

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

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**In the Matter of the Appeal of Mark Cross**

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Hearing Dates: September 1, 2020 and September 2, 2020

Hearing Location: City Hall, 200 E. Wells Street,  
Milwaukee, Wisconsin  
Room 301-A, 8:30 A.M.

Commissioners:  
Everett Cocroft  
Angela McKenzie, Esq.  
Nelson Soler

Hearing Examiner: Rudolph M. Konrad, Esq.

Appearances: For the Milwaukee Police Department,  
Robin A. Pederson, Esq.  
Office of the City Attorney

For Appellant, Mark Cross  
Brendan P. Matthews, Esq.  
Rebecca Meyer, Esq.  
Cermele & Matthews, S.C.

**PROCEDURAL HISTORY**

In Personnel Order 2020-50, dated April 29, 2020, Chief of Police Alfonso Morales (“Chief Morales” or “Chief”) found that Police Officer Mark Cross (“Officer Cross”) had violated Milwaukee Police Department Code of Conduct on three counts.

In Count 1, the Chief found that Officer Cross violated Core Value 1.00, Competence, referencing Guiding Principle 1.05, requiring all members to be familiar with department policy, procedures, and training. Specifically, Officer Cross failed to comply with Standard Operating Procedure (SOP) 747.25, which states, “Once a BWC [Body Worn Camera] is recording, members must continue to record until either the completion of the event or until they leave the scene and their involvement in the event ceases.” For this violation, he suspended Officer Cross for ten (10) working days without pay.

In Count 2, the Chief found that Officer Cross violated Core Value 1.00, Competence, referencing Guiding Principle 1.04, requiring investigations to be conducted and reports to be prepared in a prompt, thorough, impartial and careful manner. For this violation, he discharged Officer Cross.

In Count 3, the Chief found that Officer Cross had violated Core Value 3.00, Integrity, referencing Guiding Principle 3.11, which requires all members to be complete, honest and accurate in the conduct of a civil or criminal investigation. It further provides, "No department members shall knowingly or with reckless disregard for the truth sign or make any false official statement." For this violation, he discharged Officer Cross.

Officer Cross appealed the Chief's order to the Milwaukee Fire and Police Commission.

### **SUMMARY OF PROCEEDINGS**

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

For the Police Chief:           Police Officer Mark Cross  
  Sergeant Bradley Tremblay  
  Sergeant Gregory Borst  
  Lieutenant Liam Looney

For Officer Cross:            Police Officer Samuel Rodriguez  
  Police Officer Lafayette Emmons  
  Police Officer Jonathan Steinberg  
  MPA Secretary-Treasurer, Danilo Cardenas  
  Police Officer Mark Cross

### **FINDINGS OF FACT**

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

1.       This discipline arises out of an incident that occurred on August 11, 2018. Officer Cross was appointed to the Department on December 8, 2014, and at the time of the incident had approximately three and one-half years of experience. His partner, Officer Samuel Rodriguez, had less than one (1) year experience. The investigative interviews occurred almost one (1) year after the incident. Sergeant Tremblay was interviewed on June 28, 2019. Officer Cross was interviewed on July 15, 2019, and Officer Rodriguez was interviewed on July 17, 2019. This hearing was held on September 1, 2020 and September 2, 2020, more than two (2) years after the incident and more than one (1) year after the investigative interviews. Inconsistencies among the investigative interviews, the testimony, and the events as recorded on the Body Worn Camera videos should be viewed in light of the delays. Moreover, it should be noted that the events Officer Cross and Officer Rodriguez dealt with while investigating this incident as shown on the body camera video were more disjointed, confusing, and confounding than can be captured in this written summary of the facts.

2. On August 11, 2018, at 2:32 A.M., the dispatcher received a call reporting an "INJ PERSON/SICK" at 450 N. 33<sup>rd</sup> St. At 2:36 A.M. The dispatcher reported the name Elando Lee and recorded the call as follows: "TypeDesc: INJ PERSON/SICK→BATTERY CUTTING . . . REPORTING VIC STATED THAT SOMEONE NAMED JUANITA CUT HIM AND SHE'S NLOS [no longer at scene] . . . CLLR DOESN'T KNOW SUBJECT. CALLR BELIEVES THE SUBJECT IS INTOXICATED. CLLR STATES SUBJ IS NOW TALKIN. NFI." Immediately after those comments, at 2:37 A.M., Officers Cross and Rodriguez, assigned to Squad 3451, were dispatched to 450 N. 33<sup>rd</sup> Street, Apartment 1. At 2:38 A.M., the dispatcher was able to talk to the victim and entered the following note: "WAS ABLE TO CALL VIC WHO WAS UNCOOPERATIVE WHEN ASKED WHO CUT HIM, JUST STATED JUST COME AND WON'T SAY ANYTHING."

