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Richard H. Schend - Secretary
Edward Kubicki - Commissioneer
Christine Schwartz - Commissioner

Kenosha Police and Fire Commission

MEETING AGENDA

Thursday, July 17, 2014, 8:00 a.m.
Municipal Office Building, Room 202
625 52nd Street
Kenosha, Wisconsin

1. Call to order.

2. Roll Call

3. Continuation of the disciplinary hearing of Matthew Spidell from Tuesday, July 15, 2014, pursuant to section 62.13 (5) of the Wisconsin Statutes.

4. Receive and file Chief Thomsen's Brief in the Spidell disciplinary matter. (enclosed)

5. Receive and file Matthew Spidell's Summary regarding the disciplinary matter. (enclosed)

6. The Board will adjourn into closed session to deliberate and make findings, conclusions, decision and order in the Matthew Spidell disciplinary matter, pursuant to section 19.85 (1)(a). The Board will reconvene into open session to render decision on motion.

7. Continuation of the disciplinary hearing of Casey Apker from Monday, July 7, 2014, pursuant to section 62.13 (5) of the Wisconsin Statutes.

8. Receive and file the transcript of Casey Apker's disciplinary hearing from July 2, 3, and 7, 2014.

9. Receive and file Police Chief Morrissey's Closing Argument in the Apker disciplinary matter. (enclosed)

10. The Board will adjourn into closed session to deliberate in the Casey Apker disciplinary matter, pursuant to section 19.85 (1)(a). The Board will reconvene into open session and adjourn to a later date for further deliberation.

11. Adjournment.

THIS MATTER MAY BE CONTINUED FROM DAY TO DAY, CONSECUTIVE OR OTHERWISE, AT THE DISCRETION OF THE BOARD, UNTIL COMPLETED.

THE BOARD MAY, FROM TIME TO TIME, UPON MOTION MADE AND CARRIED, CONVENE INTO CLOSED SESSION FOR THE PURPOSE OF CONFERRING WITH ITS LEGAL COUNSEL AND DELIBERATIONS UNDER AUTHORITY OF SECTION 19.85 (1)(A), (B), (C) AND (F), WISCONSIN STATUTES AND THEN RECONVENE INTO OPEN SESSION.

If you are a person with a disability, please cont act the Human Resources Department at the Municipal Office Building (262-653-4130), at least seventy-two (72) hours in advance of the Commission meeting to give them time to make any necessary accommodations for you.

CITY OF KENOSHA
BEFORE THE BOARD OF POLICE AND
FIRE COMMISSIONERS

In the Matter of the Disciplinary Charges Filed Against

BRIEF ON BEHALF OF CHIEF THOMSEN

FIREFIGHTER MATTHEW SPIDELL

This brief is submitted in accordance with the schedule established at the close of the hearing on July 10, 2014.

I. INTRODUCTION

Firefighter Spidell ("Spidell") either does not like to follow rules or simply is unwilling to comply with the rules applied to all City of Kenosha firefighters. The evidence presented to the Commission demonstrated that:

1. Spidell operated Department motor vehicles without a driver's license from July 7, 2013 until October 15, 2013 in violation of his job description, State laws and State regulations (Exhibits J and K);

2. Spidell failed to report the loss of his driver's license in violation of Department Policy 01-D-01 (Exhibit L);

3. Spidell failed to comply with the residency restrictions found in the Collective Bargaining Agreement when he moved to Milwaukee to live with his girlfriend in October, 2013 (Exhibit DD);

4. Spidell failed to update his personal contact information as required under Policy 01-C-03 (Exhibit M);

5. Spidell failed to adhere to Department policy and, as a result, violated Policy 01-P-3 (Exhibit N);

6. Spidell provided false statements to Deputy Chief Poltrock on December 30, 2013 regarding his residency and again provided false statements to Chief Thomsen on May 15, 2014 during his investigatory interview.

II. DRIVING WITHOUT A LICENSE

Spidell admitted in his testimony that he drove Department vehicles without a driver's license for over three months. He said he thought this was a "victimless crime," ignoring the potential liability for the City if he had an accident while driving. He admitted violating the Department policy requiring him to report the loss of his driver's license. He begged the Commission to excuse his misconduct because allegedly he was abusing alcohol and suffering from depression at the time. However, he offered no proof whatsoever to support his excuses. There was no medical evidence offered or even testimony from fellow firefighters to support his position. Spidell asked the Commission to accept his unsupported testimony and give him another chance. Spidell could have provided supporting documentation or testimony and simply did not do so. There is no justification for driving without a license and failing to report the loss of his license.

III. SPIDELL LIVES IN MILWAUKEE

When it comes to residency, it is fair to say that home is where the heart is. From the testimony and written evidence provided to the Commission, it is clear that Spidell's heart is in Milwaukee. He is from Milwaukee, went to school in Milwaukee and is now virtually engaged to Emily Gebhardt, who lives in Milwaukee. When Spidell is taking care of his son, Remy, he testified that they always spend the night at Ms. Gebhardt's house. His dog, Bowser, lives in Milwaukee with Ms. Gebhardt. He shares a bank account with Ms. Gebhardt and the address for that bank account is her house in Milwaukee. He testified that he is at that house on every off day with or without his son, since he needs to take care of his dog.

Even though Spidell claims to live in Racine at the Emstad Hills Road address, he admits that he only stays there when he does not have his son. Essentially he wants the Commission to believe that he only spends the night with his relatively new girlfriend when he has his son. Doesn't it seem odd that he is not enjoying the time alone with Ms. Gebhardt when he has the chance?

In contrast to his many Milwaukee connections, Spidell offered absolutely no evidence to support his assertion that he resides in Racine. Supposedly he rents a room for $400.00 cash from his friend and fellow firefighter JD Adams. He does not have a lease and he offered

nothing to show he actually lives at that address. He did testify that he never brings his dog there and his son never spends the night there. Residency is more than address.

Spidell also parks his Toyota Camry in the garage wherever he goes. JD Adams and his wife have a two-car garage and two cars. Ms. Gebhardt has a one-car garage and one car. At both houses Spidell testified that he parks in the garage. This can only be an effort to hide where he actually lives.

Spidell was deceptive about his residence in discussions with Deputy Chief Poltrock and when interviewed by Chief Thomsen. He continued this deception before the Commission.

