Board of Police & Fire Commissioners
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Edward Kubicki - Commissioneer
Christine Schwartz - Commissioner

Kenosha Police and Fire Commission

MEETING AGENDA

Thursday, July 24, 2014, 7:30 a.m.
Municipal Office Building, Room 202
625 52nd Street
Kenosha, Wisconsin

1. Call to order.
2. Roll Call
3. Receive and file Casey Apker's Post-Hearing Brief. (enclosed)
4. 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 to render decision on motion.
5. Adjournment.

THIS MATTER MAY BE CONTINUED FROM DAY TO DAY, CONSECUTIVE OR OTHERWISE, AT THE DESCRETION 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.

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July 15, 2014

VIA EMAIL

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RE: In the Matter of Charges Filed Against Officer Casey Apker

Dear Commissioners:

Enclosed please find the Post-Hearing Brief of Officer Casey Apker regarding the above matter. Please contact me if you have any questions.

Very truly yours,

HAWKS QUINDEL, S.C.

By _____
Timothy E. Hawks
thawks@hq-law.com

TEH:kak
Enclosure
cc: via email
Eugene Brookhouse
Nancy L. Pirkey
Casey Apker
Pete Deates

BEFORE THE CITY OF KENOSHA
BOARD OF POLICE AND FIRE COMMISSIONERS

In the Matter of Charges Filed Against:

OFFICER CASEY APKER.

POST-HEARING BRIEF OF OFFICER CASEY APKER

STATEMENT OF THE CASE

On June 3, 2014, Chief John W. Morrissey filed disciplinary charges against Officer Casey Apker, recommending that Officer Apker be terminated and requesting that the City of Kenosha Board of Fire and Police Commissioners (Board) affirm the termination based on the Department's investigations of three matters: a complaint by Officer Jennifer Wasielewski; Officer Apker's response to a call for assistance in Pleasant Prairie; and a citizen complaint by Mr. Jeremie Berry.

Pursuant to Wis. Stat. §62.13(5), the Board is charged with deciding objectively whether, according to all of the evidence presented at the hearing on July 2, 3, and 7, 2014, the Chief's investigations and the resulting charges satisfy the Chief's burden of proof of the seven statutory criteria for just cause, as enumerated in Wis. Stat. §62.13(5)(em)1-7, specifically:

1. Whether Officer Apker could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
2. Whether the rule or order that Officer Apker allegedly violated is reasonable.
3. Whether the Chief, before filing the charges against Officer Apker, made a reasonable effort to discover whether Officer Apker did in fact violate a rule or order.
4. Whether the Chief's effort described under subd. 3 was fair and objective.
5. Whether the Chief discovered substantial evidence that Officer Apker violated the rule or order as described in the charges filed against Officer Apker.
6. Whether the Chief is applying the rule or order fairly and without discrimination against Officer Apker.

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to Officer Apker's record of service with the Department.

In this post-hearing brief, Officer Apker argues that the charges are wholly without just cause, may not be sustained and should be dismissed. Officer Apker respectfully requests that the Board dismiss the charges and, accordingly, return him to service.

BACKGROUND AND ARGUMENT

I. There is no just cause to discipline Officer Apker over the Wasielewski matter

The facts surrounding Officer Apker's conversation with Officer Wasielewski, as alleged in her complaint and as presented at the hearing, are insufficient to charge him with: not being courteous; harassment by creating a hostile, intimidating or offensive workplace; and harassment by threatening, intimidating and hazing. Further, the Department's investigation hardly satisfies the rigorous statutory requirements of just cause.

The facts unequivocally show that Officer Apker did not harass Officer Wasielewski by: the cautionary words he used to inform her of the facts as he knew them about a potentially damaging and ugly workplace rumor related to their prior friendship; by attending a post-work party; or by jumping on four calls during her training while they were assigned to the same area. He testified credibly that he had reasonable concerns: because she was a new officer, he wanted her to know about the rumor so she could quash it; he was concerned for the new officer's reputation in the Department; and, angry about the rumor, he was most concerned that the rumor might affect his relationship with his wife, who worked in the jail, and had herself been approached by a KPD officer asking "if it was weird/awkward for her to see my ex-girlfriend," and may also have heard the rumor. (Chief Ex. 18 p.2)

