

CIVIL SERVICE COMMISSION, CITY OF AURORA, COLORADO

FINDINGS, CONCLUSIONS AND ORDER

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST:

ERICA MARRERO AND KYLE DITTRICH, MEMBERS OF THE AURORA CIVIL SERVICE, AURORA POLICE DEPARTMENT,

Petitioners.

THIS MATTER involves Officer Erica Marrero's and Officer Kyle Dittrich's consolidated appeals of discipline imposed by Aurora Police Chief Vanessa Wilson based on allegations that Officers Marrero and Dittrich violated Directive 14.2.1 Conduct Unbecoming, resulting in Chief Wilson terminating Officer Marrero's and Officer Dittrich's employment with the Aurora Police Department.

The appeals were heard by the Aurora Civil Service Commission on February 1 and 2, 2021, at the Aurora City Council Chambers. Chair James Weeks, Commissioner Barbara Shannon-Banister, and Commissioner AJ McDonald were present with counsel, Scotty P. Krob. Respondent Chief Wilson of the Aurora Police Department was represented by Corey Hoffman and Katharine Vera of Hoffman, Parker, Wilson & Carberry, P.C. Petitioners Marrero and Dittrich were present and represented by Donald Sisson and Kathryn Sheely of Elkus & Sisson, P.C. Having heard the testimony and considered the evidence, and being now fully advised in the matter, the Commission hereby finds, concludes and orders as follows:

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Most of the facts in this case were undisputed and many were stipulated to by the parties in advance of the hearing. On August 24, 2019, Aurora Police Officers, including Officers Jason Rosenblatt and Nathan Woodyard were involved in the arrest of Elijah McClain, in which a struggle ensued and a carotid hold was applied by one of the officers in order to restrain Mr. McClain. Elijah McClain was conscious and responsive prior to being given a shot of Ketamine by EMTs. Mr. McClain was subsequently taken to the hospital where he fell into a coma and later died. Elijah McClain's death has resulted in substantial media coverage and added to racial unrest within the City of Aurora and throughout the country. Officers Dittrich and Marrero had no involvement in the underlying incident that occurred on August 24, 2019 resulting in Elijah McClain's death.

Officers Marrero and Dittrich, along with Officer Jaron Jones, were part of a closely-knit team that included Officer Nathan Woodyard, frequently working together until Officer Woodyard was placed on administrative leave following Elijah McClain's death. The other

team members kept in touch with Officer Woodyard by way of group texts. However, when Officer Woodyard abruptly stopped communicating with the rest of the team, there was concern regarding Officer Woodyard's mental state.

On October 19, 2019, approximately two months after Elijah McClain's death, Officers Marrero, Dittrich, and Jones were all on duty and reported to the scene of an alleged burglary on North Billings Street in Aurora at approximately 11:52 p.m. After clearing the call around 1:35 a.m. on the morning of October 20, 2019, the officers, still on duty, realized they were in the area where Elijah McClain's memorial was located, and decided to go take a photo in front of his memorial. Their purpose in doing so was to try to cheer up Officer Woodyard, to let him know they were thinking of him, and to try to get him to resume communicating with them. The first photo taken by Officers Marrero, Dittrich, and Jones did not show the Elijah McClain memorial. Out of concern that Officer Woodyard might not understand where they were or why they were sending him the photo, it was decided that a second photo would be taken with the memorial in the background. The second photo shows Officers Dittrich and Jones smiling with the Elijah McClain memorial in the background, while Officer Jones is simulating a carotid choke hold on Officer Dittrich.

Officer Dittrich sent the second photo via text message to the team's group chat which included Officers, Marrero, Dittrich, and Woodyard. Officer Woodyard did not respond to the texted photo at the time he received it. Subsequently, when he saw Officer Dittrich, Officer Woodyard told Officer Dittrich the photo was inappropriate. Officer Woodyard did not receive any discipline as a result of having received the photo. Officer Dittrich also sent the second photo via text message to Officer Jason Rosenblatt. In a text sent shortly after receiving the photo, Officer Rosenblatt responded, "Ha ha." Officer Rosenblatt was terminated for his response. He appealed his termination and his appeal was heard by the Commission two weeks before the above-captioned case.

Officers Marrero and Dittrich never disseminated either photo to the public. No one disclosed the existence of the photos until eight months later.

On June 25, 2020, Officer Justin Parker informed Sergeant Marc Sears that Officer Rosenblatt told him he had received a picture of Officers Marrero, Dittrich, and Jones in front of the Elijah McClain memorial site. The matter was brought to the attention of Chief Wilson and she immediately ordered an Internal Affairs investigation to be conducted on an expedited basis. As a result, several other events occurred that same day.