The Commission should also keep in mind who was not there as a witness for Spidell. Who better to testify that he never spent a night at her house without his son than his girlfriend, Emily Gebhardt? Who better to testify that Spidell spent every night that he did not have his son at JD Adams house than JD Adams himself and/or Mrs. Adams? Spidell testified that both Ms. Gebhardt and Mr. Adams were off work on July 10, 2014 and available to be called as a witness. He admitted that he was aware that he could have subpoenaed them as witnesses. He simply chose not to do so. Under Wisconsin law if a party fails to call a witness who he could have called as a witness and the party fails to give a satisfactory explanation for not calling the witness then the trier of fact (in this case the Commission) may infer that the witness would have given unfavorable testimony to the party. This is called the "Missing Witness" doctrine. *See: Featherly v. Continental Ins. Co.*, 73 Wis.2d 273 at 282, 243 N.W.2d 806 (Wis. 1976). The Commission can apply this doctrine and infer that if Ms. Gebhardt and/or Mr. Adams had been called as witnesses their testimony would not have supported Spidell's claims to reside in Racine.

Instead, his ex-wife, Natalie Spidell, testified that the only address Spidell gave her when she asked where he was living was the Milwaukee address. He admitted that he did not want to tell her where he lived but that he ultimately did so in a text message (Exhibit V). Both he and his ex-wife agreed that she picked up their son at the Milwaukee address on a number of occasions. Ms. Spidell also testified that she was completely unaware of his alleged residence in Racine.

The Chief testified that he went past the Racine address on a number of occasions on Spidell's off days and never saw his car there. The private investigator hired by the City checked the Racine address on a number of occasions in April, 2014 and only saw the car there once,

during a period of time that Spidell was on vacation with Emily Gebhardt. In contrast, he located Spidell at the Milwaukee address on three occasions in April and had pictures to prove it (Exhibits O and O-1).

Under Wisconsin law, residency is not a vague concept. In *Eastman v. City of Madison*, 117 Wis.2d 106, 342, N.W.2d 764 (Ct. App. 1983), the court addressed the residency of firefighters who maintained apartments in the City but whose families lived outside the City. In considering the meaning of "reside," the court stated at 117 Wis.2d at pp. 115-116:

> [16] The ordinance provides that a city employee must "reside" within Madison. "Reside" is not ambiguous. *Black's Law Dictionary* defines residence as "[p]ersonal presence at some place of abode with no present intention of definite and early removal ... Residence implies something more than mere physical presence ...." *Black's Law Dictionary* 1176 (rev. 5th Ed. 1979).[FN5]

The court went on to state at p. 118:

> Continuous personal presence and intention establish residency. *Waushara County v. Calumet County*, 238 Wis. 230, 235, 298 N.W. 613, 615 (1941); *Kempster v. The City of Milwaukee*, 97 Wis. 343, 347, 72 N.W. 743, 744 (1897). Appellants' declarations of intent are not conclusive. Such declarations are only evidence of state of mind, and "may be suspect because of their self-serving nature." *Restatement (Second) of Conflict of Laws* sec. 20 special note (1969).

The court concluded that maintaining apartments and voter registration was not enough to demonstrate residency. The same can be said in the case now before the Commission. Spidell has failed to demonstrate that he lives anywhere other than Milwaukee with his girlfriend, his son and his dog.

IV. CONCLUSION

Spidell has asked the Commission for another chance and said that he would change his ways. Based on a review of record before the Commission and his prior discipline it is clear that Spidell changes his ways only when he is caught. The Commission can either reinstate Spidell, suspend Spidell for a period of time or terminate his employment. If Spidell is returned to work, the Commission will be returning a firefighter who ignores the rules and regulations applicable to all the firefighters in the Department. This would undermine the Chief's authority and make it impossible for the Chief to consistently enforce the Department's general rules and policies.

Given Spidell's flagrant disregard of Department rules and policies, the Chief requests that his employment with the City be terminated immediately.

Respectfully submitted this 14th day of July, 2014.

Buelow Vetter Buikema Olson & Vliet, LLC

By: _____
Daniel G. Vliet
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the Kenosha Fire Department

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From: Matthew Spidell [mattspidell3473@gmail.com]
Sent: Monday, July 14, 2014 10:19 AM
To: Sara
Subject: Summary for M Spidell disciplinary charges

Summary In regards to the disciplinary charges against FF Matthew Spidell:

In response to the allegation questioning my residency, I believe that my cross examination of the private investigator, and of Natalie Spidell showed some critical flaws and gaps in their knowledge of where I spend a majority of my time and where I call home.

The investigator seemed very disorganized, often blaming "clerical issues" and even omitted evidence from the report that we all received, evidence that would be in my favor albeit. Had this been an investigation used in an actual court room he would be deemed an incredulous witness. Also much of some facts on his report were wrong, example being that he thought that my son, Remy, was actually Emily's, which he stated in the beginning of the report.

Furthermore, his physical surveillance of me shows me at Emily's house three out of sixteen times, which comes out to roughly seeing me there around eighteen percent of the time. I can't personally understand how he can come to a solid conclusion from those numbers, considering it's not out of the ordinary for two loved ones to see each other.

His physical surveillance also, mainly, occurred over a two to three hour window in the a.m which doesn't detail at all what time later in the day I may head home. To be exact, thirty six out of thirty eight documented times were in the a.m in that window. I gave a rational explanation why I would go up there on a given day; obviously to take care of my dog, which can't stay with me at home given my roommate/landlord, won't allow pets.

The investigator tried to bulk up his investigation by including, strange, superfluous details and photos on my relationship with Emily Gebhardt. The Facebook photo of my dog Bowzer, he interpreted the photo that "he" insinuated myself, where common sense that "he" would be referring to my male dog, that lives with my girlfriend.

At no time did I realize I was being followed by the investigation team. According to his report he shadowed me three times and lost me all three times. Nowhere in his report does he I was speeding or driving erratic, or attempting evasive traffic maneuvers, aside from the "giant loop" I reportedly did and went to Wal-mart. When he wasn't able to find me in a nearly empty parking lot, he shifts blame to me insinuating criminality, which I feel is irresponsible as a professional investigator.