Officer Wasielewski's complaint itself and the hearing testimony corroborate Officer Apker's defense. She wrote that Officer Apker began the conversation by asking her "Have you

heard any rumors about us?" (Chief Ex. 18 p.2) And after she challenged what he meant by the question, she stated clearly that he asked her: "Did Tim tell you that people are asking him how it feels to have my sloppy seconds?" (Chief Ex. 18 p. 2) Her hearing testimony was consistent with her report. She testified: "He asked if I had heard any rumors about us and I said no." (Tr. 92) She also testified that Officer Apker "asked me if my . . . fiancé Tim . . . had told me that anybody was asking him how it feels for him – for Tim to have Casey's sloppy seconds and I said no. . . ." (Tr. 92) Kenosha County Deputy Sheriff Jonathan Scifres testified credibly that he also had heard the rumor about "sloppy seconds" in the police and sheriff's common locker room and had told Officer Apker what he had heard. (Tr. 705-707)

The Chief's investigation of Officer Wasielewski's complaint proceeded apace, founded on the Chief's erroneous premise that Officer Apker had lodged an ugly and demeaning, slanderous comment at Officer Wasielewski by calling her his "sloppy seconds." There were only two parties to the conversation, Officers Wasielewski and Apker, and both state unequivocally that Officer Apker began the conversation by asking if Officer Wasielewski "had heard the rumor." The Chief, however, ignored the facts and pushed a wide-ranging investigation of possible harassment, thereby even creating the Pleasant Prairie investigation, discussed below, because he misinterpreted that Officer Apker affirmatively called Officer Wasielewski "his sloppy seconds." (*See,* Tr. 476-479)

In the investigation, the Chief made much of Officer Apker's mere attendance at a post-shift party to honor one officer's birthday and another's training milestone. However, there is absolutely no evidence that this Board should attach any meaning to Officer Apker's presence, and certainly no sinister intent or objective effect related to harassment of Officer Wasielewski. Officer Wasielewski attended the party with her fiancé. Officer Apker went after he had a

specific request from one of the honorees and after he learned that his wife had other plans. There is absolutely no evidence that Officer Apker exhibited at the party any offending or unusual behavior, or any behavior at all directed towards or about Officer Wasielewski. Officer Apker merely paid tribute, by his appearance, to his two co-workers. Officer Wasielewski suggests, however, that his presence at the party was more than a coincidence merely because, or so she was told, Officer Apker rarely comes to the parties. The Chief's own witness, Officer Jurgens, testified credibly to the contrary: the party in question honored two officers and it was no surprise that Officer Apker was there. Officer Jurgens testified that he had seen Officer Apker at a couple of other parties. (Tr. 200-201)

There also is absolutely no evidence that Officer Apker jumped four of Officer Wasielewski's calls for any reason outside his unassailable and laudable work ethic, and certainly not for any personal reasons related to or causing the harassment of Officer Wasielewski. Officer Apker denies it and Officer Jurgens testified that Officer Apker jumps a lot of calls regardless of which officers are involved:

> Q: Do you believe that Officer Apker jumps a lot of calls no matter who the officer is?
> A: I would say his work ethic was strong and, yes, he did jump a lot of calls, so I think that is fair to say.
> Q: So, in a sense, we could say with regard to many officers on the department, that Officer Apker appeared on their calls more frequently than others in the department.
> A: I believe that is fair to say, yes.
>
> (Tr. 210)

Most important, Sergeant Timothy Schaal testified that, from his careful review of the data for three weeks between mid-October and early November, he concluded that Officer Apker and Officer Wasielewski were on "three, possibly four calls" and that is not a disproportionate or large number. (Tr. 247-248) Nevertheless, Sergeant Schaal issued a report, having never

interviewed Officer Apker, but concluding there *was* harassment. His determination of harassment must have been fueled by innuendo and certainly not by the facts, because, at the hearing, Sergeant Schaal admitted this very critical fact: he determined that Officer Apker had *not* jumped a large or disproportionate number of Officer Wasielewski's calls but Sergeant Schaal admitted he had not included that important conclusion in his report. The Sergeant testified, as follows:

> Q: I believe you testified that you concluded, based upon your investigation, that Officer Apker had not joined Officer Wasielewski in an inordinate number or an inappropriate number of occasions. Isn't that true?
> A: That is correct. Like I testified, I believe there was [sic] four occasions where they had contact on patrol.
> Q: And that more importantly, that the conclusion was that that was not an inappropriate number. Isn't that true?
> A: That is correct.
> Q: And isn't it also true that you failed to . . . inform in your report that specific conclusion?
> A: I don't believe I made any specific conclusion either way. I reported the evidence that they had four contacts and I . . . never made any specific recommendation or conclusion on whether that was appropriate or not.
> Q: You just shared with this commission that you concluded that the number of jumped calls was not inappropriate. When did you make that conclusion?
> A: I never made that conclusion . . . in my report. I just let the evidence stand for itself.
> . . .
> Q: [W]hen did you conclude that Officer Apker did not jump calls an inappropriate number number of times?
> . . . Did you reach that conclusion today?
> A: No, but I never documented that conclusion.
> Q: [W]hen did you reach that conclusion?
> A: It would have been while I was examining the evidence. . . .
> (Tr. 259-261)

