

Justin Daniels
723 Suhrke Rd
Plymouth, WI 53073

vs.

PFC Complaint No.: _____

Christopher Domagalski
Chief of Police, Sheboygan Police Department
1315 N 23rd St
Sheboygan, WI 53081

RESPONSE TO COMPLAINANT'S MOTION'S

COMPLAINANT MOTION 1

Response Opposing Complainant's Motion to Allow Victims to Testify Via Zoom and in Closed-Session

Argument

The Complainant asks this Board for two actions in his first motion: 1. To allow victims to testify via Zoom; and, 2. To allow victims to testify in closed session. These two requests should be reviewed separately as they are distinct and unconnected issues.

The Complainant's first motion is littered with mischaracterizations and falsehoods, does not match the facts of this case, and does not present any rational reason for allowing testimony via zoom. First, the Complainant writes "there are victims of sex crimes involved in this." This statement is an opinion (one that the Respondent disagrees with) and is not supported by evidence. No person involved in the case at issue has alleged that they were a victim of a sex crime, has ever had police investigate if they were the victim of a sex crime, and in Abby Hernandez's own filing with the Department of Workforce Development did not allege that a sex crime had been committed. Officer Hernandez has consistently stated that she was victim of sexual harassment, which is not the same as a sex crime.

The Complainant argues that victims "should not be forced to be in the same room as their offenders unless they so choose." Complainant's complaint is against Chief Domagalski. Nothing in the complaint remotely suggests that Chief Domagalski committed a sex crime. As such, the testifying victim would not

be in the same room as their alleged offender and Complainant's statement otherwise is a mischaracterization of fact.

Finally, Complainant states that "testimony via Zoom has become commonplace" and that he has "testified many times for criminal matters as a Police Officer via Zoom." This is also a mischaracterization of fact. While zoom or other electronic means were routinely relied upon during the peak of the COVID-19 pandemic for many non-trial hearings, this practice has subsequently been replaced with in-person testimony for substantive hearings. Remote attendance is now primarily utilized for short, procedural hearings such as scheduling and status conferences. While it is also true that parties in civil matters may stipulate to allow certain individuals to testify via electronic means, these witnesses are usually subject-matter experts or individuals whose testimony will play a small part in the hearing such that the admission of digital testimony does not place either party at a disadvantage. According to the Sheboygan County Clerk of Courts, there has not been a single trial conducted via zoom, even during the COVID-19 pandemic.

Having fact witnesses provide testimony in-person is a critical component of due process. A person's body language, movements, gestures, and tone are best observed in person. One's statements may be undermined by attributes not viewable on a screen. Moreover, like an actor reading from cue cards, an individual testifying remotely may be influenced by other persons or items outside of the camera's range. Being able to see and hear a witness "live" is an important aspect of being able to assess their credibility and truthfulness, to ensure that they are being candid, and to minimize any outside influence on the testimony.

The Complainant lacks any first-hand knowledge of any of the events at issue. As such, he will have to rely on witnesses to present any alleged evidence. Barring some unduly burdensome issue of distance, cost, or accommodation, Complainant has not provided a reason justifying remote attendance. Given the disadvantage remote testimony would have on Respondent and on the hearing itself, this Board should deny Complainant's request to allow remote testimony.

Complainant also asks the Board to allow victims to testify in closed session. Complainant provides no basis as to why this should be allowed. The only argument potentially on point is Complainant's assertion

that “the PFC, complainant, and respondent will all be able to receive testimony and make determinations without further humiliating [the victim] to the public.” However, it is unclear if this sentence was meant to support the zoom request, the closed session request, or both. Regardless, Complainant provides no compelling reason why such testimony should be done in closed session when Wisconsin law would otherwise require this testimony be solicited in open session.

Wisconsin Statute § 62.13(5)(d) provides, “Following the filing of charges in any case, a copy thereof shall be served upon the person charged. The board shall set date for hearing not less than 10 days nor more than 30 days following service of charges. *The hearing on the charges shall be public*, and both the accused and the complainant may be represented by an attorney and may compel the attendance of witnesses by subpoenas....” (emphasis added). This statute makes clear that the public must have access to view the hearing, and this Board is required to follow state statute. Moreover, conducting this hearing in open session furthers Wisconsin’s policy “that the public be entitled to the fullest and most complete information regarding the affairs of the government,” that “all meetings of ... local governmental bodies shall be publicly held ... unless otherwise expressly provided by law.” Wis. Stat. § 19.81.

Conclusion

Complainant has failed to present a compelling argument as to why any witness should be allowed to testify remotely. Further, Wisconsin statutes make clear that PFC hearings must be conducted in public. For the reasons previously stated, Respondent objects to Complainant’s requests and respectfully requests this Board **DENY** Complainant’s motion.

