

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

In the Matter of the Appeals of Erik A. Andrade

Hearing Dates: December 18, 2018
 December 19, 2018

Hearing Location: City Hall, 200 E. Wells Street, Milwaukee, Wisconsin
 Room 301-A, 8:30 A.M., on December 18, 2018
 Room 301-B, 8:30 A.M., on December 19, 2018

Commissioners: Marisabel Cabrera, Esq.
 Steven M. DeVougas, Esq.
 Ann Wilson

Hearing Examiner: Rudolph M. Konrad, Esq.

Appearances: For the Milwaukee Police Department,
 Jeremy Levinson, Esq.
 Halling & Cayo, S.C.

 For Erik Andrade,
 Brendan P. Matthews, Esq.
 Cermele & Matthews, S.C.

PROCEDURAL HISTORY

In Personnel Order 2018-111, dated September 12, 2018, Chief of Police, Alfonso Morales, found Police Officer Erik Andrade violated two Milwaukee Police Department Core Values.

1. Core Value 1.00, *Competence*, Guiding Principle 1.05, referencing Standard Operating Procedure 685.15, Use of Social Networking Sites, which states in part, “Members are free to express themselves as private citizens on SNSs [social networking sites] to the degree that their speech is not disruptive to the mission of the department.” (Exs. 4, 5)

2. Core Value 3.00, *Integrity*, Guiding Principle 3.01, which states, “Our behavior shall inspire and sustain the confidence of our community. Whether on or off duty, department members shall not behave in such a way that a reasonable person would expect that discredit could be brought upon the department, or that it would create the appearance of impropriety or corruptive behavior.” (Ex. 5)

The Chief found that Erik Andrade posted inappropriate, disrespectful, and defamatory comments to various memes and videos on his personal Facebook social networking site and shared them with his Facebook friends. For violating Core Value 1.00, the Chief suspended Andrade for thirty (30) days without pay and, and for violating Core Value 3.00, the Chief discharged him from the department. Andrade appealed the Chief's order to the Milwaukee Fire and Police Commission.

SUMMARY OF HEARING PROCEEDINGS

A hearing was held and recorded by a stenographic reporter. Testimony was taken from the following witnesses:

For the Chief of Police:

Sergeant Thomas Hines
Chief of Police Alfonso Morales
Deputy Chief District Attorney Kent Lovern
Attorney Craig Mastantuono
Assistant Chief Raymond Banks

For the Appellant:

Lt. David Feldmeier
Jordan Griffin
Haynie Smith
Joshua Bailey
Sgt. Jaime Rosado
Captain Alex Ramirez
Michael Crivello
Erik Andrade

FINDINGS OF FACT

We find the following facts have been established by a preponderance of the evidence.

1. Sterling Brown, a Milwaukee Bucks Basketball Player, was arrested in the early morning hours of January 26, 2018. In the course of taking him into custody, the arresting officers used force and shocked him with a Taser. Because of his status as an NBA-level professional basketball player, the arrest was reported on local and national news and sports media.
2. Officer Andrade answered a call to assist at the scene of the Brown stop, but was not directly involved in arresting Brown. Andrade's direct contact with Brown occurred

while he was conveying him. In his statement to Internal Affairs, Andrade relates the conversation he had with Brown at that time. (Ex 3, pp. 31-32)

