

Justin Daniels
723 Suhrke Rd
Plymouth, WI 53073

vs.

PFC Complaint No.: _____

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

ANSWER and AFFIRMATIVE DEFENSES

NOW COMES THE RESPONDENT, Chief of Police Christopher Domagalski, by his Attorney, Adam James Westbrook, and reserving all jurisdictional objections submits the following answer to the complaint.

Justin Daniels (COMPLAINANT) is a resident of the City of Plymouth Wisconsin and at no point during the alleged time frame of the complaint did the COMPLAINANT live in the City of Sheboygan, or have any personal or direct involvement with any of the alleged charges. He filed these charges based entirely on third-hand information and demonstrates either a lack of understanding in the law or a blatant disregard for facts and truth in his numerous charges. In order to best assist the commission in evaluating these meritless charges, since the COMPLAINANT did not number charges in his complaint, I will separate this answer using the same "headings" that the COMPLAINANT used.

STATEMENT OF CHARGES

These charges stem from an internal investigation regarding alleged sexual harassment occurring at the police department. Through this investigation it was discovered that there were numerous officers engaging in consensually sending, receiving, and taking sexually explicit photographs of one another.

Some of these photographs were then showed without the consent of the individuals depicted in the photographs. The only officer mentioned in the charging documents as a victim is Officer Abigail Hernandez, who on information and belief resides with and is in a romantic relationship with the COMPLAINANT.

According to statements made by Officer Hernandez during the initial investigation she was at an intoximeter training with several other officers and one night while intoxicated and at a hotel Officer Pray asked Officer Hernandez to “flash” him which Officer Hernandez did, exposing her breasts to him. Pray took his cell phone out and took a picture. Officer Pray then showed this photo to other officers without Officer Hernandez’s consent or knowledge.

In addition to Officer Hernandez, there were several other officers who had nude photos of them being shown between employees. This investigation took months to complete and the investigation notes total over 200 pages. Chief Domagalski reviewed all of the documents and recommendations from the investigation and, as required and outlined by state statute, issued discipline he felt reasonable and appropriate to those employees who were found to have violated city and/or department policies.

SPD Policy 1010.8 – Administrative Leave

The first charge in the complaint is that Chief Domagalski violated a Police Department policy when he did not place Officer Pray on administrative leave during the investigation. The policy states: “When a complaint of misconduct is of a serious nature, or when circumstances indicate that allowing the accused to continue to work would adversely affect the mission of the Department, the Chief of Police or the authorized designee *may* temporarily assign an accused employee to administrative leave.” (*emphasis added*).

There are two primary reasons why this charge is frivolous and should be found not substantiated.

First, the act of placing an officer on administrative leave is a discretionary power of the Police Chief. There is no requirement that he place an officer on leave at any time, however the policy gives him the ability to place an officer on leave when he feels it necessary during the course of an investigation. It cannot be a policy violation to not exercise a discretionary power. The policy indicates that Chief has the sole power to decide when an employee should or should not be placed on leave during the investigatory process and in this matter, the Chief exercised that power and did not place any officer on leave during the investigation, which was his right and which is in line with the policy.

Second, the facts of this entire investigation are complicated and took many weeks to come fully to light. The original complaint which initiated the Internal Investigation was not the only misconduct that ended up coming out during the course of the investigation. The Chief acted with the best interest of the department and with the knowledge he had along the way. At any point in time had the Chief felt there were allegations that warranted placing an employee on Administrative Leave, he would have done so.

SPD Policy 1010.9 – Criminal Investigation

The second charge in the complaint is that Chief Domagalski violated a Police Department policy when he did not assign a separate supervisor or investigator to investigate criminal conduct. The major deficiency in this charge is that there are no allegations that criminal conduct occurred. According to her statements in the original investigation Officer Hernandez consensually exposed her breasts to Officer Pray and consented (or at least had knowledge and allowed) to Officer Pray photographing her exposed breasts. This is not a crime.

Officer Pray then took that photo and showed it to other officers without Officer Hernandez's consent, which is an abhorrent action, but is not criminal. The COMPLAINANT either does not understand the law, or is intentionally misrepresenting the law when he claims there was a violation of Wis. Stat. 942.09(2)(am). That statute reads:

Except as provided in par. (dr), whoever does any of the following is guilty of a Class I felony:

1. Captures an intimate representation without the consent of the person depicted under circumstances in which he or she has a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted does not consent to the capture of the intimate representation.

2. Makes a reproduction of an intimate representation that the person knows or has reason to know was captured in violations of subd. 1. And that depicts an intimate representation captured in violation of subd. 1., if the person depicted in the reproduction did not consent to the making of the reproduction.

3. Possesses, distributes, or exhibits an intimate representation that was captured in violation of subd. 1. Or a reproduction made in violation of subd. 2., if the person knows or has reason to know that the intimate representation was captured in violation of subd. 1. Or the reproduction was made in violation of subd.2., and if the person who is depicted in the intimate representation or reproduction did not consent to the possession, distribution, or exhibition.

Wis. Stats. 942.09(2)(am)

There are several elements to this crime which all must be met in order for a person to be found guilty. First, the captured representation must be *without the consent of the person depicted*. Second, the circumstances surrounding the captured image must be such that the person has *a reasonable expectation of privacy*. Third, the person capturing the image must know that the other person does not consent to their image being captured. None of these elements are met in the current charge.