As for the supplemental Facebook "evidence" that shows that I live in Milwaukee, Wisconsin; I feel I demonstrated clearly is extremely fallible. Though my method of proving it was a bit ostentatious, it was clear that the evidence against me was invalid. At no time would I change my Facebook residency to Milwaukee, because I don't live in Milwaukee.

As to my ex-wife, there is no possible way at any time my ex-wife could know where myself, or my son is at ANY given time asides from the forty five seconds it takes to pick up and drop off my son. That would be total of 90 seconds a week where we make actual, face to face contact. She has never been inside of Emily's house, nor has she ever been inside my home in Racine.

In this modern day it is very simple to keep in touch with people, and up until last thursday she had no clue of my residence in Racine and I, and my roommate, would have preferred personally to keep it that way. She has my cell phone number and given any emergency she could contact immediately. I was honest in the chief's investigative interview about the details regarding my child care with my son. It may be a bit unorthodox, but I do what I can as a single father to make it work.

Chief Thomsen claims that he drove past my home on numerous occasions, and didn't see my car and comes to his own conclusion that I don't live there. Even after explaining the garage arrangements. Not once has he knocked on the door and asked for me, and even if he did, me not being home at that moment does not confirm his theory. I go back to what I have been saying from the start, saying something over, and over again does not make it true.

Bottom line is, there are a number of firefighters that live together, and for whatever reason my situation seems conspicuous by a phone call by my ex-wife. We have a long standing unhealthy relationship, and I understand it can be considered conjecture, but we hate each other. She supplied no evidence that she even received mail for me and no city department had her address on file.

If you see it so, that I haven't proven that my residency most certainly isn't in Milwaukee, you will be opening a door for further discipline against my roommate JD Adams, whom chief currently has an open disciplinary charge against him for something unrelated. JD has done nothing wrong, he helped a friend in need and doesn't deserve to be punished for that, and most certainly neither do I.

Now moving on to the license issue, one thing I noticed was Chief Thomsen tried to illustrate this image that I was lost cause, a misfit, who "does not want to be there". With all due respect to his opinion, no one has the right to say I do, or do not, want to be anywhere, or do anything except for myself. I admit that there has been some behavioral issues in my past, but since October when I decided to turn things around, I've been getting my inspections done, turning in fire and EMS training in a timely manner, been more focused on my job and making myself more present. This is one thing my immediate supervisor cannot deny.

In the hearing last thursday Atty. Vliet tried to make it appear as if I purposefully neglected to keep my license from the city's records. But I would never intentionally do that, nor would I willfully jeopardize my job. What happened was a very long lapse in judgement, resulting in me unknowingly neglected my duties as a citizen and a Kenosha firefighter. A lapse in judgement caused by turmoil in my personal life that I lost control of.

I absolutely have turned myself around in these past nine months, and even in the wake of this whole incident, it has shaken my resolve to continue to try and be a better man. I DO want to "be here". I love my job, and felt I found a new place, socially, amongst my coworkers. I have a son, and plans for my new life. I don't want something like this to ruin everything I worked so hard for.

I'm sorry I don't have a methodical approach to defending my position regarding my license as I do with my residency. For me, this matter requires more sympathy than method unfortunately. I understand I was negligent, and I put the city at risk. I am very aware of the gravity of this situation at this point. All I can ask is that you trust that I will never make a mistake of that magnitude again. The only approach I can take is to ask you to try and find it in yourselves to see a changed man.

Regards,
Matthew Spidell

THE TRANSCIPT FROM THE CASEY APKER DISCIPLINARY HEARING IS AVAILABLE IN ELECTRONIC FORMAT UPON REQUEST. DUE TO ITS SIZE, IT WAS NOT INCLUDED IN THIS DOCUMENT.

JO BALTES
PFC CLERK
653-4133

CITY OF KENOSHA
BEFORE THE BOARD OF POLICE AND FIRE COMMISSIONERS

In the Matter of the Disciplinary
Charges Filed Against

OFFICER CASEY APKER

CLOSING ARGUMENT SUBMITTED BY CHIEF MORRISSEY AND THE KENOSHA POLICE DEPARTMENT

In accordance with the schedule established at the adjournment of the evidentiary hearing, the Chief submits this Closing Argument in the above-captioned matter.

INTRODUCTION

Pursuant to Section 62.13(5)(em), Wis. Stats., the Chief has the burden to prove that "just cause" exists to sustain the disciplinary charges in this case. The statute identifies the following seven (7) elements of just cause:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct;
2. Whether the rule or order that the subordinate allegedly violated is reasonable;
3. Whether the Chief, before filing the charges against the subordinate, made a reasonable effort to discover whether the member did in fact violate a rule or order;
4. Whether the effort described in subd. 3 was fair and objective;
5. Whether the Chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate;
6. Whether the Chief is applying the rule or order fairly and without discrimination against the subordinate; and
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and the subordinate's record of service with the Chief's Department.

In this Closing Argument, the Chief will apply each of the elements above to the facts and evidence proffered at the hearing[1] to demonstrate that just cause has been met and that Officer Apker must be terminated from his employment with the Kenosha Police Department.

ARGUMENT

1. Officer Apker Had Prior Knowledge Of The Policies And Rules At Issue Herein And The Probable Consequences Of His Misconduct.

The disciplinary charges identify the specific policies and rules which the Chief asserts that Officer Apker violated over the course of several months. During the hearing, Officer Apker admitted to receiving a copy of the following policies and rules and admitted that he is required to comply with each policy or rule identified:

- Law Enforcement Code of Ethics (Ex. 33; Tr. at 530-531);
- General Rules and Regulations for the Police Department (Ex. 34; Tr. at 531);
- Electronic Communications Policy for the Police Department (Ex. 35; Tr. at 531);
- City Harassment Policy & Procedures (Ex. 36; Tr. at 531-532);
- Rule J(5) and Rule J(39) of the City of Kenosha Work Rules (Ex. 37; Tr. at 532-534)[2];
- Patrol Policy for the Police Department (Ex. 38; Tr. at 535);
- Harassment and Discrimination in the Workplace policy for the Police Department (Ex. 40; Tr. at 535); and
- TIME System Security Awareness Handout (Ex. 13; Tr. at 536-537).

Based on the testimony of Officer Apker, he was fully aware of the policies at issue in each of the charges and understood the probable consequences of any of these rule violations.

