

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

In the Matter of the Appeal of Nikolas B. Zens

Hearing Dates: December 14, 18 and 28, 2020

Hearing Location: City Hall, 200 East Wells Street,
Milwaukee, Wisconsin 53202
Room 301-A, 8:30 A.M.

Commissioners: Everett L. Cocroft
Fred L. Crouther
Angela McKenzie, Esq.

Hearing Examiner: Rudolph M. Konrad, Esq.

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

For the Appellant, Nikolas B. Zens
Brendan P. Matthews, Esq.
Rebecca Meyer, Esq.
Cermele & Matthews, S.C.

PROCEDURAL HISTORY

In Personnel Order 2020-76, dated July 30, 2020, Chief of Police Alfonso Morales (“Chief Morales” or “Chief”) found that Police Officer Nikolas B. Zens (“Officer Zens”) had violated Milwaukee Police Department Code of Conduct provisions on two (2) counts.

1. Core Value 1.00, Competence, referencing Guiding Principle 1.05, requiring members to be familiar with and follow department policy, procedures and training and conduct themselves accordingly; specifically, the Wisconsin Law Enforcement Standards Board’s “Tactical Response, A Training Guide for Law Enforcement Officers,” which, depending on the situation and environment, generally instructs officers engaged in a foot pursuit to not follow that exact same path as the suspect, meter (“pie”) corners in order to maintain distance from a corner to avoid turning directly into an ambush, and to stop, look, and listen for a suspect after losing sight of him during a foot pursuit. Chief Morales found that Officer Zens “failed to adhere to policy when he failed to stop and look for the suspect after losing sight of him while chasing him on foot.” For this violation, Chief Morales

suspended Officer Zens for twenty (20) working days without pay. (Ex. 15; the Training Guide reference is Ex. 8, p. 17; the complete document is part of Ex. 17)

2. Core Value 1.00, Competence, referencing Guiding Principle 1.05, requiring members to be familiar with and follow department policy, procedures and training and conduct themselves accordingly, referencing Wisconsin Law Enforcement Standards Board's "Defense and Arrest Tactics, Training Guide for Law Enforcement Officers," which instructs officer that "[if] you have determined that you face a threat that meets the requirements to permit deadly-force response, and you have decided to shoot, you may still fulfill three target requirements: Target acquisition, Target identification, Target Isolation." It further states, "Target isolation means that you can shoot at your target without danger of harming innocent people. If the person who shot at you from the apartment building ran out of the building and into a crowd of people, you could not shoot at him or her without endangering others." Chief Morales found that Officer Zens "failed to adhere to policy when he failed to meet the deadly force requirement of target isolation, ultimately wounding a Bystander." For this violation, Chief Morales discharged Officer Zens. (Ex. 14; the Training Guide is Ex. 1, pp. 81-82; the complete guide is part of Ex. 17)

Officer Zens 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 City:	Police Officer Nikolas B. Zens Sergeant Allen Groszcyk Sergeant Vynetta Norberg Sergeant Matthew Mengel Inspector Paul Formolo
For Officer Zens:	Lieutenant Liam Looney Mr. Robert C. Willis Inspector Paul Formolo (as adverse witness) Police Officer Jose Flores Sergeant Matthew Mengel Lieutenant William Wilson MPA Secretary-Treasurer, Danilo Cardenas Police Officer Nikolas B. Zens

FINDINGS OF FACT

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

1. On September 9, 2019, between approximately 1:00 A.M. and 1:30 A.M., Officer Zens, with fifteen (15) months of on the street experience, engaged in a vehicle and foot pursuit of a fleeing suspect, Mr. Kevin Brown ("Brown"), that ended when Officer Zens attempted to shoot Brown, but unintentionally shot a man standing behind Brown, Mr. Tari Davis ("Davis or Bystander").

