

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

**In the Matter of the Appeal of Daniel A. Culver
Personnel Order 2012-15**

Hearing Date: June 6, 2012

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

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

Hearing Examiner: John J. Carter

Appearances: Patricia A. Fricker, Assistant City Attorney
For the Milwaukee Police Department

Attorney John F. Fuchs
For Appellant Daniel A. Culver

PROCEDURAL HISTORY

The Chief of Police, Edward A. Flynn, charged Police Officer Daniel A. Culver in Personnel Order 2012-15 dated January 24, 2012, with the following violations of Milwaukee Police Department Rules and Procedures:

1. Core Value 3.00 – Integrity, referencing Guiding Principle 3.05: Failure to obey the laws in effect in the State of Wisconsin, for which the Appellant was discharged from the Department.
2. Core Value 3.00 – Integrity, referencing Guiding Principle 3.11: Failure to be complete, honest and accurate with respect to all relevant facts and information pertaining to an investigation, for which the Appellant was discharged from the Department.

The Appellant filed an appeal with 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 held on June 6, 2012. It was recorded by a stenographic reporter, and the transcript of the proceedings is a part of the record in this matter. Testimony was taken from the following witnesses:

For the Chief of Police: Detective Rodolfo Gomez, Jr., Milwaukee Police Department
 Detective Ralph Spano, Milwaukee Police Department
 Detective Dale Bormann, Milwaukee Police Department

For the Appellant: No witnesses

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

FINDINGS OF FACT

1. We offer a few preliminary observations. This appeal centers on an apparent assault and armed robbery of the Appellant and related events that occurred during the evening of January 16, 2011. Based on the evidence that was presented at the hearing in this matter (which is the only evidence that we are permitted to consider), it is very hard to say with any confidence what exactly happened on the evening in question. The Appellant himself did not testify. Rather, the only testimony that was presented was that of three detectives who separately interviewed the Appellant on three different occasions. The testimony was largely comprised of the detectives' second-hand summaries of what the Appellant had told them. In some respects, the three statements were in accord with one another and with the other evidence presented at the hearing, but in other respects the statements differed from one another or conflicted with other representations made to us. We had little basis for resolving such discrepancies based on the evidence that we received. Since the City bears the burden of proof, the Appellant receives the benefit of the doubt where the record is equivocal.
2. On January 16, 2011, the Appellant got off work at approximately 6:20 p.m. and went to the Silver Spring Tap, a tavern. While there, he consumed several alcoholic beverages. At one point, he left to retrieve a package of food, but then returned.
3. Some time between 10:00 and 10:30 p.m., the Appellant left the Silver Spring Tap for good and drove south on 35th Street in his Volkswagen Passat.
4. At some point during this drive, one or two individuals entered the Appellant's vehicle. It is here where the various different versions of events begin to diverge in significant ways.

5. The Appellant told Detectives Gomez and Spano that a male armed with a gun entered his vehicle while it was stopped at an intersection, presumably through an unlocked door.
6. By contrast, the Appellant told Detective Bormann that, as he was driving along, he saw a female walking down the street. The Appellant pulled over and lowered his window. The woman asked for a ride, and he complied. Once in the car, the woman produced a knife.
7. Still a third story was suggested through some of the evidence presented at the hearing, although hardly in a systematic or detailed fashion. Apparently, information obtained by the Department indicates that two individuals, not one, were involved in the robbery. These individuals are males, but one or both may have been dressed as females at the time of the robbery. Exhibits 4-7 depict these two individuals with both male and female appearances. Detective Spano's testimony indicated that the two were later apprehended and confessed to burning the Appellant's car after robbing him, although no further details were supplied as to the content of their confessions or the investigation that led to their arrests. It is apparently the Department's view that the men obtained access to the Appellant's car by posing as prostitutes.
8. While it is plausible that the Appellant wished to engage the services of a prostitute as he drove south on 35th Street, we cannot conclude that a finding to this effect would be supported by the greater weight of the evidence presented at the hearing. Although Detective Spano testified that prostitution does occur in the neighborhood in which the Appellant was driving, he also stated that it would not be reasonable to assume that any white male in the area is there to solicit a prostitute. Other possible explanations exist as to why the Appellant was driving down 35th Street and how his assailant(s) gained access to his vehicle, including the alternative accounts supplied to Detectives Gomez, Spano, and Bormann. Based on the evidence presented at the hearing, it would be speculative to select the Department's theory over other possibilities.
9. Despite all of these uncertainties, the Appellant's statements and the other evidence presented at the hearing do provide clear support, at least in broad outline, for what happened next. The Appellant continued to drive for a time, pursuant to the instructions of the armed individual or individuals who had entered his car. Eventually, the car was stopped, and the Appellant was struck repeatedly in the head. He escaped or fell or was pushed from the car, after which the beating continued for a time. The assailant(s) then made off with the Appellant's car and cash. Later, the car was torched.
10. After police officers responded to the crime, the Appellant was taken to a hospital for the treatment of his injuries, including a golf ball sized lump on his forehead and a laceration requiring stitches above his right eye. He was admitted to the hospital and evaluated by a neurosurgeon, Dr. Jack Deckard.
11. The hospital records (Exhibit 8) include the following notations. "The patient does not remember what happened. . . . The patient does not have any other complaints other than some headache in the range of on admission 2/10 in the right side of the head. . . . [H]e is

not in apparent distress. . . . Assessment: (1) Blunt head trauma from a physical assault. . . . (2) Postconcussion syndrome He does not recall the events and thinks that he might have lost consciousness. . . . He is, however, displaying some signs of mild confusion, memory difficulties and having some trouble remembering all the details of what happened tonight. There were several other police officers here investigating the incident and state that he just does not seem to be quite acting right. . . . CT scan of the head without contrast showed a small skull fracture. . . .”