2. The Rules and Policies That Officer Apker Violated Are Reasonable.

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[1] All references to the transcript of the hearing will be identified by page number as "Tr. at ___." All references to the exhibits submitted by the Chief will be identified by number as "Ex. ___." All references to the exhibits submitted by Officer Apker will be identified by number as "Apker Ex.__."

[2] Officer Apker challenged the applicability of these work rules to police officers. The Chief is not arguing that the entire policy applies to police officers. Rather, the Chief submits that Rule J(5) and Rule J(39) address an employee's treatment of the public, supervisors and fellow employees, and are standards with which every City employee must comply. Officer Apker admitted that he is familiar with these two rules and that he must comply with these two rules.

The Chief submits that each of the policies and rules at issue in this case are reasonable because they regulate the conduct of police officers while on duty. The reasonableness of a work rule or policy is often defined by whether it is directly and proximately related to the legitimate needs of the Employer. Here, the Police Chief has a legitimate need to establish and enforce policies on ethics, patrol, electronic communications, and discrimination and harassment in the workplace. Similarly, the Police Chief has a legitimate need to create and enforce rules and regulations that address the conduct of police officers while on duty including rules on truthfulness, competence, courtesy and avoiding threatening or intimidating conduct in the workplace. Finally, the Police Chief has a legitimate need to restrict the use of the TIME system solely to law enforcement purposes in order to satisfy the limitations imposed by the Wisconsin Department of Justice.

The policies and rules at issue in this case are reasonable and Officer Apker has not challenged the reasonableness of any of these rules.

3. Before Filing The Charges Against Officer Apker, The Chief Did Make A Reasonable Effort To Discover Whether Officer Apker Did In Fact Violate A Rule Or Order.

The Chief directed that three different internal investigations be conducted by Lieutenant Brad Hetlet, who heads the Internal Affairs Division of the Police Department. On one investigation, Sergeant Tim Schaal conducted the early stages of the investigation and then turned the investigation over to Lt. Hetlet for completion. (Ex. 29; Tr. at 248-250). Chief Morrissey had complete confidence that Lt. Hetlet would conduct a fair and impartial investigation, and he did do exactly that. (Tr. at 459).

All three investigations were conducted in a competent, thorough and objective manner. (Exs. 29-31). Written statements were collected from both citizens and police officers, and in some cases, interviews were conducted with these witnesses. (Exs. 3-4, 14-19, 22-24, 28, 30-32;

Tr. at 297-340). Officer Apker was interviewed at least once during each investigation, was given *Garrity* warnings at the start of each interview and had a representative of his choice attend each interview. (Exs. 16-17, 24, 28; Tr. at 297-340). Lt. Hetlet collected citizen complaint forms, police reports, video footage, computer log-in and log-off records, AVL data, calls for service reports, work schedules, and TIME system data as part of these internal investigations. (Exs. 2-3, 8-13, 21, 25-27,30-32; Tr. at 297-340). Sgt. Schaal conducted the early stages of the investigation by taking written statements from Officer Wasielewski and Officer Zurcher, and collecting and analyzing work schedules, computer log-in and log-out records, MDC chat messages and dispatch audio recordings. (Exs. 18-21, 29; Tr. at 236-250). The fairness and impartiality of the investigation is demonstrated by the fact that both Lt. Hetlet and Sgt. Schaal investigated whether Officer Apker was responding to a disproportionate number of calls with Officer Wasielewski, but found insufficient evidence on that allegation, and it was not pursued further. (Tr. at 244-248, 272-279).

The Police Department does not have any rules or guidelines that require an investigation be completed in a particular amount of time. (Tr. at 463-464). Internal investigations take time. Chief Morrissey has determined that the time it takes to conduct an internal investigation is important, but not at the expense of the thoroughness and accuracy of the information collected during that information. (Tr. at 463-464). Officer Apker never challenged the speed in which these internal investigations were conducted, other than to make two inquiries as to the status of the citizen complaint filed by Jeremie Berry. (Tr. at 454).

As a result of these three (3) internal investigations, the Chief did make a reasonable and substantial effort to discover whether Officer Apker violated various policies and rules.

4. The Investigations Conducted by Lieutenant Hetlet Were Fair and Objective Investigations.

All three internal investigations were conducted in a fair and impartial manner. Chief Morrissey did not provide any direction to Lt. Hetlet as to what findings he should reach at the conclusion of each investigation. (Tr. at 459). Chief Morrissey had not pre-determined that Officer Apker should be disciplined simply because allegations of misconduct had been brought to the Chief's attention. (Tr. at 459).

Lt. Hetlet conducted three different fair and impartial investigations. Like the Police Chief, he did not pre-determine what findings he would reach at the end of his investigation. (Tr. at 338-339, 353-356, 372-373). Lt. Hetlet had not determined whether Officer Apker would be disciplined before he started the investigation. (Tr. at 338-339, 353-356, 372-373,). Indeed, Lt. Hetlet did not make any recommendation on whether discipline should be imposed when he submitted his final report of each investigation to the Chief. (Tr. at 374-375).

Both Lt. Hetlet and Sgt. Schaal prepared comprehensive reports at the end of each investigation to identify the evidence he collected, the conclusions he reached and identified the facts he relied upon to support each policy or rule violation he found at the conclusion of each investigation. (Exs. 29-32). All three investigations where conducted in a fair and impartial manner.

5. The Chief Did Discover Substantial Evidence that Officer Apker Violated the Policy or Rule Identified in the Charges.

The Chief directed that three different internal investigations be conducted into allegations of misconduct by Officer Apker. (Tr. at 457). Each of those investigations revealed substantial evidence that Officer Apker violated various policies and rules of the Police Department, but this Closing Argument will focus on the witness testimony and exhibits presented at the Commission hearing to demonstrate there is just cause to terminate Officer Apker's employment.

a. Citizen Complaint.

On December 9, 2013, Lt. Hetlet took a complaint from a citizen named Jeremie Berry, who alleged that, while on duty, Officer Apker used his position as a police officer to unnecessarily intimidate and threaten him on December 8th at a Speedway gas station. (Ex. 3; Tr. at 292-294). When he filed this citizen complaint, Mr. Berry simply requested that this matter be "handled professionally to prevent recurrences." (Ex. 2; Tr. at 390-391).