Officers Marrero and Dittrich were given notices of investigation informing them Internal Affairs Investigation IAB case #20-25 was being opened in connection with their alleged violation of Directive 14.2.1. Conduct Unbecoming for their involvement in taking photos at Elijah McClain's memorial with other members of the Aurora Police Department. On June 25, 2020, Officers Marrero and Dittrich also received and signed the advisement Garrity Warning in connection with the ensuing interview and investigation.

After being advised by Officer Parker of the existence of the photos on the officers' cell phones, the Department's Internal Affairs Bureau ordered Officers Marrero and Dittrich to provide their personal cell phones to the Department, which the officers did. Mobile device extraction was conducted on the officers' cell phones and the photos in question were discovered on Officer Dittrich's personal cell phone. Still on June 25, 2020, Officers Marrero and Dittrich were informed they were being placed on paid administrative leave for the duration of the investigation.

On June 30, 2020, Officers Marrero and Dittrich each submitted a Letter of Defense to the Chief's Review Board. That same day, Officers Marrero and Dittrich were informed the Conduct Unbecoming violation had been sustained and the Chief's Review Board recommended termination. Also on June 30, 2020, Chief Wilson conducted pre-disciplinary hearings with each of the officers, separately.

On July 1, 2020 in separate emails to Chief Wilson, Officers Marrero and Dittrich requested to have their IAB cases reviewed by an Independent Review Board. On July 2, 2020, Chief Wilson denied Officers Marrero's and Dittrich's requests. In her emails denying their requests Chief Wilson explained that their IRB requests were denied due to the expedited process required because of the "intense public scrutiny" of the Department after the McClain incident, and Department of Justice and FBI involvement in reviewing this specific matter to determine if a federal civil rights investigation is appropriate, indicating the potential that this matter involves possible allegations of federal criminal conduct.

On July 3, 2020, Chief Wilson issued a disciplinary order terminating Officer Marrero effective the date and time of the order. Also, on July 3, 2020, Chief Wilson issued a disciplinary order terminating Officer Dittrich effective the date and time of the order.

On July 8, 2020, Officers Marrero and Dittrich filed petitions appealing Chief Wilson's disciplinary orders, resulting in this case before the Civil Service Commission.

FINDINGS AND CONCLUSIONS

Based on the facts set forth above and the evidence presented during the hearing, the Commission unanimously finds and concludes as follows with regard to the charge specified against each of the Petitioners. Aurora Police Department Directive 14.2.1 Conduct Unbecoming, provides, in relevant part:

Members will conduct themselves at all times, ... in such a manner as to reflect most favorably on the Department. Unprofessional conduct and responsibility will include that which brings the Department into direct disrepute, publicly or amongst its members, reflects direct discredit upon the member, or impairs the operation or efficiency of the Department or member.

Officers Marrero and Dittrich testified at length that they realize they violated the Conduct Unbecoming directive and took full responsibility for doing so, apologizing for their

actions. They testified that their focus was in trying to assist a fellow team member who was struggling, but in trying to help him, they brought harm to many others that they failed to consider and did not intend to hurt.

The Commission accepts the Officers' testimony on this issue and believe they are both genuinely remorseful and intended no harm. However, Officer Marrero's and Dittrich's intent in taking and sending the photos is not determinative of whether they violated the directive. It is their conduct and the impact of that conduct, not their intent, that is at the heart of the Conduct Unbecoming directive.

After taking the photos, Officer Dittrich sent them to several individuals, knowing he had no control over who those people might share the photos with. It was certainly foreseeable, if not inevitable, that the photo would become known to the public at some point. Unfortunately, that public disclosure came on June 25, 2020, almost one month to the day after George Floyd died while being restrained by a Minneapolis Police officer, and at a time when racial tensions within the City of Aurora were already extraordinarily high and escalating.

The only issue raised by Officers Marrero and Dittrich as to whether the City met its burden of showing by a preponderance of the evidence that they violated the Conduct Unbecoming directive is their assertion that the Chief's rush to judgment compromised the investigation and decision-making process. The Chief acknowledged she substantially expedited the investigation and review process, feeling she had to do so in order to conclude the matter as soon as possible and mitigate potential risks of harm to the Department and its officers stemming from public outcry over the photo-taking incident.

The IAB investigation, which often takes weeks or longer to complete, was ordered on Thursday, June 25, 2020 and, at the insistence of Chief Wilson, completed by end of Sunday, June 28, 2020. The Investigation Review Process, which begins after the IAB investigation is completed, can take as long as 14 days, but was reduced to 2 days. The time for the Officers to provide mitigating statements was similarly shortened. Officers Marrero's and Dittrich's requests that an Independent Review Board review their cases and provide a recommendation as to appropriate discipline were denied, in part, because of the time it would take to convene the Board.

