

OFFICER MENSAH KNOWINGLY VIOLATED POLICIES 17-11 AND 13-08
BY PUBLICLY DISCUSSING WITH THE MEDIA AN ON-GOING INVESTIGATION

1. Wauwatosa Police Department Policies 17-11 and 13-08 strictly limit Wauwatosa Police Officers' statements to the media regarding activity of the Wauwatosa Police Department.

2. Policy 17-11 deals specifically with the public discussion of information regarding a police shooting. Subsection B of the policy states: "Any media release will be made by the Lead Investigator, the Chief of Police or their designees. No other Department personnel are permitted to speak with the media about the incident."

3. Policy 13-08 is a more general media policy, similarly restricting the media activities of Wauwatosa Police Officers to those specifically designated or approved by the Chief of Police. In particular, the Policy states at Section III G 1, "Unless pre-approved by the Chief of Police, the Operations Captain, or Administrative Captain, only the PIO [Public Information Officer] may participate in any "on-camera" or "on-air" news media interviews."

4. Officer Mensah did not have permission to conduct the on-camera July 24, 2020 podcast or the July 28, 2020, on-air radio interview. In both interviews, Officer Mensah discussed the Cole shooting, which was then under investigation by the District Attorney.

5. Counsel for Officer Mensah argues that Officer Mensah did not violate a rule or policy when he did the interviews because they were done in Officer Mensah's private capacity.

6. I recommend that the Commission reject this contention, particularly given the specifics of the radio interview. Nothing in the radio interview indicated that Officer Mensah was speaking about the Cole incident in anything other than his capacity as Wauwatosa Police Officer.

7. Moreover, even to the extent that Officer Mensah was off-duty or on suspended status, Office Mensah was still in violation of Policies 17-11 and 13-08. While being off-duty may allow an officer leeway to engage in certain conduct that he or she could not engage in while on duty (for example, when to wear a uniform, carry a firearm, use social media, drive a particular vehicle, perform certain tasks), being off-duty or on suspended status should not and does not allow an officer to disregard and violate significant rules necessary for the proper performance of the Wauwatosa Police Department. Policies 17-11 and 13-08 are important policies that must be followed while officers are on-duty as well as off-duty. Nowhere in the policies is there any suggestion that they can be violated or disregarded when officers are off-duty or on suspension.

8. The Chief of Police has suggested that any violation is mitigated because Officer Mensah did not discuss any facts not already on the public record and may not have appreciated the seriousness of this violation. I recommend that the Commission reject this position as well. First, as discussed in the next section, Officer Mensah provided misleading information during the interview. Second, one important purpose of the rule is to restrict *all* unauthorized public statements, regardless of content.

9. The justification for this general restriction, as set forth in Policy 17-11 at page 4, is to ensure that WPD leadership (“the Lead Investigator, the Chief of Police or their designee”) control the flow of information to other investigators and the District Attorney.

10. It is crucial that *all* WPD statements by line police officers on the subject of police officer shootings be official statements and reports, since those statements become “discovery” that a District Attorney is required to disclose during court proceedings. *See, e.g.,*

State v. DeLao, 2002 WI 49, 252 Wis. 2d 289 (granting new trial when discovery statements were not timely sent from police officers to district attorney to defense counsel).

11. Critically, at the time of the radio interview, Officer Mensah's shooting of Alvin Cole was still under investigation by the Milwaukee County District Attorney's Office.

12. During the interview, host Dan O'Donnell commented regarding the Cole shooting that, "in fact the suspect ran out of the mall and shot at you." Tr. p. 6. This is an inaccurate statement. Cole never fired at Officer Mensah or any other officer. Cole shot himself in the arm. Throughout the interview, Mensah discussed the Cole shooting but did not correct this misstatement.

13. Also during the interview, the host cautioned Officer Mensah not to comment specifically on the Cole case "because it is ongoing." Tr. p. 7. In the separate podcast, Officer Mensah acknowledged that the Cole case was "still under investigation."

14. Yet, particularly in the radio interview, Officer Mensah freely discussed the Cole shooting in conjunction with his other two. "I'm an anomaly in this whole situation even though they continue, continue to disregard the fact that the common denominator in every single one of these incidents is that the subject was armed.... Either they displayed a weapon, went for a weapon, fired that weapon in every single one of them. And out of all of these the entire – their defense in all these incidents is that I am the problem in every single one of them. It completely takes out the fact that you have people who are committing crimes where I'm going to call where people have committed crimes. They present a weapon at an officer." Tr. p. 17 (emphasis added).

15. A line officer who unilaterally decides to conduct a radio interview regarding a pending investigation commits an egregious violation of Policy 17-11, as well as Policy 13-08.

OFFICER MENSAH VIOLATED RULE 7 AND POLICY 13-08

BY PROVIDING MISLEADING INFORMATION

A. Statement Regarding Number of Police Shootings

1. Wauwatosa Police Department Rule 7 requires that a police officer “speak the truth at all times, and under all circumstances, whether or not under oath. Members shall not lie, give misleading information, falsify written or verbal communications in official reports or in their statements or actions with supervisors or organization, when it is reasonable to expect that such information be relied upon because of the member’s position or affiliation with the organization.” In addition, under Media Policy 13-08, information supplied by Wauwatosa Police Officers to the media should be “factual” and “accurate.” *See* Policy 13-08, pg. 2.

2. In the radio interview, Officer Mensah stated the following regarding the number of “critical incidents” (officer shootings) that had taken place in Wauwatosa beyond his own: “It’s crazy because if you were to look at my department and other departments as well, there are several officers that have fired way more. I’m not trying to deflect onto them, but the issue is even with my own department, we have over half a dozen officers within these past five years that have gotten in several critical incidents of shootings.” Tr. p. 8.

3. In fact, according to the Wauwatosa Police Department, *there are not* officers that have fired “way more” nor are there “over a half dozen” officers who in the last five years have fired their weapons on “several” separate incidents. The Wauwatosa Police Chief stated that *no* Wauwatosa Police Officer during this time frame has fired his or her weapon in citizen encounters more than once, except for Officer Mensah. *See* Weber Tr. pp. 86-87.