On November 30, 2013, Jeremie Berry and his fiancée, Susan Romero, went to the LaFogata Restaurant on Sheridan Road. (Exs. 3-4). Officer Apker and his wife arrived around the same time and parked in a parking place that Mr. Berry was waiting to take. (Tr. at 520-521). There is conflicting testimony about who had first rights to the parking space, but the outcome of that conflict is not determinative of the charges in this hearing. There is no dispute that there was a confrontation between Mr. Berry and Officer Apker in the parking lot immediately after they each parked their respective vehicles. Mr. Berry admits telling Officer Apker that he made an "asshole move" by taking his parking space and Officer Apker admits telling Mr. Berry to go back to Illinois. (Tr. at 38, 521). There is also no dispute that Mr. Berry wrote "Karma is a bitch" in the dirt on the back window of Officer Apker's vehicle as he left the restaurant that evening. (Tr. at 39, 521). Officer Apker claims he considered this comment a threat, but did not take any action, either that evening or thereafter, to contact the police or file a police report about this incident. (Tr. at 588). Officer Apker admits that no crime occurred when Mr. Berry wrote on his vehicle. (Ex. 16, page 30; Tr. at 588).

One week later, on December 7, 2013, Officer Apker was working third shift when he was flagged down outside the VFW post to assist a group of young people who had locked themselves out of their vehicle. (Tr. at 523). While in the VFW parking lot, Officer Apker testified that he noticed Mr. Berry standing in front of the VFW post, and then noticed his

vehicle parked on the street. (Tr. at 592). Officer Apker admits that Mr. Berry did not take any action while in the VFW parking lot that would lead to an arrest or any kind of police intervention. (Tr. at 595). Officer Apker ran the license plate number of Mr. Berry's vehicle through the TIME system at 23:55:08 pm. (Ex. 10). During the hearing, Officer Apker admitted he ran this license plate number *before* the lockout call, which is contrary to what he told Lt. Hetlet during the internal investigation. (Ex. 6; Tr. at 596).

After running the license plate (incorrectly), Officer Apker contacted Officer Jurgens to assist on the lockout call. (Tr. 202). While on this lockout call, Officer Apker explained to Officer Jurgens that he had, in Officer Jurgens' judgment, a "battle" over a parking spot with a citizen the week before, and that the same citizen's vehicle was now at the VFW post. (Tr. at 202-203). Officer Apker stated his intent to wait and confront this citizen and Officer Jurgens suggested multiples times to Officer Apker that he not do anything "stupid." (Ex. 15, page 5; Tr. at 204-205). Officer Jurgens also advised Officer Apker to "be careful, be smart with whatever you do if you do anything." (Tr. at 203-204). Officer Jurgens also told Officer Apker to "relax and maybe just squash it." (Ex. 15, page 7). Officer Apker failed to heed this advice and failed to request that Officer Jurgens intervene and speak with Mr. Berry. (Tr. at 592).

After completing the lockout call, Officer Apker drove through the VFW parking lot and parked his squad car in a Shell gas station parking lot where he had a better view of Mr. Berry's vehicle. (Tr. at 659). At 12:18:52 am on December 8th, Officer Apker ran the correct license plate for Mr. Berry's vehicle. (Ex. 10). It is important to note that the license plate was run a second time more than 18 minutes after the incorrect plate was run; 18 minutes was more than enough time for Officer Apker to realize he should just forget the whole incident at LaFogata. From running the license plate, Officer Apker learned the driver's license number of the registered owner of Mr. Berry's vehicle. Officer Apker ran the drivers license number of the

registered owner at 12:19:58 am and again at 12:21:04 am. (Ex. 10). Immediately thereafter, at 12:22:31 am, Officer Apker ran the name and date of birth of the registered owner of Mr. Berry's vehicle. (Ex. 10). None of these queries to the TIME system were for a law enforcement purpose. Officer Apker claimed he had a law enforcement purpose for running the license plate, driver's license and name through the TIME system; however, Officer Apker testified that Mr. Berry did not commit a crime when he wrote on Apker's car, and that Mr. Berry had done nothing at the VFW to warrant an arrest or any police contact. Instead, all of the queries were related to a personal dispute that Officer Apker had with Mr. Berry because he wrote "Karma is a bitch" on his vehicle. Officer Apker simply wanted to know who the man was that would dare write on a police officer's personal vehicle.

At approximately 12:30 am, Mr. Berry and his fiancée left the VFW post and drove to the Speedway gas station. (Tr. at 660). Officer Apker saw Mr. Berry driving away from the VFW post and made a U-turn to follow him. (Tr. at 659-660). Officer Apker followed Mr. Berry to the Speedway gas station. (Tr. at 596). Before getting out of his squad car, Officer Apker physically logged off the Data Pursuit program on his computer at 12:30:23 am. (Ex. 9). Officer Apker admits that he confronted Mr. Berry in the gas station between 12:30 am and 12:35 am. (Tr. at 516). Officer Apker did not notify dispatch before entering the Speedway gas station. (Tr. at 609).

Officer Apker entered the Speedway gas station at 12:35 am. (Ex. 30, page 16). Once inside, Officer Apker confronted Mr. Berry and asked him (Berry) if he remembered him (Apker). When Mr. Berry failed to recognize him, Officer Apker stated "Karma is a bitch, remember that from here on out." (Ex. 3; Tr. at 42). Officer Apker admitted during the hearing that he told Mr. Berry that he could have him arrested for disorderly conduct for writing "karma is a bitch" on his vehicle. (Tr. at 601.). Officer Apker's sole purpose in confronting Mr. Berry

and threatening to arrest him was to ensure that he was on notice not to mess with a cop's car. (Ex. 16, page 37; Tr. at 598).

Notwithstanding the fact that running the license plate number, drivers license number and name and date of birth did not yield Mr. Berry's identity, Officer Apker never asked Mr. Berry for identification when he confronted him at the Speedway gas station. (Tr. at 540, 595, 603-604). Officer Apker was in full uniform and on duty when he confronted Mr. Berry at the Speedway gas station, which did intimidate Mr. Berry. (Tr. at 43, 596, 599). Officer Apker had no law enforcement reason to confront Mr. Berry at the Speedway gas station; this was purely a personal dispute over the words written on Officer Apker's personal vehicle. (Tr. at 595). Officer Apker used his position and power as a police officer to threaten Mr. Berry with an arrest for disorderly conduct, when he knew that an arrest could not be made, all because of a minor incident that occurred off-duty one week earlier.