3. Andrade's Facebook profile picture included a badge with a memorial band on it. His account was set to private so that his posts were shared with his 1200 Facebook friends, who know he was a police officer with the MPD. (Ex. 3, pp. 6-11) He admits posting or sharing the following internet memes and videos on his personal Facebook social networking site. (Ex. 1, sub. 3)
 - a. After Sterling Brown was arrested, Andrade posted, "Nice meeting Sterling Brown of the Milwaukee Bucks at work this morning! Lol#FearTheDeer." (Ex. 1, sub. 9) Andrade claims he did not post the comment to mock Brown, but because he enjoyed talking to him while he conveyed him and found it hard to believe that the incident had occurred at work. (Ex. 3, pp. 31-33)
 - b. On March 24th he posted a comment in response to a Channel 58 article titled, "Milwaukee County Supervisor Introduces Policy Against Mass Incarceration." His comment reads, "It's hilarious when people talk about mass incarceration lmao [laughing my ass off] like wtf [what the fuck] is that? Mostly all the people I deal with at work cannot stay locked up and they should be. Last time I checked, if you don't commit crimes, you don't get incarcerated . . . but that's hard for people to comprehend." (Exs. 1, sub. 2, 3, p. 12-13) Andrade said he was not making fun of mass incarceration, but sought to enlighten or educate people. He now saw that some people might take offense, but did not see it when he posted the comment; nevertheless, he does not believe that it could damage the department's reputation or violated the Code of Conduct. (Ex. 3, pp. 14-16)
 - c. On April 16th he posted "What comes to mind when I'm at work and I'm driving down Greenfield Av. Smh [shake my head] SICK AND *Tide* OF THESE HOES." The word "*Tide*" is represented by a reproduction of the Tide Detergent logo. (Exs. 1, sub. 4, 3, p. 15) Andrade said the he used the "Tide" logo because it was popular on the internet and was notorious because people have eaten it in pod form. He used the logo as a joke and was not making fun of how certain cultures or races pronounce the word "tired." He does not believe his joke is offensive or violated the Code of Conduct. (Ex. 3, pp. 18-19)
 - d. On April 24th he posted a comment to an internet meme that contained a picture of professional basketball player Kevin Durant next to a picture of an ice cream cone that has been dipped in Jimmies, or something similar, and at the top the words "WHO WORE IT BETTER???" To this meme, Andrade commented, "Damn . . . more naps than preschool. Lmac" [laughing my ass off]. (Ex. 1 sub. 3, 3, pp. 19-20) Andrade believes the who-wore-it-better internet meme has nothing to do with race because various memes include all kinds of people. He posted it as a joke. He does not believe it could be perceived as racist. (Ex. 3, pp. 20-22)

- e. On May 3rd he posted a comment in response to a video titled “Man Fights Police on Milwaukee’s North Side 5/2/18.” The comment reads, “Let’s see the whole video now since people are crying police brutality and how officers are beating an innocent black man for no reason. You social media educated fools are too much sometimes. Time after time, people rush into judgment and make comments after seeing a short clip of an incident and all the sudden, you all act like you were there and give expert opinion. Educate yourself on instant before you dummies want to voice your opinion about it.” (Ex. 1, sub. 1, 3, p. 8) When asked if he thought some people might be offended by the post, Andrade said some might think it offensive and some might agree with him, but he did not think in advance people would be offended. He did not believe the post violated the Code of Conduct because it was his opinion and is what he believes is right. (Ex. 3, pp. 11-12)
- f. On May 23rd he was tagged to a Facebook post that read “I need your autograph. I spotted you arresting an NBA player, LOL [laugh out loud].” Also on the post was body camera video of the Sterling arrest. Andrade commented, “I didn’t arrest him, LOL.” (Ex. 1, sub. 7) He was also tagged to a post that read “Erik Andrade let the man get his early morning popcorn.” Underneath the comment is a local news video titled “Milwaukee Bucks Rookie Stunned, Arrested.” (Ex. 1, sub. 8) Andrade added a laughing emoji to the post. When asked about these posts, Andrade stated he did not think the arrest of Sterling Brown was funny but thought it was funny people were tagging him about it. (Ex. 3, pp. 27-30)
- g. On May 27th he shared a post of a video from Mind of Jamal who posted on his Facebook account a comment that reads, “The epidemic of the black community lying on the police need to be addressed. Yes, whenever something happens, it always and epidemic of racism, police brutality or whatever lie these failed liberal handpicked so-called liberal black leaders come up with this epidemic crap to cover up the fact they have failed the black community.” Under the comment is a video that shows Jamal, an African-American male, and to the right of the video are smaller videos. One shows Sterling Brown at the scene of his arrest and the other two show other incidents. Andrade added the comment, “A little truth to those who want to listen.” Andrade admits he should not have commented on this video while the officers in the Sterling Brown case were under internal investigation, but he agrees with the comments that the news media only lets out parts of a story that fits their agenda. He acknowledges that some people might disagree with the post and his comment but does not believe it damaged the department or violated the Code of Conduct. (Ex. 1, sub. 5-6, 3, pp. 22-27)
- h. After the May 31st Cavaliers-Warriors basketball game, Andrade posted “I hope J.R. Smith double parks in Walgreens handicap parking spots when he’s in Milwaukee.” (Ex. 1, sub. 10) He posted it as a joke in reaction to J.R. Smith, who plays for the Cavaliers, making what Andrade thought was “boneheaded moves” which “blew the game in game one of the championships.” (Ex. 3, pp. 35-36)