4. I find that Officer Mensah provided misleading information to the public regarding the number of other Wauwatosa Officers who have been involved in shootings. It appears that Officer Mensah did so in order to minimize the significance of his own conduct then under review.

B. Responding to Madison Park

1. During the radio interview, Officer Mensah further stated the following with respect to the Jay Anderson shooting in the context of the three shootings at issue.

“I’m an anomaly in this whole situation even though they continue, continue to disregard the fact that the common denominator in every single one of these incidents is that the subject was armed.... Either they displayed a weapon, went for a weapon, fired that weapon in every single one of them. And out of all of these the entire – their defense in all these incidents is that I am the problem in every single one of them. It completely takes out the fact that you have people who are committing crimes where I’m going to calls where people have committed crimes. They present a weapon at an officer.” Tr. p. 17 (emphasis added).

2. In fact, in the case of Jay Anderson, Officer Mensah had not been called to Madison Park to investigate a report of a crime being committed. He went to the park on routine patrol and saw a car parked there after closing – a non-criminal offense punishable, if at all, by a forfeiture of between \$20 and \$200.

3. Officer Mensah might have been referring to the fact that *after arriving on the scene*, Officer Mensah observed Anderson with a firearm on the seat of his vehicle, which could be a criminal violation under the circumstances. But, in context, Officer Mensah erroneously communicated to the radio audience that he was “called” to Madison Park by someone else because Jay Anderson was committing a crime.

C. Statements Regarding the Activating of the In-Squad Video

1. During the time period relevant to the Anderson shooting, the Wauwatosa Police Department utilized a camera/audio system based in each squad car. The technology of the squad camera was such that it was constantly recording video (not audio) and then automatically deleting video, on a 30 second loop. Only when the camera is formally activated does deletion stop, thus preserving video from the prior 30 seconds and continuing to record audio and video until the recording is manually “turned off.”

2. The recording system could be activated manually via the in-squad laptop computer, or via the in-squad camera itself, or it could be activated remotely via a unit worn on an officer’s uniform. If the officer activated the camera using the unit on his uniform, the unit would vibrate to alert the officer that the recording was functioning. The camera also was automatically activated when the squad’s emergency lights were turned on or when the squad reached a certain speed. The operation of the in-squad camera was dictated by Wauwatosa Police Department Operating Procedure 2016-03.

3. In the encounter with Anderson, Officer Mensah activated the recording via the unit on his uniform *after* shooting Anderson, enabling a video recording (but not audio) of the shooting and other activity going back approximately 30 seconds. Both video and audio were engaged going forward from the time the unit was activated.

4. In the aftermath of the shooting of Anderson, Officer Mensah represented to a superior officer and another officer that he unsuccessfully attempted to activate his squad video/audio.

To the supervisor:

“I tried to hit the button a couple of times.” “Just a regular occupied auto.”

To a fellow officer:

“I tried to hit record. Kept hitting record over and over but it wouldn’t turn on.”⁶

5. In his official interview with Milwaukee Police Detective O’Day just over a day later, Officer Mensah did not mention the unsuccessful attempts to engage the recording system.

“P.O. Mensah stated immediately after discharging his weapon, he pressed the button on his squad mic that activated the camera. (He explained the video goes back 20 seconds without audio.)”

6. In his public radio interview, Officer Mensah stated the following with respect to the engagement of his squad video/audio:

“The family claims I violated a policy by not turning on my body cam. I’m not going to get into it, but that’s not a policy violation. There’s reasons and circumstances when that gets turned on. It’s turned on because I turn it on. You can’t accidentally bump that camera. You can’t accidentally push the button. It’s in a leather case. You have to physically turn that button on. I turned it on. I turned it on because I knew that people would want to believe me, but I wanted – I needed them to. I needed to have the

⁶ For purposes of Wisconsin Statute § 164.02, these initial statements by Officer Mensah were not the result of an “interrogation.” Fellow officers arriving on the scene in the immediate aftermath of the shooting properly attempted to gather information to assess what should be done next, not whether Officer Mensah should be subject to discipline. In fact, according to the audio recording, Mensah was unprompted when he said the following to fellow Patrol Officer Bryan Wade: “I tried to hit record. Kept hitting record over and over but it wouldn’t turn on.”

evidence to support what I saw. So I turned that on fully knowing that once I hit the button it would go back in time or it would go back, you know, 20, 30 seconds and it would capture that. I did that.” Tr. pp. 24-25.

7. These different statements could potentially be reconciled by assuming that Officer Mensah initially believed that he *unsuccessfully* attempted to turn on the audio/video, but subsequently learned that he had in fact activated it.

8. Nonetheless, given the importance of the video, Officer Mensah should have related more complete information to Detective O’Day. The timing of when the audio/video was engaged was critical. If it took Officer Mensah several tries to activate the audio/video, that should have been related. Even a delay of a few seconds because of a malfunctioning unit would mean that the subsequent recording may have missed critical activity.

9. I note that in the interview with Detective O’Day, Officer Mensah conceded that his recollection was “hazy” and, as such, it is possible that he did not recall the unsuccessful attempt to engage the video; and/or the questioning of Detective O’Day may not have suggested that such information needed to be supplied. Moreover, to the extent that the information about the unsuccessful attempt was relevant to the Detective O’Day investigation, Detective O’Day ascertained that information within a week by independently reviewing the recorded statement of Mensah discussing that information with his fellow officers. Detective O’Day did not feel it necessary to follow-up with Officer Mensah on this particular topic.

10. In contrast, however, Officer Mensah conveyed no such uncertainty in the radio interview as to the activation of the video: He turned it on without incident and for the specific purpose of properly recording the shooting. (“You can’t accidentally push the button in a leather

case. You have to physically turn that button on. I turned it on. I turned it on because I knew that people would want to believe me....”)

