

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

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**In the Matter of the Appeal of Emeterio Gutierrez  
Personnel Order 2015-61**

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Hearing Dates: October 5, 2015

Hearing Locations: City Hall

Commissioners: Kathryn A. Hein  
Steven M. DeVougas  
Fred Crouther

Appearances: Robin Pederson, Milwaukee City Attorney  
For the Milwaukee Police Department

William R. Rettko, Rettko Law Offices, S.C.  
For Appellant Emeterio Gutierrez

**PROCEDURAL HISTORY**

The Chief of Police, Edward A. Flynn, charged Sergeant Emeterio Gutierrez in Personnel Order 2015-61, dated May 28, 2015, with the following violations of Milwaukee Police Department Rules & Procedures:

1. Core Value 4.00-Leadership, referencing Guiding Principle 4.04: Failure to ensure a subordinate carried out professional duties correctly.

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

**SUMMARY OF HEARING PROCEEDINGS**

The hearing was conducted on October 5, 2015. The hearing was recorded by a stenographic reporter. Testimony was taken from the following witnesses:

For the Chief of Police: Sergeant Thomas Hines, Milwaukee Police Department  
Captain James Shepard, Milwaukee Police Department  
Lieutenant Heather Wurth, Milwaukee Police Department  
Lieutenant Justin Carloni, Milwaukee Police Department  
Chief Edward Flynn, Milwaukee Police Department

For the Appellant: Sergeant Emeterio Gutierrez, Milwaukee Police Department  
Lieutenant Justin Carloni (adversely), 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. Sergeant Gutierrez has been a member of the Department for eighteen years and a supervisor since 2006. He was assigned to the Sensitive Crimes Division (“SCD”), on the late “Power Shift,” wherein he supervised three officers and three detectives in investigating sexual assault and abuse crimes.
2. On September 2, 2014, Sergeant Gutierrez assigned Detective Amy Stolowski and Officer Aleia Avant to investigate a Stranger Sexual Assault. (Exhibit 3.) DNA evidence was recovered at the scene and submitted to the Wisconsin Regional Crime Laboratory (WCRL). (Exhibit 6.)
3. On October 14, 2014, the Wisconsin Regional Crime Laboratory reported a cold case DNA hit identifying Robert Brown as the assailant in the offense. On October 25, 2014, Detective Stolowski initiated a report that she identified Brown as a match for the sexual assault. (Exhibit 5.) She then prepared a photo array for the victim to possibly identify Brown. (Id.) On October 26, 2014, Detective Stolowski met with the victim for the photo array. However, the victim was unable to make the identification.
4. Detective Stolowski initiated Supplemental Report No. 0009 identifying Brown on October 25, 2014. (Exhibit 7.) On October 29, 2014, a Temporary Felony Want was issued for Brown. (Exhibit 8.) A Temporary Felony Want differs from a warrant in that it lasts 72 hours and can only be renewed four (4) times. According to Captain James Shepard, SCD’s commanding officer at the time, Detective Stolowski should have taken the case to the District Attorney for review and issuance of a warrant within 48 hours of obtaining the DNA evidence. The reason for this is that when a Stranger Sexual Assault is involved, law enforcement must move quickly because there is a higher risk of further victimization.
5. On November 16, 2014, Sergeant Gutierrez reviewed and approved Detective Stolowski’s Supplemental Report No. 0009. (Id.) Sergeant Gutierrez testified that he read the report and acknowledged that the report states in the second line that the WRCL reported a DNA match on October 14, 2014. Sergeant Gutierrez also testified that Detective Stolowski had enough to seek a warrant. However, Sergeant Gutierrez’ review of the report did not trigger a status or a prompt for him to follow up with Detective Stolowski regarding the status of the investigation.

6. In June 2014, Captain Shepard instructed his sergeants, including Sergeant Gutierrez, to conduct monthly audits on their subordinates' investigations. This directive came in response to a similar incident which occurred involving a Stranger Sexual Assault, in addition to Captain Shepard learning that cases were not being investigated in a timely manner. As an additional "fail safe," in November 2014, Lieutenant Justin Carloni, created and implemented various logging and tracking systems for DNA evidence results received by SCD.
7. The monthly audits consisted of reading reports, checking the SharePoint system, and communicating with the investigating officer. High priority cases were to be briefed between shifts. Captain Shepard did note in his testimony that Sergeant Gutierrez' shift was always backlogged when it came to completing reports.
8. Inexplicably, this case was not charged in the District Attorney's office until December 11, 2014, even though Sergeant Gutierrez reviewed the report on November 16, 2014. Subsequently, Brown committed four additional sexual assaults from October to December. (Exhibit 14.) Brown was ultimately convicted on all charges.
9. On December 19, 2014, Captain Shepard directed Sergeant Gutierrez to commence an investigation with the Internal Affairs Division regarding Detective Stolowski and the delay in obtaining a warrant from the District Attorney's office. (Exhibit 25.) During the course of the investigation, it was discovered, and ultimately determined, that Sergeant Gutierrez failed to adequately supervise Detective Stolowski, in violation of Core Value 4.00, Guiding Principle 4.04.