As further evidence of its unfair investigation, the Department admits it made no effort to inquire into and to determine the frequency with which other officers jumped calls of Officer Wasielewski or of other officers. The investigation also ignored the fact that Officer Wasielewski herself jumped on one of Officer Apker's calls. Importantly, Officer Apker was notified of this

complaint four months after it was filed. Sergeant Schaal agreed that, despite one's police training, the longer time passes a person usually remembers fewer details of distant events. (Tr. 265-266) That certainly would be true in situations such as the Wasielewski matter where, unlike an investigative police officer performing his duties, Officer Apker had not made investigative notes from which he could refresh his memory as time passed, the rumor obviously subsided and, some four months later, the Department finally interviewed Officer Apker. Given the inordinate delay in addressing the complaint with Officer Apker, he was obviously not on notice that his conversation with Officer Wasielewski would threaten his job.

Further, implicit in the underlying premise of the harassment charge is the unfair suggestion that Officer Apker's actions are akin to repeating conduct and Officer Apker should "know better," having agreed to ethics and policy training in 2012. The unequivocal evidence shows however that, although Officer Apker agreed to such training, it was never scheduled by the Chief or conducted by the Department. (Tr. 612-613; 724)

At bottom here is an ugly rumor, perhaps created by an insensitive, workplace "jokester." The Chief even admitted that, theoretically, officers "should" have a conversation if one learns about potentially damaging, untrue rumors. (Tr. 476-477) Officer Apker's conversation with Officer Wasielewski was admittedly ill-timed, as they were on-duty. Officer Apker's comments perhaps reflect social awkwardness and his judgment may have been clouded by the backdrop of his former friendship with Officer Wasielewski and his protectiveness of his rather new marriage. One certainly cannot control locker room-type exchanges and inept "jokes," as surely only persons *not* implicated would characterize them. Officer Apker had been teased by fellow officers about his former relationship with Officer Wasielewski. Officer Wasielewski herself told Officer Apker that Mrs. Apker had "mean mugged" her, giving what Officer Wasielewski

considered dirty looks when their paths crossed on-duty at the county jail. The gravamen of the Wasielewski matter concerns this one, brief conversation, which ended, as the two of them agree, with Officer Apker's assurance that their prior relationship would not be a factor in the workplace, Officer Apker's coincidental appearance at a post-work party honoring their two colleagues, and Officer Apker's unremarkable efforts jumping three to four calls. There is no evidence to support the broad charges against Officer Apker and that this one conversation can be interpreted as harassment of Officer Wasielewski.

Application of the seven criteria of just cause to the Wasielewski matter

For ease of analysis, we address first the assertions of call jumping and attending the after-work party and show that the Chief's case fails to meet any of the seven criteria:

- There is no rule prohibiting Officer Apker's conduct so he could not have had reasonable notice that he might be terminated for these behaviors. The Chief's case fails criterion 1.
- If there were a rule prohibiting either behavior it would be unreasonable on its face. The Chief's case fails criterion 2.
- The Chief's effort to determine whether Officer Apker engaged in misconduct regarding these two elements was not reasonable, fair or objective and it did not produce evidence of misconduct. As noted above, Sgt. Schaal uncovered evidence that exonerated Officer Apker (no evidence that he jumped Officer Wasielewski's calls an inappropriate number of times) yet he did not report out the finding. There is no evidence that Officer Apker knew that by attending the party, Officer Wasielewski would be discomforted. Further he never knew that she was discomforted at all by any conduct of his prior to his being confronted some four months later with a copy of the investigation report. The Chief's case fails criteria 3, 4 and 5.
- The Chief offered no evidence to demonstrate that the discipline for these two allegations is even-handed, nor could he, because the evidence demonstrates that there was no misconduct by Officer Apker. The Chief's case fails criterion 6.
- Given that the evidence presented exonerates Officer Apker of a charge of "harassment" with regard to these two allegations of misconduct, criterion 7 does not come into the analysis.