D. Fitness for Duty Considerations

1 I find that the totality of Officer’s Mensah’s statements under Rule 7 and Policy 13-08 further impact his credibility as a potential witness under fitness-for-duty rules. *See Vidmar v. Milwaukee City Board of Fire and Police Commission*, 2016 WI App 93, ¶19, 372 Wis. 2d 701, 889 N.W.2d 443 (upholding termination of officer whose future ability to testify in court was impaired by prior filing of false police report).

2. Under court rulings, prosecutors are obligated to review the history of potential law enforcement witnesses to determine whether impeachment material may exist. *Giglio v. United States*, 405 U.S. 150, 152 (1972); *see also State v. Anderson*, 2009 WI App 95, ¶13 (officer personnel files may contain impeachment material) (unpublished decision).

3. The statements of Officer Mensah described herein would give a reasonable prosecutor pause before deciding whether to call Officer Mensah to the witness stand on matters connected to these issues. The statement regarding the number of prior Wauwatosa police officer shootings was an improper exaggeration meant to minimize his own conduct. The statement regarding *why* Officer Mensah responded to Madison Park gave the wrong impression of the true facts. The statements regarding the video recording are troubling because of the significance of when and how that equipment was engaged and because in the Gonzales shooting, Officer Mensah *shut off* the video recording on his way to the scene.⁷

⁷ Although not set forth as a separate potential rule violation, additional concern arises from Officer Mensah’s public disparagement of the Police and Fire Commission during the same radio interview. “Not to throw race out there, but it is just kind of weird that out of all these critical incidents that we have, there’s a black officer. I am the only one who has got suspended for a critical incident involving a suspect that’s armed. It’s confusing and I don’t understand why.” Tr. p. 9. I find no evidence that the suspension of Officer Mensah was racially motivated.

**THE EVIDENCE DOES NOT ESTABLISH THAT OFFICER MENSAH
IMPROPERLY USED DEADLY FORCE IN THE SHOOTING OF JAY ANDERSON**

A. Overview

1. The Complainant contends that Officer Mensah used excessive force in shooting Jay Anderson, in violation of Wauwatosa Police Department Policy 13-01, which was in effect at the time of the Anderson shooting and which dictated when officers may use deadly force.⁸

2. The complaint alleges that Officer Mensah violated the policy because:
(a) Anderson did not lunge for the firearm, as Mensah contended; (b) no verbal warning was given, as required by the policy; (c) Anderson did not have a gun in his hand; (d) Anderson was falling asleep or passing out; and (e) Mensah did not need to fire as many shots as he did.

B. Legal Standards

1. Policy 13-01 incorporates federal and state standards on use of force and sets forth the conditions under which an officer may lawfully utilize deadly force,

2. The federal standard was summarized in *Graham v. Conner*, 490 U.S. 386 (1989), wherein the U.S. Supreme Court held that a law enforcement officer's use of deadly force was permitted under the Fourth Amendment of the U.S. Constitution when, from the objective standard of a "reasonable officer on the scene," the use of force was justified by: (a) the severity of the alleged crime at issue; (b) whether the suspect posed an immediate threat to the safety of the officers or others; and (c) whether the suspect was actively resisting or attempting to evade arrest. See Policy 13-01 at pg. 2. The federal standard also considers whether the officer's response was proportional to the threat posed by the suspect. Deadly force is appropriate only

⁸ The policy has since been amended twice; neither of the changes impact the analysis herein.

when an officer in good faith believes such force is necessary to respond to a significant threat of great bodily harm. *Id.*; *See also Tennessee v. Garner*, 471 U.S. 1 (1985).

3. The Wisconsin standard is encompassed by Wisconsin's implementation of DAAT (Defense and Arrest Tactics), which is a uniform policy required by Wis. Stat. § 66.0511 and administered by the State of Wisconsin Law Enforcement Standards Board. Under DAAT, officers are trained on when and how to use force (including deadly force) when responding to threats. *See Manney v. Board of Fire and Police Commission of the City of Milwaukee*, 2017 WI App 85, ¶ 33; *Milwaukee Police Association v. Board of Fire and Police Commission of the City of Milwaukee*, 787 F. Supp. 2d 888 (E.D. Wis. 2011). In addition, Wisconsin law provides that law enforcement officers are privileged (immune from prosecution) when they use force "in good faith" and consistent with "authorized and reasonable fulfillment" of official duties. Wis. Stat. §939.45(3).

4. Finally, Policy 13-01 E (1)(a) states, "The use of deadly force is authorized as follows: [To] Protect the officer or others from what is reasonably believed to be an imminent threat of death or great bodily harm...."

5. Under the totality of these standards, the applicable questions arising from Officer Mensah's shooting of Jay Anderson are: (a) did Officer Mensah reasonably perceive a threat of great bodily harm? (b) was Officer Mensah's subsequent use of deadly force reasonably necessary to respond to the threat? and (c) did Officer Mensah act in good faith?⁹

⁹ This is similar, but not identical, to the analysis of the District Attorney, who condensed the issues down to these two questions: (1) Did the officer have an actual subjective belief that deadly force was necessary to prevent imminent death or great bodily injury to himself and others? and (2) Was the belief objectively reasonable? The District Attorney's analysis of these questions is contained in the appendix. *See Chief Deputy District Attorney Lovern* December 5, 2016 Letter.

C. Analysis

1. I find that the evidence supports that Officer Mensah acted in accordance with Policy 13-01 and the accompanying federal and state standards for use of force.

2. Officer Mensah reasonably perceived a threat of great bodily harm when faced with a situation in which a suspect, sitting in the driver's seat of a parked car at 3 a.m. in a closed county park, had a firearm within reach on the front passenger seat of the automobile.

3. Officer Mensah reasonably responded to that threat when the person in the driver's seat failed to obey the following commands:

"Hands up!"

"I see the gun! Don't reach for it!"

"Stop reaching for the weapon!"

