2013-50**

Hearing Dates: September 11, 2013
 September 27, 2013

Hearing Locations: 200 East Wells Street, Rooms 301A and 301B, City Hall
 Milwaukee, Wisconsin

Commissioners: Paoi X. Lor
 Michael M. O'Hear
 Ann M. Wilson

Hearing Examiner: Michael M. O'Hear

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

Attorneys D. Michael Guerin and Steven C. McGaver
For Appellant Kurt D. Kezeske

PROCEDURAL HISTORY

The Chief of Police, Edward A. Flynn, charged Police Officer Kurt D. Kezeske in Personnel Order 2013-50 dated May 15, 2013, with the following violations of Milwaukee Police Department Rules and Procedures:

1. Core Value 1.00 – Competence, referencing Guiding Principle 1.05, referencing Standard Operating Procedures relative to Vehicle Pursuits, Section 660.20(A)(B): Failure to exercise due regard when engaging in a pursuit that violated department policy.

2. Core Value 3.00 – Integrity, referencing Guiding Principle 3.11: Knowingly and with reckless disregard for the truth, making false statements to department investigators and supervisors.

3. Core Value 1.00 – Competence, referencing Guiding Principle 1.02: Lacking the capacity to enforce federal and state laws, and city ordinances.

Kezeske, 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 September 11 and 27, 2013. The hearing was recorded by a stenographic reporter. Testimony was taken from the following witnesses:

For the Chief of Police: Police Officer Adam Rusch, Milwaukee Police Department
 Sergeant Alberto Riestra, Milwaukee Police Department
 Detective William Sheehan, Milwaukee Police Department
 Detective Edward Chaim, Milwaukee Police Department
 Sergeant John Corbett, Milwaukee Police Department
 Sergeant Erwin Estacio, Milwaukee Police Department
 Sergeant Thomas Johnson, Milwaukee Police Department
 Lieutenant Johnny Sgrignuoli, Milwaukee Police Department
 Captain Gary Gacek, Milwaukee Police Department
 Chief Edward Flynn, Milwaukee Police Department

For the Appellant: Michael Kuspa
 Kurt Kezeske
 William Skurzewski

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

FINDINGS OF FACT

1. At the time of his discharge in May 2013, Police Officer Kurt Kezeske had worked for the Milwaukee Police Department for a little over eighteen years. During that time, he amassed an impressive record of awards and commendations. (Exhibit 29) By all accounts, Kezeske was an “exemplary officer,” as even Counsel for the City conceded in his closing argument in this proceeding.
2. On August 17, 2012, Kezeske made a series of errors in judgment in connection with a vehicular pursuit and a subsequent investigation of the pursuit. It is difficult to reconcile Kezeske’s conduct on August 17 with his prior record of highly effective and reliable service to the Police Department and the people of Milwaukee. Yet, it is these events of August 17 that gave rise to the present disciplinary proceeding.
3. The vehicular pursuit at issue was captured on video from Kezeske’s squad car. The video was admitted into evidence as Exhibit 13 and played several times at the hearing.

Kezeske admits that the video accurately represents what it purports to depict, and we rely heavily on it for our findings regarding the pursuit.

4. At about 4:40 p.m. on August 17, while in his squad car traveling southbound on South 1st Street in Milwaukee, Kezeske observed a motorcycle going northbound at what seemed to him an excessive rate of speed. Indeed, Kezeske has indicated that the motorcycle's speed was about 70 MPH in a posted 30 MPH zone. (Ex. 2) Having viewed the video ourselves, we believe this estimate to be exaggerated. Captain Gary Gacek, who provided a detailed analysis of the video during his testimony in the hearing on this matter, thought the speed closer to 40 MPH. We found Gacek's testimony in this and in all respects to be highly credible and persuasive. We note, too, that Kezeske had an incentive to exaggerate the motorcycle's speed in order to try to justify his subsequent high-speed pursuit.
5. Kezeske decided to effectuate a stop of the motorcycle. He performed a U-turn and then turned east on Becher Street. His lights and sirens were activated and the sound of his engine makes clear that he was accelerating rapidly to try to catch up with the motorcycle. (It appears that certain icons on the video relating to the siren and other aspects of the car's performance were not functioning, but the siren can be clearly heard. (Ex. 12, p. 6))
6. From Becher Street, Kezeske observed the motorcycle turn southbound onto Kinnickinnic Avenue. At that point, Kezeske lost sight of the motorcycle. He turned onto Kinnickinnic, too, turning off his siren, but keeping his lights on and continuing to look for the motorcycle. He eventually spotted it and reactivated his siren. In then executing a right turn on South Howell Avenue, Kezeske (still traveling southbound) moved into the northbound lane in order to get around traffic stopped at the intersection.
7. After turning westbound onto Lincoln Avenue, Kezeske accelerated rapidly. At the hearing, Kezeske estimated his speed at about 60 MPH. He finally caught up with the motorcycle at the intersection of Lincoln and South 5th Street, where the driver was waiting for traffic to clear in order to execute a left turn.
8. The motorcycle moved through the intersection with Kezeske's vehicle close behind. For a moment, after completing the turn onto South 5th Street, the motorcycle appeared to slow, but then abruptly accelerated. In response, Kezeske sped up, too. Both vehicles went through a stop sign and turned left onto Chase Avenue, causing cars on Chase Avenue to brake suddenly to avoid a collision.
9. The motorcycle and the squad car accelerated rapidly on Chase Avenue, with the motorcycle outpacing the car and eventually disappearing from the video. Kezeske estimated his speed at about 60 MPH and the motorcycle's at about 90 MPH. Kezeske ran a red light at South 1st Street. As he proceeded along Chase Avenue, he narrowly avoided colliding with a truck, causing him to drive briefly on the curb.