Applying the seven criteria to the allegations grounded in the November 1 conversation, the Chief's case fails to establish just cause for discipline for the following reasons:

- The Chief did not establish that Officer Apker had reason to believe that his truthful communication to her of information that was potentially harmful to both of them would lead to his termination. The Chief's evidence fails to meet criterion 1.
- While the policy prohibiting "harassment" is facially reasonable, it is too vague to be reasonably applied to these facts because it fails to allow for a distinction between reasonable and unreasonable reactions of the employee putatively "harassed." The policy also makes no accounting for expressions that may be intimidating but are clearly not misconduct, for example, an experienced officer's advice to a junior officer that his or her handling of a situation was incorrect. The Chief's evidence fails to demonstrate that the "harassment" policy is reasonably applied to these facts, thereby failing to meet criterion 2.
- The Chief's four-month delay in interviewing Officer Apker about the November conversation with Officer Wasielewski, in and of itself, renders the investigation unreasonable. You cannot ask one person to recount a conversation a few days after it occurred, and then ask the other person to recount the conversation four months after it occurred, and provide the latter with a fair opportunity to recall the details of the conversation. There is no just cause for this element under criteria 3 and 4.
- The Chief did not prove substantial facts supporting termination over the November conversation and that termination for this sort of alleged misconduct is even-handedly applied. There is no just cause for this element under criteria 5 and 6.
- The Chief did not demonstrate that the alleged violation was so serious to justify termination, thereby failing to meet criterion 7.

II. There is no just cause to discipline Officer Apker over the Pleasant Prairie matter

The facts surrounding Officer Apker's response to a request for assistance from the Pleasant Prairie Police Department are not sufficient to sustain the Chief's charges of four rule violations. The Chief alleges that Officer Apker left his assigned area without supervisory approval and was not truthful in the investigation, because he was 4.3 miles outside his assigned area, logged off his computer and communicated with dispatch on Channel 2 ten minutes later in order to hide his whereabouts. However, there is credible testimony that Officer Apker was only about 13 blocks outside his assigned area, that it is common for officers to respond within that range of territory – and even all across the city – and that he was not hiding or evading supervision by using Channel 2. On the contrary, Officer Apker should be commended for having successfully apprehended a felon who was fleeing from an accident, assisting the Pleasant Prairie officers, and not instead be vilified as a dishonest sneak who should be discharged.

The Chief's investigation was unreasonable and hardly objective for several reasons. First, the Department's efforts to track Officer Apker were premised on Lt. Hetlet's mistaken belief Officer Apker was acting out of personal and not professional reasons in relation to Officer Wasielewski so his movements should be tracked to determine whether he was harassing Officer Wasielewski by jumping on calls while they were assigned to the same areas. Second, Lt. Hetlet testified unequivocally that although he was in command during this incident that while watching Officer Apker's movements, he could have and did nothing to resolve the question of Officer Apker's whereabouts. In short, he never tried to communicate with Officer Apker to ask him where he was and what he was doing. Further, Officer Hetlet's own description is contradictory as to when he observed that Officer Apker's squad was off the AVL. He first stated that it was after Officer Ball called Pleasant Prairie and after Officer Apker had notified dispatch that he was "on the scene" in Pleasant Prairie. (Chief's Ex. 28 p. 13) Later, in the same interview, Officer Hetlet stated that it was earlier, and that he had watched Officer Apker's squad from the beginning, "as the call progressed." (Chief's Ex. 28 p.18)

Third, the investigation was also premised on Lt. Hetlet's observation that Officer Apker was four miles outside his assigned area, when he jumped the call for assistance from Pleasant Prairie. On the contrary, Officer Apker testified that, at the time of the Pleasant Prairie incident, the incident was within approximately thirteen blocks of the boundary of his assigned west rover area. (Tr. 619-620, 648, 673) He was clearly responding to a, not uncommon, formal request for assistance from Pleasant Prairie. Fourth, the Department made no effort to determine that other officers sign off their computers, the frequency with which that happens and why they may delay logging back on. Had the Chief made such an investigation it would have yielded the information provided by the testimony of Officer Miller:

Q: Do you have occasion to log off of . . . that laptop computer during the course of your shift?

A: Yes.

Q: How frequently and if sufficient, to provide a range.

A: It varies greatly depending on the squad, the computer itself, but one to two times would be a low average, up to several times a shift depending on circumstances.

Q: What would be the . . . cause for you to have to log off your computer several times or more during a shift?

A: What causes us to log off is if any of the main programs that are run under the whole data pursuit would freeze. Generally, the way to remedy that is to log off and then log back on.

. . .

Q: When you log off the computer for any reason, is there on occasion a reason not to immediately log back on?

A: Yes.

. . .

If you were logged off for it was frozen and you go to a current call that is in progress, especially if it is a short distance, you won't log back on, because you want to focus on getting there. If you are going to do something that doesn't require you to use the computer system, you may not log back on such as if you are coming here for a meeting or going to be in the building for an amount of time.