4. The video of the incident, particularly the infrared version, shows that Anderson continued to move his hands and, immediately before the shooting, moved his hands and body in the general direction of the firearm.

5. The Complainant contends that Officer Mensah's version is not credible because he sets forth a verbal exchange with Anderson that was not captured by the video/audio recording. For example, the complaint argues that no verbal warning was given although Mensah stated he did give such warning. Likewise, Officer Mensah stated that Anderson denied having identification on him, when in fact Anderson did have identification in his pocket.

6. I find that the lack of audio support does not invalidate Mensah's justification for the shooting under Policy 13-10, given the video evidence (Mr. Anderson obviously is following verbal orders at the start by keeping his hands up) and the undisputed presence of the firearm on the passenger seat of the vehicle.

7. The complaint further points out that Anderson did not have the firearm in his hand at the time of the shooting and that the movements of Anderson were the result Anderson falling asleep or succumbing to the effects of his alcohol and marijuana use.

8. I agree that the facts support both of these complaint assertions: Anderson did not have the gun in his hand when Mensah shot; and, Anderson's movements may well have been the result of his sleepiness and/or the effect of alcohol and marijuana. Nonetheless, these facts do not negate the permitted use of force under Policy 13-01. First, Officer Mensah was not required under the law or the policy to wait until the suspect actually grabbed the nearby firearm before responding to the threat that the firearm created. Second, the threat presented by the movement towards the firearm is not negated because Mr. Anderson was intoxicated (whether or not that fact was known to Officer Mensah).

9. The complaint also points to the number of shots fired at Anderson, contending they were excessive. Officers permitted to use deadly force, however, are constitutionally justified to keep firing until the threat has ended. *See Plumhoff v. Rickard*, 572 U.S. 765 (2014) (finding that officer firing gun 15 times in 10 seconds was not excessive force).

10. Mensah's six shots took approximately two seconds. He also fired only six of the 16 bullets he had available to fire.¹⁰

11. From the available evidence and under the applicable legal standard, I further find that Officer Mensah acted in good-faith fear for his personal safety.

12. In sum, despite the other findings herein, I find that the evidence supports that Officer Mensah acted within legal bounds in the shooting of Mr. Anderson.

¹⁰ This same analysis supports a finding that the total number of shots fired by Mensah during all three shootings does not by itself run afoul of use-of-force restrictions. As such, I conclude that no violation arises for the total number of shots fired during all three shootings, as contended by the Complainant.

THE EVIDENCE DOES NOT SUPPORT THAT OFFICER MENSAH
VIOLATED OPERATING PROCEDURE 2016-03
BY FAILING TO PROPERLY ENGAGE HIS SQUAD VIDEO

1. In addition to the issue regarding Officer Mensah's statements about the attempt to activate the squad's video/audio recording system, the Complainant contends that Officer Mensah violated the substance of the policy by failing to engage the camera from the start of the encounter with Jay Anderson, which the Complainant characterizes as the equivalent of a traffic stop subject to a mandatory recording requirement under the rules.

2. Operating Procedure 2016-03, in effect at the time of the Anderson encounter, outlined procedures for an officer's use of the squad recording equipment. Section III A stated that the "camera must be recording when the vehicle's emergency lights are activated, or the squad reaches a speed of 65 mph for the following: ... (c) During all traffic stops...."

3. I find that the evidence does not support a finding that Officer Mensah violated the substance of Operating Procedure 2016-03.

First, it is not clear from this language whether the encounter gave rise to the "traffic stop" requirement of the policy. The literal language of the policy at the time made it unclear as to whether the policy applied to all traffic stops or only those involving the use of emergency lights or which came after the squad reached a speed of 65 mph ¹¹

Second, even assuming that policy applied to all traffic stops, the encounter with Jay Anderson could not definitively be characterized as a traffic stop. While Wisconsin courts have referred to parking violations as "traffic stops," *see United States v. Ferrell*, 2009 WL

¹¹ The policy was amended in 2018 to clearly state that the camera shall be activated for all traffic stops of any kind. *See* Operating Procedure 18-01.

6376179 (E.D. Wis. 2009); *State v. Thomas*, 2016 WI App 57; there exist constitutional distinctions between pulling over a speeding driver and approaching an illegally parked car. *United States v. Johnson*, 874 F.3d 571 (7th Cir. 2017). Moreover, Officer Mensah approached Anderson's vehicle because Anderson was in the park after closing – a potential violation of Milwaukee County Ordinance § 47.27 whether or not Anderson was in a vehicle.¹²

¹² This is not to say that it would not have been better had Officer Mensah turned on his video at the start of the encounter or as soon as he saw the firearm. The rule gave an officer the discretion to turn on the video at any time.

THE EVIDENCE DOES NOT ESTABLISH THAT OFFICER MENSAH
FAILED TO RENDER MEDICAL AID
UNDER POLICY 13-01 AND WISCONSIN STATUTE § 940.291

1. The Complainant contends that Officer Mensah failed to render medical aid to Jay Anderson after the shooting. The complaint states that by failing to do so, Mensah violated Wauwatosa Police Policy 13-01 and Wis. Stat. § 940.291.

2. Policy 13-01 states, in part, that after use of force (such as a shooting) and “after the situation has stabilized and the subject is under control,” an officer has an obligation to “check for injuries and render first aid, if necessary” and to “keep in close physical contact with [the] subject to monitor conditions while [the subject] is in police custody.”

3. Wisconsin Statute § 940.291 makes it a Class A misdemeanor for an officer to intentionally fail to render aid or to make arrangements for such aid for any person in the officer’s custody. The statute further notes, however, that the officer must possess the knowledge and ability to render the necessary aid.

4. I find that within one minute after the shooting of Jay Anderson, Officer Mensah notified Dispatch that Anderson had been shot (“suspect down” according to the log). Within another minute, the Wauwatosa Fire Department paramedics had been directed to the scene. Within that second minute, Officer Mensah further stated, “You can have fire stage on 100th street,” thus confirming that Officer Mensah knew that paramedics were en route. After approximately seven minutes, paramedics were told that it was safe to enter the parking lot. Upon arrival, paramedics immediately began administering aid.

