

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

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**In the Matter of the Appeal of Mark M. Kubicek**

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Hearing Date: May 23, 2019

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

Commissioners: Everett Cocroft  
Fred Crouther  
Angela McKenzie, Esq.

Hearing Examiner: Rudolph M. Konrad, Esq.

Appearances: For Chief of Police Alfonso Morales ("Chief"),  
Attorney Tyrone M. St. Junior, II of the City Attorney's Office

For Police Sergeant Mark M. Kubicek ("Kubicek")  
Attorney William R. Rettko of Rettko Law Offices, S.C.

**PROCEDURAL HISTORY**

In Personnel Order 2019-20, Chief of Police, Alfonso Morales, found Police Sergeant Mark M. Kubicek violated two (2) Milwaukee Police Department Core Values. First, the Chief found he violated Core Value 1.00, Competence, referencing Guiding Principle 1.05, referencing Standard Operating Procedure 725.15(B)(3), by failing to disclose the preliminary facts of an investigation to his shift commander. Second, the Chief found he violated Core Value 4.00, Leadership, referencing Guiding Principle 4.04, by failing to be a role model for professional and effective police service. For the first violation he ordered a ten (10) day suspension without pay. For the second violation he ordered Sergeant Kubicek be demoted to the rank of Police Officer. (Ex. 8) Sergeant Kubicek appealed the Chief's order to the Milwaukee Fire and Police Commission.

## SUMMARY OF HEARING PROCEEDINGS

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

For the Chief of Police:

MPD Sergeant Thomas Hines  
MPD Lieutenant David Feldmeier  
MPD Assistant Chief Raymond Banks

For the Appellant:

MPD Police Officer Jason Stachowiak  
MPD Police Officer Miguel Benitez  
Mr. Corey Kroes  
MPD Police Sergeant Mark M. Kubicek

## FINDINGS OF FACT

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

1. This case arose on March 10, 2018, out of a high speed pursuit that occurred between 3:12 A.M. and 3:19 A.M., and its aftermath. At 2:50 A.M. squads were dispatched to South 10<sup>th</sup> Street and West Rogers Street in response to multiple 911 calls for police assistance. The first officers to arrive approached the vehicle, a white Lexus, on foot. A male, later identified as Darrel Lewis ("Lewis"), the registered owner, was in the driver's seat. As the officers approached, he stepped out of the vehicle and demanded the officers "get that bitch out of the car." He was referring to a woman, later identified as Jessica Rodriguez ("Rodriguez"), who was sitting in the back seat of the vehicle. While the officers were questioning Lewis, Rodriguez moved to the driver's seat and drove off without the owner's consent. (Ex. 3)
  
2. Officer Jason Stachowiak heard on his squad's radio the description of a vehicle that had fled from a police stop in a reckless manner and, almost immediately, spotted the white Lexus traveling 50 mph on Mitchell Street between 8<sup>th</sup> and 9<sup>th</sup> streets. He followed it into an alley between Lapham Boulevard and Orchard Street. Using the squad's red light and siren, he attempted to stop the vehicle, but the driver sped away and a chase ensued. The vehicle proceeded east on W. Greenfield Avenue, a 30 mph zone, at speeds over 50 mph. The vehicle disregarded a red traffic signal at 6<sup>th</sup> and Greenfield and another at 5<sup>th</sup> and Greenfield. The vehicle went north on 4<sup>th</sup> Street. As it approached Washington Street, the vehicle went west in the east bound lane. The vehicle then fled north on South 6<sup>th</sup> Street at a speed above the posted speed limit. There were other vehicles on the road at the time. The vehicle continued north on 6<sup>th</sup> Street, then west on Juneau Avenue past the point where it transitions into Vliet Street. The vehicle came to a stop on Vliet Street, east of 20<sup>th</sup> Street. (Exs. 3, 7, 28) The pursuing officers reported to the dispatcher the vehicle's speed during the chase ranging from 20 mph to a high of

