

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

In the Matter of the Appeal of Philip J. Poulos, Jr.

Hearing Date: May 9, 2019

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

FPC Commissioners: Everett Cocroft
Steven M. DeVougas, Esq.
Ann Wilson

Hearing Examiner: Rudolph M. Konrad, Esq.

Appearances: For the Milwaukee Police Department (“Department”)
Assistant City Attorney Robin A. Pederson

For Philip J. Poulos, Jr (“Officer Poulos”)
Attorney Jonathan Cermele, Cermele & Matthews, S.C.

PROCEDURAL HISTORY

Chief of Police Alfonso Morales charged Police Officer Philip J. Poulos, Jr. with violating Core Value 1.00, Competence, referencing Guiding Principle 1.05, referencing Standard Operating Procedures relating to Drug Testing, Sec. 770.50(2-3), testing positive for a prohibited controlled substance. The Chief found the charge to have been proven and ordered him discharged from the Department, effective, January 16, 2019. (Complaint and Personnel Order attached to Ex. 1)

SUMMARY OF HEARING PROCEEDINGS

Officer Poulos appealed the discharge order to the Milwaukee Fire and Police Commission and a hearing was held on May 9, 2019. The hearing was recorded by a stenographic reporter. Testimony was taken from the following witnesses:

For the Police Chief: Chief of Police, Alfonso Morales

For the Appellant: Police Officer Philip J. Poulos, Jr.
Mrs. Darlena Poulos
Police Officer Steven Roufus
Police Officer Adam Robokowski
Police Officer Adam Halase

Police Officer Andrew Gollup
Police Sergeant Rochelle Friedrich
Mr. Larry "Spike" Bandy

STANDARD OF PROOF

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). Disciplinary appeals before this Board are divided into two parts. In Phase I, we determine whether a violation of a Department rule has been proven by a preponderance of the evidence. In making this determination, we are guided by the first five "just cause" standards set forth in Wis. Stat. §62.50(17)(b). In Phase II, we determine whether the "good of the service" requires discharge or some lesser discipline. In making this determination, we are guided by the sixth and seventh statutory "just cause" standards.

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

PHASE I

1. Officer Poulos did not contest the charge in the Complaint nor whether the Police Chief, in his investigation and imposition of discipline, satisfied the five "just cause" standards stated in Wis. Stat. §62.50(17)(b). Accordingly, a stipulation, marked Exhibit 1, was entered into by the parties that established the following:

- a. Poulos was an employee of the City of Milwaukee and a sworn member of the Milwaukee Police Department holding the rank of Police Officer.
- b. Poulos knowingly waived his right to a fact-finding hearing for what is commonly referred to as Phase I of the appeal of the discipline but to proceed with Phase II of the appeal.
- c. Poulos specifically waived a hearing on the first five "just cause" factors under Wis. Stat. sec. 62.50(17)(b), and stipulated the commissioners may deem them established.
- d. Poulos admitted violating Core Value 1.00, Competence, referencing Guiding Principle 1.05, referencing Standard Operating Procedures relating to Drug Testing, Sec. 770.50(2), testing positive for a prohibited controlled as charged in the Complaint filed in this matter and dated January 16, 2019, and Personnel Order 2019-15.
- e. Poulos reserved his rights under Phase II with respect to the discipline to be imposed, to wit:

i. Whether SOP 770.50(3) applies to this case. The SOP provides that “[t]he Department position is that any member who tests positive for illicit or illegal drugs in violation of this standard operating procedure should be discharged from the Department.”

ii. Whether the Chief complied with the sixth (6th) “just cause” factor, which asks “Whether the Chief is applying the rule or order fairly and without discrimination against the subordinate.”

iii. Whether the discipline imposed complied with the seventh (7th) just cause factor, which asks “Whether 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.”

2. The specification in the Complaint summarizes his offense as follows:

“On October 10, 2018, Police Officer Philip J. POULOS, Jr. submitted a urine sample pursuant to an order to participate in a random drug test. On October 22, 2019, the Milwaukee Police Department received notice that the test was positive for a prohibited controlled substance. The positive test result was verified by a medical review officer.