(Tr. 712-713)

In similar fashion, this investigation, like the Wasielewski matter, proceeded for four months before the Department informed Officer Apker about it. Lt. Hetlet admitted that Officer Apker was unaware of the investigation and was not notified of any problem related to his success apprehending the Pleasant Prairie felon until he was required four months later to attend an interview in March, 2014. (Tr. 388)

There is credible testimony that Officer Apker was not far afield when he responded to the Pleasant Prairie appeal for help. Having also worked the west rover area, Officer Andrew Skowronski agreed with Officer Apker about the east boundary of Officer Apker's assigned area that night. (Tr. 702) Further, Officer Brian Miller testified credibly that he frequently patrols area 40 and that he commonly leaves his area without notifying dispatch. (Tr. 716) Officer Miller testified that if, like Officer Apker, he had only been about thirteen blocks outside his assigned

area, Officer Miller himself would likely not have notified dispatch immediately. (Tr. 718) According to Officer Miller's unequivocal testimony, he and others jump calls across the entire city and do not put a limit on how far they would work outside a specific assigned area, "I wouldn't put a limit on how far I go." (Tr. 719)

Officer Zurcher testified, and his testimony was not rebutted, that it is rare for Pleasant Prairie to ask for assistance, but when it does it is on a "larger" call because Pleasant Prairie has fewer police officers than Kenosha. (Tr. 80-81)

There is no dispute that Officer Apker did notify dispatch that he was responding to the Pleasant Prairie call. The Chief contends that his notice was delayed and that it was on Channel 2, implying he was hiding from supervision. Officer Miller testified that he would not immediately notify dispatch unless the situation allowed, "If somebody is in a chase or a real significant situation where I don't want to block the radio traffic, I wouldn't immediately [call dispatch], but at some point, normally, you would want to advise them that you are en route or there." (Tr. 719) As to whether an Officer might be "hiding" to communicate on one channel rather than another, Officer Miller testified that he frequently, purposefully uses Channel 2 "because of the amount of traffic that's on there." (Tr. 718)

There is no dispute that there is no Department rule prohibiting an officer from logging off his or her computer. There is also no rule requiring an officer to be logged in at all times during the day. Likewise, there is no rule prohibiting collaborative work with Pleasant Prairie officers or prohibiting jumping calls outside one's assigned area. Officer Apker cannot reasonably have known that he was putting his job on the line, because there are no rules prohibiting his actions in the Pleasant Prairie matter. Without a clear rule violation, the Chief

has condemned Officer Apker's conduct in this matter unfairly and merely by implication. The Chief himself admitted as much in his own testimony, as follows:

> Q: Chief, first of all, I will try to take one issue off the table. If the only issue before you in this matter was the Pleasant Prairie response and associated issues, would we be here today?
>
> A: I don't think so. I think we could have worked something out.
>
> (Tr. 476)

There is no evidence that Officer Apker was shirking his duty by hiding from supervision. There is also no evidence that any information was lost about Officer Apker's whereabouts. The evidence is unequivocal that the Department made no effort whatsoever to determine Officer Apker's whereabouts when Lt. Hetlet noticed his squad "disappear." In fact, Officer Apker was transparent about what he was doing: he notified dispatch and his reasons for notifying dispatch are entirely credible.

Application of the seven criteria of just cause to the Pleasant Prairie matter

Applying the seven criteria to the allegations surrounding the Pleasant Prairie matter, the Chief's case fails to establish that he has just cause for discipline for the following reasons:

- The Chief did not establish that Officer Apker had reason to believe that by responding to a Pleasant Prairie call his continued service would be in jeopardy, thereby failing the 1st criterion for just cause.
- On their face the rules are reasonable; however, wrongly applied here because the evidence reveals that Officer Apker's response to the Pleasant Prairie call was reasonable, and envisioned by the rule ("[f]or emergency police business), and he was truthful, thereby failing the 2nd criterion for just cause.
- The Chief's investigation of this matter also fails to satisfy the 3rd, 4th, 5th, and 6th criteria for just cause because: (1) it was premised on the Chief's misunderstanding of the conversation between Officers Apker and Wasielewski, thereby causing superiors to watch Officer Apker to determine whether he was improperly responding to Officer Wasielewski's calls; (2) while Lt. Hetlet was observing Officer Apker's movements on the night of the Pleasant Prairie incident, when Lt. Hetlet had a question about Officer Apker's whereabouts he could have and did not call Officer Apker to ask where he was and what he was doing; (3) the Chief made no reasonable effort to discover that Officer Apker was only 13 blocks outside his assigned area; (4) the Chief made no reasonable efforts to discover that Officer Apker had notified dispatch within a reasonable time that he was responding in Pleasant Prairie; (5) the

Chief did not notify Officer Apker of the investigation until Officer Apker was questioned four months after the incident.