- i. Sometime after working the Fifth District, Andrade posted “Had a great time workin (sic) replacement over in D5 the other day 5+ OT and use of force. Lol.” (Ex. 1, sub 11) Andrade claims this post refers to a shift where he worked for someone else on the north side. He had to decentralize a man and take the man’s girlfriend, who was later found to have drugs on her, to the hospital for mental observation. As a result, he earned five hours of overtime. The “LOL” was his way of expressing disbelief. (Ex. 3, pp. 3-4)
4. On June 19, 2018, Sterling Brown filed a civil rights lawsuit against the Milwaukee Police officers who were at the scene of his arrest. Brown alleges that Andrade’s posts are an admission that the officers engage in unlawful attacks and arrests of African Americans without justification and then “relish such events without any fear of real discipline.” (Ex. 2, sub. 189)
5. On June 19, 2018, the Milwaukee Journal Sentinel published an article that reported Andrade’s Facebook posts and comments. Reporting on the Brown lawsuit, the article states in part:

The lawsuit quotes extensively from the body camera footage and includes images of Facebook posts from one officer involved in Brown’s arrest. The officer appears to mock Brown and share racist memes on Facebook, the suit says. Hours after the arrest, Officer Erik Andrade wrote: “Nice meeting Sterling Brown of the Milwaukee Bucks at work this morning! Lol#FearTheDeer,” according to the lawsuit. Three months later, Andrade shared a meme of NBA star Kevin Durant mocking his hair. More than a week after the department released a video of Brown’s arrest, leading to a public outcry, Andrade wrote a post about J.R. Smith of the Cleveland Cavaliers after the team lost Game 1 of the NBA Finals: “I hope JR Smith double parks in Walgreens handicap Parkin spots (sic) when he’s in Milwaukee!” Smith had rebounded a missed free throw while the game was tied and let the clock run out, later telling reporters he thought the team was going to take a timeout. Andrade’s post about Smith ‘is an admission that he and the other Defendant officers are allowed to engage in unlawful attacks and arrests of African Americans without justification and then relish such events without any fear or real discipline,’ the suit says. (Ex. 19)
6. On June 19, 2018, Andrade took down his Facebook page because of the “nationwide news of the incident and the media twist, ah, to make me look a certain way, which I am not.” (Ex. 3, pp. 4-5) Andrade returned his Bucks season tickets on June 27, 2018, because he did not like being portrayed nationwide as a racist. He explained, “I saw it was all over CNN, ah, ESPN, every--I’m a big sports fan so I have, I subscribe to all the pages, I see my name everywhere, I’m getting calls from everybody. . .” (Ex. 3, p. 34)
7. Andrade’s posts came to the attention of the police department on or about May 26, 2018, when Milwaukee Alderman Hamilton sent a screen shot to Assistant Chief Banks. The

alderman had received it from an unnamed department member. (Ex. 16) An Internal Affairs investigation was then initiated on May 29, 2018. (Ex. 2)