COMPLAINANT MOTION 2

Response Partially Opposing Complainant’s Motion Requesting Victims be Identified by Number Instead of Name

Argument

Complainant asks this Board to require those participating in the hearing to identify the victims by redacted identifier instead of by their names. We agree to this motion only in so much as it involves those

victims who have not already been publicly identified by Complainant himself in his multiple filings. In his initial complaint and charges, Complainant identifies Officer Abigail Hernandez continually and specifically cites situations she was involved in that were previously redacted in reports. The complainant states that “several females came forward” and has publicly stated that he has spoken with many of them, however he only chose to identify Abigail Hernandez in his complaint.

The acts of filing a public complaint with a Board that is required to hold hearings open to the public, and publicly, and repeatedly, naming Ms. Hernandez in his public complaint contradicts Complainant’s stated goal to prevent victims from being named and publicly humiliated. Respondent agrees that, to the extent possible, those individuals who have not yet been publicly identified may be referred to via redacted identifiers or pseudonyms, but Respondent objects to using redacted identifiers or pseudonyms for any person testifying or who has already been publicly identified because doing so would serve no purpose and would only complicate the proceeding more than necessary.

Conclusion

Complainant has provided no compelling reason to refer to testifying witnesses or individuals who have already been publicly identified by anything other than their names. As such, Respondent objects to using redacted identifiers or pseudonyms to identify any individual already publicly known or providing testimony to the Board and respectfully requests this Board **DENY** Complainant’s motion accordingly.

COMPLAINANT MOTION 3

Response Opposing Complainant’s Motion to Allow Hearsay

Complainant asks this Board to allow him to quote from “fact checked” media outlets regarding issues in the Complaint. As argument, he contends that subject matter experts have opined on this matter and he will use their statements in his “totality of the circumstances” argument.

Because Complainant has not asked the Board to allow hearsay evidence, this response assumes that the civil rules of evidence regarding hearsay will be enforced. As such, Respondent does not object to

the Complainant using articles or quotes *if the purpose is to show that an article was written*. However, if Complainant seeks to use the quotes or articles to speak to the truth or veracity of one of his charges, then the rules of hearsay would not allow such evidence and Respondent would object to their admission. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or the hearing, offered in evidence to prove the truth of the matter asserted.” Wis. Stat. § 908.01(3). “Hearsay is not admissible except as provided by [rule or statute].” Wis. Stat. § 908.02.

If Complainant would like statements from subject matter experts to be admitted to support his charges, then he should subpoena those subject matter experts.

Conclusion

Complainant has provided no evidence or rationale to support his motion to allow hearsay evidence be admitted. He has not provided any compelling reason why an article or quote should be accepted in lieu of expert testimony or why an expert is not otherwise available to testify directly to their previously-quoted statements. As such, Respondent respectfully requests this Board **DENY** Complainant’s motion.

COMPLAINANT MOTION 4

Response Partially Opposing Complainant’s Motion to Make an Opening Statement

Argument

Complainant asks this Board to permit him to make a “brief opening statement” “in order to introduce himself and outline [his] charges and witness testimony.” Respondent does not object to Complainant outlining his charges and witness testimony if the Board chooses to proceed in that way as long as Respondent is afforded the same opportunity. However, Respondent cautions the Board that, consistent with the rules of civil procedure, such statements should not be considered as evidence. Complainant should not be allowed to offer testimony or other evidence during his opening statement unless Complainant is first sworn under oath and Respondent is afforded an opportunity to cross-examine Complainant and to object to any reference to evidence or statements Complainant attempts to introduce during his “opening statement.”

Typically, in a PFC hearing, the character and credibility of the complainant is important because the Board will be examining their testimony and weighing it against the testimony of others. In this case, however, Complainant's character and background have no bearing what-so-ever because Complainant has no first-hand knowledge or testimony to provide. If Complainant is not testifying or providing first-hand evidence, then his "introduction" and back story is of no importance and should not be allowed. As such, we respectfully request this Board **DENY** the Complainant's motion accordingly.

COMPLAINANT MOTION 5

Response Opposing Complainant's Motion for Lack of Understanding

Complainant asks that this Board "consider the totality of all documented policy violations and charges." He then assumes what the City's arguments will be and discusses what Complainant will be arguing. Although unclear, if Complainant is asking this Board to rule based on all of the evidence they receive during the hearing, then Respondent does not object. In fact, Respondent would join in recommending the Board to do that.

However, if Complainant is asking this Board to consider in its ruling *anything* they read, hear, or see regardless of source or circumstance, or to base its decision on charges that have been dismissed or evidence not admitted, then Respondent absolutely objects. As this Board is aware, the only evidence that may be considered when making a ruling is the evidence that is presented and received during the public hearing. Any statement or evidence that is ruled to be inadmissible during pre-trial hearings may not be considered in making such determination.

