

**Response to:**

**Motion 1. SPD Policy 1010.8 – Administrative Leave**

I will be presenting evidence as a totality of all circumstances and showing the Chief repeatedly abused his discretion, went against best practices, and contradicts himself many different times in defending his own actions.

While I will acknowledge the discretionary word, “may”, in this policy, my argument is and will continue to be that Chief Domagalski abused that discretion. Police Officers have discretion in most of what they do. I understand the concept of discretion and why it’s there. I think everyone also understands that discretion can be abused. Being that this is a discretionary policy for the Chief to follow, he absolutely would be in violation of this policy if the Board finds that he abused his discretion. I am prepared to present evidence to you showing he has done exactly that. HR Westbrook notes, “The Chief cannot be disciplined for following policy just because the Complainant does not like the decision the Chief made”. This statement again assumes he followed policy. The Board is the Chief’s oversight and is directly in charge of scrutinizing the Chief’s actions, including his discretion. To simply say that something is discretionary, so a violation can never occur is a scary argument. This is also a terrifying precedent to set for anyone. The purpose of an oversight committee is to keep public servants with a substantial amount of discretion and power in check. I assume Chief Domagalski has disciplined an officer at some point for their misuse of discretion or abuse of authority. This would include whether to arrest or not arrest someone, write a ticket or not write a ticket, etc.

This charge should remain, and the Board should hear evidence and testimony on this charge. As I have also previously stated, the abuse of discretion on this is directly correlated with the many other abuses of discretion that the Chief committed while in charge of this investigation.

## **MOTION 2. SPD Policy 1010.9 – Criminal Investigation**

As HR Westbrook notes in his argument, the Chief did not assign a separate investigator or request an outside investigation into the criminal conduct of Bryan Pray. SPD policy states, in part, “where a member is accused of potential criminal conduct, a separate supervisor or investigator shall be assigned to investigate the criminal allegations apart from any administrative investigation”. Again, this policy requires the Chief to open a parallel criminal investigation if a member is accused of **potential** criminal conduct. The standard is potential criminal conduct. It does not require there to be proof beyond a reasonable doubt or even probable cause, just potential.

It seems initially the argument is that Officer Hernandez did not report a crime, she was just reporting sexual harassment. This argument is obviously flawed. It is entirely possible that when Officer Hernandez filed her complaint, she had no idea a crime had been committed against her. The job of the Police Department is to investigate complaints. The theory behind HR Westbrook's argument here is that the police may only investigate the specific allegation being brought forward. If a woman reports she had been punched and she wanted a person arrested for battery, then the police will not and cannot investigate the fact she also stated she was strangled unless she specifically asks for that to be investigated. I can assure you, in my 15 years of law enforcement experience, that is not the way it works. A victim will tell a story of what happened to them, then it is investigated. This should not be any different. Lt Teunissen was the Lt of criminal investigations at the time he received this complaint. If he and Chief Domagalski couldn't figure out that there was a “potential” crime that had taken place, they are incompetent.

It then states that as the investigation continued, it became evident to the Chief that Pray's actions were not criminal. Lt Teunissen disagrees, as evidenced by his conclusionary report. He concludes that the photograph of Officer Hernandez taken by Pray, was taken without her consent. That is a potential crime, period.

The next argument is that they wouldn't have jurisdiction over the potential criminal conduct as there were not any allegations of a crime occurring in Sheboygan. First, this is why the policy allows an outside investigation. I assume they could find a telephone number for the agency whose jurisdiction this happened. Wisconsin also has a state wide law enforcement agency called, DCI, or the Department of Criminal Investigations. I assure you they could find a phone number or contact for that agency. Second, this is not factual. They have their own police officers stating that Pray possessed the photo of Officer Hernandez, which was possessed without consent, in the City of Sheboygan. Officer Pray was showing the photo to coworkers, while in uniform on duty. This is in direct violation of WI Statute 942.09(2)3. Which states:

“Possesses, distributes, or exhibits an intimate representation that was capture 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 did not consent to the possession, distribution, exhibition.”

Pray’s possession of the photograph without consent after he took it without consent is also a felony crime. This happened on duty in the City of Sheboygan. Reminder, this policy calls for a parallel investigation for “potential” criminal conduct.

HR Westbrook’s next argument is one that states she didn’t have a reasonable expectation of privacy because she was in a hotel in a space where any member of the public can view her breasts, clearly showing that her actions weren’t private. His point is that anyone in the vicinity could have **seen** her breasts. I provided the appropriate case law to HR Westbrook prior to him filing this motion and he continues to lie in describing reasonable expectation of privacy when it comes to this statute. He seems caught up on the viewing of her partially nude.

I will direct you to WI Court of Appeals case *State v. Jahnke*, 2007AP2130-CR. The Appellate Court found that this statute does not criminalize the **viewing** of a nude person, regardless of circumstances. Rather the prohibited act is *capturing* a representation of the person. By placing limits on the ability of others to record, the statute protects a person’s interest in limiting, as to time, place, and persons, the viewing of his or her body. It follows that the pertinent privacy element question is whether the person depicted nude had a reasonable expectation, under the circumstances, that he or she would not be recorded in the nude. Officer Hernandez allowed the viewing of her breasts to Pray, and clearly had a reasonable expectation of privacy that he specifically would not record her while doing so and share it with whoever he wanted. This has nothing to do with the fact that it was in a hotel or that it was in a “public space” and anyone could have viewed her, as HR Westbrook states. The Appellate Court specifically addresses that it does not criminalize the viewing, only capturing a representation. HR Westbrook makes several more assertions of location and viewing being the main elements in reasonable expectation of privacy, which this case law clearly asserts is not the case.