10. Kezeske first broadcast that he was involved in a pursuit while he was on Chase Avenue. His broadcast was not picked up on the video, but there was a separate audio recording of the broadcast that was played at the hearing and marked as Exhibit 5. In it, Kezeske clearly states that the motorcycle had tried to “ram” him. (*See also* Ex. 3) Kezeske does not deny that he made this statement in the broadcast. However, as even Kezeske now admits, the statement was not accurate; the motorcycle had not at any time tried to ram him. Kezeske asserts that he misspoke in the heat of the chase. Whether his statement was an intentional lie or a mere slip of the tongue is an important area of factual dispute that will be discussed further below.
11. The pursuit finally ended when Kezeske came upon the wreckage of the motorcycle in the road. It had collided with another vehicle, causing apparently minor injuries to the occupants of the other vehicle and much more serious injuries to the motorcycle operator, Emmanuel Green (“Green”). In the video, Green is seen lying in the middle of the road, conscious and obviously in a great deal of pain. Kezeske testified that a portion of Green’s femur was protruding from his leg.
12. The Department had amended its vehicle pursuit policy in 2011 in order to discourage dangerous pursuits in certain circumstances. Chief Flynn, in his testimony at the hearing, described the tragic accidents that led to the change in policy and indicated that the new policy was intended to provide greater safety to officers and members of the public. It seems to us that Kezeske’s pursuit of Green was precisely the sort of highly dangerous police action that the policy was meant to regulate. Kezeske drove 60 MPH on city streets posted for 30-35 MPH, continuing the pursuit for nearly two miles. He ran red lights and a stop sign. His car jumped the curb at one point, which might have posed a deadly danger for pedestrians. All of this occurred at a heavily trafficked time of day (about 4:40 in the afternoon). Moreover, as far as we can tell, the pursuit caused Green to drive even less safely and even more over the speed limit than he had been before (reaching, by Kezeske’s own account, 90 MPH). It is extremely fortunate there were no fatalities, but the seemingly inevitable collision did occur and caused injuries to multiple people, including the entirely innocent occupants of the vehicle with which Green collided. It seems clear to us that this sort of police pursuit should never happen without a truly compelling and urgent need. Zeal in law enforcement must be tempered by a commonsense regard for the safety of innocent bystanders.
13. Kezeske admitted in his testimony that he had been trained in the new policy prior to August 17, 2012, and was well aware of how the Department was viewing pursuits at the time. The new policy makes very clear that traffic infractions alone are not a sufficient justification for an “eluding/fleeing” pursuit. (Ex. 17, Milwaukee Police Department Standard Operating Procedure §660.20(B)) Thus, in order to justify his pursuit of Green, Kezeske could not rely solely on the fact that Green was traveling in excess of the speed limit. However, a pursuit *is* justified under the new policy if the person being pursued “has committed, is committing, or is about to commit a violent felony.” (SOP §660.20(B)(1)) The story that Green had tried to ram Kezeske thus served Kezeske’s immediate need to come up with an adequate justification for his pursuit of Green.