2. The MPD investigation and the District Attorney's review both concluded that Officer Zens' use of deadly force against Brown was justified under the circumstances. (Ex. 2, 7, 19) Accordingly, the Chief did not charge Officer Zens with unlawful use of deadly force. That issue, therefore, is not before the Commission. The Chief charged him with failing to adhere to two (2) MPD policies regarding the manner in which a police officer should chase a suspect and focus on the intended target before shooting. It is these two (2) alleged violations that were appealed to the Commission and are the subject of this decision. Nevertheless, it is necessary to review the facts of the shooting because they are helpful to decide whether the policies relied upon by the Chief to impose discipline were indeed violated.

3. At about 1:13 A.M., officers saw a speeding auto traveling south on North 27th Street drive through a flashing red light at the Townsend Street intersection. It drove through the intersection at approximately 65 to 70 miles per hour. The officers pursued the auto with their red light and siren on. A lengthy pursuit followed. The vehicle pursuit went on for a distance of 13.7 miles in the city and lasted about nineteen (19) minutes. The fleeing auto reached speeds up to an estimated 70 miles per hour. The driver, Brown, made a turn into an alley of North 27th Street and collided into an embankment. He then backed into a marked police squad that had pulled up behind and hit the squad as an officer was exiting. Brown continued east in the alley until he exited the auto at the rear of 3218 N. 26th Street and fled on foot. The auto, however, kept moving, hit a utility pole, and came to a stop. During the chase, Brown disregarded numerous red or flashing red traffic signs, numerous stop signs, and nearly hit two (2) other cars, all at speeds of approximately 50 to 70 miles per hour with headlights off. Officers used stop sticks to attempt to stop the fleeing auto. Officers also reported that Brown was using his phone during the pursuit. (Exs. 3, 7, 9)

4. Officer Zens and his partner first heard the vehicle pursuit broadcast when it was patched into District 7's radio channel. He heard the request for stop sticks and that the driver was on his cell phone. They drove to the area of the pursuit. Zens followed the pursuit broadcast and concluded that, although the stop was for a traffic offense, the driver must be fleeing for serious reasons because of his reckless behavior and the length of the pursuit. As Zens and his partner approached North 26th Street, they saw Brown running west toward them and north across the front yards on the eastside of the 3200 block. Officer Zens exited his squad and pursued Brown on foot. (Exs. 3, 7, 9)

5. As Officer Zens pursued Brown, he saw Brown kept his hands in front of him under his shirt leading him to believe that Brown was armed and, based upon Brown's conduct during the chase, dangerous. As Officer Zens began chasing Brown, he shouted at him "Stop! Stop! Stop!" Officer Zens chased Brown north across the front yards of 3218 and 3222 N. 26th Street. Officer Zens shouted "Show me your f***ing hands, let me see your f***ing hands!" Brown turned east around the northwest corner of the 3222 house, and then south around the northeast corner of the house to the rear door. It was very dark as Officer Zens followed about ten (10) feet behind Brown.

As Brown tried to enter through the door, Officer Zens shouted, "Let me see your hands, now!" At the same time, Officer Zens noticed another person in the doorway. The two persons were backlit by the interior light shining into the dark backyard. Brown turned towards Officer Zens and abruptly extended his arms outward from under his shirt near his waistband. Officer Zens, now five (5) to ten (10) feet from Brown, feared Brown was about to shoot him, fired at Brown center mass to stop him. Officer Zens did not use his firearm's site to aim his shot. Instead, he turned and reacted quickly. Officer Zens then saw Brown's hand: he was unarmed. Thereafter, Officer Zens holstered his firearm. After he shot, both persons fell to the ground. Office Zens then saw Brown's hands and holstered his firearm. When he shot at Brown, he missed him and hit Davis, who was behind Brown. Davis was seriously injured but fortunately not killed. The time from when Officer Zens began the chase to the time he discharged his weapon was about 12 seconds. (Ex. 3, 7, 9, 17)