5. A total of approximately 8 minutes passed between the time of the shooting and the paramedics first administering aid.

6. During the first three minutes, besides the conduct described above, Officer Mensah moved further away from the Anderson vehicle and back toward his own squad. He did not re-approach Anderson's vehicle during this time.

7. Approximately three minutes after the shooting, Officers Salyers and Mills arrived on the scene. Unaware of Anderson's immediate condition, according to the video evidence, they appear concerned that Anderson was still in the vehicle within reach of the suspect firearm. They then approach the vehicle with great caution and with guns drawn. As shown by the squad video, Officer Mensah initially appears not to share that same concern, as he wanders causally around the squads. But he then joins the other two officers at their prompting to cautiously approach the vehicle with his gun drawn.

8. At that point, it appears to Officers Salyers and Mills that Anderson is incapacitated. The firearm is removed from the vehicle.

9. The officers lower their weapons and return to their squads. They are joined by other Wauwatosa Police Officers. Two officers then approach the vehicle with what appears to be a first aid kit. Anderson is removed from the vehicle as paramedics arrive. As indicated previously, approximately eight minutes have passed from the time of the shooting.

10. I have located no Wisconsin case law interpreting the requirements of Wis. Stat. § 940.291 and policies mandating that an officer render medical aid. In the absence of controlling Wisconsin law, I am guided by cases from around the country evaluating other such instances.

11. In *Houston v. Galluzi*, 2019 WL 249211 (M.D. Fla. 2019), a federal court evaluated a claim that a person shot by law enforcement was constitutionally deprived of medical care. The court held otherwise, finding that since paramedics had been called within one minute of the shooting, no constitutional violation had taken place.

12. Likewise, in *Peacock v. Smith*, 2018 WL 5649899 (M.D. Ga. 2018), a federal court found no constitutional violation for an individual officer's failure to *personally* administer aid where the officer was aware that paramedics had been called.

13. At the other end of the spectrum, in *Valderama v. Rousseau*, 780 F.3d 1108, 1117 (8th Cir. 2015), a court found a constitutional violation for failure to render aid where an officer: waited three and a half minutes to call for paramedics; downplayed the seriousness of the injuries; and attempted to conceal evidence during the delay. The court further said that one of the key points of inquiry was whether the officer activity during the delay served legitimate law enforcement purposes. In that case, the court held, the delay in rendering aid did not serve a legitimate purpose because officers were obstructing justice and minimizing the victim's injuries.

14. I find the evidence insufficient to establish that Officer Mensah failed to administer aid as contemplated by Policy 13-01 and Wis. Stat. § 940.291.

First, within one minute of the shooting, Officer Mensah reported that shots had been fired and that the suspect had been injured. During the first two minutes, he became aware that paramedics had been called and confirmed that they should stage a short distance from the parking lot.

Second, Officer Mensah reasonably waited for backup to arrive before approaching the vehicle. This was not necessarily inconsistent with his personal view that Anderson had been incapacitated, since the park was very dark and he could not know for sure

all the surrounding circumstances. Wauwatosa police officers have indicated that it was standard practice to wait for backup to arrive before approaching a dangerous situation. As such, Mensah acted consistent with that practice by waiting for backup to arrive, then deferring to the direction of the other officers to make sure that Anderson was incapacitated and the firearm was removed from the vehicle. Policy 13-01 requires that officers wait until “after the situation has stabilized” before attempting to administer aid. The situation was not stabilized until the firearm had been removed and Anderson’s condition had been confirmed.

Third, Officer Mensah and the other officers initially responding to the scene had little or no ability to treat serious gunshot wounds to the head. This was not a case where officers could have applied basic first aid to stop the head wound from bleeding or to apply CPR to revive Anderson.

**THE EVIDENCE DOES NOT ESTABLISH THAT OFFICER MENSAH
VIOLATED HIS RULE 22 DISCRETION BY APPROACHING
THE PASSENGER SIDE OF THE ANDERSON VEHICLE**

1. Rule 22 requires that Wauwatosa Police Officers utilize proper discretion in the exercise of their duties.

2. The Complainant argues that Officer Mensah violated his discretion under Rule 22 by parking his squad car facing the front of Anderson's vehicle, by turning on "blinding take down" (white) lights instead of the emergency lights; and by approaching the passenger side of the vehicle (instead of the driver's side) – all in the investigation of nothing more serious than a county ordinance violation.

3. I find that the evidence does not establish a violation of the discretion given a law enforcement officer under Rule 22, particularly with respect to approaching the passenger side of Anderson's vehicle.

4. Officer Mensah approached a parked vehicle in the middle of a very dark parking lot at 3 a.m. His decision to park facing Anderson's vehicle; to turn on the bright white take-down lights to illuminate the front of Anderson's vehicle instead of the rear; and to approach the passenger side instead of the driver's side were all objectively reasonable and not in violation of any Wauwatosa rule, policy, or training. By approaching the passenger side, Officer Mensah avoided putting himself between the two vehicles (an inherently more dangerous position) and also put himself in a position where he was able to better see the interior of Anderson's vehicle. These advantages would have been lost had he walked between the two vehicles and approached the driver's side of the vehicle.

5. As part of this investigation, Mensah's approach was reviewed with numerous current and former law enforcement officers. No law enforcement officer, active or retired, suggested that Officer Mensah should have walked between the two vehicles to the driver's side door. In general, officers stated it was good strategy for Officer Mensah initially to park facing Anderson's vehicle. Two retired Milwaukee Police Officers, however, noted that Milwaukee Police Officers would never park and approach from the front. Both said that they had been involved in thousands of traffic stops and said that in their view, approaching the driver's side from behind, but stopping before being parallel to the door, would have been a better practice because a person in the driver's seat with a gun and bad intention would have had to grab the gun and turn his or her entire body to aim it at the approaching officer. At the same time, other law enforcement sources set forth multiple advantages for an approach to the passenger side from the front – one that gave the Officer the benefit of seeing more of the interior of the vehicle (including the face of the driver) with more time and space to react. All of those interviewed indicated that officer safety is a paramount concern when approaching an unknown vehicle.