14. In the aftermath of the pursuit, Kezeske repeated the story of the ramming attempt to several people, as outlined below. We credit the witnesses who claim that Kezeske told them this story (even though Kezeske himself testified that he cannot recall making these statements). We are persuaded that these statements were made by the similarity of the different witnesses' accounts and by their concurrence with the undisputed fact that Kezeske had asserted a ramming attempt in his radio broadcast during the pursuit. Moreover, the fact that Kezeske repeated the ramming story several times convinces us that the radio broadcast was no mere slip of the tongue, but a deliberate misstatement of fact.
15. In addition to Kezeske, a series of other police officers and supervisors arrived at the scene of the motorcycle accident. The first were officers Anthony Bialecki and Adam Rusch ("Rusch"), who were responding to Kezeske's broadcast about the pursuit. It seems that Rusch has given conflicting statements as to whether Kezeske told him that the motorcycle had attempted to ram him (compare Exhibits 6 and 7). At the hearing in this matter, Rusch testified that he did not recall Kezeske saying anything at the scene about the ramming. Based on his demeanor and his answers to questions, it seemed to us that Rusch was an uncooperative witness and perhaps not entirely candid. In any event, for purposes of this appeal, it is not necessary for us to resolve the apparent discrepancies in Rusch's statements.
16. Sergeant Alberto Riestra ("Riestra") arrived at the scene in order to investigate the accident. At the hearing, Riestra testified that he asked Kezeske what happened and was told that the motorcycle had attempted to hit him. This testimony was consistent with an earlier statement that Riestra gave to Internal Affairs investigators. (Ex. 12, p. 24)
17. Detective William Sheehan ("Sheehan") took a more formal statement from Kezeske. Sheehan testified at length at the hearing about Kezeske's statement. Most importantly for present purposes, Sheehan recalled Kezeske recounting an elaborate story about the motorcycle stopping at an intersection, Kezeske pulling up behind and exiting his squad car, and the motorcycle then executing a "hairpin u-turn" and speeding away, almost striking Kezeske in the process. (*See also* Ex. 10.) Sheehan documented his investigation in an incident report, including Kezeske's account of almost being struck by the motorcycle. Sheehan testified that he gave his cell phone number to Kezeske and asked him to call if there was anything inaccurate in his incident report. Kezeske never contacted him about the report.
18. Sergeant Thomas Johnson ("Johnson") was responsible for preparing the official pursuit report for the incident. In order to do so, he, too, interviewed Kezeske. His interview notes were introduced into evidence as Exhibit 14 in the hearing, and Johnson testified as to the contents. The notes include the following: "Because he was stuck in traffic—bike goes around squad towards OK [that is, Officer Kezeske] almost hitting OK." Johnson's vehicle pursuit report (Exhibit 15 at the hearing) also contained the information about the motorcycle allegedly turning around and driving toward Kezeske. Johnson testified that, before preparing his report, he did not read Sheehan's report or hear from Sheehan about Kezeske's statement to him.

19. Sheehan and Johnson prepared their reports based on information provided to them by Kezeske. Because of technical problems with the video, they were not able to view the video first and so were not aware at the time that Kezeske's statements were inconsistent with the video.
20. The testimony of Riestra, Sheehan, and Johnson was consistent and credible. Based on their testimony and the associated exhibits, we find that Kezeske incorrectly told each of them that Green had nearly struck him with his motorcycle. Although Kezeske says now that he cannot remember making these statements, we believe that a clear preponderance of the evidence supports our finding.
21. Sergeant John Corbett ("Corbett") also testified that Kezeske told him about Green trying to hit him, although the timing of this exchange is in doubt. Corbett recalled seeing Kezeske in plain clothes at District Two two or three days after the incident. Corbett further recalled that Kezeske told him that a motorcycle had tried to run him down and now he was suspended, thus accounting for the plain clothes. The trouble with this testimony is that Kezeske was not suspended until September 12, over three weeks after the incident. Corbett has obviously misremembered the timing of the exchange, which also raises questions about the accuracy of his recollection of the content of the exchange. On the other hand, Corbett's testimony as to the content gibes with the testimony of Riestra, Sheehan, and Johnson, and Corbett had no apparent motive to fabricate his testimony. On balance, we are inclined to credit Corbett's testimony as to the content of what Kezeske told him, although we do not think this crucial to the ultimate disposition of this appeal.
22. We believe it has been clearly established by the evidence at the hearing that Kezeske made incorrect statements in his broadcast during the pursuit and to at least three members of the Department who were investigating the incident (Riestra, Sheehan, and Johnson). The somewhat closer, but no less important, question that remains is whether Kezeske's misstatements were deliberate.
23. The two sides in this proceeding drew sharply contrasting pictures of Kezeske's state of mind during the incident and subsequent investigation. In the City's account, Kezeske knew that he was engaged in an improper, or at least highly questionable, pursuit, and he knowingly fabricated the story of the near-ramming in order to try to avoid getting into trouble. In Kezeske's account, the emotional stress of the pursuit and its aftermath caused him to say things that he did not really mean or perhaps to imagine events that did not really happen. We find, however, that the evidence provides more persuasive support for the City's account. If the City had relied only on Kezeske's erroneous broadcast message during the heat of the chase, then we might more easily believe that Kezeske was guilty of no worse than an inadvertent misstatement. However, the false story was embellished and retold repeatedly. Given the strong motive to lie, the repetition of the false statement (including to Detective Sheehan about two hours after the incident), and the many specific details offered by Kezeske in relation to the ramming attempt, we find

by a preponderance of the evidence that Kezeske knowingly attempted to mislead the investigators.