6. The Chief found that Officer Zens failed to follow police training on foot pursuit tactics. Specifically, when he rounded the northeast corner of the 3222 house after losing sight of Brown, he did not "meter" the corner or stop or slow to avoid running into an unforeseen situation. To "meter" a corner means to not turn the corner close to the wall; in other words, step away from the wall before turning the corner. Wisconsin Law Enforcement Standards Board's "Tactical Response, A Training Guide for Law Enforcement Officers," is a training guide for law enforcement officers. In reference to foot chases, it recognizes that tactics will vary depending on the situation and environment; nevertheless, the general guidelines instruct officers engaged in a foot pursuit to not follow that exact same path as the suspect, meter corners in order to maintain distance from a corner to avoid turning directly into an ambush, and to stop, look, and listen for a suspect after losing sight of him or her during a foot pursuit. (Ex. 8, p. 17, Ex. 19)

7. The Chief also found that Officer Zens failed to follow police training on specific target requirements relating to the use of deadly force. Specifically, he failed to acquire target isolation and as a result wounded a Bystander. Wisconsin Law Enforcement Standards Board's "Defense and Arrest Tactics, Training Guide for Law Enforcement Officers," instructs officer that "[if] you have determined that you face a threat that meets the requirements to permit deadly-force response, and you have decided to shoot, you may still fulfill three target requirements: Target acquisition, Target identification, Target Isolation." It further states, "Target isolation means that you can shoot at your target without danger of harming innocent people." Nevertheless, a police officer may shoot without acquiring target isolation "if the consequence of not stopping the threat would be worse than the possibility of hitting an innocent person." (Ex. 1, pp. 81-82) The training guide entitled, "Firearms, A Training Guide for Law Enforcement Officers," contains the same provisions. (Ex. 4, pp. 53-54)

8. The Chief's rationale for disciplining Officer Zens was given by Inspector Formolo. Prior to his testimony, Inspector Formolo had reviewed the investigative reports, videos, interviews, and Officer Zens' PI-21 statement. He testified that Officer Zens was engaged in a single minded pursuit of Brown as exhibited by his PI-21 statement. The statement the Inspector referred to is recorded in Sergeant Vynetta Norberg's memorandum. "He stated he lost sight of him for approximately a half second. He stated he chased him around the corner directly after him. He stated he should've stopped after he lost sight of him but kept going because of fear and adrenaline and he wanted to get him into custody." (Ex. 9, p. 56) The Inspector testified that his actions are inconsistent with the Tactical Response training guide, which states "If you decide to pursue,

remain flexible—do not allow yourself to be sucked into a mindset of, ‘I’m going to catch this guy at any cost.’ Be smart and don’t over-commit.” Officer Zens’ decision to charge ahead resulted in a confrontation that endangered him and the lives of Brown and the Bystander because he limited his options to respond. He shot at Brown without target acquisition and injured the Bystander behind Brown. The training instructs officers to use more caution, meter corners, don’t follow the tracks of the person being chased, don’t lose sight, and don’t charge ahead after losing sight. Had Officer Zens followed these training guidelines, the shooting might have been prevented.

9. Lieutenant Looney, in recommending discipline, summarized his analysis as follows, “During the foot pursuit, Officer Zens’ decision making process was contradictory to what is trained by MPD in regards to foot pursuit. He failed to meter a corner while chasing a suspect whom he lost sight of, putting himself at risk. Because he did not stop after he lost sight of the suspect nor did he keep a reaction distance, which would have allowed him to disengage.” (Ex. 19, p. 36) When questioned about his report, he explained that although the shooting was justified, Officer Zens’ actions, inconsistent with training, were not justified.

10. Officer Zens maintains he did not violate police training in foot pursuit tactics. He admits he did not stop or slow to meter the corner before rounding it, but he did so for valid tactical reasons. He was too close to Brown for him to setup any kind of ambush and had he slowed down, Brown would have gotten farther away and would have been more difficult to apprehend. Brown might have had time to enter the house, which would have created a greater danger to the officers and the people inside the house. Officer Zens maintains his failure to stop, slow, or meter the corner was not a violation of the training guidelines because the guidelines themselves allow for varying tactics based upon the situation and environment. (Ex. 1, p. 17) Moreover, in his judgment, stopping or slowing his quick pursuit when he was ten (10) feet behind Brown would have created a greater danger to himself, the other officers, and the public by allowing Brown to either escape or enter the house and hold the resident hostage.