- The Chief's proposed discharge of Officer Apker on the basis of the Pleasant Prairie matter is wholly unfounded, especially given all of the facts and the Chief's own testimony that it could have been resolved. There is no support for the 7th just cause criterion.

III. There is no just cause to discipline officer Apker over the Berry matter

The Chief's investigation of Officer Apker's conduct in response to Mr. Berry's verbal rant over a missed parking spot and his written threat "karma is a bitch" on Officer Apker's car was unfairly conducted and did not produce sufficient evidence to charge Officer Apker with eight rule violations regarding engaging in discourteous and unbecoming conduct, giving dishonest answers, and misuse of the TIME System.

Mr. Berry's conduct was based solely on something very trivial: a missed parking spot among several available parking spots at La Fogata Restaurant on the evening of November 30, 2013. Mr. Berry admitted in his complaint and in his testimony that he affirmatively approached and engaged Officer Apker because Officer Apker pulled into a parking spot that Mr. Berry had wanted. First, he admitted that he approached Officer Apker and his wife and challenged Officer Apker for making an "asshole" move. Second, he testified that he also said to Officer Apker, "oh, so you're a real tough guy now." (Tr. 39) Third, after the verbal altercation that Mr. Berry provoked, Mr. Berry decided to leave the restaurant and then he wrote "karma is a bitch" on the dirty, rear window of Officer Apker's car.

"Karma is a bitch" may be an ambiguous statement when considered alone, but its interpretation depends mightily on the context in which it is expressed. For example, Mr. Berry now claims it only means "what goes around comes around," suggesting perhaps that Officer Apker too may lose a parking spot himself someday. That may be so, and to interpret it in that way, one would have expected Mr. Berry to have said something innocuous to Officer Apker,

such as, "Well, tough guy, you'll know how I feel when you lose a parking spot someday." But he did not. Instead he taunted Officer Apker with two statements, inferring that Officer Apker is an "asshole" and a "real tough guy." Given that context, writing "karma is a bitch" on Officer Apker's car outside of his presence and after Mr. Berry had accosted him, Officer Apker and Mrs. Apker did not interpret it so benignly. They interpreted the "karma" message on their car as a warning or a possible threat and thus something they should be concerned about, especially if Mrs. Apker drove the car alone, unaccompanied by her husband. This interpretation is reasonable, because the "karma" message did not appear in a vacuum. Mr. Berry had reacted in an extreme fashion in that parking lot, initiating an altercation with Officer Apker. Within that altercation Mr. Berry made two challenging, taunting, verbal overtures. Given this context, Officer Apker reasonably formed the conclusion that Mr. Berry's conduct was possibly worthy of a citation for disorderly conduct.

Although Officer Apker had not concluded that he should issue a citation to Mr. Berry, he was concerned enough to consider a citation an option if he observed any concrete danger from Mr. Berry. In doing so, he was on solid ground legally, as the Wisconsin Supreme Court has opined that the disorderly conduct statute may be applied to speech only, because such a citation "is directed at controlling the harmful effects of the speech." *State v. A.S.*, 2001 WI 48, ¶16, 243 Wis. 2d 173, 626 N.W.2d 712. These concerns governed Officer Apker's conduct about week later, when he happened on Mr. Berry during Officer Apker's routine work covering the VFW and sought to identify the Berry car and registered owner, and surely to discover whether there were cautionary details that might be important to consider if there was danger from Mr. Berry, such as whether there were any existing warrants.

Lt. Hetlet confirmed that a police officer on patrol would be acting in accordance with Department policy if he:

1. Attended to an observation that a citizen was writing in the dirt on the back window of a car; and
2. Upon observing the words "karma is a bitch" on the back window, stopped his squad and confronted the individual; and
3. Warn the individual that his conduct approached disorderly conduct; and
4. Upon observing the individual enter a vehicle, notice and retain the make, model, color and plates of the car; and
5. Use the TIME system to obtain a history of the apparent operator of the vehicle.