24. At the hearing, Kezeske tried to bolster the emotional distress theory through the expert testimony of Michael Kuspa ("Kuspa"), a distinguished former member of the Milwaukee Police Department. (Ex. 24) Kuspa has worked a great deal with officers who have been involved in critical incidents, that is, incidents in which there is a death or a use of deadly force. He testified as to the long-term psychological impact on officers who have been involved in critical incidents, including the appearance of "intruding distracting thoughts." He observed that Kezeske had been involved in three critical incidents prior to the motorcycle chase, which is an unusually high number for a single officer. He further testified that after at least two of the three critical incidents, Kezeske was not given appropriate care by the Department. Kuspa thus suggested that Kezeske may have been suffering from intruding distracting thoughts during the pursuit and afterwards.
25. We don't doubt that Kezeske must have experienced a considerable amount of stress during the high-speed pursuit through traffic on busy city streets. Nor do we doubt that he experienced a powerful emotional response later at the scene of the accident, when he was incorrectly informed that Green died. It seems quite believable that, as Kezeske testified, this news brought back thoughts of the earlier critical incidents. However, it also seems to us quite speculative that any of this caused Kezeske to imagine a ramming incident that did not actually happen. Indeed, his first mention of the attempted ramming occurred during the radio broadcast, which was well before Green's accident, let alone the news that Green had died. Moreover, although Kezeske's statement to Sheehan was made after he heard that Green was dead, we have no basis in the record for concluding that a trauma such as that experienced by Kezeske was likely to result in the inadvertent fabrication of a detailed story such as the one he told to Sheehan. (It is not clear whether the false statements to Riestra and Johnson were made before or after Kezeske was told that Green died.)
26. Kuspa also testified that the Department should have taken a statement from Kezeske 24-48 hours after the incident because information recalled sooner after a traumatic event may not be accurate. Kuspa's testimony was apparently based on research conducted by the Force Science Institute, although he provided nothing more than vague, general characterizations of the research. We have no idea how much more accurate memories become after the 24-48 hour period, what kinds of errors are typical (e.g., omissions versus affirmative misstatements), and whether the research applies to situations in which an officer is guilty of misconduct and has an incentive to lie. We don't doubt that there may sometimes be some value to revisiting an officer's statement with him after a 24-48 hour cooling off period. On the other hand, there is also the obvious risk that an officer who has acted improperly will simply use the extra time to come up with a more convincing cover story. Moreover, it should be noted that Kezeske was invited to review Sheehan's report and correct any inaccuracies; it's not as if the Department denied Kezeske any opportunity to revisit his statement after cooling off. In any event, the question we face is not whether the Department's process in this case was optimal, but

whether Kezeske's false statements reflected a desire to deceive or were somehow based on false memories. Once again, the suggestion of false memories seems highly speculative based on the record we have before us.

27. Kezeske's strongest challenge to the City's intentional fabrication theory rests on the existence of the video. "Why would I lie about the ramming," Kezeske seems to ask, "if I knew that the lie would so easily be disproved by the video?" This is a significant difficulty for the City, but two complementary responses are apparent. First, there is the emotional distress that Kezeske himself relies on. In effect, Kezeske is arguing, "I was so emotionally distressed that I imagined events that did not occur, but at the same time was capable of coolly evaluating the risk that any false statements I made would be disproved by my squad video." This does not seem likely to us. Second, there is the fact that Kezeske himself admits that he knew the video playback was not working by the time he met with Sheehan. (Ex. 2, Bates no. 194) It seems quite plausible that Kezeske thought and hoped that the video would never be recovered, and so saw an opportunity to fabricate a story that could not be disproven. Thus, in the heat of the chase, Kezeske may have blurted out a false excuse for the pursuit without thinking about the video or perhaps with a vague sense that he might be able to say that the ramming happened outside the video's view (the motorcycle is out of range for much of the video), and then thanked his lucky stars later when he realized that the video was malfunctioning, which saved him from having to correct the ramming story and concoct another. Whether or not this is precisely how things played out, we do not, on balance, see the presence of the video as a fact that causes us to reject what otherwise seems established by the evidence: that Kezeske knew the ramming story was false as he repeated it again and again to the investigators.
28. Kezeske makes one final point that merits discussion here. "If I really said that Green had tried to ram me," he seems to ask, "why didn't I insist that he be charged accordingly?" Green was, in fact, criminally charged, but not with the alleged attempt to run down a police officer. (Ex. 11) However, Kezeske's failure to insist on this charge seems readily explicable. Having falsely accused Green of a serious crime in order to excuse his own misconduct, Kezeske would hardly have wanted to draw further attention to the false charge, especially attention in the form of prosecutorial scrutiny.

CONCLUSIONS OF LAW

29. This appeal is governed by the seven just cause standards set forth in Wis. Stat. §62.50(17)(b). We conclude that all seven standards are satisfied with respect to the first two charges against Kezeske. We further conclude that the fifth standard is not satisfied as to the third charge. For that reason, we need not, and do not, determine whether any of the other standards are satisfied as to the third charge.
30. The first just cause standard asks "[w]hether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct." Kezeske has acknowledged that he was aware of the new vehicle pursuit policy. Moreover, we see no material ambiguities in the pertinent provisions of the Code of

Conduct (i.e., the provisions forming the basis of the first and second charges), and Kezeske has not argued the contrary. Indeed, Kezeske himself testified that he was scared of losing his job after he was told that Green died. We conclude that the City has satisfied the first standard by a preponderance of the evidence.