Furthermore, these are types of arguments that would be had in motion hearings or at a criminal trial after an arrest was made. These are not arguments that need to happen to determine if a “potential” crime has been committed. While the facts are on my side with this argument on reasonable expectation of privacy, it is irrelevant for determining that a “potential” crime had been committed.

HR Westbrook then, after presenting you with incorrect legal analysis tells the board that they are not authorized and don’t have the ability to make legal analysis. You are not tasked with making a legal analysis for a conviction of a crime. I have confidence in the Board’s ability to read a law and determine if there is a “potential” criminal violation. He notes that this is a civilian Board. I have been a part of many jury trials where the jury is exactly that, civilians. A Jury is responsible to convict or acquit beyond a

reasonable doubt. The Board is required to determine a preponderance of the evidence. The Board also has an Attorney providing them legal guidance in this process.

I also filed a John Doe petition to the circuit court for an independent criminal investigation into this matter. The Judge reviewed all documents I provided and assigned a special prosecutor to look into this matter. It is important to note that the Judge, if he felt this was unsubstantiated, had the ability to dismiss my petition with prejudice. He chose to move forward.

It could not be any clearer that the allegations brought forward by Officer Hernandez were a potential crime committed by Pray. Lt Tuenissen even found that a crime had potentially been committed when he found the picture was taken without her consent. For these reasons, it is clear a criminal investigation should have been carried out and this charge should remain.

### **MOTION 3. SPD Policy 321.3.1 – Supervisor Responsibilities**

This investigation is much more than a single report of sexual harassment. Approximately 10 officers were punished, 30 interviewed, and several suspended. This was a wide-ranging investigation that had sexual harassment, unauthorized use of the police systems, illegal stalking by officers on duty, and more. The Police Chief is not required to know every policy violation before they happen, I agree. However, the fact that so many officers were behaving so poorly and the fact that the Chief had no clue about it, shows his incompetence. He has fostered and encouraged poor behavior from his officers, which is why almost half of his Department was involved in this in one way or another. HR Westbrook argues that he could not possibly be aware of anything going on in his Department until its made known. I will argue that the Chief had a duty to monitor his officer's behavior much closer or to have his management staff do so. There are GPS units in squad cars. Spillman, the program used to run plates and people, logs everything an officer searches. The fact officers were inappropriately running plates and personal information, possibly illegally, while sitting in their squad cars outside coworkers and coworkers ex wife's homes, shows the Chief had the ability to monitor and see these things were happening. He did not.

#### **MOTION 4. SPD Policy 1004.3 – Retaliation Prohibited**

HR Westbrook argues that my examples of retaliation are not adverse actions against Officer Hernandez. After the Chief abused his discretion and did not place Officer Pray on leave for committing a crime, lying, or violating gag and no contact orders, Officer Hernandez had to take FMLA for her own well-being. This is retaliation for her filing the complaint. Pray violated no contact and gag orders, she asked for protection and did not get it. This is retaliation. Pray committed a crime against her and he continues to be shown on Facebook, allowed to be in newspaper articles glorifying him, and received awards. Her complaint was clearly not being taken seriously. This is retaliation. The Chief even laughed in her face when she was literally crying to him for help. He chose to talk up Pray to her as she was explaining what was happening. This is retaliation and witnessed by former Officer Hang Lor. He will come to testify to what happened.

Officer Hernandez was also constructively fired from her job as a Police Officer from the City of Sheboygan. The complaint was filed in January 2021. They allegedly investigated this for four months. They repeatedly told her, which I heard myself, that the investigation was almost over and never concluded it until she finally quit. While she was out of work, she used every minute of PTO she had. When it began time to go unpaid, she quit. Less than two weeks after she quit, the complaint was completed, the punishments were handed out, and it was swept under the rug. This is retaliation in its truest form. She was constructively fired for filing a complaint and as soon as she was gone, the police investigation was over and the Chief thought it would go away. The external investigation only started two months later, in July 2021, and was abruptly ended for unknown reasons. Witnesses will also be testifying to this as well. For these reasons, I request that this charge remain.

## **MOTION 5. Criminal Violations**

HR Westbrook argues that I have petitioned the court alleging that criminal violations have taken place, which is true. HR Westbrook has not seen my petition to the court for the John Doe investigation so he wouldn't know what my allegations are.

This is a civil hearing, and the Board is the police Chief's oversight committee. If I am alleging that the Chief committed a crime, the Board should hear the evidence. The Board is not tasked with convicting the Chief of a crime, as this is not a criminal trial. The Board is tasked with scrutinizing his behavior and deciding on whether he is fit to be Chief of Sheboygan PD. If the Chief refuses to answer questions at this civil hearing in fear of his answers incriminating himself and potentially leading to a criminal conviction, that should tell you everything you need to know. According to Sheboygan Policy, he should be criminally investigated at this time, if "potential" criminal conduct has taken place. If he has some independent knowledge that he is being criminally investigated then fine, but I have no knowledge or information of that being true. This is why I request the Board ask for an outside investigation to be completed. The Board is tasked with looking at each charge and determining if the preponderance of evidence supports those charges, then deciding on punishment, if any. I believe that the alleged criminal violations should be heard.

If this hearing is not heard because the Chief feels he may incriminate himself, he should immediately be placed on leave pending the outcome of the John Doe Investigation, as he clearly fears he may have committed a crime. Nothing is prohibiting him from speaking to his own oversight committee. In a criminal trial, invocation of a persons fifth amendment rights cannot be held against them and a Judge cannot make any assertions against the defendant. The same does not go for Civil matters. If Chief Domagalski invokes his fifth amendment rights against incrimination, the Board absolutely can use that in their findings. For these reasons, I request that this charge remain, and the hearing remain as scheduled.

Thank you

Justin Daniels