3. Officer Cross and Officer Rodriguez arrived at 2:42 A.M. Both officers had their BWCs on as they entered the apartment. Officer Cross turned his BWC off when he called Sergeant Trembley for advice, and failed to turn it back on after he ended the call. He admits this was a failure on his part. Officer Rodriguez, who had no reason to turn off his camera, left it on for the entire investigation. He recorded twenty-six (26) minutes of the stop whereas Officer Cross recorded twenty-two (22) minutes. (Ex. 9)

4. Upon entering the hallway, the officers found the victim, who identified himself as James Lee. The victim was later identified as Elando Lee James ("James"). Milwaukee Fire Department ("MFD") personnel also arrived and began treating the victim's injuries. James appeared to be intoxicated and continued drinking and smoking during the investigation. He told the officers he had been held down on the stairs of the apartment hallway by a man and a woman who had attempted to rob him of \$45.00, which he still had in his pocket. In the course of the robbery attempt, the woman cut him with a box cutter.

5. When questioned, James gave a general description of the male assailant, but only described the female as, "some punk bitch." When asked her name, he said he did not know. While being treated, he turned to Officer Rodriguez and said, "Here's her name," spelling it out in part, "J-W-A-N-I-T-A Biddle." Officer Cross asked James who did this to him? James nodded his head. Officer Cross asked him if the person was there. James did not respond, but pointed up. Officer Cross asked if the person was upstairs. Officer Rodriguez asked if the person was here. James said no. James then asked the MFD and police officers to go to his apartment because he did not want the neighbors to know what was occurring. James' sister-in-law watched the events from their apartment doorway.

6. In the apartment, Officer Rodriguez again asked James who did this to him, and James replied, "I don't know." Officer Rodriguez then said to him, "You were saying the name, Juanita, two minutes ago. So, who cut you?" James said he did not know, but repeated that a woman cut his leg in an attempt to get his \$45.00 dollars. He then told Officer Rodriguez that Juanita was his significant other, but then said the suspect was not his significant other. He told them that his significant other had been in the apartment, but not when the assault occurred. Officer Cross asked for James' significant other's last name, and in response his daughter-in-law said her last name was "Tharp." While Officer Cross tried to speak to the daughter-in-law, James became argumentative and accused Officer Rodriguez of trying to catch him in a lie. The Officer Cross

and Officer Rodriguez stepped out to discuss what to do next when James followed them out and reached for Officer Cross' memo book. Officer Cross handed James his memo book. James motioned for a pen and wrote something in the memo book.

7. Officer Cross and Officer Rodriguez began to leave the apartment building and they met James at the front entry door. Officer Cross ask James if he wanted them to go and finally told James, "You're going to have to tell us exactly what happened." James replied, "I just told you what happened. I can't tell you no more than what I can tell you." The officers stepped away and Officer Rodriguez ask Officer Cross what James had written in the memo book and Officer Cross told him, "Juanita Biddle," apparently while winking at the officers.

8. During this time the following comments were noted in the CAD. At 2:51 A.M., "3451 Comment: VICTIM IS NOT BEING VERY COOPERATIVE AT THIS TIME." At 3:04 A.M., "VICTIM NO LONGER WISHES TO TALK TO US, HE CLOSED THE DOOR ON US. WE ARE GOING TO STAND HERE AND SEE IF HE WILL COME OUT AND TALK TO US." (Ex. 2)

9. Officer Cross then called the District 3 Acting Lieutenant, Sergeant Bradley Tremblay ("Sgt. Tremblay") on his phone and asked for instructions as to how to proceed. Although the details of the conversation could not be clearly established, Officer Cross basically told Sgt. Tremblay that the injured person claimed to be the victim of a robbery, but that he has been uncooperative in the investigation, no longer wishes to talk, and closed the door on him (thereby locking the officers out of the building). "That's all I got." It was clearly established in the BWC video that Officer Cross mentioned "robbery" to Sgt. Tremblay. Officer Cross also believes he told the sergeant about the conflicting statements. Sgt. Tremblay testified that he told Officer Cross "it sounds like a sick and injured." He also speculated that had he had more information, he would have told Officer Cross to call a supervisor to the scene. Officer Cross understood Sgt. Tremblay's comments to mean he should end the investigation and file a Sick and Injured Report.