6. While the strategy debate is an interesting one from a law enforcement standpoint, Wauwatosa has no *requirement* that an Officer approach a parked vehicle in a certain fashion – the matter is left to individual officer discretion under Rule 22. Given the objectively reasonable criteria set forth above, no violation of Rule 22 is established.

**THE EVIDENCE DOES NOT ESTABLISH THAT OFFICER MENSAH
VIOLATED MEDIA POLICY 13-08 BY FAVORING CONSERVATIVE MEDIA**

1. Wauwatosa Police Department Media Policy 13-08 states that it is the policy of the department to “cooperate fully and impartially with the news media.”

2. The Complainant contends that Officer Mensah violated Media Policy 13-08 by granting interviews to two conservative media (including the above-referenced July 28, 2020 WISN radio interview and the July 24, 2020, a 15-minute podcast interview at <https://www.youtube.com/watch?v=2ugNGIPfDf8>) but no other media.

3. Since as discussed above, the interviews were unauthorized, I do not believe that the evidence warrants an additional finding that Policy 13-08 was violated by granting two interviews to only conservative media.

4. While Policy 13-08 states that it is the policy of the department to “cooperate fully and impartially with the news media,” the policy does not restrict individual media interviews and does not dictate which media outlets should be utilized and when. Such decisions should be made by the Chief of Police and other policy makers, so that if objection is raised by other media, the Chief or other policymakers are in position to address (and if necessary, correct) the issue.

THE EVIDENCE IS INSUFFICIENT TO ESTABLISH
THAT OFFICER MENSAH VIOLATED
SOCIAL MEDIA POLICY 18-10
OR RULE 30 DEALING WITH OPPRESSIVE CONDUCT

1. The Complainant contends that Officer Mensah violated Social Media Policy 18-10 and Rule 30 (prohibiting oppressive conduct) by posting an entry on a social media site. The complaint alleges that Officer Mensah, using a pseudonym Joseph Frost, posted the following Facebook warnings about libel and slander; and that he may have done so while on duty at 10:18 p.m. on June 5, 2020.

"Slander: the utterance of false charges or misrepresentations which defame and damage another's reputation

*Libel: defamation of a person by written or representational means
Y'all better pray to whoever it is you pray to that you that you can back up whatever allegations you make about me. ESPECIALLY if you work for or are associated with any organizations. I'll leave it at that."*

2. Wauwatosa Police Department Policy 18-10 states that officers are free to exercise their First Amendment rights by utilizing social media, including Facebook, but may not do so during work hours and may not discuss WPD investigations without permission. Further, in using social media, officers are instructed that they "are expected to maintain professionalism and appropriate conduct online." Rule 30 states that officers should not engage in any conduct at any time that is overbearing or oppressive; or which unreasonably erodes public respect for the Department.

3. In response to this complaint allegation, counsel for Officer Mensah has not disputed that this Facebook post was made by him.

4. The evidence from this investigation further establishes that Officer Mensah was not on duty at 10:18 p.m. on June 5, 2020, or anytime near that hour, so he did not post to Facebook while on duty.

5. The evidence also establishes that Officer Mensah has conceded his use of Facebook under a pseudonym and that he has used Facebook to engage his critics – particularly those who have made derogatory racial comments about him or have called him a coward. Radio Interview Tr. pp. 13-14.

6. I find that Officer Mensah's Facebook post cited above does not rise to the level of conduct subject to discipline. Officer Mensah has been subject to intense protests both in-person and online. The social media policies gave him a certain leeway to respond.

7. In the post, Officer Mensah essentially stated that he might resort to legal action against those who he believes may have libeled or slandered him. While perhaps not the wisest decision on his part to engage his critics in this manner, I find no violation of the rules under these circumstances for that particular post.

THE RECORD DOES NOT ESTABLISH THAT OFFICER MENSAH
VIOLATED LEGAL AND ETHICAL REQUIREMENTS
WHILE PARTICIPATING IN A LEGAL DEFENSE FUND

1. The Complaint alleges that Officer Mensah has violated legal and ethical requirements by participating in a legal defense fund through the gofundme.com web site. The Complaint alleges that the site utilizes Officer Mensah's official picture.¹³ The Complaint further cites potential violations from this conduct under Wisconsin Statute § 19.59 (code of ethics for local government officials, employees and candidates); Wauwatosa Municipal Code sections §§ 2.05.030 and 2.05.040 (conflict of interest); and Wauwatosa Police Department Rules 57, 58 and 65 (prohibiting use of position for personal gain).

2. I find that as a matter of law, the record is insufficient to discipline Officer Mensah for any such conduct.

First, the Wauwatosa City Attorney has previously represented that § 19.59 only applies to elected municipal officials, those employees otherwise serving in high positions, or those appointed to particular committees. <https://www.wauwatosa.net/home/showdocument?id=114>, at pg. 7 [copy included in the appendix].

Second, legal defense funds are sometimes exempted under state ethical prohibitions. *See* Wis. Stat. § 11.1301 and 2014 GAB 01 (permitting public officials to use campaign funds or establish defense funds under limited circumstances).

¹³ According to the Chief of Police, the photo had been released to the public based on media requests. Tr. p. 11.

Third, these ethical provisions cannot significantly impair the rights of police officers to obtain legal counsel under the Sixth Amendment of the United States Constitution and Article I, section 7 of the Wisconsin Constitution.

Fourth, by virtue of their positions, police officers in Wisconsin have additional statutory rights to legal counsel under Wisconsin Statute §164.02.