60 mph. For a majority of the streets traveled, the speed limit was 30 mph. Before the pursuit ended, seven additional squads had joined in the chase. (Ex. 1, 3, 7)

3. Almost immediately after Officer Stachowiak commenced pursuit with red light and siren, Sergeant Kubicek, who was nearby, reported to the dispatcher he was actively monitoring the pursuit. He monitored the chase on his radio, followed the pursuit, and stopped at 20<sup>th</sup> and Vliet. Rodriguez was sitting in the driver's seat with the windows up and the engine running. Police officers at the scene attempted a high-risk traffic stop. Several times they commanded the driver to shut off the vehicle and step out. She refused to do either. Instead, she had called 911 and was on her cell phone talking to a police communications operator threatening to kill herself and harm her children. The operator relayed this information to the officers on the scene. This went on for about five minutes without success. Sergeant Kubicek, who was parked directly across the street from the vehicle approached on foot. Officer Tolentino approached the left side of the vehicle to provide cover. Kubicek walked up to the driver's door and began speaking to Rodriguez through the closed window while the vehicle was running. She refused to turn off the vehicle or lower any window or unlock any door, but her hands were visible and she remained on the phone. After several minutes, Rodriguez agreed to unlock the front passenger door. While she was in the driver's seat with the vehicle running, Kubicek walked in front of the vehicle and then sat down in the front passenger seat. As Kubicek entered the vehicle, Officer Tolentino turned toward the other officers at the scene and made a "WTF" gesture. After Kubicek entered, he did a "sweep" of the "lunge areas" for weapons including a white purse. Tolentino moved toward the left bumper to observe the conversation. Rodriguez told Kubicek she was involved in sex trafficking but that she was not suicidal. She claimed to be suicidal and that her children were in danger to avoid arrest. She told Kubicek her pimp had told her to make those kinds of statements to avoid arrest. In the course of their conversation, Rodriguez offered to provide information on sex trafficking in Milwaukee if he agreed not to arrest her. After speaking to Rodriguez for about fifteen minutes, Kubicek believed the situation had de-escalated sufficiently that it could be presented to the District Attorney as an order in, thereby avoiding arrest, and ensuring her cooperation in a sex trafficking investigation. He released all squads, except for Stachowiak, to assist with a developing foot chase in the area of 5<sup>th</sup> and Hayes, and, thereafter, continued to speak with her for some time. (Exs. 1, 3, 20, 27)

4. Rodriguez, finally, turned off the vehicle and gave Kubicek the keys. He exited the vehicle with the keys and drove his squad next to the Lexus to ease Rodriguez's entrance because she had no shoes. She sat down in his squad in the front passenger seat. His squad was not equipped with a secure rear squad area or an in-car video system. He then drove to 10<sup>th</sup> and Rogers to retrieve her shoes from the middle of the street, and then drove her home. He was unable to provide beginning mileage for the conveyance due to odometer malfunction. He directed Officer Stachowiak to write out a reckless driving ticket, which he delivered to her at her house. (Exs. 1, 3, 20, 27)

5. Kubicek allowed both Lewis and Rodriguez to be released without consulting his shift commander. Officer Stachowiak filed a police report of the fleeing offense and the case was ordered to the District Attorney's Office for review. While in the vehicle with Rodriguez, Kubicek confirmed her identification from a recent booking photo, documented her cell phone number, and told her Sensitive Crimes Division ("SCD") would be contacting her. The next day

Kubicek contacted Sensitive Crimes Division Lieutenant Jones, who instructed him to file a police report regarding the human trafficking disclosures. On March 12, 2018, Sergeant Caroline Knitter, in response to the district attorney's request for a charging conference, contacted the officers involved in the chase, Kubicek, and Sensitive Crimes Division Lieutenant Jones, and asked that they complete the necessary follow-up as soon as possible. SCD officers were unable to contact or locate Rodriguez because the contact information Kubicek provided was inaccurate. On March 27, 2018, a detective and a police officer were assigned to find her. (Exs. 6, 27)