10. After both officers returned to their squad car, James walked out of the building and approached them. After some back and forth Officer Cross asked him, "What do you want?" James replied, "Come to my house man." Officer Cross replied, "Talk to me right here." James refused to talk to them and the officers left. At 3:07 A.M., approximately the time the officers left the scene, the CAD notes: "CHANGE TypeDesc: BATTERY CUTTING→INJ PERSON/SICK Comment:PER 3451." (Ex. 2)

11. At 4:30 A.M., Officer Cross filed a Sick/Injured/Deceased Person report regarding the incident rather than a battery or attempted robbery report. In his report, Officer Cross does not state the victim alleged he was cut by a box cutter in the course of an attempted robbery by a person named Jwanita or Juanita Biddle or Jwanita or Juanita Tharp. Instead, he stated that the victim refused to let officers know how the injury occurred. (Ex. 4.)

#### CONCLUSIONS OF LAW

12. 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). On the first count, we conclude that the seven just cause standards are satisfied and sustain the 10-day suspension imposed. On the second count, we conclude that standards one through six are satisfied with respect to the charges against Officer Cross. In reference to the seventh standard, however, we conclude that the preponderance evidence supports a 6-day suspension in lieu of discharge. On the third count, we conclude that just cause standard five is not satisfied and find that the charge is not sustained.

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.” Each of the Code of Conduct violations charges concern basic police departments procedures that every officer can reasonably be expected to know, turn your body camera on when you arrive at the scene, conduct a prompt, thorough, impartial, and careful investigation, and write a complete, honest, and accurate report. 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.” As noted above, the rules alleged to have been violated in this case are necessary for effective and honest police work. 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.” Sergeant Gregory Borst testified regarding the effort made to investigate this case, which is recorded in his Citizen Complaint Supervisor’s Report. His report also includes a summary of the Officers Cross’ and Rodriguez’s P I-21 interviews, summary of his interview of Sergeant Tremblay, and a review of the BWCs footage and the CAD reports. Officer Cross also submitted a memorandum stating his understanding of what had occurred, which is part of the investigative file. We noted in Paragraph 1 that the investigative interviews occurred almost a year after the incident and this hearing was held more than two years after the incident. The length of time taken, however, does not by itself make the Chief’s effort unreasonable. We conclude the Chief has satisfied the third standard by a preponderance of the evidence.

16. The fourth just cause standard asks, whether the investigative effort described above was “fair and objective.” Reviewing the entire record in this matter, we find no evidence of any animus directed against Officer Cross or unfairness or lack of objectivity in the investigation. 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.” We address each count separately.

18. On the first charge, SOP 747.25, governing the use of BWCs is unequivocal. Officer Cross was required to continue his recording until he left the scene He properly turned it off when he consulted with Sergeant Tremblay, but failed to turn it back on after he ended the conversation,

which he admits. In reference to the first count, we find the Chief has satisfied the fifth just cause standard by a preponderance of the evidence.

19. The remaining two charges are more complicated because they involve the exercise of an officer's judgment and a superior's direction in dealing with an intoxicated and at times hostile victim who vacillates between obfuscation and cooperation to the point where it is difficult, if not impossible, to discern where the truth lies. The second charge concerns the investigation conducted by Officer Cross. It appears that Officer Cross concluded after trying to deal with James that his efforts were futile and he had no way of knowing what parts of James' story were true, or who the perpetrator was, or if even a robbery occurred in the first place or if the injury was the result of some sort of fight, domestic or otherwise. The CAD record does not mention a robbery when the incident was first reported, nor after the dispatcher spoke to the James. It is never established if there are one or two Juanitas, or whether the Juanita who allegedly cut him is his significant other or someone else. Nevertheless, it is established that a battery occurred and the investigation should have been more thorough. There was no effort to contact the person who called the police in the first instance or canvass the apartment building for witnesses, or more diligently attempt to learn the true identity of the one or two Juanitas, or arrange to talk to James the next evening after he sobered up or with his sister-in-law later out of James' presence. In reference to the second count, we find the Chief has satisfied the fifth just cause standard by a preponderance of the evidence.