8. Andrade acknowledge reviewing SOP 685, Social Networking Sites, and admitted he was familiar with the SOP. (Ex. 2, sub. 13, Andrade testimony) He admitted the posts could be seen as unprofessional but did not see them that way when he posted them. (Ex.3, p. 44)
9. The investigation was completed by Sergeant Hines and forwarded by Lieutenant David Feldmeier. The lieutenant reviewed the investigation and concluded that the preponderance of the evidence supports the allegation that Andrade “made defamatory and offensive comments regarding public citizens that is disruptive to the mission of the department.” Ex. 2, sub. 118) His report does not mention the effect of Andrade’s posts on his ability to testify as a witness in criminal cases. That issue was raised later by Chief Morales when he was considering the severity of the discipline to be imposed. (Feldmeier and Morales testimony)
10. Chief Morales testified that he considered Andrade to be a good officer; nevertheless, in his judgment, some or all of the posts are offensive and defamatory. Andrade’s posts and comments make fun of incurring overtime, brag about use of force, mock African-Americans for speaking in a certain manner, mock Sterling Brown, and undermine trust in the department. Andrade’s posts undermine the Chief’s mission to mend police-community relations in Milwaukee. The Chief learned from colleagues across the country that the story of the posts was receiving national media coverage, especially on sports channels. Nevertheless, the Chief would not have discharged Andrade for his posts and comments; instead, he would have imposed a lesser discipline. The Chief, however, was concerned over Andrade’s ability to testify effectively in light of the manner in which Detective Mark Furman was cross-examined in the famous O.J. Simpson trial, during which Furman’s credibility was effectively impeached over his use of a racist term. He solicited the opinion of the Milwaukee District Attorney’s Office whether Andrade could remain a witness in state criminal cases. The DA’s Office informed him it would not permit Andrade to testify because of his Facebook posts and comments. The Chief’s decision to discharge Andrade was based on the DA’s position that Andrade could not testify credibly and, therefore, would not be permitted to testify. In the Chief’s judgment it would be disruptive to the mission of the department to keep an officer on the force who could not be called upon to testify in court. In his opinion, police department operations require full service officers, which includes the ability to testify credibly in court. (Morales testimony)
11. Craig Mastantuono is an experienced criminal defense attorney who had participated in more than fifty jury trials and has crossed examined hundreds of police officers in trials and hearings. In his opinion, Andrade’s posts and comments are exculpatory evidence; accordingly, the DA, under the rule in *Brady v. Maryland*, would have to give copies of Andrade’s post and comments to the defense in any criminal case in which Andrade was to be called as a witness. In Mastantuono’s opinion, Andrade’s comments and posts stereotype minorities in a negative way, exhibit racial bias, imply he approved of the

arrest of Sterling Brown, makes light of incurring overtime and use of force, and implies he wants similar force used on others. Andrade's posts and comments, because they call into question his credibility as a witness, certainly would be used by defense lawyers to impeach his credibility. (Mastantuono testimony)

12. Standard Operating Procedure, 685.15, Use of Social Networking Sites, which Andrade certified having read three times, warns of these possible scenarios by warning against speech that is disruptive to the mission of the department. (Ex. 2, sub. 134)
13. The police department provided Deputy Chief District Attorney, Kent Lovern, with copies of Andrade's posts and comments. He concluded and informed the department that some of the posts were damaging enough that his office would not call Andrade to testify as a witness for the prosecution. The posts and comments create the appearance of racial bias, which would damage his credibility. If he were called as a witness, the posts would have to be turned over to the defense under *Brady v. Maryland*. The DA's office keeps a record of officers who 1) should not be called; 2) might be called with disclosure after consultation; and, 3) can be called with disclosure. Andrade would be placed in the first category. A case that relies primarily upon the testimony of an officer in the first category, like Andrade, would not be prosecuted. (Lovern testimony; Ex. 13)

