

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

In the Matter of the Appeal of Timothy W. Koestering

Hearing Dates: February 17, 2020

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

Commissioners: Dr. Fred Crouther
Steven M. DeVougas, Esq.
Ann Wilson

Hearing Examiner: Rudolph M. Konrad, Esq.

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

For Timothy W. Koestering
William R. Rettko, Esq.
Rettko Law Offices, S.C.

PROCEDURAL HISTORY

In Personnel Order 2019-143, dated October 17, 2019, Chief of Police Alfonso Morales found Police Officer Timothy W. Koestering (“Office Koestering”) guilty of violating Milwaukee Police Department Core Value 5.00, Respect, on two counts. The first count, violating Guiding Principle 5.01, which requires Department member to treat others with courtesy and professionalism. The second count, violating Guiding Principle 5.03, requires members to promptly obey a proper and lawful order from an officer of a higher rank.

On the first count, the Chief found that Officer Koestering, on April 19, 2019, while investigating a robbery, behaved in a disrespectful and demeaning manner. He ridiculed his supervisor in front of his co-workers. He was rude and condescending toward the robbery victim. He chastised her and told her he would notify Child Protective Services (CPS) and if she failed to cooperate in the investigation, CPS could take her child from her. For these violations, the Chief suspended Officer Koestering for twenty (20) days without pay.

On the second count, the Chief found that Officer Koestering, while investigating a robbery, “intentionally failed” to broadcast a description of the suspect in a timely manner, after being

instructed to do so by his supervisor. For this violation, the Chief discharged Officer Koestering from the Department.

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

SUMMARY OF HEARING PROCEEDINGS

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

For the Police Chief: Sergeant Thomas Ackley
 Sergeant Rena Rokus
 Inspector Alexander Ramirez

For Officer Koestering: Police Officer Timothy W. Koestering
 Mr. Mark Wagner

FINDINGS OF FACT

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

1. On April 19, 2019, Police Officer Koestering was dispatched to the 9700 block of West Brown Deer Road to investigate a report of a battery/domestic violence that had just occurred. The Computer Aided Dispatch (CAD) report records he arrived on the scene at 3:37 P.M. As he approached the scene, he turned on his body camera, which began recording with the video time clock at 0:00. He began his interview with the victim one minute later. (His body cam video is exhibit number 12, but will hereinafter be referred to by its time clock.)
2. Approximately fifteen minutes later, Sergeant Rena Rokus arrived on the scene. After talking to other officers, she approached Officer Koestering and asks if he has a description of the suspect. He replied he has not "gotten there yet." She tells him she will drive around and then asks the victim what the suspect was wearing, his height and build. She then leaves. (Video, 15:40-16:30) Sergeant Rokus maintains that as she walked away from Officer Koestering and was no longer in the video, she told him to broadcast a complete description of the suspect and the vehicle. Her instruction to broadcast is not heard on the video. Although wind noise makes it difficult to hear everything that is said on the video, and we have no way of knowing how much noise the wind actually made on the scene; nevertheless, it is apparent that it was windy at that time. Officer Koestering maintains that he did not hear the direction to broadcast the description and he had not fully resolved whether he should broadcast the incident as a Battery DV/Theft or as a Strong-Armed Robbery. Sergeant Rokus testified that she does not know if Officer Koestering heard her direction to him to broadcast the description.
3. Approximately 27 minutes later, Sergeant Rokus returns and asks Officer Koestering whether he has broadcast the description. He responds "not ready with that yet, I'm going down the list [MPD Domestic Violence Checklist]. I'm getting there. It'll be a little bit." Koestering then asks the victim about her injuries, and asks for a description of the vehicle and the license plate

number, which took a minute and 20 seconds. (Video, 43:40-45:00) Sergeant Rokus then directs Officer Koesterling to broadcast a description of the suspect and the vehicle. She says to him, "What I'm going to ask you to do is get a description of him and get the car, vehicle, and his description out." Officer Koesterling replies "ok." Sergeant Rokus says, "broadcasted." (Video, 45:00-45:10)