6. On April 16, 2018, Rodriguez was found deceased at 1117 West Burnham Street. Several days later Donte Harris, who had been her pimp, was arrested, and on April 9, 2019, he was convicted of her murder. (Exs. 4, 27)

7. The day after the Rodriguez stop, Kubicek met with Lieutenant Jesus Ortiz ("Ortiz") and told him about the pursuit and ensuing events by text and over the phone. Ortiz met with him on the 12<sup>th</sup> and spoke with him for over an hour and twenty minutes. Kubicek relayed to him the events of the 10<sup>th</sup> and told Ortiz that he felt there were several things he now believes he could have done better. On the same day, Ortiz received an email from Kubicek outlining the events of the 10<sup>th</sup> entitled, "Summary of MMK's tactical mishaps from the vantage of Squad 150 DashCam (End of Pursuit)," discussed below. (Ex. 20)

7. In his investigation, Sergeant Hines interviewed officers involved in the initial stop and the pursuit. Kubicek's conduct raised various concerns among the officers, to wit: he parked his squad directly across from the stopped vehicle, which posed cross fire risk; he put himself at risk by approaching a suicidal subject, who could have been armed, without a shield or any other cover; he put himself at risk by stepping in front of a running vehicle with the subject of the stop, who had just lead officers on a high speed chase, behind the wheel; he put himself and other officers at risk by sitting next to the subject in the front seat; had the vehicle driven away, they would have had to engage in a high speed chase with the sergeant in the car; officers were uncomfortable about how things transpired and were concerned about his safety; officers were puzzled as to why Rodriguez was not arrested and why he went into the car when it was something they were not trained to do; they were concerned that with him in the car, they could not take police action if the situation escalated. (Ex. 3)

8. During his PI-21 interview Kubicek stated the events described in his email entitled "Summary of MMK's tactical mishaps from the vantage of Squad 150 DashCam (End of Pursuit)" was thorough and accurate. (Ex. 1) He acknowledged writing it because "I felt obligated that the chain of command be notified of these things that I didn't think should be repeated in the future either by myself or anybody else." Kubicek admitted he should not have walked in front of the running vehicle. He also admitted he should have never gone inside a running vehicle with someone who had just exposed the officers and the public to the risks of a police pursuit. He later described it as his "worst decision." (Ex. 22) He states he should have contacted his shift commander before he entered the vehicle. He acknowledges if he had "underestimated her strength" she could have driven away with him in the car, leaving his officers wondering what to do as the scene commander drove off with the suspect. He verified he did not have a conversation with his shift commander until he returned to the station. By that time, both Lewis and Rodriguez had been released. He waited a day to notify the Sensitive

Crimes Division because he had to correct some information in reports, debrief Office Stachowiak, and he wanted to report to Lieutenant Jones directly. He admitted he should have called the shift commander from the scene so SCD could have been notified. He admitted he did not search Rodriguez before she sat down in the front seat of his squad and that it was not ideal to transport her in his squad without a squad camera. He also admitted he drove her to 10<sup>th</sup> and Rogers, but did not observe what house she entered. Finally, Kubicek explained he did not take Rodriguez into custody for mental observation because she admitted to him the whole thing was an act to avoid arrest. (Ex. 3, 22)

9. When asked why he did not arrest her, Kubicek stated:

The reason why she wasn't arrested is I felt that this was kind of an anomaly of a situation, meaning I don't believe I would have ever considered that course. If there had been some kind of accident or if the pursuit had been longer, if there weren't several times during the chase where she was slowing down looking to stop and then for whatever reason decided to continue, but not at high-speeds anymore. The other thing that I favored too much was mixed with my fatigue at the time, was the fact that my prior career as a victim advocate for the D.A.'s office and like I said because of the fatigue level and because of for example, I already had a traffic control officer running up and take some kind of action what is something I'd sanctioned. My way of correcting things turned into I'd say an over correction, okay. I felt because I took that extra ownership of where squads needed to go and where they needed not to go, I thought I was still within my authority to make an order-in, even though it was a felony type of thing, the fleeing. (Ex. 3)