31. The second just cause standard asks “[w]hether the rule or order the subordinate allegedly violated is reasonable.” As explained in Paragraph 12 above, we have no trouble concluding that vehicle pursuit policy is reasonable. Nor is there any need to explain at length the self-evident reasons why it is reasonable for the Department to insist that its officers comply with its standard operating procedures (Guiding Principle 1.05) and be honest with respect to investigations, reports, and inquiries (Guiding Principle 3.11). Kezeske has not argued to the contrary. We conclude that the City has satisfied the second standard by a preponderance of the evidence.
32. The third just cause standard asks “[w]hether 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.” Lieutenant Sgrignuoli testified at length regarding the Chief’s “effort[s]” in this case. The depth of the investigation is reflected in Sergeant Estacio’s (“Estacio”) voluminous report. (Ex. 12) Although Kezeske’s counsel and expert witness suggested a few ways in which the Department’s investigation might have been better (e.g., taking a statement 24-48 hours after the incident), we do not see these adding up to any serious claim that the Chief’s efforts fell short of reasonable. We conclude that the City has satisfied the third standard by a preponderance of the evidence.
33. The fourth just cause standard asks “[w]hether the effort . . . was fair and objective.” Although Kezeske attacked Estacio’s report as “subjective” and “one-sided,” (Ex. 2, Bates no. 201), his point ultimately seems to be that the investigation could have been more thorough, rather than that the investigation was biased against him. At the hearing, Kezeske was asked what he meant by the one-sidedness charged, and his chief response seems to be that Estacio’s report was overly “dramatized.” We are not in agreement with Kezeske’s characterization of Estacio’s work, which we doubt would qualify as anyone’s idea of a page-turner. At bottom, what we see in this case is a reasonably thorough, if not absolutely perfect, investigation, and absolutely no evidence pointing to any sort of animus directed against Kezeske. To be sure, we acknowledge Kezeske’s troubling testimony that Detective Chaim (“Chaim”), after delivering the erroneous news of Green’s death, said, “The Department is going to f*** you on this.” However, we have no clear idea of what Chaim meant by the alleged statement, which might, for instance, have been premised on the belief that Green was dead, which turned out not to be true. More importantly, we have no reason to believe that Chaim was possessed of some special insight into how the internal affairs processes would play out in this case. Chaim’s statement was at most a speculative prediction of a biased process, and nothing in the record indicates that Chaim’s prediction proved correct. We conclude that the City has satisfied the fourth standard by a preponderance of the evidence.

34. The fifth just cause standard asks “[w]hether the Chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.” We consider each of the three charges separately below.
35. The first charge is for a violation of the new vehicle pursuit policy. Captain Gacek’s (“Gacek”) testimony cogently explained precisely how Kezeske violated the policy. We note a few key points. The policy permits pursuits in only three circumstances. The first, relating to the commission of a violent felony, plainly does not apply, particularly in light of the note at the end of SOP §660.20(B) that fleeing is not considered a violent felony. The third, relating to a “refusal to stop” pursuit also plainly does not apply, as Kezeske’s pursuit of the motorcycle was not of the “refusal to stop” variety. SOP §660.15(A)(2). The only plausible possibility, and the only one that we hear Kezeske to be urging in this appeal, is the second: “The occupant(s) [of the pursued vehicle] presents a clear and immediate threat to the safety of others and therefore the necessity of immediate apprehension outweighs the level of danger created by the vehicle pursuit.” Kezeske’s theory is that the speed of the motorcycle and the reckless manner in which it was driven satisfy this criterion.
36. One problem with Kezeske’s theory is that the policy expressly states, “Eluding/Fleeing pursuits are NOT authorized for traffic infractions” The obvious and eminently sensible rationale for this rule is illustrated by this very case: if the underlying concern is merely the risk from unsafe driving, a pursuit is only likely to heighten, not diminish, the risk. It seems to us that unsafe driving cannot provide a justification for pursuit under the policy except perhaps in some extreme and unusual circumstances, as where, *even before police intervention*, a driver has demonstrated a pattern of such reckless driving that a collision seems highly likely to result whether or not there is a pursuit. We cannot conclude that such was the case here.
37. The parties disagree over when the pursuit began. On the City’s view, as stated well in Gacek’s testimony, the pursuit began when Kezeske initially began to go after Green on South 1st Street. This seems to us to reflect a commonsensical view of what a “pursuit” is. Kezeske activated his lights and siren, and accelerated rapidly. In that and in all of his subsequent actions, there seems a clear and unwavering determination on Kezeske’s part to overtake Green, even if that meant traveling well above the speed limit and disregarding the other normal rules of the road. We think most people would have little difficulty labeling this a “pursuit.”
38. As against this view, Kezeske argues that the pursuit actually began on South 5th Street, when Green accelerated away from Kezeske after initially seeming ready to pull over to the side of the road. The basis for this view seems to be that Kezeske did not know for certain that Green was trying to evade him until that time. Kezeske’s theory does concededly find some support in the pursuit policy, which defines an “eluding/fleeing” pursuit as follows: “An active attempt by one or more law enforcement officers to apprehend a suspect who is either an occupant of or operating a motor vehicle, *during which time the operator of the motor vehicle is attempting to avoid capture by using high speed driving or other evasive tactics*” SOP §660.15(A)(1) (emphasis added).