Lieutenant Carlson was the supervisor of the IA investigation. She acknowledged this was the shortest time for completing the investigative and disciplinary process of any case she was aware of in the Aurora Police Department. However, when asked whether the rapidity with which the investigation was performed compromised its results, Lieutenant Carlson testified unequivocally that it did not. According to Lieutenant Carlson, from a factual standpoint this was a relatively simple investigation with a limited number of witnesses and little dispute as to what occurred. She testified that the investigation was thorough, accurate and complete. Her conclusions are supported by the fact that Officers Marrero and Dittrich provided no evidence of flaws or omissions in the completed investigation. Neither Officer Marrero nor Officer Dittrich pointed to anything they would have said or done during the investigation but were prevented from doing due to the shortened time

limits. Furthermore, the purpose of the investigation was to determine the facts and whether they supported the conclusion that a specific directive was violated. Here, Officers Marrero and Dittrich stipulated as to most of the facts, and admitted their conduct violated the Conduct Unbecoming directive.

The Commission finds and concludes that Officer Marrero's and Officer Dittrich's conduct in connection with the photos violated virtually every subsection of Directive 14.2.1. Their actions reflected unfavorably on the Aurora Police Department, brought the Department into direct disrepute, both publicly and amongst its members, reflected direct discredit upon Officers Marrero and Dittrich, impaired the operation and efficiency of the Aurora Police Department, and rendered Officers Marrero and Dittrich virtually unable to perform the duties of a police officer, at least in the City of Aurora.

Accordingly, the violation of Directive 14.2.1 – Conduct Unbecoming, is SUSTAINED.

DISCIPLINE

Whether Officers Marrero and Dittrich violated Directive 14.2.1 as alleged by Chief Wilson is determined solely by the Commission as the trier of fact. Having determined the violations were established, the Commission must, after giving due consideration to the Chief's need for administrative control over the Aurora Police Department, determine whether the Chief's discipline of termination should be affirmed, reversed or modified.

Although they conceded they violated the directive, Officers Marrero and Dittrich adamantly disputed that their conduct warranted termination, particularly when compared to discipline imposed on other officers. Officers Marrero and Dittrich provided a substantial list of other cases involving violations of the Conduct Unbecoming directive, none of which ultimately resulted in termination.

Some of the previous cases involved horrific statements by the officers involved. Most of those cases involved discipline imposed by previous chiefs, not Chief Wilson. Chief Wilson testified that if the decision in some of the previous cases had been hers to make, the officers involved would have been terminated. Rule 10 of the Commission's Rules expressly recognizes that in considering discipline imposed in other cases, the greatest weight is to be given to those cases involving the same chief as is involved in the current case. The Attorney for Officers Marrero and Dittrich suggested their discipline should be reduced to a reinstatement with suspension of between 10 to 160 hours.

The Commission finds that none of the cases presented were comparable to Officer Marrero's and Dittrich's misconduct. None of the cases involved officers taking smiling photos at the site of the tragic death of an Aurora citizen. None of the previous cases involved photos that, once disclosed to the public as they almost certainly would be, had this much potential to create or exacerbate a chasm between minorities and police at precisely the time Chief Wilson was undertaking substantial efforts to improve those relations.

The Commission understands the importance of peer support in the Aurora Police Department. Officers need to have an outlet for voicing to their peers the stresses and pressures they are under as they serve the community in their law enforcement capacity. As presented to the Commission, the photo of the simulated choke hold sent to Officer Woodyard was supposed to send the message, "We are thinking of you." The response of Officer Woodyard to Officer Dittrich regarding the photo is telling: "Hey dude, that's not cool." Officer Woodyard, a peer of Marrero and Dittrich and one of the officers having direct involvement with Elijah McClain in August 2019, clearly knew the photo was at least inappropriate. Like so many who saw the photo, within the Aurora Police Department and the community at large, Officer Woodyard did not find any humor in seeing a photo of a simulated choke hold at the site where the Elijah McClain tragedy occurred.

There were numerous other methods Officers Marrero and Dittrich could have used or photos they could have sent to offer support for Officer Woodyard. The Commission simply does not understand how a photo depicting a choke hold at the Elijah McClain memorial could possibly be expected to help Officer Woodyard. Taking the photos, and then disseminating them to others with no control over who they might ultimately view them, while perhaps not malicious, demonstrated a severe lapse of judgment by Officers Marrero and Dittrich. The revelation of their misconduct one month after George Floyd's death resulted in catastrophic harm to the Department's relationship with the community, not to mention harm to fellow officers and pain to the McClain family. These circumstances are far different from the circumstances involved in the cases Officers Marrero and Dittrich argue are comparable. The Commission concludes Officers Marrero and Dittrich terminations were warranted.

ORDER

Based on the foregoing findings and conclusions, the Commission hereby sustains the violation and Chief Wilson's termination of Petitioners Marrero and Dittrich.

ENTERED THIS 9th DAY OF FEBRUARY, 2021.

AURORA CIVIL SERVICE COMMISSION


James Weeks, Chair