12. Detectives Gomez, Spano, and Bormann separately interviewed the Appellant a few hours apart from one another on the night of the incident and the next day. Consistent with the hospital records, all three reported that the Appellant appeared “confused” and had difficulty remembering the events surrounding the assault and robbery. The Appellant told Detective Spano that he was sleepy and in pain, and that he was taking Percocet. Detective Bormann testified that the Appellant appeared highly medicated.
13. As indicated above, the Appellant gave inconsistent stories to the detectives, and all three stories are apparently inconsistent with information the Department obtained later, e.g., from the confessions of the two robbers. These inconsistencies *may* result from intentional lying, but the record plainly suggests other possibilities, including confusion and memory impairment resulting from the Appellant’s head injuries, perhaps exacerbated by the effects of pain medication and/or alcohol consumption. Dr. Deckard, the neurosurgeon who examined the Appellant in the hospital, opined as follows (Exhibit 9): “As noted, Mr. Culver did suffer an injury to his head. There was also alcohol involved. Either one of these could contribute to difficulty in remembering the circumstances surrounding the injury. In combination, this difficulty could be accentuated further.” On this record, we cannot conclude that a finding of intentional lying is supported by the greater weight of the evidence.

CONCLUSIONS OF LAW

14. This appeal is governed by the just cause standards set forth in Wis. Stat. § 62.50(17)(b).
15. The first just cause standard is “Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.” Because the alleged conduct would plainly violate Guiding Principles 3.05 and 3.11, and because these Principles codify critically important duties of a police officer (see ¶16 below), we conclude that the first just cause standard is satisfied. No evidence to rebut these common-sense inferences was presented at the hearing.
16. The second just cause standard is “Whether the rule or order that the subordinate allegedly violated is reasonable.” We have no difficulty concluding that Guiding Principles 3.05 and 3.11 are reasonable. As stated in the Department’s Core Value 3.00, “Honesty and truthfulness are fundamental elements of integrity. It is [officers’] duty to earn public trust through consistent words and actions.” Indeed, if it were proven that the Appellant had violated Guiding Principles 3.05 and 3.11, we would regard this as a very serious matter warranting significant disciplinary action.

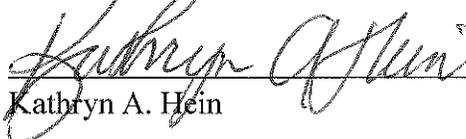
17. The third just cause standard is “Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.” Although we received no testimony that fully detailed the Chief’s efforts in this regard, Exhibit 3 provides a lengthy list of documents and other materials that were apparently produced and considered in connection with the investigation and charging of the Appellant. Exhibit 3 seems to reflect a reasonable effort to discover whether the Appellant violated a rule or order. Our conclusion in this regard is buttressed by the testimony of Detectives Gomez, Spano, and Bormann. This testimony evidenced a fair and diligent effort to determine the truth of what happened on the night of January 16, 2011. We have no reason to doubt the credibility or good faith of these detectives.
18. The fourth just cause standard is “Whether the effort described [in the third standard] was fair and objective.” For the reasons set forth in ¶17 above, we believe that this standard is also satisfied. No evidence to the contrary was presented at the hearing.
19. The fifth just cause standard is “Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.” This standard is not satisfied. Based on the testimony and documents admitted into evidence at the hearing—which must be the basis for our decision—we cannot conclude that there was substantial evidence supporting a determination that the Appellant (a) solicited a prostitute to engage in sex acts for money (see ¶8 above); or (b) failed to be complete, honest, and accurate with respect to all relevant facts and information pertaining to the investigation of the events of January 16, 2011 (see ¶13 above). Although there was *some* evidence in support of these determinations, we cannot conclude, in light of the hearing record as a whole, that the evidence was *substantial*. Perhaps additional evidence was available. We note that very little of the material listed in Exhibit 3 was introduced into evidence at the hearing. It is possible that some of these materials contain the missing “substantial” evidence. However, we cannot base our decision on such speculation. We are limited to a consideration of the evidence that was actually presented to us at the hearing. That evidence was equivocal in some key respects (see ¶¶ 1, 8, and 13 above). Accordingly, we conclude that the Chief has failed to meet his evidentiary burden under the fifth just cause standard.

DECISION

The charges against the Appellant, Daniel A. Culver, are not sustained.

Dated at Milwaukee, Wisconsin.

BY THE COMMISSION:


Kathryn A. Hein

June 7, 2012



Paoi X. Lor

June 15, 2012



Michael M. O'Hear

June 7, 2012