20. The third count alleges the Officer Cross' Sick/Injured report was not complete, honest, and accurate. This count is complicated by the fact we do not know exactly what was said in the Cross-Tremblay conversation. It appears Sergeant Tremblay has little or no memory of the conversation. This is not a criticism of him but a consequence of the difficulty of remembering a short telephone conversation a year after the fact. When interviewed by Sergeant Borst on June 28, 2019, Sergeant Tremblay first reviewed the CAD and then stated he believed he recalled the event. But all he recalled was that Officer Cross told him James had closed the door, would not talk to them further, and had not provided him with any information regarding how he was injured. At that time, he did not recall that Officer Cross told him that James claimed he was injured in a robbery. Because he used the CAD report to refresh his recollection, it is not surprising that he did not recall being told of the robbery allegation. The CAD report does not mention robbery, only battery. Before testify at the hearing, however, Sergeant Tremblay was able to view the BWC video in which it could be heard that Officer Cross used the word robbery in his conversation with the sergeant and, as a result, Sergeant Tremblay so testified. Officer Cross' version of the conversation is summarized in paragraph 9 above. In light of Sergeant Tremblay lack of a clear recollection and the burden of proof, we have to accept Officer Cross' version of the conversation; that is, Sergeant Tremblay told him to write it up as a Sick/Injured. It appears that immediately after the conversation, Officer Cross notified the dispatcher of the change of status. (Ex. 2, at 03:07:01) Officer Cross wrote in the SICK/INJURED report later that morning He noted in the report that Lee refused further more medical attention and refused to let the officers know how the injury occurred. Officer Cross' reason for this conclusion is that he could not determine if James was telling him the truth or not. In other words, Office Cross made a judgment that more specific information about how the injury occurred was not credible and should not be entered on the report. He also had some doubts about including further information that would make the SICK/INJURED report appear to be a robbery report after he had been told to write a SICK/INJURED report. We are reluctant to discipline an officer for conduct motivated by directions given him by a superior

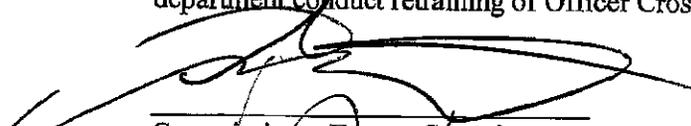
officer. In reference to the third count, we find the Chief has not satisfied the fifth just cause standard by a preponderance of the evidence.

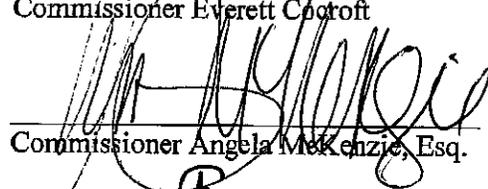
21. The sixth just cause standard asks, "whether the Chief is applying the rule or order fairly and without discrimination against the subordinate." As discussed above, we find a thorough investigation was conducted with no credible evidence of animus against the officer. The testimony of Lieutenant Liam Looney and the Discipline Review Summary and the supporting documents establish the considerations that were presented for the Chief's consideration. (Ex. 10) We conclude the Chief has satisfied the sixth standard 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." On the first charge, we uphold the Chief's 10 (ten) working day suspension without pay. The rule governing BWC is so clear that there is no excuse for not following it, irrespective of the amount of the officer's experience. On the second charge, we change the Chief's order of discipline from discharge to a 6 (six) day suspension without pay. We find Officer Cross' inadequate investigation was not the product of negligence or ill will, but the result of a judgment he made that further investigation would be futile. In light of his limited experience and the confounding situation he had to deal with, a much lesser discipline is appropriate. In deciding the amount of discipline, we note that several days later two officers were dispatched to the same apartment house and failed to adequately investigate an assault complaint. Each officer received a 6 (six) day suspension. We believe the same discipline is warranted here.

### DECISION

On the first charge, the Chief's discipline is sustained and the Appellant, Mark Cross, is ordered suspended from the Milwaukee Police Department for a period of 10 (ten) working days without pay. On the second charge, the Chief's finding of a rule violation is sustained, but the Chief's discipline of discharge is modified. On that charge, the Appellant, Mark Cross, is ordered suspended from the Department for a period of 6 (six) working days without pay. On the third charge, the Chief's finding of a rule violation is not sustained. Finally, we order that the department conduct retraining of Officer Cross on SOPs relevant to Disciplinary Order 2020-50.

  
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Commissioner Everett Cooft

  
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Commissioner Angela McKenzie, Esq.

  
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Commissioner Nelson Soler

9-11-2020  
Date

9/22/2020  
Date

September 15, 2020  
Date