### **CONCLUSIONS OF LAW**

10. This appeal is governed by the seven just cause standards set forth in Wis. Stat. § 62.50(17(b)). The Commission must find by a preponderance of the evidence that there is just cause to sustain the charges. Preponderance of the evidence means "more likely than not," rather than just possible. *See, e.g., U.S. v. Johnson*, 342 F.3d 731, 734 (7th Cir. 2003). We conclude that all seven standards are satisfied with respect to the charge against Sergeant Gutierrez.
11. The first just cause standard asks, "whether the subordinate could reasonably be expected to have knowledge of the probable consequences of the alleged conduct." Sergeant Gutierrez has been an officer with the Department for over 18 years and has been in a supervisory position since 2006. Sergeant Gutierrez admitted that he was supposed to review and audit the reports of his subordinates. Sergeant Gutierrez also testified that he read Detective Stolowski's report on November 16, 2014, and saw that a match had been made by the Wisconsin Regional Crime Lab on October 14, 2014. However, it did not prompt him to follow up with Detective Stolowski or to have Brown charged by the District Attorney.

12. Sergeant Gutierrez was also aware that Stranger Sexual Assaults are very rare and that these type of criminals tend to be repeat offenders, which is what occurred in this case. In addition, Sergeant Gutierrez was specifically instructed by Captain Shepard to perform supervisory audits and make sure that his subordinates were properly investigating crimes for this very reason.
13. In his defense, Sergeant Gutierrez claimed that the SharePoint system was flawed and that he could not rely on it to stay on top of an investigation. Sergeant Gutierrez placed the onus on Detective Stolowski to come forward and keep him apprised of case developments, and if she needed any assistance. As such, if there was no information in the SharePoint system, or the detective did not inform him, Sergeant Gutierrez had no way of knowing what was going on in a case.
14. We find Sergeant Gutierrez' arguments unconvincing. First, Sergeant Gutierrez assigned Detective Stolowski to the case. He was charged with her supervision. We also note that Detective Stolowski was a relatively new detective. Second, he reviewed her report, approximately twenty days after she created it, wherein the second line states when the DNA evidence was matched by the State. This should have prompted him to inquire as to the status of the case, given its rare nature. We conclude that the Chief has satisfied the first standard by a preponderance of the evidence.
15. The second just cause standard asks, "whether the rule or order the subordinate allegedly violated is reasonable." Guiding Principle 4.04 states, "Supervisors shall be role models for delivering truly professional, impartial and effective police service. Supervisors shall ensure that individuals for whom they are responsible carry out their professional duties correctly. Supervisors must put the department's mission first, in both word and action, and do nothing to interfere with its accomplishment." We have no trouble concluding that the leadership policy is reasonable. Nor is there any need to explain at length the self-evident reasons why it is reasonable for the Department to hold supervisors accountable in supervising their subordinates, even more so in the Sensitive Crimes Division. We conclude that the Chief has satisfied the second standard by a preponderance of the evidence.
16. The third just cause standard asks, "whether 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." Sergeant Hines and Lieutenant Wurth testified at length regarding the efforts made to investigate this case. This is also reflected in Exhibits 1 and 3. We conclude that the Chief has satisfied the third standard by a preponderance of the evidence.
17. The fourth just cause standard asks, "whether the effort was fair and objective." According to the record, on December 30, 2014, the Internal Affairs Division began an investigation regarding Detective Stolowski and Officer Aleia Avant. Subsequently, Captain Shepard sent an email to Sergeant Gutierrez directing him to initiate an internal investigation regarding Detective Stolowski concerning the charging of Brown.