10. When asked to explain what he meant when he stated in his report that Rodriguez would cooperate and provide information to SCD regarding human trafficking if she were not arrested, he stated she explained to him this was her opportunity to "break free of this life style." Kubicek acknowledged that he "does not profess to be any kind of expert at all of Human Trafficking things whatsoever" and wishes he "at least consulted to the CIB lieutenant, if not a night inspector." (Ex. 3)

11. Before releasing her, Kubicek stated he verified her cell phone number and told her SCD would be contacting her. Officers assigned to follow-up were unable to contact her because the phone number she provided was a non-working number and she did not live at the address listed. (Ex. 3)

### **CONCLUSIONS OF LAW**

12. 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 standards are satisfied with respect to the charges against Sergeant Kubicek.

13. 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 knowledge of the officer at the time he or she committed the violation, but rather whether a reasonable officer would know the probable consequences of the alleged conduct. Absent exigent circumstances, no reasonable police officer would employ the high risk tactics used by Kubicek. A reasonable police sergeant would know that acting in violation of prudent safety procedures and training, not contacting his or her shift commander while on the scene, and releasing a felon on his or her own volition would set a bad example for other officers and constitute a failure in leadership. We conclude the Chief has satisfied the first standard by a preponderance of the evidence.

14. 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. Standard Operating Procedure, Section 725.15(B)(3), Crime Scene Investigations, Initial Response, Patrol Sergeant Responsibilities, requires a patrol sergeant to communicate preliminary facts to his or her shift commander to facilitate the dispatch of appropriate investigative resources to the scene, unless the investigation is already completed. Core Value 4.00, *Leadership*, referencing Guiding Principle 4.04, requires supervisors to be role models for the delivery of professional, impartial, and effective police service. We find these rules to be a reasonable means of governing police conduct. Moreover, no argument was raised that these rules are unreasonable. We conclude the Chief has satisfied the second standard by a preponderance of the evidence.

15. 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 Sergeant Hines and Lieutenant Feldmeier and the related documents. Kubicek response to the charges is recorded in the Hines memorandum where he summarizes Kubicek PI-21 interview and his memo of January 9, 2019. (Ex. 22) We conclude the Chief has satisfied the third standard by a preponderance of the evidence.

16. 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 Kubicek. The sergeant was notified of the charges and was given an opportunity to respond to the charges, which he did in his PI-21 interview and memo. (Ex. 3, 22) The investigation proceeded as recorded in Sgt. Hines’ memorandum. (Ex. 3) We conclude the Chief has satisfied the fourth standard by a preponderance of the evidence.

17. 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.” The evidence in this case established that Kubicek failed to disclose the preliminary facts of an investigation to the shift commander, and that he failed to be a role model for professional and effective police service. Kubicek basically has admitted these failures. The day after the Rodriguez stop, he talked to his superior by text and telephone about the event. On