Clearly, Green was engaged in high speed driving before South 5th Street, but Kezeske suggests that he was not necessarily “attempting to avoid capture.” On Kezeske’s view, whether or not there is a pursuit that is regulated by the new policy depends not solely on the officer’s conduct and intentions, but also, in part, on the other driver’s intentions (or, perhaps, the officer’s beliefs as to the other driver’s intentions). This seems an unlikely interpretation of the policy. The whole point of the new policy was to prevent officers from engaging in unsafe driving without a good justification; officers should not be any freer to drive dangerously before the target is aware of being a target than afterwards.

39. In context, the underlying purpose of the “eluding/fleeing” definition, and especially the “attempting to avoid capture” language, seems to be to draw a distinction between an “eluding/fleeing” pursuit and a “refusal to stop” pursuit. This distinction matters under SOP §660.20(B)(3), which is not at issue in this case. However, the general prohibition on unjustified pursuits does not refer to “eluding/fleeing,” but rather states more generally, “*Vehicle pursuits* are justified only when” (SOP §660.20(B) (emphasis added)) For the reasons stated in the previous paragraph, we think the term “vehicle pursuits” should be understood more broadly to encompass conduct like Kezeske’s whether or not the other driver is attempting to avoid capture, rather than being strictly limited to the “eluding/fleeing” and “refusal to stop” categories.
40. Even under Kezeske’s narrow interpretation of “pursuit,” we think there is ample basis for concluding that the pursuit began in this case well before the vehicles reached South 5th Street. Green admitted that he saw the police car with its emergency lights activated back on South 1st Street and then “sped up just in case” the officer was attempting to stop him. (Ex. 12, p. 6) To be sure, Green also apparently denied that he was attempting to elude the police car, but he would, of course, have an incentive to deny this in order to try to reduce his criminal liability. In these circumstances, the admission that he “sped up just in case” is really no different than an admission that he was “attempting to avoid capture by using high speed driving” and far more credible than his denials.
41. If we accept the City’s interpretation of when the pursuit began (which we do), then it seems clearly unjustified. Kezeske began the pursuit on the basis of nothing more than observing Green exceeding the speed limit for a very brief period of time and perhaps executing a U-turn on Becher Street. (Ex. 2, Bates no. 191)
42. Even if we accept Kezeske’s theory of when the pursuit began, however, we still conclude that the pursuit was unjustified. True, Green had been speeding over a much longer distance by that time, probably about a full mile, but that doesn’t seem to us to change the calculus much. There remains the basic prohibition on pursuits over traffic infractions. Kezeske wants us to also consider Green’s running of a stop sign when turning from South 5th Street, but that does not help Kezeske because, on his view of the case, the pursuit had already begun when Green accelerated away from him while still on South 5th and Kezeske followed suit. It seems reasonably clear, and both parties agree, that Green knew Kezeske was after him when he ran the stop sign; he did so precisely because he was “attempting to avoid capture.” An “eluding/fleeing” pursuit was already

in progress, and Kezeske cannot invoke Green's "eluding/fleeing" conduct as a justification for initiating the "eluding/fleeing" pursuit.

43. In short, under *any* plausible theory of when the pursuit began, it was backed only by traffic-infraction-type conduct that did not supply an adequate justification under the new policy. We discount the possibility, suggested at one time by Kezeske, that he thought Green might be a bank robber. (Ex. 2, Bates no. 192) We do not understand Kezeske to have pursued this theory at the hearing. Even if he did, we would regard it as wildly speculative, and certainly well short of the "probable cause" standard imposed by the vehicle pursuit policy.
44. For the foregoing reasons, we conclude that the fifth just cause standard is satisfied by a preponderance of the evidence as to the first charge.
45. Moving to the second charge, all disputes are factual in nature and were resolved against Kezeske above in our Findings of Fact. We conclude that Kezeske was not "complete, honest and accurate with respect to all relevant facts and information pertaining to any criminal or civil investigation, report or inquiry," specifically, in regard to his statements about the ramming attempt to Riestra, Sheehan, and Johnson in connection with their investigations. The fifth just cause standard is satisfied by a preponderance of the evidence as to the second charge.
46. The third charge requires more extensive discussion. In essence, this charge duplicates the dishonesty charge, but adds that Kezeske has rendered himself incompetent to serve as a police officer by virtue of his false statements. In prosecutions, acts of dishonesty by an officer-witness must be disclosed to the defendant. As a result, the City claims that "Kezeske may not be relied upon as a prosecutorial witness in any criminal or civil circumstance" and that he therefore "lacks the capacity to enforce federal and state law and city ordinances." (Ex. 1) It is not clear to us why this was charged separately from the underlying dishonesty charge. Some members of this panel recall other cases of dishonesty in which the impairment of the officer's ability to testify was presented not as a separate charge, but as a factor to consider in determining the gravity of the offense. This seems a sensible approach, particularly insofar as it diminishes the significance of necessarily somewhat speculative findings about how the Department might use an officer with a dishonesty issue and how prosecutors might deal with such an officer in hypothetical future cases.
47. In any event, we are unpersuaded by the evidence that "Kezeske may not be relied upon as a prosecutorial witness in any criminal or civil circumstance" and that he therefore "lacks the capacity to enforce federal and state law and city ordinances." Three documents are presented for our consideration. First, Exhibit 18, a letter from the Office of the Milwaukee County District Attorney says, "The District Attorney's Office will reserve determining what impact, if any, Kezeske's actions in this case will have on his ability to testify in future evidentiary matters until the conclusion of the MPD internal investigation regarding his statements throughout this matter." This is far from a statement that Kezeske lacks the capacity to enforce the law. Lieutenant Sgrignuoli