During the internal investigation, Officer Apker made conflicting and contradictory statements to Lt. Hetlet, which means at least one of Officer Apker's statements is untruthful:

- On December 17th, Officer Apker told Lt. Hetlet that another car was waiting for the parking space at LaFogata. During his investigatory interview on April 3, 2014, Officer Apker denied another vehicle was waiting for the parking space.

- During the investigatory interview on April 3, 2014, Officer Apker stated that he noticed Mr. Berry and his vehicle *after* the lockout call. During the investigatory interview on April 9, 2014, Officer Apker admitted having a conversation with Officer Jurgens *during* the lockout call in which he told Officer Jurgens that he had a battle over a parking space at LaFogata and that the same gentleman's vehicle was outside the VFW. DOJ records confirm that Officer Apker ran the license plate number for Mr. Berry's vehicle *before* the lockout call.

- During the investigatory interview on April 3, 2014, Officer Apker stated that he did not learn anything from running the license plate for Mr. Berry's vehicle and did not do anything with the response to that query. DOJ records confirm that Officer Apker learned the driver's license number of the registered owner of the vehicle from running the license plate, and then used the driver's license number to run the name and date of birth of the registered owner.

- During the investigatory interview on April 9, 2014, Officer Apker denied logging off his computer before entering the Speedway gas station. Computer records confirm that a code 28 was generated because Officer Apker physically logged off his computer at 12:30:23 am, within minutes of when he entered the gas station.

  (Ex. 30).

Officer Apker used his position as a police officer to access confidential information from the TIME system for personal reasons. It is important to note that misconduct occurred only *one month* after Officer Apker attended training which confirmed that the TIME system can only be used for law enforcement purposes. Officer Apker used his position as a police officer to intimidate and threaten to arrest a citizen for disorderly conduct for an incident which occurred off duty. More importantly, Officer Apker made this threat with full knowledge that Mr. Berry did not commit any crime when he wrote on Officer Apker's personal vehicle. Officer Apker offered conflicting and untruthful statements during the internal investigation, despite being warned that he could be disciplined for such conduct. Officer Apker also offered conflicting and untruthful statements during his testimony at this hearing.

b. Harassment Complaint.

On November 6, 2013, Officer Wasielewski met with Sgt. Tim Schaal to report various incidents involving Officer Apker that made her feel "uncomfortable." (Ex. 29; Tr. at 237). Sgt. Schaal noted that Officer Wasielewski appeared nervous and afraid during their meeting. (Tr. at 238). Officer Wasielewski reported to Sgt. Schaal that the following conversation occurred between her and Officer Apker on November 1, 2013 while both were on duty, and then confirmed the content of that conversation in a written report:

Apker: Did Tim tell you that people are asking him how it feels to have my sloppy seconds?

Wasielewski: No.

Wasielewski: I was never your girlfriend. We were friends and went to a wedding together.

Apker: Well I told my wife that nothing happened between us so if that were ever asked of you it would be a lot easier for you if you said the same.

Wasielewski: Are you asking me to say that?

Apker: I'm just saying that it would be a lot easier for you if you said that.

Wasielewski: Easier for me?

Apker: Well you'd have a lot less explaining to do.

Wasielewski: I don't owe anyone an explanation for anything. What happened was a long time ago and it doesn't matter anyway.

Apker: Well now that we work together it does matter.

Wasielewski: Is it going to affect the way that you back me up?

Apker: I'm just saying that now that we work together it does matter.

Wasielewski: Is it going to affect the way you back me up?

Apker: My personal feelings about anyone don't affect the way that I back them up.

Wasielewski: Okay then.

(Ex. 18; (Tr. at 238-238).

Officer Wasielewski also reported to Sgt. Schaal that other officers had commented on the number of times that Officer Apker jumped calls to respond to calls with Officer Wasielewski. (Tr. at 244). In particular, Officer Wasielewski reported that Officer Jurgens told her that Officer Apker was coming to her calls on purpose and that her FTO needed to have a conversation with Officer Apker about his coming to her calls. (Ex. 18; Tr. at 100-101).

Officer Wasielewski's report also describes an after work party on November 1, 2013, which is the same day that the "uncomfortable" conversation with Officer Apker occurred. (Ex. 18; Tr. at 102-103). Officer Wasielewski attended that after work party with her boyfriend. (Tr. at 102). When Officer Apker arrived at the after work party, Officer Wasielewski decided to leave because she was uncomfortable being around Officer Apker based on his inappropriate

comments earlier on the shift. (Ex. 18; Tr. at 102-103). Later, Officer Wasielewski learned from Officer Jurgens that Officer Apker never attends after work parties. (Ex. 18).

During an internal investigation of this incident, Lt. Hetlet obtained statements from Officer Jurgens and Officer Brennan which confirmed that they each believed that Officer Apker was jumping calls to be on the same call as Officer Wasielewski. (Exs. 22, 23). In his statement, Officer Jurgens noted:

> I had mentioned to officer Apker that he needed to stay away from her calls unless dispatched or needed for officer safety purposes. I had also mentioned to Officer Zurcher that he should speak with Officer Apker and ask him to please stay away from her calls unless his presence is absolutely needed.
>
> (Ex. 22).

During the hearing, Officer Jurgens testified that "I felt that Officer Apker was going to calls of a frequent nature and it was going to cause an issue on the shift and it could cause additional stress to Officer Wasielewski." (Tr. at 201). At the hearing, Officer Wasielewski testified that Officer Apker made her feel "extremely uncomfortable" because he was addressing a prior personal relationship between them and that this conversation occurred while both were on duty. (Tr. at 94). Most importantly, Officer Wasielewski testified that the request that Officer Apker made – that Officer Wasielewski should say "nothing happened between them" – was untruthful. (Tr. at 125-126). Below is Officer Wasielewski's testimony during cross-examination:

> **Q** Returning to this question about quashing the rumor, I am referring you back to Exhibit 18, Page 2. You see nine lines up, the words you attribute to Officer Apker."I told my wife that nothing happened between us so if that were ever asked of you it would be a lot easier for you if you said the same." Do you see those words?
>
> **A Yes, I do.**
>
> **Q** Do you understand him to be asking you to tell the truth about your prior relationship?
>
> **A That is not him asking me to tell the truth.**

Q Isn't he asking you to tell others that nothing happened between us?