(*See* Tr. 376-379) Lest there be a distinction in this situation if the vehicle was the patrolling officer's own car creating in addition to a law enforcement interest also a "personal interest," Lt. Hetlet also testified that if a home video surveillance camera of a KPD police officer recorded an apparent but unsuccessful attempt to "break and enter" into his personal residence that also recorded the offender's entry into a vehicle and its plates and later while patrolling the officer observed the same vehicle traveling, the officer would be well within his rights as a KPD police officer to:

1. Run the plates on the TIME system.
2. Stop and confront the individual.

(*See* Tr. 379-380) In sum, the officer responsible for the internal investigation, in response to cross examination questions plainly testified that similar, if not identical behavior by a hypothetical police officer was NOT a violation of department policy.

A week after the La Fogata incident, on the night of December 7th, there is no dispute that Officer Apker was dispatched by the Department as part of his regular duty to surveil the VFW because the Department was concerned that there was an "unusual" crowd there that night. The testimony of both Officer Jurgens and Officer Apker is consistent with the information that Officer Jurgens gave Lt. Hetlet in April 2014, that they were to be watchful of the crowd at the

VFW. (Ex. 15) Just south of the VFW, Officer Apker saw several kids who had been locked out of their car. He pulled up next to them and sought lock-out assistance for them from Officer Adam Jurgens. Officer Apker continued surveiling the VFW, as he was assigned, and then he noticed Mr. Berry, whom he recognized as the person who had written the "karma" threat on his car window. While Officer Apker was also attending to Officer Jurgens' response to the lock-out, Officer Apker saw Mr. Berry driving away in the same car he had driven in the La Fogata parking lot and drive to a nearby Speedway. Then, over 30 minutes after Officer Apker had first seen Mr. Berry, he ran a search of the plates on Mr. Berry's car and identification of the driver's license number assigned to plates. The search revealed the car's owner was much older than Mr. Berry appeared, so Officer Apker did not know Mr. Berry's identity from the searches. Officer Apker entered the Speedway and, hoping to put to rest any fears of retaliation by Mr. Berry for the parking lot incident, Officer Apker approached him, asked Mr. Berry whether "karma is a bitch" rings a bell and warning him that the Officer could arrest him for disorderly conduct. (Tr. 43) Mr. Berry's fiancée observed their exchange and testified that, as she watched from the check-out register, the conversation at the Speedway appeared to be just that and "not a confrontation." (Tr. 35)

There is no evidence whatsoever that Officer Apker stalked Mr. Berry, as the Chief testified. There is no dispute that Officer Apker made no inquiries about Mr. Berry between the incident at La Fogata and his chance sighting of Mr. Berry a week later during his assigned work at the VFW. Officer Apker worked four shifts in the intervening time and made no effort to search out, to identify or to track Mr. Berry. (Tr. 515-516) He certainly did not lie in wait at the VFW looking for Mr. Berry.

Although the Department began its investigation of the Berry complaint on December 9, it did not notify Officer Apker that this complaint was filed. (Tr. 302, 380, 397-88) Officer Apker heard a rumor about it and on December 17, he asked Lt. Hetlet whether the rumor was true that a complaint was filed against him. (Chief Ex. 6) On January 10, 2014, Officer Apker again asked Lt. Hetlet about the status of the complaint. (Tr. 305; Chief Ex. 7) It was not until March 20, 2014, that the Department formally questioned Mrs. Apker and on April 3 that the Department formally questioned Officer Apker about the Berry matter from November 30 and December 8. (Tr. 328-331; Chief Ex. 14, 16) By then, Officer Apker's memory was surely stale. Such a delay in giving Officer Apker formal notice of an investigation and questioning him with signals that the Department's investigation was flawed, unfair and not objective. Further, the Department made no inquiry to determine the reasonableness of Officer Apker's responses and to discover that Mr. Berry has a recent history of emotional instability and a labile temper, which surely is reflected in his behavior at La Fogata. (Tr. 33-34; 52-53) This information, which would have been readily available to the Department, reasonably supports Officer Apker's concerns that Mr. Berry might have posed a danger.

Admittedly, Officer Apker could have been more courteous to Mr. Berry and could have held his tongue instead of admonishing Mr. Berry at La Fogata that he could just go back to Illinois. With the benefit of hindsight and especially the knowledge that Mr. Berry did not initiate other encounters later, Officer Apker's greater concerns *may* have been off the mark, since the dispute arose over something very trivial: a parking spot. However, at the time, and given the entire context, Officer Apker reasonably interpreted Mr. Berry's conduct as irrational and potentially threatening. At best, Officer Apker's conduct may have exhibited a poor assessment of his and Mrs. Apker's risk of retaliation by Mr. Berry; however Officer Apker's

conduct should not be elevated to a terminable offense. Further, one will never know if Officer Apker's warning to Mr. Berry at the Speedway was fruitful because there is absolutely no evidence to the contrary that Officer Apker's comments at the Speedway had their intended effect and Mr. Berry put to rest the parking lot incident.