the 12<sup>th</sup> he met with his superior and told him there were things he should have “handled better.” On the same day he wrote an email to his superior outlining in detail the “tactical mishaps” for which he was responsible. Later he stated he wished he had contacted either the CIB lieutenant or a night inspector while at the scene. He acknowledged he should not have walked in front of the running car and described getting into the car with Rodriguez as his “worst decision.” Finally, he wished he had contacted a superior while he was at the scene for direction. Instead he released a suspected felon on his own volition. Nevertheless, Kubicek argues he should not be suspended and demoted because he was acting with good intentions. He was trying to deescalate the situation and agreed to release a felony suspect in exchange for a promise of cooperation in a sex trafficking investigation. Good intentions alone, however, are not an adequate defense. By not following a safer protocol consistent with training to approach the vehicle and by entering the vehicle he set an improper and dangerous example for the other officers at the scene, who were both puzzled and concerned by his actions. By not communicating the preliminary facts to his shift commander and acting on his own volition, he released a felon who should have been arrested. His rationale for releasing her is not a justification. Whether to forgo a felony charge in exchange for a promise of cooperation in another investigation is a decision that should be made at a level higher than police sergeant. Moreover, had he contacted his shift commander, an investigator could have been dispatched to the scene to interview Rodriguez and possibly obtain sex trafficking evidence. We conclude that Sergeant Kubicek failed to disclose the preliminary facts of an investigation to his shift commander and failed to be a role model for professional and effective police service. We conclude the Chief has satisfied the fifth standard by a preponderance of the evidence.

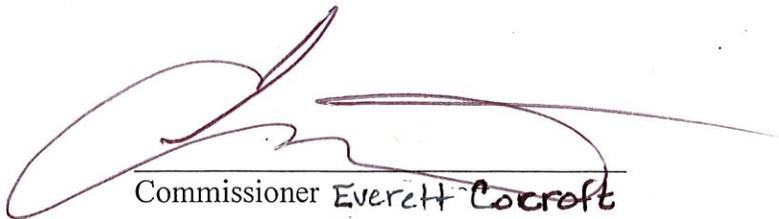
18. The sixth just cause standard asks, “whether the Chief is applying the rule or order fairly and without discrimination against the subordinate.” As discussed above, we find a thorough investigation was conducted with no evidence of animus against Kubicek, nor was any credible evidence of comparable disciplines presented that would dissuade the Commission from upholding the suspension and demotion. We conclude the Chief has satisfied the sixth standard by a preponderance of the evidence.

19. 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.” Assistant Chief Raymond Banks (“Banks”) testified as to the seriousness of the violation. A sergeant’s job, Banks explained, is to make sure what Kubicek did on the scene that night does not occur. He was there to make sure the felony suspect was arrested. He was there to make sure all precautions were taken to ensure the safety of the officers, the suspect, and the public. He harmed the MPD by engaging in unsafe conduct in front of other officers. His failure to consult with his shift commander prevented the MPD from dispatching additional resources to the scene that could have help Rodriguez and could have assisted in sex trafficking investigations. She could have been interviewed at the scene and then placed in a safe women’s shelter. Had he arrested her instead of making an agreement he had no authority to make on his own, the MPD would have had an opportunity to interview and protect her. Because of these failures, the MPD lost a chance that might have saved Rodriguez from her brutal death. In the Chief’s opinion, there were too many failures to retain Kubicek as a sergeant. His work performance consistently was rated either above average or average; he had no prior suspensions, and had been recognized for meritorious actions. (Exs. 10, 15, 31-34) His ratings as

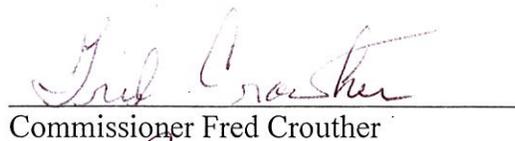
a probationary sergeant were satisfactory until this incident occurred, which lowered his rating to "Needs Improvement." (Exs. 11-14) Weighing the seriousness of this violation against his record of service, the Chief decided to suspend and demote Kubicek, rather than terminate him. We agree with the Chief's decision and conclude the Chief has satisfied the seventh standard by a preponderance of the evidence.

**DECISION**

The Appellant, Police Sergeant Mark M. Kubicek, is ordered suspended from the Milwaukee Police Department for ten (10) working days without pay and demoted to the rank of Police Officer.

  
Commissioner Everett Crockett

6-6-19  
Date

  
Commissioner Fred Crouther

6-6-19  
Date

  
Commissioner Angela McKenzie, Esq.

6/6/19  
Date