4. Officer Koesterling then asks the victim if the suspect had a weapon and asks for a detailed description of the suspect—height, weight, complexion, hair, facial hair, clothing—and asks where he might be found. (Video, 45:10-48:40) He then walks to his squad, verifies information on his squad computer, accesses the squad radio, and, at 52:50, broadcasts the description of the suspect and the vehicle. (Video, 48:40-52:50) He broadcasts the offence as "BATTERY DV/THEFT FROM A PERSON, VEH THEFT." (CAD Report, exhibit 5) Officer Koesterling broadcast the wanted bulletin and the accompanying description seven minutes and forty seconds after being directed to do so. He used three and a half minutes of that time to obtain or verify the description of the suspect and four minutes and ten seconds to verify information, prepare to broadcast, and make radio contact.

5. Officer Koesterling and Sergeant Rokus disagreed whether the incident was a theft or a "strong-armed robbery," which is theft by use of force or threat of imminent use of force. Wis. Stat. Sec. 943.32. This disagreement resulted in Officer Koesterling adopting a disrespectful attitude towards the sergeant and prompted him to make disrespectful and unprofessional comments about her to other police officers.

- As Sergeant Rokus tried to discuss the issue with Officer Koesterling, he interrupts her. When she asks him not to interrupt but to listen, he says to her "Don't talk to me like that, Rokus, don't disrespect me. I'm not going to get into a pissing match with you, but you are not going to disrespect me." (Video, 54:50)
- While talking to Officer Kraker, he criticizes Sergeant Rokus for further investigating the incident. He says she is off on a "tangent" reinvestigating what he sarcastically describes as his "sloppy police work." He refers to her as "Misses." (Video, 59:10)
- While talking to Officers Janotta and Presti, he complains again about Sergeant Rokus "reinvestigating" his incomplete investigation. Officer Presti tells him the witness "said he saw him slam her to the ground and punch her." Officer Koesterling says that differs from what the victim told him; nevertheless, Officer Koesterling continues to complain about Sergeant Rokus' "reinvestigating the whole thing." When Officer Presti asks why is she doing this, Officer Koesterling replies, "So she can scam overtime because I don't know what I'm doing for DV, ya know. I probably do the most thorough DV reports. No reason for her to be here." (Video, 1:01:00-1:06.20)
- Sergeant Rokus asked Officers Janotta and Officer Koesterling to speak to the victim again. She tells them she was thrown to the ground three times. Finally, Sergeant Rokus tells Officers Koesterling, Janotta, and Presti that "this is going to be a strong armed." Officer Koesterling, nevertheless, continued to question her in a manner that implies he still questions her judgment. (Video, 1:06:20-1:13:40, 1:33:58, 2:22:30)

- Although Officer Koesterling was present when the victim told Sergeant Rokus she was thrown to the ground three times, he calls her on the squad radio and asks her to file a supplemental report of the statements the victim made to her and he will file a report of the statements the victim made to him. Sergeant Rokus tells him that is not necessary because he was present when she questioned the victim. Officer Koesterling, nevertheless, called Sergeant Panfil, the District 4 Acting Lieutenant, and complained to him that Sergeant Rokus declined to file a separate report and that she is making him file the incident as strong-armed robbery when, in his opinion, it should be filed as a theft, battery DV. (Video, 1:24.00-1:27:00)
- The day after the incident, the Acting Lieutenant reviewed Officer Koesterling's initial report. The report contained a sentence to the effect that he directed Sergeant Rokus to write a supplement report about her victim interview, but she refused to do so. The Acting Lieutenant deleted the comment and directed Officer Koesterling to leave it out of the report. (Exhibit 1, pg. 5)

6. During the events described above, Sergeant Rokus' demeanor was calm and her actions were professional. Nothing she said or did justified or provoked Officer Koesterling's disrespectful conduct.