CONCLUSIONS OF LAW

14. This appeal is governed by the seven just-cause standards set forth in Wis. Stat. sec. 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 standards are satisfied with respect to the charges against Officer Andrade.
15. The first just-cause standard asks, "whether the subordinate could reasonably be expected to have knowledge of the probable consequences of the alleged conduct." The phrase "could reasonably be expected," does not inquire into the subjective intent of the officer at the time he or she committed the violation, but rather whether a reasonable person would know the probable consequences of the alleged conduct. The charges solely concern whether Andrade's social media posts and comments disrupt the mission of the department (first charge), or undermine confidence of the community in the department by engaging in conduct that discredits the department or otherwise create the appearance of improper or corrupt behavior (second charge). The basis of the first charge, the standard operating procedures governing social media use by department members, describes a violation, expressed positively, as speech that is "disruptive to the mission of the department." Sec. 685.15(A)(5). The basis of the second charge, Referencing Guiding Principle 3.01, seek to maintain the community's confidence in the police department by prohibiting officers from behaving "in such a way that a reasonable person would expect that discredit could be brought upon the department, or that it would create the appearance of impropriety or corruptive behavior." In other words, the first charge asks whether the post is disruptive to the mission of the department. The second charge asks

whether a reasonable person, not the charged officer, would expect the behavior to undermine the confidence of the community by engaging in behavior that discredits the department or creates the appearance of impropriety or corrupt behavior. Accordingly, Andrade's claim that he did not believe his posts were disruptive, or that he did not believe he violated the Code of Conduct or, more directly, that he did not intend to discredit the department, is not a defense to the charges. The posts and comments themselves and the public's reaction to them as described in the record are sufficient to establish that a reasonable person would expect that the posts and comments violate the rules here cited. We conclude the Chief has satisfied the first standard by a preponderance of the evidence.

16. The second just-cause standard asks, "whether the rule or order the subordinate allegedly violated is reasonable." Core Value 1.00, *Competence*, holds department members accountable for the quality of their performance. Reference Guiding Principle 1.05, requires department members be familiar with department policy, procedures and training and conduct themselves accordingly. Section 685.15, establishes a social media policy that correctly balances the officer's First Amendment rights against the department's interest in maintaining its professionalism. See, for example, *Nixon v. City of Houston*, 511 F.3d 494 (5th Cir. 2007), which held that a police employee's speech as a private citizen and addressing a matter of public concern is not protected by the First Amendment if the court finds that the police department's interest in maintaining discipline, order, community trust and cooperation to accomplish its mission outweighs the employee's interest in the speech. We conclude the Chief has satisfied the second standard by a preponderance of the evidence.
17. 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 the rule or order." The record of the department's investigation of this incident is recorded in the memoranda of Sgt. Hines and Lt. Feldmeier. Andrade's response to the charges is recorded in the Hines memorandum. (Ex. 2) We conclude the Chief has satisfied the third standard by a preponderance of the evidence.
18. The fourth just cause standard asks, "whether the effort was fair and objective." Reviewing the entire record in this matter, we find no evidence of any animus directed against Andrade. The officer was notified of the charges and was given an opportunity to respond to the charges, which he did in his PI-21 interview. (Ex. 3) The investigation proceeded as recorded in Sgt. Hines' memorandum. (Ex. 2) We conclude 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." Andrade does not dispute that he made the posts and comments here in issue, or that his Facebook page displayed a badge with a memorial banner, or that his Facebook friends knew he was a Milwaukee police officer. The disputed issue is whether the posts and comments were disruptive to the mission of the department and undermine the confidence of the public in the department due to conduct that discredits the

