

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

In the Matter of the Appeal of Salvador Hernandez

Hearing Date: July 9, 2020

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

Commissioners: Mr. Everett Cocroft
Steven M. DeVougas, Esq.
Angela McKenzie, Esq.

Hearing Examiner: Rudolph M. Konrad, Esq.

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

For Appellant, Salvador Hernandez
William R. Rettko, Esq.
Rettko Law Office, S.C.

PROCEDURAL HISTORY

In Personnel Order 2020-26, dated March 5, 2020, Chief of Police, Alfonso Morales, ("Chief Morales") found Sergeant Salvador Hernandez ("Hernandez") violated Milwaukee Police Department Core Value 3.00, Integrity, referencing Guiding Principle 3.05, which requires department members to obey federal, state, and local laws on and off duty. Chief Morales found that on October 19, 2019, Sergeant Hernandez committed trespass, assault and battery. For this violation, he suspended Sergeant Hernandez for ten (10) working days without pay. Chief Morales also found that Sergeant Hernandez violated Core Value 3.00, Integrity, referencing Guiding Principle 3.01, behaving in such a way that discredit was brought upon the department. Chief Morales found that Sergeant Hernandez used the power of his police position to intimidate his former boyfriend. For this violation, Chief Morales demoted Sergeant Hernandez to the rank of Police Officer.

Officer Hernandez 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: Mr. Jeremiah Thomas
 Police Officer Salvador Hernandez
 Sergeant Debbie Allen
 Inspector Alex Ramirez

For Officer Hernandez: Lieutenant Elizabeth Ibarra
 Police Officer Salvador Hernandez

FINDINGS OF FACT

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

1. Officer Hernandez was appointed to the Department on September 2, 2000, and served as a police officer until January 29, 2017, when he was promoted to sergeant. On the date of the incident that resulted in his discipline, he had served approximately nineteen (19) years on the department. During that time, he had not been disciplined for any misconduct. (Ex. 12)
2. Officer Hernandez and Mr. Jeremiah Thomas ("Thomas") had a tempestuous, on and off relationship for two (2) or three (3) years before this incident. In 2018, a fight between the two (2) resulted in Thomas breaking Hernandez's jaw, for which Thomas was convicted and sentenced to five (5) days in jail. The Circuit Court, in its disposition, placed Thomas on probation and, as a condition of probation, ordered him to have no contact with Hernandez. A second incident occurred in 2018, when Thomas ran into Hernandez, who was in a bar on a date with someone else. At the time of the October 19th confrontation, here at issue, Thomas was on probation and the no-contact order was still in effect. Thomas claims he finally ended the relationship about a week before the October 19th incident. Hernandez claims he ended the relationship on October 19th because he caught Thomas cheating on him.
2. On October 19, 2019, at approximately 2:51 A.M., then Sergeant Hernandez, off-duty and dressed in civilian clothing, entered an apartment in a building located at 2324 W. Wisconsin Avenue. (Ex. 8) Hernandez had heard earlier that night that Thomas was seeing a young man named Erick. He decided to enter Thomas' apartment unannounced

in the middle of the night to learn if Thomas was cheating on him. He unlocked the building's front door and the door to Thomas' apartment with keys given to him by Thomas. Once in the apartment, a verbal and physical confrontation ensued.

3. Thomas testified Hernandez entered his apartment without consent or permission. While Thomas was asleep, Hernandez entered his apartment, yelling, screaming, and cursing. He demanded to know who the young man was, and why was he in Thomas' apartment. Thomas told Hernandez to leave the apartment several times but he refused to do so. He was afraid because Hernandez appeared to be in an intoxicated rage and he did not know if he had a gun. During the confrontation, Hernandez blocked the doorway of Thomas' bedroom when Thomas tried to go to the living room to get his phone. Hernandez repeatedly grabbed Thomas below the neck and pushed him away. Hernandez pushed him into a closet door causing a mirror to fall to the floor. When Thomas pushed past Hernandez to get into the living room, Hernandez pushed him into the living room wall. In the course of the argument Hernandez threatened to send Thomas back to jail. Hernandez said something to the effect of, "you'll go to jail again." "You can call the police... I won't get in trouble." Hernandez slapped Thomas' cell phone out of his hand when he tried to use it to call the police. Thomas told Hernandez to leave again. Thomas finally was able to overpower him and call the police with Hernandez still holding on to him. Once he contacted the dispatcher, however, Hernandez let go and quickly left the apartment. Thomas did not suffer any injury but reported pain in his neck and face, the latter because Hernandez had slapped him near his left eye during the fight. The young man, Erick, who had quickly left the apartment, also called the police. By the time the police arrived, Hernandez had left. Thomas did not suffer any visible injuries and refused medical attention at the scene, but reported he suffered pain. (Ex. 6) He also informed the police he did not want to press charges against Hernandez, but instead just wanted him to stay away. Thomas, testified, he did not try to defend himself as he had in the past when Hernandez put his hands on him. When he defended himself in the past, he was charged with battery and sent to jail. Thomas testified that Hernandez repeatedly told him that he, Hernandez, would not get in trouble because he was "a cop," and would tell Thomas he could send him to jail. Thomas' fear of Hernandez's police powers appears in the September 30th text messages, where Hernandez reassures him, "Don't worry I'm not putting you in jail." (Ex. 1)