7. As Officer Koesterling interviews the victim, she tries to tell him that she sees her car down the street, but he argues with her over whether she is "sure" or whether she "thinks" it's her car. When she tells him "I know it's my car," he ignores her and asks her to start her description of the events over again. He is short with her when she tries to tell him the location of the incident. He asks her for a detailed explanation and tells her the interview could last an hour and half. (Video, 1:37, 9:05, 10:00) Toward the end of the interview, he tells her that he was going to notify Child Protective Services (CPS), because the baby was in the car and witnessed the domestic violence. Under those circumstances, he explained, the notification was mandatory. As a result, CPS will open a case on her. He then told her she should cooperate with the courts, otherwise, CPS will think that her child is in danger and might take her child away from her. He then pointed his finger at her and told her "Monday at 1:30, you must be there. No if's and's or but's, you must be there." (Video, 2:24:00-2:27:45)

8. The MPD Domestic Violence Checklist (PD-52) does not state contacting CPS is mandatory if a child is present during a domestic violence incident. (Exhibit 3) Moreover, Sergeant Ackley reviewed the MPD Referral Memo (PR-3), MPD Domestic Violence Referral Notice, the MPD Domestic Violence Supplementary Incident Report (PD-15D), and the Crime Victim Resources (PV-17), and found no such directive. (Exhibit 1, pg. 9)

CONCLUSIONS OF LAW

9. 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 standards one through six are satisfied with respect to the charges against

Koestering. In reference to the seventh standard, however, we conclude that the preponderance evidence supports 30-day suspension in lieu of the 20-day suspension imposed. On the second count, we find that the fifth just-cause standard was not satisfied; that is, we find that the evidence presented did not show that Koestering violated the order described in the charges filed against him.

10. The first just cause standard asks, “whether the subordinate could reasonably be expected to have knowledge of the probable consequences of the alleged conduct.” At the time of this incident, Officer Koestering had been a police officer for twenty-two years. He should have known that he is required to treat co-workers and member of the public with dignity and respect and to obey proper and lawful orders of a superior. Moreover, Officer Koestering never claimed or testified that he did not know the possible consequence of his conduct. We conclude the Chief has satisfied the first standard by a preponderance of the evidence.

11. The second just cause standard asks, “whether the rule or order the subordinate allegedly violated is reasonable.” We have no difficulty concluding that Core Value 5.00, Respect, and Principles 5.01 and 5.03 are reasonable. It is not necessary to explain at length the self-evident reasons that the treating colleagues and citizens with respect and obeying proper and lawful orders is reasonable. Moreover, Officer Koestering made no argument that these rules are in any way unreasonable. We conclude the Chief has satisfied the second standard by a preponderance of the evidence.

12. 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 Thomas Ackley testified regarding the effort made to investigate this case, which is recorded in his investigation summary, which includes his summery of the PI-21 interview of Officer Koestering, and his review of the video from Officer Koestering’s body camera. (Exhibit 1, 12) Sergeant Rokus and Officer Koestering also submitted reports stating their version of events. (Exhibits 2, 7) We conclude the Chief has satisfied the third standard by a preponderance of the evidence

13. 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 Koestering or unfairness or lack of objectivity in the investigation. Although Officer Koestering made complaints about Sergeant Rokus in his PI-21 interview, she did not conduct the investigation. Moreover, the conduct that is the subject of the charges was recorded almost entirely on Officer Koestering’s body camera. The Chief has satisfied the fourth standard by a preponderance of the evidence.

14. 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.”

15. In reference to Count 1, findings of fact numbers 5 through 8 above clearly establish Officer Koestering ridiculed the authority of his supervisor in front of his co-workers in a disrespectful and demeaning manner, and that he was rude and condescending toward a victim by chastising her

and threatening her with the loss of her child if she failed to cooperate in the investigation. The Chief has satisfied the fifth standard by a preponderance of the evidence.

16. In reference to Count 2, two members of the Commission conclude that the Chief failed to present substantial evidence that Officer Koesterling refused to obey Sergeant Rokus' direction to broadcast the suspect's description. Sergeant Rokus herself testified that she did not know if Officer Koesterling heard her first direction to him to broadcast the description. The second time Sergeant Rokus directed Officer Koesterling to broadcast the description, he complied with the direction. The Chief has failed to satisfied the fifth standard by a preponderance of the evidence.