A **That is what he said, but –**

Q That is what you said he said. Right?

A **Correct.**

Q He is asking you to say nothing happened between us and isn't that the truth?

A **It depends how you define "nothing happening between us."**

Q You understand the words "nothing happened between us" to mean did not have a physical relationship.

A **Then that is not true.**

(Tr. at 125-126).

Officer Apker confirmed that the entire conversation about "sloppy seconds" on November 1st was not work-related. (Tr. at 559-560). Instead, the conversation about "sloppy seconds" was meant to address some anonymous rumor that Officer Apker had heard and his concern that it would have a negative impact on his marriage. (Tr. at 560-561). Officer Apker's reason for raising this issue with Officer Wasielewski was purely for his personal benefit, and had nothing to do with work. (Tr. at 560). During the hearing, Officer Apker claimed that he heard the "sloppy seconds" rumor from Officer Yandel, but when he asked Officer Yandel who started the rumor, Officer Yandel denied ever hearing the rumor. (Tr. at 561-562). Similarly, Officer Apker claims he heard the "sloppy seconds" rumor was said by an anonymous person in the locker room, but his brother-in-law testified that he heard the rumor in the locker room but never told Officer Apker about it until after the disciplinary charges were filed. (Tr. at 566-567, 708-710).

Officer Apker spoke with Officer Wasielewski about their prior intimate relationship for only one reason – to protect his marriage. (Tr. at 560). While that discussion may benefit Officer Apker personally, it made Officer Wasielewski uncomfortable and was inappropriate in the

workplace. (Tr. at 91). Significantly, it raised serious concerns for Officer Wasielewski about her working relationship with Officer Apker since he stated "it would be a lot easier for you" if she was untruthful and stated nothing happened between them. (Ex. 18; Tr. at 93-94). Officer Wasielewski's concern about the effect on her work is genuine and sincere since she asked Officer Apker twice whether he would have any issue with backing her up on a call. (Ex. 18; Tr. at 93-94).

Officer Apker's conduct was inappropriate, intimidating, and unwelcome and violates both the City policy and the Department's policy on harassment in the workplace. Specifically, the Department policy defines harassment as" any verbal, written, visual, or physical act that creates a hostile, intimidating or offensive work environment or interferes with an individual's job performance." (Ex. 40). Officer Wasielewski testified that she was extremely uncomfortable with the conversation with Officer Apker, since he was asking her to be untruthful at work about their prior relationship in order to protect his marriage. Officer Apker's demand was intimidating unwelcome, and negatively impacted Officer Wasieleski's job performance.

c. **Pleasant Prairie Call.**

Officer Apker was assigned to Patrol Area 70 on November 10, 2013. (Apker #x. 3; Tr. at 544). A dispatcher notified officers that Pleasant Prairie police needed assistance on a roll-over accident at Springbrook Road. (Tr. at 524). Three officers notified dispatch they would assist on the call. (Tr. at 363). Lt. Hetlet was in the Operations Center at the time and watched on the AVL screen as Officers Ball and Fitzgerald made their way to the scene of the accident. (Tr. at 356-357). Lt. Hetlet also noted the location of both Officer Apker's squad car and Officer Wasielewski's squad car.[3] (Ex. 31; Tr. at 358-359). As Lt. Hetlet monitored the AVL screen, he

[3] Lt. Hetlet noted the location of these two officers because he had recently learned from Captain Flahive that Officer Wasielewski reported an inappropriate conversation with Officer Apker.

observed Officer Apker's squad number disappear from the screen. (Ex. 31; Tr. at 359). By switching to the "non-log-in" screen, Lt. Hetlet again identified the location of Officer Apker's squad, but this time via his squad number. (Ex. 31; Tr. at 359-360). Lt. Hetlet then observed Officer Apker travel eastbound on Highway 50, and make his way to the area of the Pleasant Prairie call (at 24th Avenue). (Ex. 31; Tr. at 359-361). Officer Apker was not directed by dispatch or a supervisor to respond to the Pleasant Prairie call. (Tr. at 545-546).

Officer Apker did not immediately notify dispatch that he was responding to the call, and was on scene for 10 minutes before notifying dispatch at 1:14:59 am that he was en route to the call. (Tr. at 547-548). Only two seconds later (at 1:15:01 am), Officer Apker notified dispatch that he had arrived at the scene of the Pleasant Prairie call. (Ex. 260). Rather than use Channel 1, Officer Apker notified dispatch on Channel 2 of both his travel to the Pleasant Prairie call and his arrival. (Tr. at 549). At the hearing, Officer Apker admitted this was a "stupid" thing to do, because not all officers monitor radio traffic on Channel 2. (Tr. at 549-550).

During the hearing, there was a great deal of testimony regarding the eastern boundary of Area 70. Officer Apker testified that he believed the boundary was 39th Avenue, which places him 13 blocks outside his patrol area while on the Pleasant Prairie call. (Tr. at 618-619). The third shift schedule for November 10, 2013 confirms that Officer Apker was assigned to patrol area 70 and that the eastern boundary of that patrol area is Green Bay Road, which places Officer Apker over 4.5 miles outside his area. (Apker Ex. 3). One of Officer Apker's own witnesses, Officer Andrew Skowronski, confirmed that the eastern boundary of the west rover position is 39th Avenue and the eastern boundary of patrol area 70 is Green Bay Road. (Tr. at 704).

Officer Brian Miller testified that he does not regularly notify dispatch or a supervisor when he leaves his patrol area unless one of three conditions is present: (1) he leaves the City limits; (2) he is more than two patrol areas from his assigned patrol area, which he estimates to

be 30 blocks; or (3) there is a significant police call like a chase. (Tr. at 717-718). Here, the actions of Officer Apker on November 10, 2013 meet all three of these conditions: (1) Officer Apker was outside the City limits; (2) Officer Apker was more than 4.5 miles outside his patrol areas; and (3) Officer Apker was involved in a significant police call that lead to a foot chase with a suspect. (Ex. 25).

