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To : Kenosha Police & Fire Commissioners  
From : Kenosha Police Chief John W. Morrissey  
Re : Use of Force Review ~ KPD Incident 2012-102556

I think it is important to highlight that this report examines a use of force incident. Use of force should not and cannot be viewed as synonymous with excessive force. Force is an occasional and unfortunate outcome of the work that we ask the men and women of the Kenosha Police Department to do. Overall, the Kenosha Police Department uses force in a very small percentage of calls.

The first analysis of the use of force was that the officer followed the policies and procedures of the Kenosha Police Department and that he properly utilized the training provided to him at the Law Enforcement Academy, which provides the training for individuals to be certified as law enforcement officers in the State of Wisconsin, and the subsequent training the officer has received during his career to include, Taser deployment. However, it is sometimes appropriate to scrutinize a specific incident at a deeper level than a routine review.

I would like to thank Lieutenant Brad Hetlet and Officer Desiree Farchione, members of the Kenosha Police Department, and Mr. Randall L. Revling, who is considered an expert in the use of force by law enforcement officers in the State of Wisconsin, for the mature and thoughtful way they went about their work on this review. They brought a variety of perspectives to the analysis, but shared a commitment to the public, subject(s) and police officer(s).

I would like to particularly thank Charles R. Joyner from Survival Sciences, LLC for his review and findings of this incident. Mr. Joyner provided both logical thinking and an ability to clearly articulate the independent review of this incident.

It is the goal of the Kenosha Police Department that all members be capable of using effective and reasonable force when appropriate to protect the public, subjects, and officers. It is also the goal of the Kenosha Police Department that, when force is appropriate, members apply those reasonable and effective force options that carry lower risks of injury to subjects and officers.



*The mission of the Kenosha Police Department is to serve all people with respect, fairness and compassion. We are committed to preserving peace, order and safety; enforcing laws and ordinances; and safeguarding constitutional rights.*

Physically fighting with a suspect, and perhaps using a striking implement such as a nightstick or baton, carries with it a significant potential for injury. Injuries ranging from scrapes and sprains to deep bruises and broken bones are often the result. Occasionally medical treatment may be required, sometimes resulting in time off from work for the involved subjects. The use of the Taser (Conducted Energy Weapon) has reduced the injuries to the subjects as well as officers.

Allegations of excessive force are examined by the courts under the Fourth Amendment prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 394 (1989) is the landmark case frequently referred to when assessing use of force incidents. Per *Graham v. Connor*, an officer is not to be judged with 20-20 hindsight, but rather by a reasonable officer on the scene during events which are often tense and uncertain. In *Graham v. Connor*, the U.S. Supreme Court established a three-prong test to determine the "reasonableness" of an officer's actions. Generally, these three are:

1. What is the nature of the offense? What brought the officer and the suspect together in this incident?
2. Does the suspect pose an immediate threat to the officer or someone else?
3. Is the suspect trying to flee or evade arrest?

Of these three, the greatest weight is given to the second item listed, or the determination if the suspect poses an immediate threat. As mentioned in the Ninth Circuit's decision in *Lundberg v. County of Humboldt*, the "most important element in the *Graham* analysis is whether the suspect posed an immediate threat to the safety of the officers or others." *Per Graham v. Connor, it is the officer's perception of a threat which dictates the appropriate response.*

Incidents involving the alleged use of excessive force by the police frequently receive attention from the media, legislators, and, in some instances, civil and criminal courts. Whether the excessive force is aberrant behavior of individual officers or is a pattern and practice of an entire law enforcement agency, both the law and public opinion condemn such incidents. I as the Chief of Police for the Kenosha Police Department and as a law enforcement officer for 30 plus years also deplore such incidents. However, use of force should not and cannot be viewed as synonymous with excessive force.

The use of force that was used under Kenosha Police Department incident 2012-102556 was thoroughly and carefully reviewed by me as Chief of Police and four individuals with varying degrees of training and expertise in the use of force by law enforcement officers. Lt. Hetlet and Officer Farchione are employed by the Kenosha Police Department and have specialized training in Defense and Arrest Tactics (DAAT) and Taser deployment and usage. Mr. Randall L. Revling is considered a use of force expert in the State of Wisconsin and has an extensive background in law enforcement and use of force by law enforcement officers. Mr. Charles Joyner from Survival Sciences, LLC has served in the CIA from 1983-1987, and was a FBI Special Agent from 1987 until his retirement in 2011. He has extensive experience in use of force training and consultations.

The independent but collective opinion of the four individuals that have reviewed and analyzed the use of force have all concluded that the use of force was appropriate and within the policies and procedures of the Kenosha Police Department and consistent with training and laws. The summary of their findings are outlined in this report, along with the complete copies of the reviews.