17. We will now address just-cause standards six and seven in reference to Count 1 only.

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 credible evidence of animus against the officer. Although Officer Koesterling complained about Sergeant Rokus in his memo responding to the charges, there is no evidence in the record that Sergeant Rokus treated him unfairly in any way. (Exhibit 7) Sergeant Rokus' memo about the incident is factual and professional in tone. (Exhibit 2). Moreover, her behavior on the scene as record on the body camera was calm and professional. The testimony of Inspector Alexander Ramirez and the Discipline Review Summary and the supporting documents establish the considerations, both aggravating and mitigating, that were presented for the Chief's consideration, and we find nothing unfair or improper about any of them. (Exhibit 6-11) 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." To meet this standard the Chief reviewed the items listed in the Discipline Review Summery and weighed the factors listed. (Exhibit 6) Nevertheless, the Commission finds that the proposed discipline is inadequate in light of the seriousness of the alleged violation and Koesterling's disciplinary record. In reference to his treatment of the victim, Inspector Alexander Ramirez testified that as a police officer with 22 years of service, Koesterling should have interviewed the victim in a respectful and non-confrontational manner. He also should have known that telling a mother that he will report her to Child Protective Services, when he is not required to do so, would dissuade her and other persons from reporting crimes. To make matters worse, he told her she might lose custody if she did not fully cooperate in the investigation of the incident. In reference to his treatment of Sergeant Rokus, he generally was rude to her and cooperated only grudgingly. Even worse, he made derogatory comments about her to other Department members. He went so far as to state she was unnecessarily interviewing the victim to "scam overtime," when it was clear she stepped into the investigation because she was frustrated by Officer Koesterling's slow pace. In his response to the charges, Officer Koesterling failed to take responsibility for his misconduct; instead, he defended his conduct. Finally, Officer Koesterling's 22-year disciplinary record contains seven sustained violations related to discourtesy, three of which involve discourtesy toward associates. Of the twelve comparable cases reviewed, most had no prior disciplines, and, except for one, none had more than two prior disciplines. The one exception is a lieutenant who had "multiple sustained violations of various offences." He was suspended for twenty days and was demoted to sergeant. (Exhibit 11) Based upon these facts and the record as a

whole, the Commission concludes that a 30-day suspension is warranted. Accordingly, the Chief's order imposing a 20-day suspension for the Count 1 violation is changed to a 30-day suspension.

DECISION

The Appellant, Timothy W. Koesting, is ordered suspended from the Milwaukee Police Department for a period of thirty (30) working days, and the Chief's order of discharge is not sustained.

Dr. F. L. Crouther

Commissioner Dr. Fred Crouther

03-10-2020

Date

Commissioner Steven M. DeVougas, Esq

Date

Commissioner Ann Wilson

Date

whole, the Commission concludes that a 30-day suspension is warranted. Accordingly, the Chief's order imposing a 20-day suspension for the Count 1 violation is changed to a 30-day suspension.

DECISION

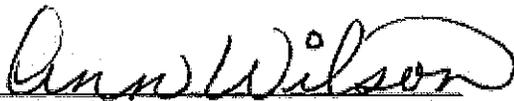
The Appellant, Timothy W. Koestering, is ordered suspended from the Milwaukee Police Department for a period of thirty (30) working days, and the Chief's order of discharge is not sustained.

Commissioner Dr. Fred Crouther

Date

Commissioner Steven M. DeVougas, Esq

Date



Commissioner Ann Wilson



Date

whole, the Commission concludes that a 30-day suspension is warranted. Accordingly, the Chief's order imposing a 20-day suspension for the Count 1 violation is changed to a 30-day suspension.

DECISION

The Appellant, Timothy W. Koestering, is ordered suspended from the Milwaukee Police Department for a period of thirty (30) working days, and the Chief's order of discharge is not sustained.

Commissioner Dr. Fred Crouther

Date



Commissioner Steven M. DeVougas, Esq

3/11/2020

Date

Commissioner Ann Wilson

Date