During an investigatory interview, Officer Apker was presented with computer data that demonstrates unequivocally that he logged off his computer at 1:00:21 am while driving to the Pleasant Prairie call. (Ex. 28, pages 15-16). The computer system generates a code 28 only when an officer logs off the data pursuit program on his/her squad computer. (Ex. 8; Tr. at 368-369). A code 28 is *not* generated if the officer logs off a different program on the squad computer, if the computer shuts down due to lack of activity, or if the computer loses its connection to the server. (Ex. 8; Tr. at 136).

During the hearing, Officer Apker testified that he did not log off his computer, and could not explain how a code 28 was generated at 1:00:21 am as he was making his way to the Pleasant Prairie call. (Tr. at 526). The live demonstration presented by Captain Apker confirms that Officer Apker did log off his computer while traveling to the Pleasant Prairie call on November 11, 2013. The live demonstration at the hearing confirmed that the squad disappears from the AVL screen when an officer logs off the Data Pursuit program, but that the officer's location can still be tracked by switching to the "non-log-in" mode where the squad number will appear on the AVL screen. The live demonstration by Captain Apker at the hearing created the exact same set of events that Lt. Hetlet observed when Officer Apker logged off his computer and disappeared from the AVL screen. The fact that Officer Apker's squad re-appeared on the "non-log-in" AVL screen unequivocally demonstrates that Officer Apker logged off his computer on

his way to the Pleasant Prairie call. Thus, Officer Apker was untruthful during his interview with Lt. Hetlet on March 14, 2014 and during his testimony at the Commission hearing.

Officer Apker violated four different policies while responding to a call to assist Pleasant Prairie police on November 11, 2013. Officer Apker violated policy by not performing his duties in a competent, efficient and common sense manner; leaving his duty assignment without permission of a dispatcher or a supervisor; and untruthfulness.

6. The Chief Has Applied the Policies and Rules Fairly and Without Discrimination Against Officer Apker.

Chief Morrissey testified that all officers are given a copy of the policies and rules and regulations of the Department, and must comply with the policies and rules. (Tr. at 456). Officer Apker has raised only one challenge as to whether the policies and rules of the Police Department have been applied even-handedly and without discrimination to all police officers. Officer Apker claims that many different patrol officers leave their assigned patrol area without notifying dispatch or a supervisor, which means they violate Rule 26.1(II)13 of the General Rules and Regulations (Ex. 34) and the Patrol policy (Ex. 38) on a regular basis. However, the issue in this case is not whether police officers violate policy by leaving their patrol area without notifying dispatch or a supervisor; the issue is whether management is aware that police officers violate the policies and fail to take any enforcement action. There was no testimony at the hearing that management is aware and condones these violations of Rule 26.1(II)13 of the General Rules and Regulations (Ex. 34) and the Patrol policy (Ex. 38) by Officer Apker or any other police officer.

7. The Request for Termination of Officer Apker's Employment is Reasonably Related to the Seriousness of Multiple Rule Violations and His Record of Service with the Kenosha Police Department.

On July 6, 2012, Officer Apker was issued a 72 work day suspension without pay and placed on a last chance agreement for unprofessional and inappropriate behavior with women who he interacts with as part of his job duties. (Ex. 45). Officer Apker was disciplined for violating the Code of Ethics, and for violating various rules in the General Rules and Regulations, including untruthfulness, unbecoming conduct, incompetency and failure to enforce local, state and federal laws. The last chance agreement was in effect for 12 months, from August 1, 2012 to July 31, 2013. At the time he engaged in the misconduct that forms the basis for these charges, Officer Apker had just completed serving his 72-day suspension without pay, and was less than 6 months beyond the expiration of his last chance agreement.

Chief Morrissey testified that he has not imposed such significant discipline on any other member of the Kenosha Police Department. Despite imposing a very severe disciplinary action less than 18 months prior, Officer Apker has failed to correct his behavior and engaged in multiple rule violations, some of which are extremely serious. Chief Morrissey testified that he considered the citizen complaint and the harassment complaint as serious acts of misconduct which separately serve as sufficient grounds for termination, but when taken together, serve as just cause to terminate Officer Apker's employment. The Police Department cannot be expected to tolerate or employ a police officer who intimidates and threatens members of the public and threatens and intimidates a female police officer. As Chief Morrissey testified, Officer Apker does not meet the professional standards expected of a police officer, and has proven that he is not willing to conform his conduct to those professional standards.

A police officer cannot be permitted to use his power and authority to threaten or intimidate the citizens that they are sworn to protect from harm. The Chief testified that he

considers Officer Apker's treatment of Mr. Berry to be abuse of his police power, and his use of the TIME system for personal reasons to be a very serious violation, which could have broader implications for the entire Police Department. A police officer must perform his job duties in a satisfactory, competent, and professional manner. Officer Apker was deceptive and untruthful in his investigatory interviews on multiple occasions, conduct which cannot be tolerated in a Police Department. Officer Apker also deliberately logged off his computer on several occasions to hide his location, and left his assigned patrol area without notifying dispatch of his location.

Officer Apker has engaged in unwelcome, intimidating and inappropriate conduct toward Officer Wasilewski which violates the Department's harassment policy. This misconduct is compounded by the fact that Officer Wasielewski is newly hired and concerned for her job because she is serving in her probationary period. Chief Morrissey stated that Officer Apker's treatment of Officer Wasielewski was degrading, and that asking Officer Wasielewski to be untruthful about her prior intimate relationship with Officer Apker is a very serious infraction that cannot be tolerated in the Kenosha Police Department.

If the Commission were to decide that Officer Apker should remain a police officer, but face another lengthy suspension without pay, it could have a negative impact on the Police Department for many years into the future. Officer Apker has already faced the most significant disciplinary suspension that Chief Morrissey has ever imposed, and further disciplinary action will not correct his behavior nor will it send the appropriate message to other officers who perform their job in a competent and professional manner. Officer Apker has been given more than enough opportunity to conform his conduct to the standards expected of every police officer in the Kenosha Police Department, and he has chosen not to abide by the rules. Based upon the serious nature of these acts of misconduct by Officer Apker as described above, there is "just cause" to conclude that Officer Apker engaged in the misconduct that serves as the basis for

these disciplinary charges. The Chief respectfully requests that the Commission uphold the disciplinary charges filed on June 3, 2014 and terminate Officer Apker from his employment with the Kenosha Police Department.

Respectfully submitted this15th day of July, 2014.

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