## **Conclusions and findings from Charles Joyner:**

### **Was the use of force reasonable?**

*The use of a TASER by Officer Ruha was not only reasonable as defined by Graham v. Connor, but it was also tactically advisable based on Mr. Smith's aggressive, threatening behavior.*

*There are several pre-incident (TASER deployment) indicators that Mr. Smith posed an immediate threat. These include:*

- 1. The nature of the call (disturbance call).*
- 2. The 911 call stating several people were about to fight.*
- 3. Mr. Smith and Mr. Gaston were in the street as described by the 911 caller.*
- 4. Officer Ruha believed Mr. Smith to be intoxicated (and Mr. Gaston later said Mr. Smith was intoxicated).*
- 5. Mr. Smith continued to advance toward Mr. Gaston without regard to the presence of the police officers.*
- 6. Mr. Smith failed to show signs of compliance or obey the commands of the police officer.*
- 7. Mr. Smith turned toward Officer Ruha in what could be described as a fighting stance.*

*Post incident events which would indicate Officer Ruha's perception that Mr. Smith posed an immediate threat was accurate include:*

- 1. Mr. Smith struggled with officers after being handcuffed.*
- 2. Mr. Smith made threats to others and was verbally abusive.*
- 3. Mr. Smith stated he wanted to fight the officers.*

### **Was the use of force within Kenosha P.D. policy?**

*Per Kenosha P.D. policy, an officer is not to "brandish, display, or threaten the use a Conducted Energy Weapon unless he or she can reasonably conclude its use may become justified and is anticipated." Officer Ruha was responding to a disturbance call to a possible fight in progress involving several adult males. As Officer Ruha arrived on scene, Mr. Smith continued to move aggressively toward Mr. Gaston in spite of police presence. It was tactically sound for Officer Ruha to believe the use of a TASER may be necessary and to have the TASER in his hand in preparation of its use.*

*Per Kenosha P.D. policy, officers may use a Conducted Energy Weapon "when a subject is threatening to actively resist, or is actively resisting and the subject poses an articulable threat to an officer or another person." As mentioned above, Mr. Smith failed to comply with Officer Ruha's commands and demonstrated he was a threat to officers and Mr. Gaston. Officer Ruha was within Kenosha P.D. policy when he drew and fired his TASER in probe mode. It would have been tactically inadvisable for Officer Ruha to have done otherwise.*

**Does a malicious discrepancy exist between the video and the reports?**

*There are no discernible discrepancies between what is viewable on the dash camera video and the reports of Officer Ruha and Officer Niebuhr. All evidence indicates a fight did occur between suspects Mr. Smith and Mr. Gaston, and officers from the Kenosha Police Department properly responded, resolved, and reported the incident.*

*When making an arrest, the best possible outcome is for the officer to obtain compliance or control without any injuries to the suspect or the officer. That's what happened in this situation – Officer Ruha successfully arrested Mr. Smith, who indicated he was an immediate threat, without either officers or Mr. Smith suffering any injuries.*

**Conclusions and findings from Randall Revling:**

*Based on my analysis of the existing materials and the application of my knowledge and experience, I believe that Officer Ruha was justified in his actions. He demonstrated an excellent and effective ability to assess warning signs, ability to select the proper use of force option, professionalism and restraint when using force and professionalism in showing calm and compassion for the subjects before and after control has been achieved.*

*Video and audio recording of police actions is an important and useful tool for law enforcement as it can provide: documentation of actions; feedback to reinforce desired behavior; and opportunities to monitor while providing feedback to officers. However, at times it does not provide the complete picture. The camera may not be pointed in the correct direction or be obstructed (as in this case) also the dimension of resistive tension, voice modulation and assessment opportunities may be hard to capture.*

*Therefore, when this incident is reviewed in its entirety the officer's actions are found to be commendable in quick assessment, decision making, and legal and ethical response.*

**Conclusions and findings from Kenosha Police Lieutenant Brad Hetlet:**

*After examination of all reports, video, and audio recordings, I find that the actions of P.O. Ruha were within the Kenosha Police Department Policy and Procedures relative to the use of force.*

*P.O. Ruha made an appropriate tactical assessment of the situation concluding that Mr. Smith's actions indicated that he was a threat to the safety of Mr. Gaston and to P.O. Ruha.*

*P.O. Ruha responded appropriately by deploying his ECD.*

**Conclusions and findings from Kenosha Police Officer Desiree Farchione:**

*After a comprehensive examination of all reports and videos, it is my opinion that the actions of Officer Ruha were within Kenosha Police Department policies and procedures relative to use of force.*

*It is the finding of the use of force review that Officer Ruha utilized appropriate tactics throughout this incident.*

**Final Determination by Kenosha Chief of Police John W. Morrissey:**

*Was the use of force within Kenosha Police Department policy? **Yes***

*Was the use of force reasonable? **Yes***

*Is discipline warranted? **No***