The Wisconsin Jury Instructions Civil 50 reads:

Your duty is to decide the case based only on the evidence presented at trial and the law given to you by the court. Anything you may see or hear outside the courtroom is not evidence. Do not let any personal feelings, prejudices or stereotypes about personal characteristics such as (race), (religion), (national origin), (sex), or (age) affect your consideration of the evidence.

In fairness to the parties, keep an open mind during the trial. Do not begin your deliberations and discussion of the case until all the evidence is

presented and I have instructed you on the law. Do not discuss this case among yourselves or with anyone else until your final deliberations in the jury room. This order is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your experience as a juror. Once deliberations begin in the jury room you will then be in a position to intelligently and fairly exchange your views with other jurors.

Respondent believes that the standard enumerated in Wis. JI-Civil 50 should be the standard by which this Board reviews the evidence presented. As such, Respondent objects to Complainant's motion and respectfully request this Board **DENY** Complainant's Motion.

COMPLAINANT MOTION 6

Response Not Opposing Complainant's Motion for Power Point

There is no objection to the use of a power point presentation as long as such presentation is otherwise admissible under the rules of evidence and is, in fact, admitted by the Board.

COMPLAINANT MOTION 7

Response Not Opposing Complainant's Motion to Define Rules of the Hearing

As long as the rules derive from Wisconsin Jury Instructions or party stipulation, Respondent does not object to the Board being provided rules for the hearing.

COMPLAINANT MOTION 8

Response Opposing Complainant's Motion for Removal of Attorney Adams as PFC Counsel

Complainant has asked this Board to remove Attorney Adams as Counsel for this hearing. In support of this request, Complainant lists several allegations, which Respondent addresses below.

First, Complainant alleges that the City HR Director representing the Chief "prejudices the commission by standing the City of Sheboygan behind the Chief's actions." Not only is this incorrect, it is irrelevant to the Complainant's request to remove Attorney Adams.

Second, Complainant states that Attorney Adams and Attorney Westbrook work in the same building and are representing different entities in this hearing. This statement is true. Both attorneys have

offices in City Hall. However, Complainant offers no argument or legal basis as to why this should be cause for Attorney Adams' removal. It is not uncommon for two attorneys who work in the same building to represent different parties, particularly when there is not an adversarial relationship between the parties, and there is no conflict or ethical issue as long as the attorneys put in place the proper precautions to ensure all parties receive fair, ethical, and competent representation. Those precautions or "walls" were put in place for this matter. Attorneys Adams and Westbrook do not work in close proximity to one another, do not share support staff, and do not discuss this matter with one another. Both attorneys are ethically bound to maintain this separation when in the best interest of their clients and they have done so here.

Third, Complainant alleges he will present multiple witnesses who will testify to Attorney Adams' knowledge of this complaint, and that Attorney Adams was "more interested in burying these violations and complaints than dealing with them appropriately." However, Complainant offers no facts or evidence to support such an allegation. If such evidence exists, it needed to be presented to the Board *prior* to the Board deciding to remove Attorney Adams.

Fourth, Complainant alleges that he has evidence that Attorney Adams initially brought in an outside investigator to investigate the Chief's handling of the matter "but then abruptly called off the investigation." Again, Complainant fails to cite any evidence to support such a demonstrably false claim.

Lastly, Complainant alleges that Attorney Adams "unilaterally decided to withhold this complaint from the PFC for almost 30 days." The delay in the Board receiving the complaint is appropriate for the Board to consider, but Complainant has not and cannot show that the delay was contrary to policy or standard operating procedure, or that the delay adversely impacted Complainant in any way.

It is Respondent's understanding that Attorney Adams' role is to provide legal guidance to the Board, but he does not participate or provide his opinion on the facts and evidence presented to the Board. This narrow, passive role also limits any concern the complainant may have. Not only is each Board member educated and competent to make their own decisions, but to assume otherwise implies that the entire Board is inept and unqualified. As a practical matter, the City should not have to bear the cost of hiring outside counsel simply because Complainant doesn't like Attorney Adams, or because he's thrown

baseless accusations against him. If Complainant can provide evidence that Attorney Adams is unable to perform his duties to the Board due to some conflict or other ethical issue, then justice would require his removal. However, an aggrieved person saying “I know people” cannot be enough.

Conclusion

Complainant has provided no evidence or factual basis that would require the removal of Attorney Adams so Respondent respectfully requests that the Board **DENY** the motion. However, who the Board chooses to use as legal counsel has no impact on Respondent as the Board makes all final determinations, not the attorney.

COMPLAINANT MOTION 9

Response Not Opposing Complainant’s Motion for Digital Evidence

Respondent does not object to the use of digital evidence subject to the rules of evidence, the rule of completion, and the rule of authentication.

Dated this 5th day of June, 2023

CITY OF SHEBOYGAN

By: electronically signed by Adam James Westbrook

Adam James Westbrook

Director of Human Resources and Labor Relations Attorney

State Bar No. 1098561