department or creates the appearance of improper or corrupt behavior within the department. Without reviewing each post individually, it is sufficient to note that Andrade's posts managed to repeat every negative stereotype plaguing big city police departments, i.e., racism, use of excessive force, disregard for ethnic sensitivities, distrust of the public, and incurring excessive overtime. The negative impact of the posts was magnified by the extensive local and national publicity that followed. Lt. David Feldmeier concluded that the preponderance of the evidence supports the allegation that Andrade "made defamatory and offensive comments regarding public citizens that is disruptive to the mission of the department." (Ex. 2, sub. 118) The Chief, found that some or all of the posts were offensive and defamatory. Andrade's posts and comments, the Chief testified, make fun of incurring overtime, brag about use of force, mock African-Americans for speaking in a certain manner, mock Sterling Brown, and undermines trust in the department with the "epidemic of lying" comment. Accordingly, he concluded the posts and comments were disruptive to the mission of the department, undermine the confidence of the public in the department and brought discredit upon it. We conclude that the posts and comments undermined trust in the department, disrupted the mission of the department, undermined public confidence, discredited the department, and created the appearance of impropriety and corruption in the department. We conclude 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 was conducted with no evidence of animus against Andrade, nor was any credible evidence of comparable disciplines presented that would dissuade the Commission from upholding the suspension and discharge. None of the comparable disciplines introduced by the parties are convincingly analogous to this case. Andrade's case, unfortunately, consists of the proverbial three strikes. First, his nine posts reinforced almost every negative stereotype of police departments. Second, because some of his posts referred to the Sterling Brown arrest directly, and others referred to issues that could be interpreted as germane to Brown's arrest, they engendered negative publicity both locally and nationally. Third, Andrade's posts and comments constitute such effective impeachment materials that the District Attorney's Office decided that he would not be called as a witness in a state criminal case. We conclude the Chief has satisfied the sixth standard by a preponderance of the evidence.
21. 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." The Chief considered Andrade record of service and found it to be positive. His performance consistently was rated above average, he has no prior disciplines, and has performed meritorious actions. Clearly, Andrade's posts and comments were disruptive to the mission of the department in violation of Core Value 1.00, and warrant the 30-day suspension imposed. In reference to the discharge imposed, the Chief testified that he would have disciplined Andrade, but he would not have discharged him for violating Core Value 3.00, but for the fact that the District Attorney informed him, after inquiry, that Andrade would not be allowed to testify in a state criminal case. This drastic consequence of Andrade's conduct underscores the

seriousness of the offense. His inability to testify not only disrupts the operations of the police department, because it places limitations on where he can be assigned, it creates a risk to the mission of the department if he is placed, or finds himself, in a law enforcement situation where his biases are in issue. To keep an officer on the department whose credibility can be effectively attacked by impeachment directed to show him to harbor prejudices would be a discredit to the department, would not inspire public confidence in the department, and would give the appearance of corruption in that it leads the public to believe the MPD is racist. We conclude the Chief has satisfied the seventh standard by a preponderance of the evidence.

DECISION

The Appellant, Erik A. Andrade, is ordered suspended from the Milwaukee Police Department for thirty (30) working days without pay and discharged from the department.



Commissioner Marisabel Cabrera, Esq.

1/4/19

Date

Commissioner Steven M. DeVougas, Esq.

Date

Commissioner Ann Wilson

Date

seriousness of the offense. His inability to testify not only disrupts the operations of the police department, because it places limitations on where he can be assigned, it creates a risk to the mission of the department if he is placed, or finds himself, in a law enforcement situation where his biases are in issue. To keep an officer on the department whose credibility can be effectively attacked by impeachment directed to show him to harbor prejudices would be a discredit to the department, would not inspire public confidence in the department, and would give the appearance of corruption in that it leads the public to believe the MPD is racist. We conclude the Chief has satisfied the seventh standard by a preponderance of the evidence.

DECISION

The Appellant, Erik A. Andrade, is ordered suspended from the Milwaukee Police Department for thirty (30) working days without pay and discharged from the department.

Commissioner Marisabel Cabrera, Esq.

Date



01/04/2019

Commissioner Steven M. DeVougas, Esq.

Date

Commissioner Ann Wilson

Date

seriousness of the offense. His inability to testify not only disrupts the operations of the police department, because it places limitations on where he can be assigned, it creates a risk to the mission of the department if he is placed, or finds himself, in a law enforcement situation where his biases are in issue. To keep an officer on the department whose credibility can be effectively attacked by impeachment directed to show him to harbor prejudices would be a discredit to the department, would not inspire public confidence in the department, and would give the appearance of corruption in that it leads the public to believe the MPD is racist. We conclude the Chief has satisfied the seventh standard by a preponderance of the evidence.

DECISION

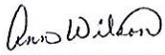
The Appellant, Erik A. Andrade, is ordered suspended from the Milwaukee Police Department for thirty (30) working days without pay and discharged from the department.

Commissioner Marisabel Cabrera, Esq.

Date

Commissioner Steven M. DeVougas, Esq.

Date



Commissioner Ann Wilson

01/04/2019

Date