11. Officer Zens maintains he did not violate police training on specific target requirement relating to the use of deadly force. Officer Zens testified that when Brown turned towards him and extended his hand forward from under his shirt, Officer Zens believed Brown was about to shoot him and responded to the threat by discharging his firearm. He pointed his gun at Brown and tried to hit him but had no time to align his gun’s sight on Brown. Officer Zens maintains that he did not violate target acquisition training because the guidelines permit him to discharge his firearm in the face of an immediate threat to his life without complying with those guidelines. The guidelines state “if a subject a few feet away from you suddenly pulls a gun and threatens to shoot you, generally the only reasonable response is to fire. There is simply not enough time to try alternatives.” Moreover, the guidelines make an exception to complying with the target isolations guidelines. The “greater danger exception allows an officer to shoot without target isolation “if the consequences of not stopping the threat would be worse than the possibility of hitting an innocent person.” (Ex. 1, pp. 81-82) At the time he shot at Brown, Officer Zens testified that he believed Brown was a greater danger to himself, other officers, and the public, than the danger of hitting an innocent person.

12. Supporting Officer Zens' actions are the testimony of MPD's rangemaster, Sergeant Allen Groszczyk ("Sergeant Groszczyk"), and police practices expert, Robert C. Willis ("Willis"), a law enforcement instructor, trainer and consultant, whose qualifications are noted on Exhibit 20. Sergeant Groszczyk testified that Officer Zens was not required to isolate his target because the "greater danger exception" applied in his situation; in other words, at the time Officer Zens shot, there was a greater danger of death or injury to him than to the Bystander. He also testified that there was no hard and fast rule governing metering a corner. Willis also testified that Officer Zens was justified in shooting at Brown without target isolation because Brown posed the greater danger. He further testified that neither metering nor stopping at a blind corner are required. Those are guidelines taught to officers for their safety, but their application depends upon the situation and environment. Officer Zens was striving for a position of advantage by keeping close to Brown. Had Officer Zens stopped or hesitated and had Brown had a gun, Brown could have shot at the officers, or he could have escaped, or he could have entered the house, creating a more dangerous situation. Finally, he explained that the fact that Officer Zens missed Brown and hit the Bystander did not by itself establish a lack of target isolation because the time between an officer's decision to fire and the time he or she pulls the trigger is long enough for the target to move. (Ex. 7, 20)

CONCLUSIONS OF LAW

13. 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 the seven just cause standards are satisfied and sustain the imposition of discipline of discharge.

14. The first just cause standard asks, "whether the subordinate could reasonably be expected to have knowledge of the probable consequences of the alleged conduct." Code of Conduct sec. 1.05 states, "All department members shall be familiar with department policy, procedures and training and shall conduct themselves accordingly." (Ex. 11) MPD SOP 460.10 states "It is the policy of the Milwaukee Police Department that all uses of force will comply with the state of Wisconsin Defense and Arrest Tactics (DAAT) Disturbance Resolution Model, Intervention Options, as outlined below: A. Approach Consideration . . . B. Interventions . . ." (Ex. 14) This SOP incorporates by reference the training guidelines alleged to have been violated by Officer Zens and gives officers notice that they are required to act accordingly. We conclude the Chief has satisfied the first standard by a preponderance of the evidence.

15. The second just cause standard asks, "whether the rule or order the subordinate allegedly violated is reasonable." The rule alleged to have been violated in this case is necessary to ensure the safety of members of the department and the public from unnecessary injuries. We conclude the Chief has satisfied the second standard by a preponderance of the evidence.

16. 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 Vynetta Norberg investigated the incident and reported the findings in a memorandum dated April 19, 2020. (Ex. 8) Her report includes a summary of the chase dispatch record, a description of Officer Zen' Body Worn Camera video and his PI-21 interview. In

addition, it included summaries of witness interviews, police reports, Sergeant Groszczyk's professional opinion, and the District Attorney's letter declining to prosecute. (Ex. 9) The Chief also received Officer Zens written response to the charges. (Ex. 22) We conclude the Chief has satisfied the third standard by a preponderance of the evidence.