3. I further note that despite these cited provisions, police officers in Wisconsin have historically been permitted to use legal counsel provided by their unions. While it is true that an individual officer may pay union dues in exchange for that benefit, the amount of legal fees paid by the union on an officer's behalf has the potential to far exceed the amount of union dues the officer has paid. In such case, the benefit conferred upon an individual officer comes indirectly from other officers contributing to that same union.

4. Therefore, I find that the laws cited by the Complainant do not clearly establish that a legal defense fund is prohibited. To the extent that the use of a legal defense fund under these circumstances concerns Wauwatosa public officials, I recommend that applicable standards be amended by the Common Council, City Attorney, or appropriate public official to clearly set forth the restriction before disciplinary action is taken.

THE EVIDENCE ESTABLISHES THAT OFFICER MENSAH
RECEIVED PROPER TRAINING

1. The Complainant suggests that Officer Mensah did not receive proper training.
2. As a result of this investigation, I find no lack of appropriate training.
3. The training received by Officer Mensah was comparable to other officers in the Wauwatosa Police Department and comparable to officers at other law enforcement agencies.
4. Officer Mensah entered duty on January 3, 2015. Between January 2015 and June 2016, Officer Mensah received 151.5 hours of training. This total included not only specific training required by the Wisconsin Department of Justice, Training and Standard Bureau, but also on-the-job training with an experienced WPD Field Training Officer. Officer Mensah was on probation throughout 2015 and any unacceptable performance would have resulted in his termination.
5. Additional training of note during the first 18 months of PO Mensah's employment included the following:
 - March 2015, WPD Lethality Assessment (addressing primarily domestic violence and assessing the possibility of violence among the actors).
 - April 2015, WPD Less Lethal Training (addressing use of force considerations).
 - May 2015, LESB Legal Update Training.
 - October 2015, "Pain Behind The Badge" (addressing the bi-product of police stress).
 - November 2015, WPD Critical Incident Debrief Training (addressing the procedures in place to investigate all critical incidents).

- May 2016, WPD High Risk Vehicle Contact (addressing various options available to an officer(s) when dealing with high-risk vehicle contacts).

6. For the entirety of his career (between January 3, 2015 and June 10, 2020) Officer Mensah received 1,149.5 hours of training, according to the Wisconsin Department of Justice, Training and Standard Bureau. This amount of training compares favorably with the following totals of Wauwatosa police officers ("PO") with similar service time.

PO 5723 - 1096 training hours

PO 3799 - 738 training hours

PO 3208 - 1511 training hours

PO Mensah - 1149 training hours

7. Therefore, I find no evidence to sustain a charge against Officer Mensah or the Wauwatosa Police Department for improper or inadequate training.

THE EVIDENCE DOES NOT ESTABLISH ANY OTHER VIOLATION
RAISED OR DISCUSSED AS PART OF THE COMPLAINT

1. The Complainant raises in summary fashion a number of additional assertions. They are set forth below, along with my explanation in bold as to why each charge is not supported.

(a) Officer Mensah either failed to call for back-up and/or should have called for back-up before approaching and shooting Anderson, in violation of his discretion under Rule 22.

The factual record supports that Mensah called for back-up (using the customary Wauwatosa Police Department signal phrase “step it up”) as soon as he saw a firearm.

(b) The totality of Officer Mensah’s conduct establishes that his work performance was unsatisfactory, in violation of Rule 27; and that he has a general disregard for safety under the general rule requirement that an Officer give due regard to the safety of citizens, *see* preamble to *Wauwatosa Police Department Rules and Regulations*.

The totality of Officer Mensah’s conduct is more appropriately dealt with under the fitness-for-duty standards (including Rule 9) discussed above.

(c) Officer Mensah and other officers failed to take a picture of the location of Anderson’s gun on the seat of the car.

No policy or procedure explicitly required such action. Moreover, given his involvement in the shooting, Officer Mensah wisely did not directly involve himself in the removal of the firearm or the decision of whether a photograph was taken.

(d) Mensah did not attend a mandatory counseling session as required under Policy 17-11.

The evidence supports that Mensah did attend such counseling.

(e) Mensah, or his supervisor, did not fill out a critical incident form after the Anderson shooting.

The form was not in existence in 2016 and the information otherwise required was orally submitted by Officer Mensah.

(f) Officer Mensah was reprimanded in February of 2019 for a driving accident.

I find no relevance of that accident to these present proceedings.

2. In sum, I find that these allegations do not support further proceedings as potential rule violations. I recommend that these additional issues be summarily dismissed.

ANALYSIS OF STATUTORY FACTORS

UNDER WIS. STAT. § 62.13(5)(em)

1. As indicated at the beginning of this report, under the statutory language of Wis. Stat. § 62.13(5), the Commission is to undertake a two-prong analysis to determine:

(a) whether “just cause” exists to sustain a charge; and (b) whether any ensuing discipline is appropriate “as the good of the service may require.”

2. To the extent applicable, the Commission must consider seven separate factors in finding “just cause” and I recommend that the Commission do so as follows.

(i) Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

I have suggested that disciplinary action be taken against Officer Mensah for violations of (a) fitness-for-duty rules, particularly Rule 9; (b) for publicly commenting on the pending Cole matter without permission, in violation of Policies 17-11 and 13-08; and (c) for providing misleading information regarding the totality of Wauwatosa police officer shootings, the reason he responded to Madison Park, and the activation of his in-squad camera, all in violation of Rule 7 and Policy 13-08.

Officer Mensah reasonably should have had knowledge of these rules, policies and procedures because all Wauwatosa Police Officers are required, as part of their duties, to have read all the rules, policies and procedures applicable to their performance. In fact, the failure to read and follow all the rules, policies and procedures is itself a rule violation.

See Rule 6.

Moreover, the violations set forth herein are not technical or trivial – they are important rules not only for the integrity of the day-to-day operation of the Wauwatosa Police Department, but also for situations involving officer-initiated shootings, one of the most critical events that can arise for the department.

(ii) Whether the rule or order that the subordinate allegedly violated is reasonable.

For the same reasons, I find that the applicable rules are reasonable.