Application of the seven criteria of just cause to the Berry matter

Applying the seven criteria to the allegations surrounding the Berry matter, the Chief's case fails to establish that he has just cause for discipline for the following reasons:

- Concerned that Mr. Berry reacted extremely by taunting Officer Apker and leaving a written threat on his vehicle because he lost out on a parking spot, Officer Apker reasonably feared that Mr. Berry's conduct was worthy of a citation and could hardly have expected to have knowledge that his own conduct would put his job at risk, as the 1st criteria requires;
- The rules may be reasonable in other contexts; however, they are unreasonably applied to these circumstances, thereby hardly supporting the 2nd criteria;
- The Chief's investigation of this matter fails the 3rd, 4th, 5th, and 6th criteria for just cause because (1) he did not question Officer Apker until April 2014; (2) he made no inquiry into Mr. Berry's history to discover his emotion lability and the reasonableness of Officer Apker's concerns about Mr. Berry's perceived threat causing him to seek to identify the vehicle and its owner; (3) he has no evidence to substantiate that Officer Apker was stalking Mr. Berry in that Officer Apker took no steps to investigate Mr. Berry between the La Fogata incident and his chance sighting at the VFW/Speedway.
- Given that there's insufficient evidence on the basis of a flawed investigation to charge Officer Apker of these violations, there is also no just cause under the 7th criteria.

CONCLUSION

Officer Apker has served about six and a half years in the Department. Performing such service to the citizens of Kenosha has been his life-long ambition. Admittedly, he has had a rocky disciplinary history, but he successfully satisfied his harsh 72-day suspension and the agreed-upon last chance agreement of 2012, to maintain his status in the Department. There is no question that Officer Apker's earlier discipline caused the Department's investigation of these three matters to be implicitly biased and unfair. Those flawed investigations, including the

Department's subjectively misinterpreted and missing facts, should not suffice for just cause to terminate this officer's service to the City. The spectre of that discipline, two years ago, has biased the Department's investigations and treatment of the facts surrounding the three matters that form the foundation of these charges against Officer Apker, as argued above.

Although the Chief may fear that Officer Apker's value to the Department is tarnished because the 2012 suspension will follow his reputation as he represents the Department in public, at least one Kenosha Circuit Court judge disagrees. Judge Jason Rossell, for example, has known Officer Apker for about six to eight years and testified to applaud his "good, gumshoe police work" and "good initiative." Although Judge Rossell knows him from one incident, in which Officer Apker adroitly searched a house for drugs, the Judge testified as a character witness on behalf of Officer Apker and was not aware of the 2012 discipline. (Tr. 496-498) Similarly, Kenosha County Sheriff David G. Beth testified that he has never been in situations in which he questioned Officer Apker's truthfulness. They have been acquainted since Officer Apker was a child and Sheriff Beth commended Officer Apker as industrious and a hard worker. (Tr. 394-395) Several witnesses testified about Officer Apker's dedication, strong work ethic, and about his commitment both to his work and to the community. Middle school teacher Joseph Williams testified that Officer Apker's four-year presence and initiative as a school resource officer unequivocally ensured safety in the school, decreased the level of student behavioral problems and enhanced the educational processes by his support of the school staff and the children. (Tr. 499-502) Mr. Williams candidly testified that over those years he had observed Officer Apker mature and grow as a role model for the students, and that Officer Apker had always been honest and "upfront," never causing there to be any question about his honesty. (Tr. 501-502)

At bottom, the evidence does not show that Officer Apker placed his personal interests above his professional responsibilities in the Wasielewski matter, the Berry matter, and in his successful response to the Pleasant Prairie call for assistance. The evidence also refutes the claims that Officer Apker was dishonest in any of the investigations. The rules were applied to Office Apker unfairly and unreasonably. And, in the Pleasant Prairie and Berry investigations, Officer Apker is threatened with serious sanctions on the basis of a rule prohibiting police officers from signing off their computers; however, there is no such rule. The Department failed to give Officer Apker timely notice of each of its investigations, to interview him in a timely manner and to seek exculpatory evidence that, if properly scrutinized, should have cleared Officer Apker.

Based upon all of the foregoing, Officer Apker respectfully requests that the Board find and order the charges against him dismissed on the ground that, pursuant to Wis. Stat. §62.13(5), there is not just cause to sustain them. Officer Apker respectfully requests that, consistent with such a dismissal, the Board orders him to be reinstated to the service.

July 15, 2013

Respectfully submitted,

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