17. The fourth just cause standard asks, whether the investigative effort described above was "fair and objective." Officer Zens argued that the investigative effort was unfair to him because no other officer had ever been disciplined for similar conduct. The argument implies that he was singled out for discipline for some other reason that has not been disclosed. There is, however, no evidence in the record to support that implication. Chiefs of police often have different disciplinary standards. If a chief decides to hold officers to more strict disciplinary standards concerning conduct that he or she believe led to an unnecessary use of force, it cannot be deemed to be unfair simply because it is imposed for the first time. Reviewing the entire record in this matter, we find no evidence of unfairness or lack of objectivity in the investigation. The Chief has satisfied the fourth standard by a preponderance of the evidence.

18. 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 facts in this case are for the most part undisputed. The issue is whether Officer Zens' conduct violated specific sections of the training guides referenced in SOP 460(10). Two opposing views were presented at the hearing. Sergeant Groszczyk and police practices expert Robert C. Willis opined that Officer Zens' conduct did not violate the applicable training guidelines for reasons explained in paragraph 12 above. Inspector Formolo's testimony and Lieutenant Looney's report recommending discipline and his testimony concluded that, although the shooting was justified, Officer Zens' actions were inconsistent with his training and were not justified. The Commission agrees with the Inspector Formolo's and Lieutenant Looney's conclusion and find there is substantial evidence in the record to support that conclusion. We find that the Chief has satisfied the fifth standard by a preponderance of the evidence.

19. 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 in paragraph 17, absent additional evidence, the fact that a rule is applied for the first time to discipline an officer is by itself not evidence of unfairness or discrimination. We find a thorough investigation was conducted with no evidence of unfairness against the officer. The testimony of Inspector Formolo, the Discipline Review Summary (Ex. 25), and the supporting documents establish the considerations that were presented for the Chief's review. We conclude the Chief has satisfied the sixth standard by a preponderance of the evidence.

20. 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." Inspector Formolo testified that the primary factor weighed in determining the seriousness of the violations in this case is the degree of harm. Officer Zens' decision to charge ahead after losing sight and not use more caution endangered his life and the lives of others. By not following training, he limited his options to respond. As a result, he unintentionally shot an innocent Bystander and seriously injured him. Under the Code of Conduct the degree of harm can be measured "in terms of the personal injury the error caused, such as the consequences of an

unnecessary use of force.” (Ex. 11, p. 14) In this case an innocent person suffered a serious injury. An additional concern was a prior incident of Officer Zens not following training. Two months earlier, while he was pursuing a suspect on foot, he swore at the fleeing subject and yelled at him several times, “I’m going to shoot you.” He was not disciplined for this conduct, but rather was counseled. We conclude the Chief has satisfied the seventh standard by a preponderance of the evidence.

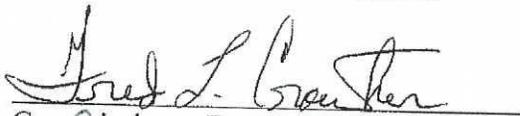
DECISION

The discipline imposed by Police Chief Alfonso Morales is sustained and the good of the service requires that on the first count, Officer Nikolas B. Zens to be suspended for twenty (20) working days without pay, and on the second count, Officer Nikolas B. Zens be discharged from the department.



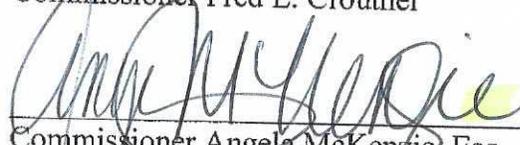
Commissioner Everett L. Cocroft

1-5-21
Date



Commissioner Fred L. Crouther

1-5-21
Date



Commissioner Angela McKenzie, Esq.

1-14-21
Date