4. Thomas testified he ended his relationship with Hernandez before this incident. Thomas had given Hernandez the keys to his apartment when they were dating, but never gave him permission to come and go as he pleased. Before the incident, he asked Hernandez to return the keys, but Hernandez told him he had thrown the keys out of his car window. In fact, Hernandez had the keys. Hernandez explained when he threw them out the window, he believed they had gone out the window, but he later found them in his car. Hernandez, however, never told Thomas that he had found the keys. In Hernandez's response to the charges memorandum, Hernandez was not forthright about

his possession of the keys. He simply stated, "I had a set of keys, given to me by Mr. Thomas with an open invitation to visit," and omitted the rest of the story.

5. Hernandez testified that he went to Thomas' apartment to learn if Thomas was cheating on him so he could end his relationship with Thomas once and for all. He also testified he wanted to see him because it was Thomas' birthday, and he had received a text a week earlier indicating Thomas wanted to see him, but he never called him to tell him he would like to stop by or that he was stopping by. Hernandez entered the exterior and apartment doors with the set of keys Thomas had given him earlier. Hernandez maintains Thomas did not put any limits on when he could use the keys. He believed he could come over anytime, without notice. He made no effort to contact Thomas earlier and entered the apartment unannounced. He surprised Thomas and Erick in the bedroom. He told Erick to get out and Erick left quickly. Hernandez started questioning Thomas about why Erick was in the apartment. When Thomas tried to get up from his bed, Hernandez shoved him back down. Thomas got up, got into his face, and the two began grabbing each other's forearms. Hernandez testified Thomas had told Hernandez once or twice to leave the apartment. In his PI-21, Hernandez said Thomas told him twice to leave. When asked about this at the hearing, he said he left after the second time. Hernandez maintains he ended the relationship because of this incident. Hernandez knew he had leverage he could use against Thomas because of the probation order, but denied that he had ever done so. Hernandez admitted his conduct was disorderly and in violation of the city ordinance.

6. The police officers who responded to the scene made no arrests because Thomas told them he did not wish to prosecute Hernandez. (Ex. 6) The District Attorney decided not to issue charges against Hernandez because Thomas and his friend, Erick, refused to cooperate. The complaint was closed as "Warrant Refused." (Ex. 5)

CONCLUSIONS OF LAW

7. 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 all seven just-cause standards are satisfied with respect to the charge against Officer Hernandez.

8. The first just cause standard asks, "whether the subordinate could reasonably be expected to have knowledge of the probable consequences of the alleged conduct." A trained police officer should know that he or she is expected to obey federal, state, and local law. Also, a trained police officer should know that to use his or her position to further his or her personal interests would bring discredit upon the department and

create the appearance of impropriety and corrupt behavior. Officer Hernandez had served on the force for nineteen (19) years and was promoted to sergeant before this incident and should have known his conduct would subject him to discipline. We conclude the Chief has satisfied the first standard by a preponderance of the evidence.

9 The second just cause standard asks, "whether the rule or order the subordinate allegedly violated is reasonable." We have no problem finding the Code of Conduct provisions Hernandez was charged with violating to be reasonable and no argument has been made that they are not reasonable. Requiring police officers off duty to obey the same laws they are enforcing and not to use their position for personal advantage is reasonable and necessary to maintain the confidence and trust of the community in its police department. We conclude the Chief has satisfied the second standard by a preponderance of the evidence.

10. 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 Debbie Allen testified regarding the effort made to investigate this case, which is recorded in her investigation. She reviewed the police reports and interviewed witnesses. (Ex. 5) Officer Hernandez also submitted a memorandum stating his understanding of what had occurred, which is part of the investigative file. (Ex. 7) We conclude the Chief has satisfied the third standard by a preponderance of the evidence.

11. 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 Hernandez or unfairness or lack of objectivity in the investigation. The Chief has satisfied the fourth standard by a preponderance of the evidence.

12. 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 Chief has satisfied the fifth standard by a preponderance of the evidence as explained below.

13. Hernandez did not have consent to enter Thomas' apartment in the middle of the night. His entry and failure to leave after being told to leave constitute trespass under state and local law. Whether being in possession of another's apartment keys by itself establish consent to enter the apartment unannounced in the middle of the night is beside the point. On the night of the entry, Hernandez did not have Thomas' consent to enter the apartment at all. When Thomas asked for the keys back, he revoked any consent that could be gleaned from his prior conduct. Hernandez did not return the keys but told Thomas he had thrown them out his car window. Assuming this is true, he never told Thomas he had found the keys, perhaps because he feared Thomas would ask for them

back. If Hernandez made up the key story, he kept the keys to enter without consent. In either case, he did not have consent by virtue of holding on to keys after Thomas had asked them to be returned. Although Thomas had discussed giving him another set, he changed his mind when he ended the relationship.