18. Sergeant Hines testified, and his report states, that he reviewed emails, SharePoint entries, CAD files, reports, PI-21 interviews of Sergeant Gutierrez, Detective Stolowski and Officer Avant. He also spoke to Captain Shepard. Captain Shepard stated that, “Gutierrez who’s the immediate late power supervisor, and at that time was Amy’s [Stolowski] supervisor, he should have been going over her work to make sure it was getting done and he didn’t catch it...” From the record, we see a thorough investigation and no evidence pointing to any animus directed against Sergeant Gutierrez. We conclude that the Chief has satisfied the fourth standard by a preponderance of the evidence.
19. The fifth just cause standard asks, “whether the Chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.” In this case, it is undisputed that Sergeant Gutierrez was instructed by Captain Shepard to conduct monthly audits on his subordinates to make sure things were done in a timely and meaningful manner. It is also undisputed that Sergeant Gutierrez logged into the SharePoint system, reviewed and approved Detective Stolowski’s report, but did nothing else to ensure that Brown’s case was progressing timely. Rather, by Sergeant Gutierrez’s own admission, he was waiting for Detective Stolowski to inform him if she needed help, or if there was a problem. However, this contravened Captain Shepard’s directives and what was intended by Captain Shepard implementing an audit system. We conclude that the Chief has satisfied the fifth standard by a preponderance of the evidence.
20. The sixth just cause standard asks, “whether the Chief is applying the rule or order fairly and without discrimination against the subordinate.” As discussed above, we find a thorough investigation and no animus against Sergeant Gutierrez. The testimony of Sergeant Hines, Lieutenant Wurth, Captain Shepard, and Chief Flynn and the notes on the Discipline Review Summary (Exhibit 19) 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.
21. In evaluating the sixth just cause standard, we often look to “comparables,” that is, the discipline imposed in earlier cases which are similar to the case under review. However, it goes without saying that this was a unique case. The Chief testified that Stranger Sexual Assaults are very rare. In addition, there are no comparables for the violation at issue. Yet, taking into account all of the foregoing considerations, we conclude that the sixth just cause standard is satisfied by a preponderance of the evidence.
22. The seventh and final just cause standard asks, “whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate’s record of service with the department.” Sergeant Gutierrez’ inaction resulted in a very significant degree of harm that had life changing consequences for Brown’s subsequent victims.

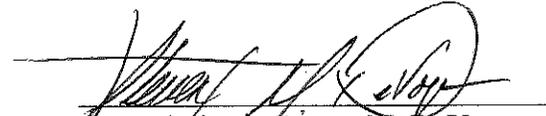
23. When we balance the serious violation versus good record of service, we do so with an eye to the ultimate question: “whether,” in the words of Wis. Stat. § 62.50(17)(a), “the good of the service requires that the accused be demoted to a lower rank.” We may also look at the member’s character, work record, and the impact of the misconduct on the complainant, department, and community. We find it appropriate to give great weight and deference to the judgment of the Chief, when the record reflects, as it does here, that his judgment appears reasonable and there is no evidence suggesting that he has been influenced by improper considerations.
24. The Chief testified that degree of harm was the most important consideration and that this is a leadership case. A supervisor’s role is to make sure the members that he or she supervises are doing what they are supposed to do. Sergeant Gutierrez failed to prioritize a rare Stranger Sexual Assault case with a potential for a high degree of harm. The case should have warranted more oversight and Sergeant Gutierrez never took responsibility for his role in this unfortunate matter. The Chief stated that he believed demotion was an appropriate level of discipline.
25. Another heavy consideration is balancing the member’s character and work record with the impact of the misconduct on the complainant, department, and community. Again, Sergeant Gutierrez has held a supervisory position since 2006, and while he received relatively decent performance reviews, he was rated as Average-Below Average by his supervisors during the Internal Affairs’ evaluation. (Exhibit 24.) Captain Shepard testified that Sergeant Gutierrez’ shift was always backlogged regarding completing reports. Further, while Sergeant Gutierrez was able to give assignments, he lacked following-up on them.
26. Sergeant Gutierrez testified that he was a Community Liaison Officer to the Hispanic community and trained three other officers. Notably absent was any mention of Sergeant Gutierrez’ impact in his current position.
27. Regardless, in this case, the seriousness of the resultant harm plainly brings a demotion within the range of reasonableness. Giving weight to the Chief’s judgment, we conclude that the good of the service requires that Sergeant Gutierrez be demoted to a lower rank.
28. In summary, we conclude that the seven just cause standards are satisfied by a preponderance of the evidence. We further conclude that the good of the service requires that Sergeant Gutierrez be demoted to the position of Police Officer for the charges we have sustained.

**DECISION**

The Appellant, Emeterio Gutierrez is ordered demoted from the rank of Sergeant to Police Officer.

  
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Commissioner Kathryn A. Hein

12/17/15  
Date

  
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Commissioner Steven M. DeVougas

12-17-15  
Date

  
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Commissioner Fred Crouther

12-17-15  
Date