First, Officer Hernandez consented to having her exposed breasts be captured by a photo on Officer Prays phone. This is known by statements in the original investigation, but also by the fact that she could see the Officer Pray had his phone out while she flashed him, and still exposed her breasts. Second, this

incident happened in the hallway of a hotel. No reasonable person would think there is an expectation of privacy in the hallway of a hotel when most hotels have security cameras monitoring the hallways and public areas. It is unreasonable to think that exposing your breasts in a public hallway was a private area. Third, Officer Pray had no way to know that Officer Hernandez did not consent to her image being captured when she willingly lifted her shirt and allowed Officer Pray to take a photograph.

It is clear that Sub. 1. Is not met, the other two subsections cannot be applicable as they require that the elements of Sub. 1 are met.

The policy states that when there is a potential criminal violation, that the separate investigator shall be assigned to investigate the criminal allegations. There was no criminal violation alleged here, so it is impossible for the Chief to have violated this policy.

SPD Policy 321.3.1 – Supervisor Responsibilities

The third charge in the complaint is that the Chief violated Police Department policy because he was not aware that officers were exchanging and then showing nude photographs of one another. This charge is baseless and there is no factual evidence supporting such a charge. The policy states that supervisors can be disciplined for “failure to be reasonably aware of the performance of their subordinates or to provide appropriate guidance and control.” This policy clearly is referring to the duties of the job and uses the word “performance” to indicate as much. The COMPLAINANT again either does not understand the policy or is intentionally trying to mislead the Commission.

The argument that a supervisor should know of harassment or off-duty misconduct before it is reported to them is non-sensical and does not align with all of the laws discussing workplace discrimination, harassment, and violence. The reason that these laws exist is because it is commonly understood that an employer and supervisors cannot be held responsible for the actions of their employees if they are not

made aware of those actions. Once made aware, supervisors/the employer have a duty to act, but not until they are put on notice. To insinuate that the Chief should have omnisciently known that officers were sending each other nude photographs, and then showing other officers those photographs is preposterous and not supported by any facts. Once made aware, the Chief acted as required by law and policy.

SPD Policy 1004.3 – Retaliation Prohibited

The forth charge in the complaint is that the Chief violated Police Department policy by retaliation against Officer Hernandez. As a threshold matter, retaliation occurs when a supervisor/employer takes adverse action against an employee in response to that employee engaging in a protected activity. According to the COMPLAINANT, the protected activity Officer Hernandez engaged in was filing a complaint against Officer Pray. The Chief agrees that this is protected activity. The COMPLAINANT then seems to imply that the following actions were retaliation:

1. the chief “failing to provide her protection from Officer Pray”
2. allowing Officer Pray to appear on the department Facebook page for Black History Month
3. allowing Officer Pray to “partake in a Sheboygan Beacon story”
4. giving Officer Pray an award at the SPD Banquet.
5. requiring individuals to attend sexual harassment training.

The COMPLAINANT states “the recognition Chief Domagalski continued to give Officer Pray was retaliation against Officer Hernandez.” Actions that the Chief did or did not do to Officer Pray cannot be retaliation against Officer Hernandez in any conceivable or rational way. The three such items the COMPLAINANT lists (number 2-4 above) in no way can be seen as “adverse actions” against Officer Hernandez.

The first item, failing to protect Officer Hernandez, could possibly be retaliation if it were true, however the COMPLAINANT contradicts his own assertion when he acknowledges that the Chief took actions to try and prevent Officer Pray from having contact with Officer Hernandez. That admission contradicts any claim of retaliation for “not protecting” Officer Hernandez.

The final item listed as retaliation is just factually untrue. The COMPLAINANT states that two female police officers had to attend sexual harassment training, and implies no one else did. The entire department was required to attend sexual harassment training. To assert otherwise is at best misleading.

SPD Policy 1010.6.1 – Supervisor Responsibilities

The fifth charge in the complaint is that the Chief violated Police Department policy by treating Officer Hernandez discourteously. The COMPLAINANT provides no factual evidence to support this charge and instead relies entirely on his opinion of what is and is not courteous and professional. With no factual record, the COMPLAINANT is relying solely on opinion and conjecture to create a charge. The Chief properly and professionally investigated the allegations and issued discipline that he thought reasonable to those who violated policy. Just because an individual disagrees with the way an investigation was handled or the outcome of that investigation does not mean the investigation or outcome were flawed or unprofessional. Two reasonable people can have two very different ideas on what is the correct outcome, that does not make either one of them “wrong.” We see things like this every day in courtrooms across America. A judge, when determining a sentence, makes the decision that they believe is the best one given the facts. A different judge, the prosecutor, and the defense attorney probably all have different opinions on what should happen, but at the end of the day, as long as what the judge decides is reasonable, it stands. The Chief has that same discretion. After the department investigated, the Chief

examined the evidence and concluded he thought best. Just because the HR Director at the time disagreed does not mean that the Chief's decision was a violation of policy.

Criminal Violations

As the COMPLAINANT indicated at the scheduling hearing, he has filed a John Doe investigation with Circuit Court and therefore the Chief will not respond to an active criminal investigation.

Conclusion

The COMPLAINANT states that they have presented "many" policy violations which he alleges Chief Domagalski committed "in an effort to protect Officer Pray" and "retaliate against female victims." However, none of the alleged violations are supported by any factual evidence, let alone enough to meet the preponderance of the evidence threshold. Because the COMPLAINANT has failed to show any violation, we respectfully request this commission dismiss all charges with prejudice.

Dated this 11th day of May, 2023

CITY OF SHEBOYGAN

By: electronically signed by Adam James Westbrook

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