14. Hernandez had no right to remain in Thomas' apartment after he was asked to leave. Thomas testified that he asked Hernandez to leave the apartment several times but Hernandez refused to do so. Asking a person to leave their home revokes any permission to enter. Hernandez in his PI-21 said he was told twice to leave and he left after the second request. We find Thomas' account more credible because it is more consistent with the sequence of events described by both of them and Thomas has no reason to be untruthful. Hernandez should have left the first time he was asked to leave. His refusal to do so also constitutes trespass. See, Wis. Stat. sec. 943.14 Milwaukee Ord. sec. 110-10.

15. An assault refers to an act which causes the victim to apprehend imminent physical harm, whereas battery refers to an act causing physical pain. Thomas' testimony as described in paragraph 3 above clearly establishes he was assaulted and battered by Hernandez even though he did not claim to have suffered an injury. Injury is not an element of battery, pain alone is sufficient. *State of Wisconsin v. Higgs*, 230 Wis. 2d 1, 601 N.W. 2d 653 (Ct. App. 1999). Hernandez himself admitted sufficient facts to constitute an assault when he admitted to entering the apartment unannounced, yelled at the young male to leave and pushing Thomas down when he tried to get out of his bed. In addition, Hernandez admitted in his testimony that his conduct constituted disorderly conduct under the municipal ordinance. Assault and battery are prohibited by Milwaukee Ordinance sec. 105-1, and Wis. Stat. sec. 940.20(1). Disorderly Conduct is prohibited by Milwaukee Ordinance sec. 106-1 and Wis. Stat. sec. 947.01.

16. Thomas' testimony as described in paragraph 3 above establishes Hernandez used his position to further his personal interest in perusing a relationship with Thomas. Thomas testified he did not defend himself when Hernandez put his hands on him because in the past when he defended himself against Hernandez, he was charged with battery. Hernandez repeatedly told him that he, Hernandez, would not get into trouble because he was "a cop." Hernandez told Thomas he could send him to jail. We find Thomas' testimony on this issue credible. Thomas' fear of Hernandez's police powers is corroborated in the September 30th text, where Hernandez reassures him, "Don't worry I'm not putting you in jail." (Ex. 1). Why would Hernandez have to reassure him unless Thomas feared that very thing?

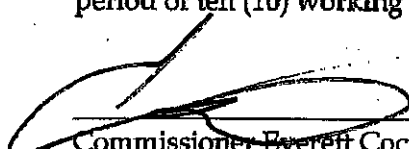
17. The sixth just cause standard asks, "whether the Chief is applying the rule or order fairly and without discrimination against the subordinate." As discussed above, we find a thorough investigation was conducted with no credible evidence of animus against the officer and there is no evidence on the record that the investigating officers treated Officer Hernandez unfairly in any way. The testimony of Inspector Alex Ramirez, the Discipline

Review Summary and the supporting documents establish the considerations that were presented for the Chief's consideration. Reviewing the comparable disciplines in light of the different cases and records of the officers involved, we find no reason to believe that a ten (10) day suspension and the demotion is unfair or the product of discrimination. In reviewing comparable cases, Inspector Alex Ramirez noted that this was the third time he had this kind of confrontation, that there are higher expectations for sergeants than for police officers, and that Hernandez did not fully accept responsibility. We conclude the Chief has satisfied the sixth standard by a preponderance of the evidence.

18. 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 Summary and weighed the factors listed. Lieutenant Elizabeth Ibarra testified that Hernandez deserved high ratings on his performance evaluation for the period ending September 5, 2019. (Ex. 16) Rather than rate him a 3 or a 4 on the various factors, she was prepared to rate him a 5 (the highest rating) on every one. (Ex. 17) Nevertheless, she agreed to sign exhibit 16 although she believed Hernandez was rated lower because of this incident. She believes that should not be a valid consideration because the incident occurred after the rating period. We do not, however, need to resolve this dispute. Hernandez's off-duty conduct here was sufficiently egregious to justify the discipline imposed irrespective of his on-the-job ratings. We conclude the Chief has satisfied the seventh standard by a preponderance of the evidence.

DECISION

The Chief's Order of Suspension and Demotion is sustained. The Appellant, Salvador Hernandez, is ordered suspended from the Milwaukee Police Department for a period of ten (10) working days without pay and demoted to the rank of Police Officer.



Commissioner Everett Cocroft

7.21.2020
Date



Commissioner Steven M. DeVougas, Esq.

7/21/2020
Date



Commissioner Angela McKenzie, Esq.

7/28/2020
Date