(iii) Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate the rule or order.

In place of the chief, this Commission has directed an independent investigation into the charges. As outlined at the start of this report, the investigation undertook investigative steps and detailed analyses to determine whether Officer Mensah did, in fact, violate certain rules. The results are contained in this report and are subject to challenge by any party.

(iv) Whether the effort described under subd. 3. was fair and objective

The detail presented in this report was an effort to show the fairness and objectivity of these proceedings (recognizing that the parties still have an opportunity under the rules to present testimony and arguments at a hearing that may contradict any of these proposed findings). The recommended findings and disposition were based solely on the facts and analysis found by the lawyers and investigators. No outside party dictated any part of this report. In addition, as a part of this investigation, Officer Mensah was offered an opportunity to participate in an interview, but he declined.

(v) Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.

Again, the Commission may be substituted for “the chief” in consideration of this factor. I believe the proposed affirmative findings in this report are supported by substantial evidence and I have further noted those instances where I believe the evidence was insufficient to sustain a charge. Under the established procedures, the parties will have the opportunity to challenge these findings.

(vi) Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

Again, this Commission may be substituted for “the chief” in consideration of this factor. No other Wauwatosa police officer has shot and killed three people. No other Wauwatosa police officer has conducted a radio interview without authorization, discussed a pending criminal investigation, and provided misleading information, including on the history of police shootings in Wauwatosa. Therefore, there are no ready disciplinary comparisons within the Wauwatosa Police Department for this matter. The proposed discipline is unique to this officer and is not based on any improper factor.

(vii) Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate’s record of service with the chief’s department.

I have proposed that Officer Mensah be terminated for the violations set forth herein. In making this recommendation, I suggest that the Commission follow the reasoning of the courts and the Milwaukee Fire and Police Commission in two recent cases.

The first is *Vidmar v. Milwaukee City Board of Fire and Police Commission*, 2016 WI App 93, 372 Wis. 2d 701, 889 N.W.2d 443 [copy included in appendix]. In that case, a Milwaukee Police Officer was terminated from his position because he had taken an abandoned dirt bike from evidence. Although initially treated as a minor violation (the bike was returned), the matter escalated because to conceal the bike's removal, the officer had falsified an evidence tag – an act that would negatively impact the officer's ability to testify in court in the future. The Commission and the courts determined that the officer was no longer fit for duty because his ability to enforce the law necessarily included his ability to testify in court. The following language of the court of appeals at paragraph 20 of the decision is instructive:

We agree with the position of the Board that the capacity to enforce the laws means the capacity to engage in the full spectrum of responsibilities that an officer may be called upon to undertake. One of the most crucial of those responsibilities is giving testimony in court that is worthy of belief. If an officer's capacity to work in the field, which includes giving credible testimony in court, has been permanently compromised—as is the case here with Vidmar—then his ability to engage in the full spectrum of the responsibilities of a police officer has also been compromised. In such a scenario, the officer does not have the capacity to enforce the laws.

In the case at hand, the fitness-for-duty analysis matches the situation with Officer Mensah. In order to properly perform as a Wauwatosa Police Officer, Officer Mensah must be capable of performing *all* designated duties, including those involving the use of deadly force. Yet that would mean that Officer Mensah is authorized to use deadly force for a fourth time, a situation creating extraordinary, unwarranted and unnecessary risk to the Wauwatosa Police Department and the City of Wauwatosa.

The second case is *Manney v. Board of Fire and Police Commission of the City of Milwaukee*, 2017 WI App 85, 378 Wis.2d 220 [copy also included in appendix]. In that matter, a Milwaukee Police Officer was terminated for failure to properly follow a “pat-down” rule (where an officer checks a suspect for weapons). The rule violation itself may have been relatively

minor and an unusual subject of discipline, but the violation was connected to an extremely serious incident: an officer shooting. Officer Manney had approached a mentally disturbed individual and the encounter escalated into a physical confrontation that resulted in the officer shooting the suspect. The use of deadly force was deemed justified and no crime was charged, but the officer was still terminated because the pat-down violation was in a chain of events connected to the escalating encounter. On review, the Wisconsin Court of Appeals held that while even a single rule violation could result in termination, *id.* at ¶32, a violation connected to the subsequent use of deadly force impacted additional concerns (and rules) that gave the board further grounds for termination. *Id.* at ¶33.

In the matter at hand, Officer Mensah's use of deadly force in the Anderson shooting has been deemed proper. Yet his accompanying rule violations involving misleading information (regarding whether such shootings are an anomaly within Wauwatosa, why he was called to Madison Park, and when his in-squad video was activated) were directly connected to the use of force and further call into question his fitness for duty, as outlined above. Moreover, in connection with the separate Cole shooting, Officer Mensah publicly and in unauthorized fashion discussed facts relating to a pending criminal investigation. This was done in direct violation of Policies 17-11 and 13-08. Thus, this Commission has multiple rule violations connected to significant events: officer-shootings.

NOTE REGARDING DUTY DISABILITY

If this Commission removes Officer Mensah solely based on fitness-for-duty criteria arising from his participation in three prior shootings, then the City of Wauwatosa will need to consider whether Officer Mensah is entitled to a duty disability benefit pursuant to Wis. Stat. § 40.65. *See Bretl v. LIRC*, 204 Wis.2d 9, 100, 553 N.W.2d 550 (1996) (considering and rejecting whether single fatal shooting created extraordinarily stressful situation for police officer); *see also Burt Redding v. LIRC*, 377 Wis. 2d 729, 902 N.W.2d 809, 2017 WL 3037552 (Ct. App. 2017); *County of Washington v. LIRC*, 2012 WL 12180949 (Ct. App. 2013) (unpublished); *Highman v. LIRC*, 2001 WI App 1, 240 Wis. 2d 323, 621 N.W.2d 385 (Ct. App. 2000) (holding same).

Respectfully submitted to the Wauwatosa Police and Fire Commission this 7th day of
October, 2020.

By:

/s Steven M. Biskupic

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