“Pursuant to PI-21, Officer POULOS stated that he had consumed medication prescribed to him between the approximate dates of October 7, 2018 and October 10, 2018; however, Officer POULOS stated that he inadvertently consumed a medication prescribed to his spouse, when he intended to take his own prescribed medication.”

3. Based upon Officer Poulos failure to contest the charges in the Complaint, his stipulation to the facts and to the admission of the documents attached to the stipulation, we find that the fact stated in the Complaint have been established as true and that first five “just cause” standards set forth in Wis. Stat. §62.50(17)(b), have been met. Accordingly, the charge against Officer Poulos is sustained.

PHASE II

4. During the Phase II hearing, Officer Poulos explained the circumstances that lead to the positive drug test. A more complete explanation is stated in his response to the charge memo. (Ex. 6) In sum, his wife, Darlena, suffers from Complex Regional Pain Syndrome (CRPS). As a result, she is partially paralyzed on her right side, cannot walk, and is confined to a wheel chair. To alleviate her physical and psychological pain, she takes 6 different prescribed medications. One of her medications is Tylenol 3, which contains codeine, a prohibited substance under the Department’s Drug Testing SOP. (Ex. 4) Officer Poulos manages his wife’s medications. He

gives her the medication when needed to ensure she receives the proper dosage and does not exceed the frequency limitations. The last medication she takes before going to sleep is Tylenol 3. He keeps the Tylenol 3 on his nightstand so that he can give her one when she awakes during the night because of pain.

5. Officer Poulos served in the Wisconsin National Guard. He was deployed in August of 2005 for active duty in Iraq. In March of 2006, he was wounded in action and was awarded a Purple Heart for his injuries. He returned to duty with the Department on November of 2006. He receives healthcare from the Veterans Administration (“VA”) because of his service related injuries. As part of his care under the VA for his war injuries, he was prescribed 60 4mg Tizanidine tablets per month. Tizanidine is a muscle relaxer. To counter its side effects, he was also given a prescription for Sennosides, which are 8.6 mg tablets. He would take up to three of those with the Tizanidine. These two medications were kept on the top of his dresser. The three prescription bottles look substantially the same. (Ex. 12)

6. Officer Poulos feared he would have difficulty sleeping during the night of October 9-10, 2018, as he had had the previous nights, because of anxiety caused by a private legal dispute that was to be heard in court on the 10th. He moved his medication from the top of his dresser to his night stand so he could access it during the middle of the night. That night, he suffered a muscle related episode. He believes he inadvertently grabbed the Tylenol 3 prescription bottle instead of one of his prescription bottles and took the medication. As a consequence, the random drug test administered on October 10, 2018, a urinalysis drug screening, was positive for a controlled substance, specifically, an opiate metabolite codeine, in violation of the Department’s drug policy. (Exs. 9, 10, 12)

7. Officer Poulos is subject to multiple random drug screening per year by the Veterans Administration as a condition of care. Random VA urinalysis drug screenings taken on February 17, 2017, June 13, 2017, September 29, 2018, April 3, 2018, and March 27, 2019, were all negative for barbiturates, cocaine, methadone, opiates, and benzodiazepines. (Exs. 10, 13, 14)

8. The sixth just cause standard asks, “[w]hether the Chief is applying the rule or order fairly and without discrimination against the subordinate.” We find the Chief conducted a thorough investigation of the charge and we find no evidence of animus against Poulos. The testimony of Chief Morales, Poulos’ response to the charges, the Internal Affairs investigation and supporting documents, established the considerations, both aggravating and mitigating, that were presented for the Chief’s consideration. We find nothing unfair or improper about the manner in which the rule violation was investigated or process by which the Chief made his decision. To be consistent, the Chief considered an earlier case in which a probationary officer was discharged because he failed a drug test. In that case, the officer also claimed he accidentally took his wife’s Tylenol with Codeine instead of the Oxycodone that was prescribed for him. (Exs. 2, 3) That case, however, could not be appealed to the Commission because it involved a probationary member. The Chief, therefore, made his decision without any guidance from the Commission on the issue of accidental ingestion. We conclude the Chief has satisfied the sixth standard by a preponderance of the evidence.