testified that there were subsequent communications with the District Attorney's Office that confirmed in more pointed terms that Kezeske would not be used as a witness. However, the testimony was vague and was undermined to some extent by Kezeske's production of a subpoena from the District Attorney's Office for him to testify after his discharge from the Department. Second, Exhibit 19 is a letter from the United States Attorney for the Eastern District of Wisconsin stating, "It is my conclusion that if Officer Kezeske was called to testify as a witness in federal court, we would be required to disclose the investigation." This is much stronger than Exhibit 18, and demonstrates that federal prosecutors would have a good reason to be reluctant to call Kezeske as a witness, but still falls short of establishing that Kezeske "may not be relied upon . . . in any circumstance" and he accordingly lacks the capacity to enforce federal law. Finally, Exhibit 20 is a memorandum of a conversation with the Milwaukee City Attorney noting, "City Attorney Langley . . . has advised all City Prosecutors not to utilize Officer Kezeske . . . in any prosecutorial case in Milwaukee Municipal Court." This is stronger still than Exhibit 19, although there is a concern here that the City Attorney's statement has been paraphrased by a police investigator. This is an area where nuances of wording may be significant, so it is regrettable that the exact wording has not been recorded. In any event, even taking Exhibit 20 at face value, we have a clearly established, categorical impediment to Kezeske appearing as a witness in only one court. The City bears the burden of proof here, and we conclude that it has not proven the third charge by a preponderance of the evidence.

48. The sixth just cause standard asks "[w]hether the Chief is applying the rule or order fairly and without discrimination against the subordinate." As discussed above, we find a reasonably thorough investigation and no evidence of animus against Kezeske. The testimony of Lieutenant Sgrignuoli and his notes on Exhibit 27 establish the considerations, both aggravating and mitigating, that were presented for the Chief's consideration, and there seems nothing unfair or improper about any of them.
49. In evaluating the sixth just cause standard, we often look to "comparables," that is, the discipline imposed in earlier cases that are similar to the case under review. Large, unexplained differences in the severity of the discipline imposed in similar cases can constitute significant evidence of discriminatory treatment. At the same time, the weight we ascribed to comparables is limited by at least two considerations. First, there are no two cases that are ever exactly alike, so some variation in the penalties imposed for violating a single rule is both expected and desirable. Second, we believe that the Chief should have the discretion to modify the penalties that he imposes for particular sort of violations over time based on new information or changed circumstances in the Department. The new pursuit policy provides a case in point. When the policy was brand new, it would have been understandable for the Chief to be relatively lenient in his treatment of violations. However, as the policy becomes more widely known and understood in the Department, we would not think it unfair for the Chief to treat violations more harshly.
50. The comparables considered by the Chief are listed in Exhibit 26. As to the first charge in this case, the Chief decided to discharge Kezeske. On the face of it, this discipline

seems quite harsh relative to other cases involving violations of the pursuit policy. In an earlier case involving an Officer Moeller, the Chief imposed only a three-day suspension (later overturned by this Commission). In two other cases, including one arising from an incident on the very same day as Kezeske's, the only discipline was policy review and additional training. If there were no other charges in this case, we would be quite troubled by the disparity between Kezeske's discharge and the penalties imposed in other cases. However, this case also included a charge of dishonesty. Although this was a separate charge and formally resulted in a separate discipline, the two charges are necessarily intertwined, for Kezeske's cover-up demonstrates in perhaps the most vivid possible way that he has not accepted responsibility for his offense. This lack of acceptance of responsibility significantly enhances the gravity of the violation of the pursuit policy and may help to account for the unusually harsh discipline imposed in this case. To be sure, the Moeller case also involved a false statement, but we don't know that Moeller's misstatement was as egregious or repeated as often as Kezeske's, and, in any event, the Moeller case arose in 2011 when the pursuit policy was much newer.

51. The comparables as to the second charge, dishonesty, are all over the place, but there is clearly precedent for a discharge. Indeed, the Chief has attempted to discharge at least three Department Members for dishonesty since 2011, although two of these decisions were overturned by this Commission for reasons that are not clear in the present record. Lighter penalties seem to have come in cases of lower-order venality or laziness. In the case that seems to be closest to this one, Officer Moeller's, the Chief did impose a discharge for the false statement.
52. Taking into account all of the foregoing considerations, we conclude that the sixth just cause standard is satisfied by a preponderance of the evidence.
53. The seventh and final just cause standard asks "[w]hether 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." This standard presents a real conundrum, for the seriousness of the violation and Kezeske's record of service point in sharply different directions. Without a doubt, and as outlined in Paragraph 1 above, Kezeske's record of service is an exemplary one. The testimony of a former supervisor, Skurzewski, also served to establish this in a particularly compelling way. At the same time, his violations are quite serious. His violation of the pursuit policy created a grave peril for all of the motorists and civilians in the area of the pursuit. Moreover, it actually resulted in a severe injury to Green (who, to be sure, was hardly blameless) and lesser injuries to one or two others. Moreover, the cover-up demonstrates that Kezeske knew that what he did was wrong and that he failed to accept responsibility.
54. Kezeske's dishonesty with investigators was also a serious offense. Kezeske's misstatements hindered the investigation into the pursuit and collision, and ultimately necessitated these proceedings relating to the cover-up. Although we have declined to find that Kezeske's misstatements categorically preclude him from serving as a police officer, Exhibits 18-20 and the related testimony do establish, at the very least, that he has drastically diminished his usefulness to the Department. Additionally, since his

misstatements amounted to a false accusation that Green had committed a very serious crime, there was some risk that, even without Kezeske's urging, there might have been a wrongful charge brought against Green.

55. When we balance serious violation versus good record of service, we do so with an eye to the ultimate question: "whether," in the words of Wis. Stat. §62.50(17)(a), "the good of the service requires that the accused be permanently discharged." In answering this question, we think it appropriate to give heavy weight to the judgment of the Chief, at least so long as his judgment appears reasonable and there is no evidence suggesting that he has been influenced by improper considerations. After all, the Chief is immersed in the life of the Department on a day-to-day basis in a way that we are not, and is therefore in a better position to evaluate the potential impact of disciplinary decisions. While we may be in as good a position as the Chief when it comes to making findings of historical fact, e.g., whether Kezeske made the misstatements that he is accused of making in this case, the forward-looking question of what the good of the service requires is another matter. While we would not defer unquestioningly to the Chief, we are disinclined in close cases—those cases in which reasonable minds may differ as to whether a discharge is required—to substitute our judgment for the Chief's as to discipline. Recall that the seventh just cause standard asks not whether we think the proposed discipline is the best possible outcome, but only whether it is reasonable (or, to be more precise, whether it "reasonably relates" to the seriousness of the violation and the record of service). Again, our approach might be quite different if it appeared that the Chief was possibly motivated by improper considerations, such as racial bias, political partisanship, or personal vindictiveness.
56. Our approach is not inconsistent with the statutory allocation of burdens of proof. It is true that the City does bear a burden of proof in disciplinary appeals such as this one. We are required, under Wis. Stat. §62.50(17)(a), to "determine whether *by a preponderance of the evidence* the charges are sustained." We have held the City to this burden in sustaining the first two charges against Kezeske. However, when it comes to deciding what penalty to impose after a charge has been sustained, the statutory language differs: "the board shall at once determine whether the good of the service requires that the accused be permanently discharged" In contrast to the explicit identification of a burden of proof in determining whether a charge is sustained, the statute is silent as to burden of proof for the determination of penalty. We think this difference was intended to provide greater flexibility in determining the penalty and appropriately reflects the important distinction between a backward-looking determination of historical fact (i.e., whether the charge is sustained) and a forward-looking determination of what the good of the service requires. This mirrors, for instance, the important procedural differences in a criminal case between the determination of guilt and the determination of what sentence to impose.
57. In this case, the seriousness of the violations plainly brings a discharge within the range reasonableness, even taking into account Kezeske's impressive record of service. Moreover, it appears that the Chief has not been influenced by any improper

considerations. Giving due weight to the Chief's judgment, we conclude that the good of the service requires that Kezeske be permanently discharged.

58. In sum, we conclude that the seven just cause standards are satisfied by a preponderance of the evidence as to the first two charges, but not as to the third. We further conclude that the first two charges, but not the third, are sustained by a preponderance of the evidence. Finally, we conclude that the good of the service requires that Kezeske be discharged as to each of the two charges that we have sustained.

DECISION

The Appellant, Kurt D. Kezeske, is ordered discharged from the Department.

Dated at Milwaukee, Wisconsin.

BY THE COMMISSION:



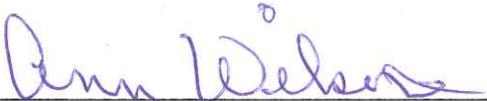
Paoi X. Lor

Oct 3, 2013



Michael M. O'Hear

Oct. 3, 2013



Ann Wilson

Oct 7, 2013