9. 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 Department.” Standard Operating Procedure, §770.50, provides “[t]he Chief shall administer all discipline involving a civilian or police member who has an MRO [Medical Review Officer] verified confirmed positive test for drug use . . . such discipline *may* include discharge from the Department. (Emphasis added.) The SOP further states “[t]he Department’s position is that any member who tests positive for illicit or illegal drugs in violation of this standard operating procedure *should* be discharged from the Department.” (Emphasis added.) The use of the terms “may,” and “should” as opposed to “shall,” indicated that under certain circumstance, discipline less than discharge might be appropriate. We must therefore weigh the discipline imposed against the seriousness of the violation and the officer’s record of service with the Department.

Officer Poulos’ offense, reduced to essentials, is as follows: Officer Poulos is prohibited by Department rule from taking the Tylenol 3 without a prescription. He was, however, in lawful possession of the Tylenol 3 because it was prescribed for his wife and he monitored the dosage and gave her the medication at the prescribed intervals. Unfortunately, in the middle of the night he accidentally took his wife’s Tylenol 3 instead of his own prescribed medication. He was called in for a random drug test the ensuing afternoon, which he failed.

The seriousness of an accidental violation is remarkably less than that of an intentional violation or a violation arising from addiction. Accidental failures are a common human occurrence and do not in all cases negatively reflect on a person’s character or morals. Accordingly, under certain circumstances, accidental violations do not warrant the strict discipline of discharge that is generally appropriate in cases of intentional violations. Nevertheless, discipline is warranted. A member who accidentally ingests a prohibited controlled substance may pose a danger to the public or fellow officers when the drug negatively affects the officer’s performance.

The particular circumstances of this case warrant the vacation of the discipline of discharge and in its place the imposition of a fifteen (15) working days suspension without pay.

The circumstances we considered are the following:

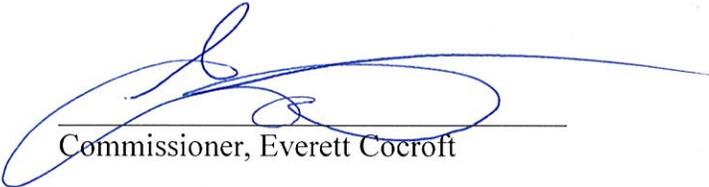
- a. We find that Poulos’ account of what occurred is credible. The truth of his testimony was not contested. Moreover, his demeanor was credible, his explanation of what had occurred was consistent with the pictures of the prescription bottles, and, because of his war injuries, he had a reason to take his medication at the time of the mistaken ingestion.
- b. He had 5 negative VA urinalysis drug screening between February, 2017, and March, 2019, which is strong evidence of that he is not addicted and not in the habit of taking his wife’s medication.
- c. He was lawfully in possession of the Tylenol 3 as his wife’s caregiver.
- d. During his sixteen years on the Department, he has received no discipline other than one 3-day suspension. (Ex. 8)

- e. In the performance review prepared as part of the Internal Affairs investigation, Poulos was rated either average or below average, depending on the supervisor and the rating category. (Ex. 11) In the working performance evaluations for the last ten years, Poulos is rated as meeting job requirements in sixteen categories and exceeding job requirements in 5 categories (Ex. 15) The performance reviews, however, are bolstered by the various awards and testimonials he received in the course of his service, including an MPD Lifesaving Award. (Ex. 5) In addition, several officers testified about his calm demeanor under stress, which allowed him to enter a burning building to rescue the occupants, and to disarm a suicidal person by holstering his own gun to gain the persons' confidence so that he could persuade the person to hand over his gun. Moreover, evidence was presented that he has gained the respect of the communities he has policed. (Ex. 5, 15, Bandy testimony)

We conclude the Chief has not satisfied the seventh standard by a preponderance of the evidence.

DECISION

Accordingly, we vacate the order of discharge of the Appellant, Philip J. Poulos, Jr., and in its place impose a suspension of fifteen (15) working days without pay.



Commissioner, Everett Cocroft

May 20th, 2019

Date

Commissioner, Steven M DeVougas, Esq.

Date

Commissioner, Ann Wilson

Date

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Commissioner, Steven M DeVougas, Esq.

May 20, 2019-----
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Commissioner, Ann Wilson

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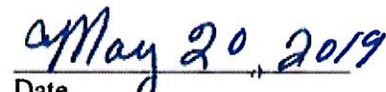
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